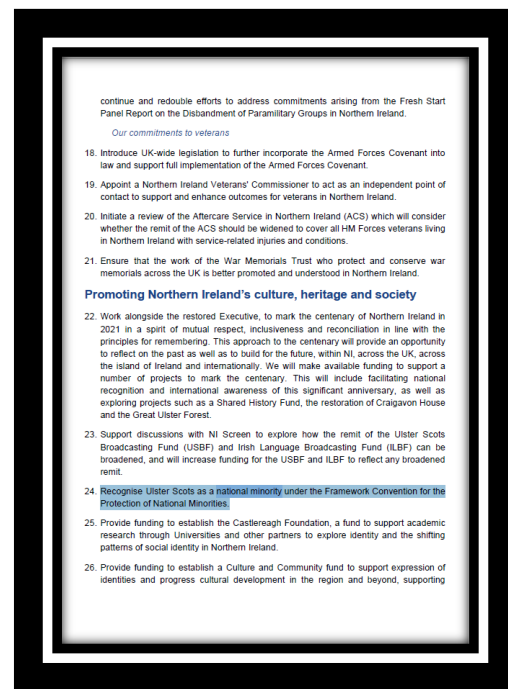


New Decade, New Approach:
Recognition of Ulster Scots as a National Minority under the Council
of Europe Framework Convention for National Minorities
Legal and Policy Implications of the UK Government Commitment
Working Paper
CAJ August 2020



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- A minority in international law refers to an *ethnic, linguistic or religious minority*. The concept of 'national minority' is used to this end in the Council of Europe Framework Convention for the Protection of National Minorities. The UK has generally recognised groups coming under the scope of the Framework Convention on the basis of 'racial group' (specifically on grounds of "*colour, nationality, ethnic or national origins*") but has also recognised *linguistic minorities*, including Ulster Scots speakers (and Irish speakers) in NI;
- The January 2020 *New Decade New Approach* (NDNA) agreement includes a commitment by the UK government, without further elaboration, that it will "*Recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities*";
- This is a separate commitment to that elsewhere in NDNA to establishing a Commissioner on the language, arts and literature "*associated with the Ulster Scots and Ulster British tradition*." The Human Rights Commission have cautioned against and recommended the removal of the 'Ulster British' element from the proposed Commissioner's remit arguing the linkage of a recognised (cross community) linguistic minority of Ulster Scots speakers with 'Ulster British' risks conflating speakers with a distinct political identity and "*could undermine developments in respect of Ulster Scots language and culture*";
- The last formal UK recognition under the Framework Convention (of Cornish as an ethnic group in 2014) was preceded by a long process of dialogue assessing the claim involving the treaty body, community and public authorities. By contrast there has been no process regarding the formal recognition of Ulster Scots. The NIO has confirmed that it holds no documents, meeting records etc in relation to the commitment prior to it being made in NDNA. It is unclear if the intention is for (continued) recognition of Ulster Scots speakers as a linguistic minority or to recognise Ulster Scots as an ethnic minority;
- Formal recognition of a group is not a requirement to be within the scope of the Framework Convention. It can be useful when a group has sought but previously been denied recognition or can also signal an intention to ensure the requirements of the Framework Convention are fully met regarding a group, including core duties such as ensuring the group is covered by anti-discrimination law;
- If the UK intention is to formally recognise Ulster Scots speakers as a *linguistic minority*, this reflects long standing existing recognition under Council of Europe treaties. An anomaly would, however, arise unless similar steps were taken in respect of other indigenous languages in a comparable situation. This not least would be in speakers of the Ulster variant of Scots being formally recognised in this way as a linguistic minority but not other speakers of Scots in Scotland. In relation to extending anti-discrimination law to cover Ulster Scots speakers, this could be done through the addition of the internationally recognised protected ground of 'language'. Solely adding Ulster Scots would risk constituting an arbitrary or unjustified distinction regarding other comparable languages;
- If in the alternative the intention is to recognise Ulster Scots as an *ethnic minority* the first obstacle is that it is not clear if persons with an affinity to Ulster Scots

wish to identify collectively as an ethnic group. The dialogue, engagement and consultation on this question has not yet taken place;

- A second particular issue to address would be that the community encompassed by recognition of Ulster Scots as an ethnic group would likely *be different to that of Ulster Scots speakers* who are drawn from across the community in areas of NI where Scots is spoken. The parameters of Ulster Scots as an ethnic group are likely to encompass ethnic indicators of British nationality and national identity along with ethnic and national origin of Scottish descent and of Protestant religion, and hence align Ulster Scots to a section of the community in a way that is not presently the case. This risks a differential with Ulster Scots speakers that could divert support away from initiatives to safeguard and develop Ulster Scots linguistically, to the detriment of speakers. This context would raise the same issues that have led to the Human Rights Commission recommending the removal of the 'Ulster British' remit from the Ulster Scots Commissioner;
- The issues of Britishness as a likely indicator for Ulster Scots as an ethnic group or conflation with the 'Ulster British' or unionist community in general raises the question of incompatibility with minority status. Groups that form part of a majority in a State, or who are in a 'dominant' or 'co-dominant' position may not fall under the scope of the Framework Convention;
- Whilst it may at one level be straight forward that Ulster Scots as an ethnic group would be protected under existing racial equality legislation (under 'nationality', 'ethnic or national origins') there is a broader question of the present unsatisfactory interface in NI between racial equality and fair employment legislation. Notwithstanding multiple identities, the existing issues around self-identification may also mean such recognition has significant implications for the effectiveness of fair employment monitoring as a tool against discrimination;
- There is a risk the UK will 'fudge' or take an approach that embeds the type of NI exceptionalism that has previously manifested itself in proposals to bring within the scope of Framework Convention rights groups that were not minorities or were solely constructed as having a different 'culture', rather than being ethnic, religious or linguistic minorities. Such a precedent could have significant detrimental implications elsewhere in a populist European context whereby minority rights are again under threat. A vague and declaratory statement without consequent legislative or other measures, will also not lead to greater protection of minority rights related to Ulster Scots, in particular its safeguarding and protection linguistically. It would also risk rendering recognition as a purely political tool, out with the specifics of carefully crafted minority rights provisions in the Framework Convention, to stake claims that may engage and adversely affect the rights of others and those of Ulster Scots speakers;
- The UK commitment to recognise Ulster Scots as a national minority has come somewhat out of the blue in NDNA without any apparent background work. The NIO has set an ambitious target of formal recognition by the end of 2020. Given the timeframes for procedural duties over policy development, not least in the NIO Equality Scheme, this leaves little time to work through the above issues, including the implications for domestic anti-discrimination legislation, which are likely to only be effectively progressed through single equality legislation.

Introduction

The UK NDNA commitment to recognise Ulster Scots as a national minority

- 1.1 The *New Decade, New Approach* (NDNA) document was published by the British and Irish Governments on the 9th January 2020. It led to the re-establishment of the Northern Ireland (NI) Executive. Alongside NDNA three draft bills were published. One was to establish a *Commissioner to enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition* in NI. The other bills were to establish an Irish language Commissioner and an Office of Identity and Cultural Expression. In NDNA there are some further explanatory provisions on the content of these bills.¹ The bills had been subject to the NDNA negotiations, and built on an earlier aborted DUP-Sinn Féin agreement in 2018.²
- 1.2 Separate to this in a different section of NDNA on UK commitments, there is a separate undertaking made that the British government will:

Recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities.³
- 1.3 A minority under UN human rights law refers to an *ethnic, religious or linguistic minority*. The similar concept ‘national minority’ is more used in the European context.
- 1.4 The UK is party to the Council of Europe Framework Convention for the Protection of National Minorities (hereafter FCNM or Framework Convention) and has interpreted ‘national minority’ as referring to groups defined by “*colour, nationality, ethnic or national origins*”.⁴ The UK has generally accordingly applied the Framework Convention to minority ethnic groups, but has also recognised linguistic minorities. Prior to NDNA the most recent UK recognition under the Framework Convention was of Cornish as an ethnic group (specifically as ‘a Celtic People’, alongside Scots, Irish and Welsh in the UK).⁵
- 1.5 The UK has long already *de facto* recognised Ulster Scots speakers as a *linguistic minority* under the Framework Convention.⁶ In part as an outworking of the GFA, the UK has also already *de jure* recognised Ulster Scots speakers as a linguistic minority under the European Charter for Regional and Minority Languages (ECRML). The ECRML is also a Council of Europe treaty where States can register the languages that come under its provisions. The UK registered Ulster Scots for NI as well as Scots *per se* in Scotland. (Ulster Scots is a variant of the Scots language.)

¹ Part 2 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.) This is complemented by Annex E of Part 2 NDNA which provides 25 further paragraphs focusing on the three bills (plus others on a new process in relation to the NI Bill of Rights and a commitment to Sign Language Legislation).

² See: <https://eamonnmallie.com/2018/02/sinn-fein-dup-deal-crashed-eamonn-mallie/>

³ NDNA, Annex A: UK Government Commitments to Northern Ireland, paragraph 24.

⁴ ACFC/SR/IV(2015)004 rev (4th UK State Report to FCNM), March 2015, Article 3, paragraph 1 (scope of application)

⁵ As above. See also: <https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>

⁶ See for example ACFC/OP/IV(2016)005 4th Opinion on the UK (adopted on 25 May 2016) paragraph 103 and ACFC/SR/IV(2015)004 rev (4th Report by UK) Framework Convention, 2015, Page 40.

- 1.6 In response to a recent Parliamentary Question from Carla Lockhart MP the UK Government has committed to implementing this NDNA commitment to recognise Ulster Scots as a national minority under the Framework Convention 'before the end of 2020'.⁷ However, it remains unclear whether the UK intention is to continue to recognise Ulster Scots speakers as a *linguistic minority*, and place this on a much more formal *de jure* footing or rather if the intention is now to formally recognise Ulster Scots as an *ethnic minority*.
- 1.7 No further information was provided in NDNA as to the nature of UK recognition, consideration of which would be expected to precede such a commitment. CAJ wrote to the Northern Ireland Office (NIO) to seek clarification of the UK's intention, in particular whether recognition under the Framework Convention concerned Ulster Scots linguistically or as an ethnic group. The NIO responded, on the 9 March 2020, that the UK Government was "*currently considering the best way to progress such recognition*."⁸

Background to the commitment: the absence of documentation

- 1.8 A significant body of work and campaigning can precede the recognition by a State of a particular ethnic group where such recognition has not been previously forthcoming. The long-overdue recognition (in 2017) of Irish Travellers as an ethnic group by the Irish government provides an example.⁹
- 1.9 Representations to and discussions with the FCNM Committee are also likely to precede confirmation that a group is within the scope of the Framework Convention. This was the case with Cornish, where the FCNM Committee from its first assessment of UK compliance in 2001 makes reference to Cornish organisations and individuals having put forward the case for recognition under the Framework Convention, and recommends UK consideration of same.¹⁰ In early 2014 the local public authority, Cornwall Council, had also petitioned the Committee and UK with a 28-page policy paper setting out the case for recognition of Cornish as a national minority under the FCNM in light of the 'distinctiveness of the Cornish people'.¹¹ Formal UK recognition followed.
- 1.10 Ascertaining the intention, and hence scope, behind the commitment to recognise Ulster Scots as a national minority is more complex. There is no record in the FCNM Committee reports of representations from organisations, individuals or public authorities for recognition of Ulster Scots as a national minority. We have not been able to locate any background policy document. In our engagement with grassroots Ulster Scots groups on the provisions of NDNA there was no awareness of the background to the commitment.

⁷ WPQ HC 48671 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-18/48671/>

⁸ NIO Correspondence to CAJ, March 2020.

⁹ For details see Mary Daly '[Ireland grants ethnic minority recognition for Irish Travellers](#)' European Social Policy Network Flash Report May 2017

¹⁰ ACFC/OP/III(2011)006 (3rd Opinion on the UK) adopted on 30 June 2011, paragraph 32.

¹¹ Cornwall Council 'Why should the Cornish be recognised as a national minority within the UK?: Cornish National Minority Advisory Report' (2014) available, along with further background information at: <https://www.cornwall.gov.uk/community-and-living/equality-and-diversity/cornish-national-minority/>

- 1.11 We have twice written to the Ulster Scots Agency to seek any background information on the commitment. The Agency however, has declined to respond.¹²
- 1.12 The NIO ultimately responded to a freedom of information request to confirm that no policy or briefing documents were held on the matter, nor were there any records of meetings or other records on the matter during the period of negotiations leading to the NDNA commitment. The only material held by the NIO during this time was limited to one internal email string between officials.¹³
- 1.13 The advice provided on the draft NDNA bill by the NI Human Rights Commission (which has a specific remit to advise on compliance with treaty-based human rights standards), also implies the Commission was unsighted on the basis for the commitment.¹⁴
- 1.14 The NI Executive proposed '*Strategy to Enhance and Develop the Ulster Scots Language, Heritage and Culture 2015 – 2035*' makes no reference to such Framework Convention recognition.
- 1.15 A section of the DUP have been the most politically prominent in advocating for additional provision for Ulster Scots, and the party have sought clarification in Westminster as to the implementation of the NDNA commitment. It is possible the NDNA commitment is a result of a DUP-UK side deal. There appears to be no DUP statement on the matter that would clarify the 'ask' (e.g. concerning further recognition as a linguistic minority or recognition as an ethnic group).
- 1.16 This NDNA commitment in this sense appears somewhat out of the blue. Crucially it appears no formal consultation has taken place to date on the matter, including with those who identify as or are speakers of Ulster Scots.

The implications of recognition under the FCNM

- 1.17 A group being under the scope of the FCNM has implications for domestic law. This is not least under Article 4(1) FCNM which provides that:

The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
- 1.18 Under Article 4(1) FCNM recognition of Ulster Scots as a national minority requires anti-discrimination legislation to ensure Ulster Scots is covered as a protected ground.¹⁵

¹² Correspondence to Ulster Scots Agency CEO Ian Crozier, of 19 May 2020 and 16 June 2020.

¹³ NIO FOI/20/89, 16 June 2020. In the first instance the NIO relied upon the FOI exemption under section 35(1)(a) relating to the formulation of government policy. On appeal (AP/20/04, of 16 July 2020) the NIO clarified that no documents were held for the period of NDNA negotiations from April 2019-January 2020, beyond the cited email string.

¹⁴ NIHRC 'Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020.

¹⁵ Ulster Scots is not presently *specified* in any anti-discrimination legislation. If a person faced *sectarian* harassment as a result of being an Ulster Scots speaker or otherwise associated with Ulster Scots the conduct may be captured by the Fair Employment and Treatment NI Order 1998, if Ulster Scots is recognised as an ethnic group protection could be afforded by the Race Relations NI Order 1997. The specific implications for anti-discrimination law depending on how Ulster Scots is recognised as a National Minority are explored in the subsequent section.

- 1.19 Under Article 4(2) adequate measures are to be adopted to ensure substantive equality for national minorities (in accordance with the specific circumstances of each). The main NI vehicles to do this are, at a legislative level, the statutory equality duty under section 75 of the NI Act 1998 and the various high-level Executive strategies, which include a strategy under s28D of the same Act to *“enhance and develop the Ulster Scots language, heritage and culture.”*
- 1.20 The implications for domestic anti-discrimination and equality law are further explored below. In legislating there will be a specific onus to ensure the law itself is not discriminatory through creating ‘arbitrary or unjustified distinctions’ in protection (for example if a State passed anti-racial discrimination law that only covered French and Chinese communities but not any other ethnic group).
- 1.21 There are also potential implications of recognition as a national minority for the NDNA Ulster Scots (etc.) bill. The bill includes provision for a statutory duty to *“encourage and facilitate the use and understanding of Ulster Scots in the education system.”* Provision within the education system had been recommended for Ulster Scots *linguistically* by the Council of Europe.¹⁶
- 1.22 The bill also provides for a Commissioner to *“enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland”*. The main functions of the Commissioner will be to increase awareness and visibility of Ulster Scots services and to provide advice and guidance to public authorities. The advisory function includes advising on the enhancement and development of the “relevant language, arts and literature” per se, and also on the effect and implementation of the FCNM, ECRML and UN Convention on the Rights of the Child in relation to the “relevant language, arts and literature”.
- 1.23 In advising on the bill the NIHRC have cautioned against and recommended the removal of the ‘Ulster British’ element from the proposed Commissioner’s remit.
- 1.24 In doing so the NIHRC set out that Ulster Scots are currently recognised as a linguistic minority under the Framework Convention and ECRML, but that *“‘Ulster British’ is not a term or a linguistic/national minority group presently recognised by human rights treaty bodies.”*¹⁷
- 1.25 The NIHRC concern is grounded in the Ulster British linkage conflating Ulster Scots with a ‘distinct political identity’. The NIHRC notes that whilst the language may be commonly associated with the unionist/Protestant community the Ulster Scots Agency have stressed that Ulster Scots is spoken in parts of Ireland by Protestants and Catholics alike and that the *“Ulster-Scots Language Society highlights that its constitution stipulates that it is ‘non-political and non-sectarian’.”* The NIHRC states that it should not be assumed all Ulster Scots speakers will associate with Ulster Britishness, and that the conflation of the two may have unintended consequences that *“could undermine developments in respect of Ulster Scots language and culture”*. The NIHRC highlights that the

¹⁶ See duties under Article 7(1)(f-g) ECRML. The most recent Recommendation (CM/RecChL(2014)3) of the Committee of Ministers on the application of the ECRML by the UK (15 January 2014) on linguistic measures for Ulster Scots recommended that as a matter of priority relevant public authorities “take measures to establish the teaching of Ulster Scots” (recommendation 4).

¹⁷ NIHRC ‘Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraphs 2.13-2.16.

Framework Convention Committee have stated that language should not be automatically linked to affiliation with a particular group.¹⁸

What form will recognition of Ulster Scots take?

- 1.26 At present Ulster Scots speakers are recognised as a linguistic minority. Languages of course are linked both to aspects of identity and to a body of cultural expression, not least the music and literature in the language. For some, Ulster Scots is focused on the linguistic, for others however Ulster Scots is broader. This is reflected in the statutory duty to adopt a strategy on Ulster Scots 'language, heritage and culture'. Ulster Scots is also an expressed part of the *identity* of a significant section of the NI population.¹⁹ There are a range of Ulster Scots cultural events that are not centred on language. The most common are Ulster Scots parades and Burns celebrations followed by festivals celebrating Ulster Scots, Ulster Scots dancing and Ulster Scots band competitions.²⁰
- 1.27 An affinity to Ulster Scots *culture* or *identity* is of course not necessarily the same as *constituting a national minority*. There are many groups in society defined by a common cultural affiliation, whether followers of a particular genre of music or other hobby, that may be cultural 'minorities' but are not ethnic, religious or linguistic minorities. Whilst it may be argued that Ulster Scots is differentiated from other cultural groups by broader common indicators relating to national identity or ethnic origin, this is essentially relates back to advocating that Ulster Scots be recognised as an ethnic group.²¹ There are of course still 'cultural rights' for all persons based around cultural identity, but this is not the same as constituting a national minority.
- 1.28 It is worth noting from the outset that coming under the scope of the Framework Convention and the minority rights it provides for does not require formal recognition. Such recognition can however assist in the context where a state party has previously contended a group *does not* fall into the scope of the FCNM.
- 1.29 Largely to avoid persons being treated as part of a national minority if they do not wish to be so there is a core principle in the Framework Convention of self-identification. Although this:
- ...does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.²²
- 1.30 Before elaboration in the subsequent sections of this briefing the following section summarises the potential options for the UK in relation to recognition of Ulster Scots as a national minority. It highlights key issues for each in relation to

¹⁸ As above.

¹⁹ 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. Cited in draft Strategy for Ulster Scots language, culture and heritage, (DCAL, July 2012).

²⁰ NISRA/Department of Communities 'Experience of Ulster-Scots culture and heritage by adults in Northern Ireland: Findings from the Continuous Household Survey 2018/19' 28 November 2019. Figures on types of Ulster Scots events attended by adults in year in question.

²¹ The North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999 SCHEDULE 1; PART 5: Language defines "Ulster-Scots cultural issues" as "relating to the cultural traditions of the part of the population of Northern Ireland and the border counties which is of Scottish ancestry and the influence of their cultural traditions on others, both within the island of Ireland and in the rest of the world".

²² FCNM Explanatory Report, paragraph 35.

matters such as domestic anti-discrimination and equality legislation; the statutory duty and Commissioner under the Ulster Scots bill.

Continued recognition of Ulster Scots as a linguistic minority

- 1.31 The first option would be for the UK to continue to recognise Ulster Scots speakers as a *linguistic minority*, and to take further legislative and other steps to ensure speakers rights are protected:
- This option would appear to be the most straight forward as it reflects current recognition of Ulster Scots speakers under Council of Europe treaties.
 - Protection could be extended in NI discrimination and equality law through the addition of the internationally recognised protected ground of ‘language’ in single equality or other remedial legislation. Solely adding Ulster Scots linguistically would risk constituting an arbitrary or unjustified distinction in relation to other languages in a comparable situation. The existing statutory duty for an Ulster Scots strategy would also already cover language;
 - The main issue with such recognition is that it would create the anomalous situation whereby Ulster Scots speakers were *the only* linguistic minority formally recognised as such in the UK. Notably this would create a situation in that speakers of the Ulster variant of Scots would be afforded such ‘formal recognition’ but that speakers of Scots in Scotland would not. The same question would arise with speakers of Welsh, Irish and Scots Gaelic, where the UK itself has recognised higher levels of duties under Part III of the ECRML. This could be addressed by concurrent UK reference to the existing *de facto* recognition of speakers of these languages as linguistic minorities;
 - The roles of the envisaged statutory duty to promote Ulster Scots in education would remain focused on the linguistic. This could be taken forward by measures to ensure provision for the teaching of Ulster Scots as a language class per se or also through the addition of Ulster Scots texts within the English literature curriculum (given the levels of mutual comprehensibility.) There would be no significant change to the role of the envisaged Commissioner.

Recognition of Ulster Scots as an ethnic minority

- 1.32 The second option would be for the UK to solely or in combination to now recognise Ulster Scots as an *ethnic minority*;
- The main obstacle to this is that it is not clear if persons with an affinity to Ulster Scots wish to identify collectively as an ethnic group. There does not appear to have been a reliable body of work undertaken to address this question. Whilst there are political and other advocates of this position, it is not clear if it is now a mainstream position among the community. To date no public consultation and broader engagement has taken place in relation to this matter;
 - Should such identification as an ethnic group be so desired the question of legislative protection in discrimination and equality law arises. At one level this should be relatively straightforward. Ulster Scots as an ethnic group would fall to be protected under the category of ‘racial group’ under the Race Relations NI Order 1997 (RRO) and the ‘section 75’ statutory equality duty. The relevant RRO ethnic indicators for Ulster Scots would include ‘nationality’; ‘ethnic or national origins’. There is, however, the broader question of the present unsatisfactory

interface between the RRO and anti-discrimination legislation covering sectarianism and the related matter of implications for fair employment monitoring. This could be addressed through a single equality bill encompassing language and religion as ethnic indicators, as well as protected grounds *per se*;

- In relation to high-level NI Executive Strategies, the interface between the Ulster Scots and Racial Equality Strategies would need teased out should recognition follow this path;
- A particular issue to address would be that the community encompassed by recognition of Ulster Scots as an *ethnic group* would likely be different to that of *Ulster Scots speakers*. Speakers are drawn from across the community in areas of NI where Scots is spoken. The parameters of Ulster Scots as an ethnic group are likely to encompass ethnic indicators of British nationality and national identity along with ethnic and national origin of Scottish descent and of Protestant religion. This would hence align Ulster Scots to a section of the community in a way that is not presently the case. Whilst language can also be an ethnic indicator, the above indicators would encompass persons who are not Ulster Scots speakers. In this context the recognition of Ulster Scots as an ethnic group risks a differential with Ulster Scots speakers that could divert support and attention away from much needed initiatives to safeguard and develop Ulster Scots linguistically, to the detriment of speakers;
- Ethnic recognition also raises the same issues of that have been raised by the NIHRC regarding the addition of an 'Ulster British' mandate to the remit of the proposed Ulster Scots commissioner. Clearly should the community of persons expressing Ulster Scots identity ultimately wish to be recognised as an ethnic group, such issues should be worked through in the context of inter-cultural dialogue;
- The importance of Britishness as a potential likely core ethnic indicator for Ulster Scots also raises the question of incompatibility with minority status. (Put simply it is not possible to be a British minority in the UK anymore that it is possible to be a French minority in France). The same issue arises if the parameters of the Ulster Scots community are constructed as a proxy for the unionist community *per se*. Such a position could also engage the 'parity of esteem' provisions within the Belfast/Good Friday Agreement as regards equality of treatment for the identity and ethos of both main communities;
- In relation to the NDNA bill, the designation as an ethnic group could have implications for the statutory education duty if it is interpreted as shifting the onus away from teaching the language (and associated culture) towards a duty to facilitate the understanding of Ulster Scots as an ethnic group within schools;
- The advisory remit of the Ulster Scots (etc.) Commissioner would also change. This would not affect advice on the European Charter, which only covers language. There would presumably be impacts on the Commissioners' advisory function in relation to the Framework Convention and UN Convention on the Rights of the Child, albeit that the focus officially remains on the relevant arts and literature. Ulster Scots would be the only ethnic group for which there are such duties. This raises a risk of unjustified distinctions in relation to provision for other ethnic groups in their specific circumstances;

Ulster Scots as a religious minority

- 1.33 A third option relates to recognition as a religious minority. This appears to be an unlikely route as whilst religion may be an aspect of Ulster Scots identity (and is often an ethnic indicator in general), Ulster Scots is not a religion *per se*.

Recognition as a ‘fudge’ or Northern Ireland cultural exceptionalism

- 1.34 A fourth option, or at least path, the UK may go down is to ‘fudge’ the recognition of Ulster Scots or even to promote a NI ‘cultural exceptionalist’ model of national minority. Either would be the least satisfactory approach:
- There was an element of ‘fudge’ by the UK in its recognition of Cornish insofar as whilst the UK recognised Cornish as an ethnic group (specifically a Celtic people) it declined to assert that protection against discrimination would be afforded as a ‘racial group’ by the existing Equality Act 2010, instead expressly deferring to the courts on the matter. In general there have already been worrying trends of NI ‘exceptionalism’ in related matters such as –as observed by the FCNM Committee- the operation of the ‘good relations’ duties or treatment of sectarianism, in a manner which falls outside human rights standards;
 - A recognition of Ulster Scots as a ‘cultural minority’ would fall outside the definition of an ethnic, linguistic or religious minority in international human rights standards. Shared cultural identity and traditions are often an important part or indicator of an ethnic group. This is not the same as a group constituting a national minority purely on the basis of subjective affinity to a particular type of cultural expression. Any such move would be a significant departure for the UK and we are not aware of examples where a group is recognised under the Framework Convention solely on the basis of being a ‘cultural’ minority. Taking forward such an exceptionalist model move could set a risky precedent across the Council of Europe area where there are populist and far right movements keen to deconstruct rights-based protections for groups that have long faced discrimination and disadvantage. The model would risk interference in the rights of others in the sense such groups could face increasing counter claims from ‘traditional’ ‘cultural’ groups that have enjoyed a dominant position. It also risks introducing significant subjectivity in the indicators of any consequent anti-discrimination law;
 - In relation to NI anti-discrimination and equality legislation it is unclear how protection would be afforded in a ‘cultural exceptionalism’ model. Adding ‘Ulster Scots’ itself as a protected ground corresponding to an exceptionalist construction would likely constitute an unjustified distinction. This would also not fit comfortably into existing statutes and could only be progressed with a standalone provision or single equality legislation;
 - One option would be to use the ECHR indicator of ‘association with a national minority’ as an indicator that would cover Ulster Scots. This could also cover other national minorities under the FCNM. Whilst protection is already provided for ethnic groups under the RRO, this could remedy the gap for linguistic minorities that are not linked to ethnic groups covered by the RRO. The main difficulty with this however is that it still involves construction of a national minority under an exceptionalism model and the courts may consequently have difficulties in extending protection. Albeit the construction would provide protection to Ulster Scots speakers as a linguistic minority.

The Framework Convention, NI exceptionalism and political advocacy

- 1.35 There has been a long and contested debate over the application of the Framework Convention in Northern Ireland in relation to the two main ethnic groups (for shorthand the unionist and nationalist communities). A particular complexity has been that neither group constitutes a ‘minority’ insofar as unionists have not previously been in a numerical minority and nationalists have not identified as a minority given affinity to Ireland as a whole. The questions of a dominant or co-dominant position have also arisen. These issues played out in relation to debates on the GFA-mandated Bill of Rights for NI, with proposals supported by unionist parties that FCNM provisions be incorporated for ‘communities’ rather than ‘minorities’, against the counter-argument that this would be out with the purpose of, and run into conflict with, minority rights.²³ This contention did not relate to Ulster Scots (although would arise in the scenario whereby Ulster Scots is used as a proxy for the unionist community). Ultimately, it has been the practice of the FCNM Committee to comment generally on the situation of the two largest communities in NI (e.g. in relation to integration and housing) without specifically referencing either as a national minority. Irish and Ulster Scots speakers have both been recognised as a *linguistic minority*.
- 1.36 A further contextual factor is that the prior political advocacy of policy measures for Ulster Scots have not always worked to progress and safeguard Ulster Scots. In some cases they have been detrimental to both Ulster Scots speakers and other minority rights, particularly those of Irish speakers. This was the case with high-level policy approaches adopted by DUP Ministers in the Department of Culture, Arts and Leisure (DCAL – now subsumed into the Department of Communities). These policy approaches sought artificial parity for Ulster Scots with the Irish language. This led to specific rebukes from the Human Rights Commission and the Council of Europe experts, with the treaty body holding that such approaches had damaged the safeguarding of both Ulster Scots and Irish.²⁴
- 1.37 In this context, a relevant consideration for the UK in how it wishes to take forward its recognition of Ulster Scots as a national minority will be the extent to which in practice this is likely to assist or harm the realisation of rights of Ulster Scots speakers and other linguistic minorities.
- 1.38 The remainder of this paper is split into two substantive sections of further analysis. The first deals with the general question of perspectives on the recognition of Ulster Scots, and in particular, recognition as an ethnic group rather than a linguistic minority. The second section further explores the definition of national minority in international law. Finally, further observations will be drawn around the implications of how the UK is likely to progress its proposed further recognition of Ulster Scots.

²³ For a detailed narrative see: Christopher McCrudden ‘Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Inglorious Role of the OSCE High Commissioner for National Minorities’ in Judges, Transition, and Human Rights (John Morison, Kieran McEvoy, Gordon Anthony (Eds)) Oxford 2007 and Elizabeth Craig ‘The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights process’ NILQ NILQ 60(2): 201–11.

²⁴ See ‘Guidance on the European Charter for Regional or Minority Languages’ DCAL, April 2016 (section 6);

2. Perspectives on the recognition of Ulster Scots

Existing recognition of Ulster Scots as a Linguistic Minority

- 2.1. The UK has recognised Scots, including the Ulster variant of Scots, as a linguistic minority. Official recognition in a declaratory form is found in the specific reference to Ulster-Scots in the linguistic diversity provision of the Belfast/Good Friday Agreement (GFA). Ulster Scots (referred to as Ullans) is defined in a UN-logged bilateral (UK-Ireland) GFA implementation treaty as “*the variety of the Scots language traditionally found in parts of Northern Ireland and Donegal*”.²⁵
- 2.2. The GFA-established NI Human Rights Commission further sets out that linguistically Scots, including the Ulster variant, is a largely spoken language from the Germanic language group that is on a linguistic continuum with English at one end of the spectrum, English with a Scots flavour and at the other end, persons whose Scots diverges more markedly from standard English. The Commission notes that “*Ulster Scots is found mainly in those parts of Northern Ireland that were settled by Scottish people, though its use is not confined to those of Scottish descent, and it is spoken by both Catholics and Protestants.*”²⁶
- 2.3. The Scots Language Centre in Perth describes the Scots language as “*Scots is the collective name for Scottish dialects known also as ‘Doric’, ‘Lallans’ and ‘Scotch’ or by more local names such as ‘Buchan’, ‘Dundonian’, ‘Glesca’ or ‘Shetland’.* The Centre sets out four main dialects, with subdialects (in Scotland).²⁷ Lallans in Scots means the Scottish lowlands and was used by Robbie Burns to describe the ‘lowland Scotch tongue.’ The Scots language is therefore sometimes known as Lallans. Ullans (the lands of the Ulaid -Ulster) is sometimes used to refer to Ulster Scots, although the Ulster Scots Academy states this names is not usually used by native speakers in Scots who would usually use ‘Scotch’.²⁸
- 2.4. The Ulster Scots Academy describes four distinct dialect areas of Ulster Scots equating to areas of lowland Scots colonisation, with markers of both religious belief and national identity:

The colonisation of Ulster was undertaken by the English and by lowland Scots settlers in a competitive manner which often enabled the two groups to retain their national identities in different districts. The spread of Presbyterianism in Ulster had by the late 17th century resulted in the formation of many Presbyterian congregations throughout the major areas of Scottish settlement. The distribution of these earliest congregations conforms closely to the notion that there were four core areas where Scottish settlers were dominant (and even equate to the four distinct dialect areas of spoken Ulster-Scots today): north Down, east and mid Antrim, the ‘Route’ area of north Antrim and north-east Londonderry, and the ‘Laggan’ area of the Foyle basin in north-east Donegal and north-west Tyrone.²⁹

²⁵ [Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing implementation bodies](#), Part 5: 1.7.

²⁶ 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, June 2010, paragraph 1.3.

²⁷ <https://www.scotslanguage.com/pages/view/id/10>

²⁸ <http://www.ulsterscotsacademy.com/ullans/2/what-is-ullans.php>

²⁹ <http://www.ulsterscotsacademy.com/research/gregg/mapping-ulster-scots.php>

- 2.5. The UK registered Scots for Scotland and Ulster Scots for Northern Ireland under Part II of the European Charter for Regional or Minority Languages (ECRML). It has also been the practice of the Framework Convention Committee itself to date to treat and recognise Ulster Scots speakers, as well as other speakers of Scots, as a linguistic minority.
- 2.6. The Committee of Experts (COMEX, who oversee compliance with the ECRML) have questioned the separate registration of Scots and Ulster Scots, when they are the same language. COMEX made this observation in the context of the registration of the same language as two separate languages in different regions of another member state for political rather than linguistic reasons.³⁰
- 2.7. The practical concern relates to the application of duties under the Charter when the languages are treated separately rather than as one. Under Article 7(1)(e) of the Charter there are specific duties to base policies, legislation and practice on the maintenance and development of links between groups in a State using a registered language in identical or similar form.
- 2.8. Language provision is largely a devolved matter and different administrations exist in Scotland and NI respectively. Yet there is also a specific ECRML duty on the UK to ensure respect of the whole geographical area of a language to ensure that administrative divisions do not constitute an obstacle to the promotion of the language in question.³¹ It may be the case that political advocates (including those exercising with Executive power) of Scots and its Ulster variant, are concentrated in the differing aspirations of sections of Scottish nationalism and NI unionism respectively. However, the duties under the Charter are to ensure that administrative and political differences are not to constitute a barrier to safeguarding of the minority language in question.
- 2.9. The separate development or even intentional divergence of the Ulster variant of Scots from Scots risks damaging the safeguarding of Ulster Scots. Enhancing and developing Ulster Scots constitutes a more difficult challenge when done in isolation from the broader body of work on Scots *per se*. There have been concerns that some Ulster Scots initiatives have not integrated with broader developments by Scots or even have sought separate development. There have also been observations that written forms of Ulster Scots have diverged from spoken variants in a rush to standardise a distinct written form.³² The framework of the ECRML and FCNM provide for resolute action to safeguard and develop minoritised languages. Such objectives can be adversely affected by

³⁰ Specifically Catalan and Valencian by Spain. See Santiago-José Castella Surribas and Miquel Strubell 'The Catalan language and monitoring the ECRML in Spain' in *The ECRML: Legal Challenges and Opportunities* (Council of Europe publishing Regional or Minority Languages No 5), page 144.

³¹ Article 7(1)(b) ECRML.

³² There is some related discussion on this issue in relation to the Ulster Scots Roadmap Ulster Scots Academy Implementation Group Partnership Board developed to seek the acceleration of Ulster Scots to Part III status under the ECRML, but not supported by government departments. See NIHRC 'ECRML: Supplementary memorandum to the Commission's Parallel Report to the Committee of Experts on the Third Periodical Report of the United Kingdom' (October 2009) paragraph 7 citing Correspondence from Linda Wilson, Chair of ICIG to Dr Philip Robinson, Chair USAIG Partnership Board, 5 Nov 2008; Ulster-Scots roadmap and assessment; Ulster-Scots and Part III of the ECRML: Ó Riagáin, Dónall, *A response to the Assessment of the Paper presented to the ICIG and the USAIG*, April 2008. See also: Dunbar, Robert 'Implications of the European Charter for Regional or Minority Languages for British linguistic minorities' (2000) 25 Supp (Human rights survey) *European Law Review* 46-69; and MacPóilin, Aodán 'Language, Identity and Politics in Northern Ireland' (1999) 45 *Ulster Folk Life* 1-4.

any artificial separation of the Ulster variant from Scots in general. By way of comparator clearly the safeguarding and development of the Irish language in NI would be adversely affected if it was treated as a separate language to the rest of Irish, and was unable to draw on the resources and development of Irish in general. Whilst there are variations in the Ulster and other dialects of Irish they are clearly part of the same language.

- 2.10. If Ulster Scots speakers are now to be (meaningfully) formally recognised by the UK as a linguistic minority within the Framework Convention, but paradoxically all other Scots speakers are not, this would risk exacerbating the problem of separated development and safeguarding of the language to the detriment of speakers.
- 2.11. Questions also arise as to where the recognition of Ulster Scots as a linguistic minority (solely or alongside Ulster Scots as an ethnic minority) leaves recognition of the speakers of other indigenous languages in the UK in light of their specific situations. The UK has recognised Welsh, Irish and Scottish Gaelic as having reached the enhanced stage of development and demand to reach the threshold for registration under specific provisions of Part III of the ECRML. Scots, including Ulster Scots, is registered under Part II of the Charter along with Cornish and Manx Gaelic. The implementation of the UK commitment in the form of specific protections is to be proportionate and tailored to the specific circumstance of each language, and not to create arbitrary or unjustified distinctions. This is relevant to matters such as the reflection of the UK commitment in domestic equality law.

Protecting Ulster Scots speakers in domestic equality legislation

- 2.12. Despite recognition as a linguistic minority under both Council of Europe treaties (which contain provisions on non-discrimination)³³ NI anti-discrimination and equality legislation does not presently cover the internationally recognised protected ground of '*language*'.
- 2.13. The only current express protection against discrimination on grounds of *language* is through application of Article 14 of the ECHR. This is given further domestic effect by the Human Rights Act 1998. This provision is however not a free standing right to non-discrimination on the grounds of language, but rather parasitic on the engagement of other ECHR rights.³⁴ A protocol to the ECHR providing for a free standing right to non-discrimination has not been subscribed to by the UK.³⁵ Such a free standing provision was also proposed for the NI Bill of Rights but this has not been legislated for either.
- 2.14. Formal recognition as a linguistic minority under the scope of the FCNM should lead to strengthened domestic legislative protection for Ulster Scots speakers against discrimination. To do this *solely* for Ulster Scots however would itself risk constituting an unjustified distinction in relation to other languages registered by the UK under the ECRML in light of their specific circumstances. This would include Scots in Scotland, and Irish in NI. The current NDNA draft

³³ Under Article 4(1) of the Framework Convention and Article 7(2) of ECRML.

³⁴ This means that Article 14 cannot be invoked on its own but only in conjunction with another substantive ECHR right being interfered with (for example Freedom of Expression under Article 10).

³⁵ Protocol 12 of the ECHR.

legislation does not provide for 'language' to be added as a protected ground in NI. There is some protection for Welsh speakers through the terms of equal treatment with English in Welsh language legislation.³⁶

- 2.15. Speakers of ethnic minority languages can be protected in NI under the RRO as indirect discrimination (e.g. if a Polish national was banned from speaking Polish privately to co-workers this could constitute racial discrimination). However, at present Irish and Ulster Scots are not linked to a particular ethnic group, and speaker representatives have generally rejected such affiliation. If a particular act of discrimination against an Ulster Scots speaker was expressly sectarian in nature (e.g. where Ulster Scots is seen as a proxy for unionist community background) protection could be provided under Fair Employment legislation. This would, however, not cover broader discrimination on grounds of being an Ulster Scots speaker. Should Ulster Scots now be recognised as an ethnic minority, this may afford protection under the RRO. Yet it raises broader questions about linking the language to a particular ethnic group affiliation.

Beyond language– links and differences to culture

- 2.16. Whilst language and culture can be closely linked (not least in music, literature, poetry etc. in the language in question), there has long been a drive to broaden Ulster Scots out beyond the question of a linguistic minority.
- 2.17. This perspective was put succinctly around the time of NDNA by the CEO of the NIHRC Dr David Russell who stated: *"People are naïve if they believe that Ulster-Scots is just a language, it's clearly much more than that... There is also clearly a historical narrative, a cultural identity, dance, music as well as a linguistic tradition, there are links to particular religious traditions."*³⁷
- 2.18. This was also earlier reflected in the duty on the NI Executive to adopt an Ulster Scots strategy provided for in the 2006 St Andrews Agreement, which covers 'culture' and 'heritage' as well as 'language'.³⁸
- 2.19. The aforementioned GFA treaty established the North-South Language Body (Tha Boord Leid in Scots) set out that this body was also to have the function of promoting 'Ulster Scots Cultural Issues'. Although it formed part of the mandate of the language body this term was defined in reference to people rather than language. Specifically as *"the cultural traditions of the part of the population of Northern Ireland and the border counties which is of Scottish ancestry and the influence of their cultural traditions on others, both within the island of Ireland and in the rest of the world."*³⁹
- 2.20. In practice, the cultural promotion work of the Ulster Scots Agency has not been limited to culture linked to the language, or lowland Scotland. A lot of the work of the Agency relates to matters other than the language, with the Agency largely conducting much of its business and activities in English.

³⁶ Welsh Language (Wales) Measure 2011.

³⁷ <http://www.northernconstitution.co.uk/news/2020/01/10/news/much-more-than-a-language-how-human-rights-can-help-ulster-scots-realize-its-full-potential-7450/>

³⁸ S28D Northern Ireland Act 1998 (as amended)

³⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing implementation bodies, Part 5: 1.7. <https://peacemaker.un.org/uk-ireland-implementation-bodies98>

- 2.21. Prior to NDNA a document from the CEO of the Ulster Scots Agency Ian Crozier was submitted to previous negotiations seeking an additional £140 million in funding for Ulster Scots.⁴⁰ The detailed proposal was described as covering funding “*for everything from Highland dance to public art and marching bands.*” The proposals included seeking core funding for activities that are expressly associated with Protestant/unionist/loyalist culture, rather than specifically with Ulster Scots.⁴¹
- 2.22. The NDNA funding bid reportedly grounded its request on the contention that there had been ‘discrimination’ in public funding of Ulster Scots when compared to the Irish language. The £140 million sought reflected a calculation of the amount previously spent on Irish. However, the overwhelming majority of the money spent on the Irish language related to the provision of Irish-medium education. This is a false cost analysis concerning the public purse, in the sense that the same children if not educated through Irish would be going to school anyway at the same or similar costs through the medium of English. The contention of discrimination on this ground is however not new.⁴²
- 2.23. The human rights framework provides for funding and other support to be proportionate and based on objective need in relation to the specific situation of each language rather than artificial parity. The contention that differential treatment for Irish and Ulster Scots constitutes discrimination has long been refuted by, among others, the NI Human Rights Commission. The NIHRC has stated that like is “*not being compared with like in any credible manner*”.⁴³
- 2.24. The practical outworking of this perspective has been detrimental in that initiatives for the Irish language have been blocked on grounds it was not possible to take equivalent measures for Ulster Scots, or that ineffective measures have been taken for Ulster Scots.
- 2.25. The Council of Europe Committee of Experts (COMEX) have also refuted the position but raised concerns that its practical impact has damaged both the development of Ulster Scots and Irish. COMEX was particularly critical of a proposal from then Minister Nelson McCausland to tie strategic Irish and Ulster Scots policy to the objective of parity between the two:

In the previous evaluation report... the Committee of Experts observed that inappropriate claims for parity of treatment between Irish and Ulster Scots in a number of instances led to the result that no measures were taken for either language, since it was not practically possible to apply the same measures to Ulster Scots. The Committee of Experts encountered similar issues in the current monitoring round, in particular in the general support of the languages. For instance, the opinion was even presented to the Committee of

⁴⁰ Sam McBride ‘Leak shows DUP man’s proposal for £140m in Ulster Scots funding’ i 22 August 2017; <https://inews.co.uk/news/uk/leak-shows-dup-proposal-140m-ulster-scots-funding-86475>

⁴¹ For example 2.2 million is in relation to marching bands to allow the Ulster Scots Agency to provide core funding to the Confederation of Ulster Bands (which [describes itself](#) as “an umbrella body comprised of bands forums from across Ulster, emanating from the Protestant, Unionist or Loyalist traditions”) and for the Ulster Scots Agency to take over the administration from the Department of Communities of an annual marching bands fund.

⁴² See for example comments of Nelson McCausland MLA in *Hansard* 9 Oct. 2007; 4 Dec. 2008; 24 Nov. 2009.

⁴³ 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, June 2010, paragraph 3.3.

Experts that before any further steps were taken to promote Irish, the Ulster Scots language should be brought into the same position.

The Charter is based on treating each regional or minority language in accordance with its specific situation. The situation of the two languages is quite different, and language measures specifically directed towards each language are needed. That is the only way that both languages can be protected and promoted according to their specific needs.

... The St Andrews Agreement Act 2006 places a statutory duty on the NI Executive to adopt a strategy to enhance and protect the Irish language. So far no strategy has been adopted. However, the Minister for Culture Arts and Leisure (DCAL) intends to bring forward one strategy entitled “A Strategy for Indigenous or Regional Minority Languages”, which is intended to be a single strategy for Irish and Ulster Scots. The Committee of Experts is concerned that the strategy will strive towards parity between the two languages and therefore not serve the needs of either the Irish-Speakers or the Ulster-Scots speakers and will hold back the development of both languages.⁴⁴

- 2.26. Joint research by CAJ and Conradh na Gaeilge in relation to the implementation of ECRML and FCNM duties by the new NI Councils on their establishment in 2015 noted that no councils where Ulster Scots was traditionally spoken had adopted Ulster Scots policies. By contrast, those Councils which had adopted Ulster Scots policies had done so in the context of adopting Irish language policies, as an apparent counterweight and at times with equivalent measures ineffective for the development of Ulster Scots. The lack of Ulster Scots policies in Councils where it is traditionally spoken can be attributed to the fact that enactment of such policies would make it untenable not to also adopt Irish language policies. This provides an example of whereby hostility to Irish also detrimentally impacts on Ulster Scots.⁴⁵
- 2.27. On occasions therefore *political advocates* of Ulster Scots have promoted policy interventions that have not necessarily been conducive to the safeguarding and development of Ulster Scots linguistically. This enhances the need to scrutinise the basis of the present ask in relation to FCNM recognition and its implementation in practice.
- 2.28. In particular, if the intention is for recognition to move beyond measures to support Ulster Scots as a linguistic minority within the framework of the FCNM does this risk shifting the focus away from Ulster Scots linguistically? Would

⁴⁴ COMEX, Application of the Charter in the UK, 3rd monitoring round ECRML (2010), 16, 17, 20, see also paragraph 57 and Finding D. See also the comments of the Advisory Committee on the FCNM that “The treaty body to the Council of Europe’s Framework Convention for National Minorities (FCNM) has stated: The Advisory Committee was disconcerted to hear that some representatives of the authorities consider that promoting the use of the Irish language is discriminating against persons belonging to the majority population. Such statements are not in line with the principles of the Framework Convention, and in particular with the provisions of Article 10. It also reiterates that, in line with Article 4.2 and Article 4.39 of the Framework Convention, implementation of minority rights protected under the Framework Convention are not be [sic] considered as discriminating against other persons. Council of Europe (2011) Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006 (adopted 30 June 2011), para. 147.

⁴⁵ For the broader findings of this research see: “Comhairlí Áitiúla, Dualgais agus an Ghaeilge: Creatlach Comhlíonta (Local Councils, Obligations and the Irish Language: A Framework for Compliance) Conradh na Gaeilge, the Committee for the Administration of Justice and Ulster University 2019.

such a course of action risk contributing to the neglect and marginalisation of the Ulster variant of Scots as a language as resources and focus shift?

Ulster Scots: recognition as an ethnic group?

- 2.29. In terms of self-identification the draft DCAL Ulster Scots Strategy cites a question included in the 2010 Omnibus Survey as to “Do you perceive yourself to be an Ulster Scot?” This was answered positively by 18% of respondents.
- 2.30. Desegregated figures are provided on some grounds. The main differential is that figures for Protestants at 31% of respondents were much higher than for Catholics at 3%. There were also much higher figures for older age groups than younger persons (with 29% of over 65s responding positively, compared to 5% of 16-24 year olds).
- 2.31. In relation to the community background differential the figures in the draft Strategy are significantly different to the question in a previous Omnibus survey about knowledge of Ulster Scots *as a language* with the overall figure of 4% constituting 3% of Catholic respondents and 5% of Protestant respondents respectively.⁴⁶ It should be noted that higher figures for *understanding* Ulster Scots are provided for in other recent surveys, although figures for *speaking* Ulster Scots are similar, this may reflect the level of mutual comprehensibility between much of Ulster Scots and English.⁴⁷
- 2.32. Whilst the Omnibus Survey data points to around one in five persons in NI (in 2010) self-identifying as Ulster Scots, including almost a third of Protestant respondents, it is not clear from this question alone if such identification is a part of a *cultural identity*, or identification with Ulster Scots as an *ethnic group*.
- 2.33. As alluded to in the introduction the perspective of recognition Ulster Scots as an ethnic group has not yet been the subject of representations or otherwise discussed by the FCNM Committee. Recognition as a separate ethnic group was also not part of the proposed NI Executive Strategy for Ulster Scots. We have not come across any academic or other articles providing further analysis of the question. The NIO had no policy documents or other broader substantive records of discussion on the matter before the NDNA commitment.
- 2.34. In general however, despite the absence of information above, it is the case that the term Ulster Scots has been used to refer to Ulster Scots as an ethnic group rather than (or as well as) speakers of a language.
- 2.35. The Ulster Scots Agency states that the term Ulster Scots “*has, for nearly 400 years, referred to people, not place - the people who migrated from the Lowlands of Scotland to Ulster, and to the Ulster-Scots communities that they established right across the nine counties.*”⁴⁸ The 2015 Ulster Scots strategy sets out that the “*first*

⁴⁶ Figures cited in draft Strategy for Ulster Scots language, culture and heritage, (DCAL, July 2012), pages 40-41 relating to identity question in 2010 Omnibus Survey and language question in 2007 Omnibus Survey.

⁴⁷ See NISRA/DfC ‘Knowledge and use of Ulster-Scots in Northern Ireland: Findings from the Continuous Household Survey 2017/18’ where 13% of the adult population responded they could understand Ulster Scots and 4% could speak Ulster Scots – the figure for fluency in Ulster Scots (“complicated conversation”) was 1% of the population. In this instance the figures for *some knowledge* of Ulster Scots were much higher for Protestants at 21% than Catholics 8% but this is largely grounded in the higher numbers of persons who understand Ulster Scots, rather than speakers. There are also differentials with more persons understanding Ulster Scots in rural than urban locations, and in more affluent than deprived areas.

⁴⁸ <https://www.ulsterscotsagency.com/what-is-ulster-scots/>

known use of the term 'Ulster Scots' (for the people rather than their speech) dates from 1640.”⁴⁹ References to the Ulster Scots as a people, rather than speakers of a language, have also regularly been made by key political advocates of Ulster Scots. This includes the former Chair of the Ulster Scots Agency the late Lord Laird.⁵⁰

- 2.36. Whilst the Ulster Scots Language Society was established in 1992 with a focus on the language, in 1995 the Ulster Scots Heritage Council was set up with a broader remit with the future DCAL Minister Nelson McCausland as its first chairperson. The Council was subsequently renamed the Ulster Scots Community Network. The Network's broader remit includes a focus on Ulster Scots as a people with origins as Scottish settlers bringing “urbanisation, new agricultural practices and livestock, new building styles and techniques, language and culture.” Noting also “Their arrival also brought new surnames, a new religion and, of course, a change in politico-historical allegiance.” and that: “As a result, Ulster would go on to have a radically different blend of peoples and traditions than the rest of Ireland.”⁵¹
- 2.37. References to Ulster Scots as a people are easily found in popular media including *Wikipedia* which describes Ulster Scots people “as an ethnic group” (although the sources for this are somewhat suspect)⁵² mostly of Presbyterian lowland ancestry. A website entitled ‘theulsterscots.com’ of unknown authorship, similarly refers to ancestors of lowland Scots that presently make up the majority Protestant population of NI. Emphasis is placed on the community being closer ethnically to Scots than Gaelic Irish. Scots is described as “a mixture of Pict, Celt, Gael, Norse and Saxon” (which diverges from the UK recognition of Scots under the Framework Convention as ‘a Celtic people’). On this website the term Ulster Scots is generally seen as interchangeable with the unionist community.⁵³ This conflation is not, however, accepted by other key actors within unionism. In response to NDNA the Orange Order raised concerns regarding the focus on Ulster Scots within the proposed bill arguing that the identity of ‘British Citizens in the UK is in many areas wider than simply Ulster-Scots’.⁵⁴ It is possible that the extended remit of the proposed NDNA Ulster Scots Commissioner to also cover Ulster British identity was an unsuccessful attempt to accommodate this.
- 2.38. What is consistent in references to Ulster Scots as a people is a strong focus on the diaspora, in particular the Scots-Irish in north America as a group of separate heritage to Irish Americans, due to Ulster Scots ancestry.⁵⁵

⁴⁹ Strategy for Ulster Scots 2015-2035, paragraph 1.10.

⁵⁰ See for example: ‘A giant leap for an ‘Ulsterman’... tributes to Neil Armstrong, the astronaut who was first to walk on the moon’ Belfast Telegraph 28 August 2012 <https://www.belfasttelegraph.co.uk/news/northern-ireland/a-giant-leap-for-an-ulsterman-tributes-to-neil-armstrong-the-astronaut-who-was-first-to-walk-on-the-moon-28785887.html> See also from Nelson McCausland <http://nelsonmccausland.blogspot.com/2017/10/a-great-scotch-irish-soldier-from.html>

⁵¹ <http://www.ulster-scots.com/history>

⁵² <http://www.ulster-scots.com/history>

⁵³ https://en.wikipedia.org/wiki/Ulster_Scots_people (accessed June 2020). The sources in this instance begin with a reference in a travel guide, and are followed by an article in the Scotsman focusing on Scottish rather than Irish roots of US presidents.

⁵⁴ <https://www.theulsterscots.com/>

⁵⁵ Grand Orange Lodge of Ireland response to the ‘New Decade, New Approach’ document, Statement of 10 January 2020; <https://mobile.twitter.com/OrangeOrder/status/1215628463438225414>

⁵⁶ See <http://www.ulster-scots.com/diaspora> (Ulster Scots Community Network; and www.ulsterscots.com (unknown) and Ulster Scots Agency: <https://www.ulsterscotsagency.com/what-is-ulster-scots/famous-ulster->

- 2.39. From these perspectives the ethnic indicators relevant to Ulster Scots as a people therefore include national identity and nationality (Scottish, Northern Irish, British, Ulster); ethnic and national origin (Scottish descent); language (Scots); 'political opinion' (unionist); and religion (Protestant in general or Presbyterian).
- 2.40. To a significant section (but not all) of persons with Ulster Scots identity Britishness may also be an important part of their identity. The extension of the proposed Ulster Scots Commissioner's remit to cover the Ulster British tradition led to the raising of the aforementioned concerns by the NIHRC. In the context of Ulster Scots speakers being drawn from across the community the Commission raised concerns that the extension risked instead tying Ulster Scots to a particular affiliation. The Commission warned that whilst Ulster Scots is a recognised linguistic minority:
- ... 'Ulster British' is not a term or a linguistic/national minority group presently recognised by human rights treaty bodies. It appears that Ulster Scots culture is at risk of being conflated with a distinct political identity. This may have unintended consequences.⁵⁶
- 2.41. The Commission states that "*whilst Ulster Scots language may be commonly associated with the Unionist/Protestant community*" it should not be assumed that all Ulster Scots speakers may associate with Ulster Britishness. The Commission highlights that the Ulster Scots Agency emphasises "*Ulster-Scots language is spoken in different areas of Ireland by both Protestants and Roman Catholics alike*" and that the "*Ulster-Scots Language Society highlights that its constitution stipulates that it is 'non-political and non-sectarian'.*" The Commission grounds its concerns that conflating Ulster Scots and Ulster British in the context of the proposed Commissioner "*could undermine developments in respect of Ulster Scots language and culture*".⁵⁷
- 2.42. The same issues would appear to unavoidably arise in the recognition of Ulster Scots as an ethnic group, which would cover a significantly different group to the linguistic minority. This would provide challenges with to the efforts by Ulster Scots speakers (as with Irish speakers) to promote the linguistic heritage as part of shared heritage.
- 2.43. Depending on interpretation, there may also be implications for the new statutory duty to promote Ulster Scots throughout the NI education system. Should this move away from teaching Ulster Scots *linguistically* to teaching around a specific *ethnic group* and its culture and traditions, the question of construction will have specific implications. Any tying of the ethnic group to a specific political affiliation will be controversial, in a context where history is already contested. For example, Presbyterians of Scottish decent could also constitute the most active segment of the United Irishmen/women tradition.
- 2.44. There is also an alternate view that rejects the emergence of Ulster Scots peoples as initiating with a 16th century settler or planter community. Instead, emphasis is placed on a much longer span of history and movements of peoples between

[scots/](https://www.ulster.ac.uk/research/topic/english/ulster-scots/about) (The diaspora is also the current principal area of academic research currently being undertaken by an Ulster University institute with a focus on Ulster Scots. <https://www.ulster.ac.uk/research/topic/english/ulster-scots/about>).

⁵⁶ NIHRC 'Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraph 2.14.

⁵⁷ As above paragraphs 2.15-6.

the both islands, and of identities of Britishness and Irishness as part of diverse but shared inheritance.⁵⁸

- 2.45. It is not publicly clear to date what the intention was behind the ask for Ulster Scots to be recognised as a national minority. It is clear however that in relation to recognition as an ethnic group, the UK Government is entering into a highly complex and contested area, both within unionism and beyond.

Ulster Scots as an ethnic group: fair employment and racial equality law

- 2.46. Equality legislation in NI protecting ethnic groups from discrimination is already disjointed between fair employment legislation covering only sectarian discrimination and the belated advent of anti-racism legislation in the mid-90s.
- 2.47. The treaty bodies to both the United Nations anti-racism convention (ICERD) and the Council of Europe Framework Convention Advisory Committee have both stated that sectarianism in Northern Ireland should be treated as a specific form of racism.⁵⁹ The UK is party to both treaties. This position has also been advocated by the NI Human Rights Commission who have stated that *“This does not mean that sectarianism should not continue to be individually named and singled out just as other particular forms of racism are, for example, anti-Semitism or Islamophobia.”*⁶⁰
- 2.48. The Council of Europe specialist institution on combatting racism provides a recommended definition of the concept, with the following protected grounds (with those highlighted relevant to Ulster Scots from the perspectives above):

“racism” shall mean the belief that a ground such as ‘race⁶¹, colour, language, religion, nationality or national or ethnic origin justifies

⁵⁸ The work of the late Dr Ian Adamson, who among many other posts was the first chair of the Ulster Scots Academy, details such a perspective in works on the historical and cultural legacy of Dalaridia. See for example Ian Adamson ‘Dalaridia Kingdom of the Cruthin’ (Pretani Press, 2003)

⁵⁹ In 2011 the UN Committee on the Elimination of all Forms of Racial Discrimination made clear that *“Sectarian discrimination in Northern Ireland [...] attract[s] the provisions of ICERD in the context of “inter-sectionality” between religion and racial discrimination”* (paragraph 1(e) UN Doc CERD/C/GBR/18-20, List of themes on the UK). Later in the same year the Council of Europe Advisory Committee on the Framework Convention for National Minorities directly addressed the approach in the predecessor draft strategy to *Together* raising concerns that the Committee *“finds the approach in the CSI Strategy to treat sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards”*. *Third Opinion on the United Kingdom adopted on 30 June 2011* ACFC/OP/III(2011)006, paragraph 126. The UN Committee on the Elimination of all Forms of Racial Discrimination stated its position following representations from the Northern Ireland Human Rights Commission. The Commission had raised concerns that “policy presenting sectarianism as a concept entirely separate from racism problematically locates the phenomenon outside the well-developed discourse of commitments, analysis and practice reflected in international human rights law” and hence was not harnessing this framework to tackle sectarianism. The Commission elaborated “This risks non-human rights compliant approaches, and non-application of the well-developed normative tools to challenge prejudice, promote tolerance and tackle discrimination found in international standards. In particular, it seriously limits the application of ICERD to Northern Ireland, and therefore obligations on the state to tackle sectarianism along with other forms of racism.” Northern Ireland Human Rights Commission, ‘Parallel Report on the 18th and 19th Periodic Reports of the United Kingdom under the International Convention on the Elimination of All Forms of Racial Discrimination’ (ICERD), paras 17-23.

⁶⁰ NI Human Rights Commission ‘Parallel Report to the Advisory Committee on the Third Monitoring Report of the United Kingdom on the Framework Convention on National Minorities, February 2011 paragraph 59.

⁶¹ The European Commission against Racism and Intolerance (ECRI) standard qualifies the use of the term ‘race’ as follows: *“Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.”*

contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons;⁶²

- 2.49. These grounds, that provide key indicators of protected grounds for Ulster Scots, are presently split across NI statutes. The ground of '*language*' is not included at all, which unless remedied may in itself prompt complainants to require the type of link in to ethnicity to assert protections against discrimination that is avoided in promoting the language as shared heritage.
- 2.50. 'Fair Employment' legislation relies on the two protected grounds of *religious belief* and *political opinion* to combat sectarian discrimination and has specific monitoring duties in relation to 'community background' of the two main ethnic groups.
- 2.51. The Race Relations NI Order 1997 (RRO) relies on the concept of 'racial group' as defined in the RRO as a group of persons by reference to "*colour, race [sic], nationality or ethnic or national origins.*" The RRO itself expressly precludes protection to groups of persons defined by reference to *religious belief* or *political opinion*. This mirrors a broader earlier problem with the original UK Race Relations legislation (originally from 1965) when Stormont opposition to the inclusion of religious belief as a category (which would have included anti-discrimination claims by NI Catholics) contributed to religious belief not being included as a protected ground. This left an ambiguity as to whether other ethnic groups where religion is an ethnic indicator (Jews, Sikhs, Muslims) would be protected by the race relations legislation. This was not advanced until the landmark *Mandla v Dowell-Lee* case held that Sikhs were protected.⁶³
- 2.52. The Section 75 statutory duties on equality and 'good relations' rely on the RRO concept of racial group, along with political opinion and religious belief. ⁶⁴ The NI legislation preventing incitement to hatred encompasses the following protected grounds in the same statute: *religious belief, colour, race, nationality (including citizenship) or ethnic or national origins.*⁶⁵
- 2.53. Whilst there have long been moves to consolidate the numerous NI anti-discrimination statutes into single equality legislation (as was undertaken in Great Britain under the Equality Act 2010), this has not progressed largely due to DUP opposition. Therefore, should Ulster Scots formal recognition as an ethnic group proceed, there would be ambiguities in protection unless consolidated single equality legislation is taken forward. This is also the case with the Section 75(2) 'good relations' duty that applies to ethnic but not linguistic groups – and hence would apply to Ulster Scots as an ethnic group, but not speakers of Ulster Scots (or Irish).
- 2.54. At high level policy level there is the NI Executives' *Racial Equality Strategy* – dealing with issues faced by ethnic minority groups, along with the *Together: Building a United Community Strategy*, largely geared to sectarianism. There are

⁶² European Commission Against Racism and Intolerance (ECRI) General Policy Recommendation No. 15, explanatory memorandum, paragraph 7.

⁶³ <https://www.bailii.org/uk/cases/UKHL/1982/7.html>

⁶⁴ <http://www.legislation.gov.uk/ukpga/1998/47/section/75>

⁶⁵ Public Order NI Order 1987. In 2004 grounds of sexual orientation and disability were also added: <http://www.legislation.gov.uk/nisi/1987/463/part/III/crossheading/acts-intended-or-likely-to-stir-up-hatred-or-arouse-fear>

also the St Andrews Agreement mandated Irish language strategy and Ulster Scots language, culture and heritage strategy (although neither of the latter have been adopted to date).

- 2.55. The fragmentation of NI anti-discrimination legislation occurs in a particular historical context. This includes the past positions of both the British and Irish States' that people in NI were British and Irish respectively, thus limiting the recognition of ethnic indicators based on national identity and citizenship. This changed with the advent of the peace process, and in particular, the incorporation into the GFA treaty of birthrights for the 'people of Northern Ireland' to 'identify and be accepted as' British or Irish or both.
- 2.56. There has also been the practice of 'Northern Ireland exceptionalism' whereby the community background divide and sectarianism in NI is presented as something unique rather than relating to ethnic division as defined in international standards. The use of 'religious belief' and 'political opinion' as ethnic indicators create a complex dynamic. The former links to a designation of community background regardless as to whether a religious belief is actually held or practiced and the latter can conflate political affiliation with ethnicity. The GFA embedded political designation of nationalist, unionist and other within the power sharing Assembly, yet these indicators also find themselves in community background monitoring. There is also the context of changing demographics, across 'community background', but also in the growth of the 'other' category, now approaching 20% of the population reflective only in part of new migration but also of a reluctance to self-designate with a political affiliation. The context of 'other' approaching a fifth of the population means it is more difficult to disregard in 'fair employment' monitoring, with the FCNM committee calling for ethnic monitoring across all indicators.
- 2.57. These trends have evolved in both demographic as well as political change. As articulated by Dr Robbie McVeigh in the 2019 Equality Coalition report on sectarianism:

The Northern Ireland state was conceived on a sectarian demographic logic – it was created in order to maximise the dominion of Protestant majoritarianism in Ireland... It was a state that assumed it would manage the consequent sectarian algorithm – a population that was roughly two-thirds Protestant/unionist (and 'loyal') and one-thirds Catholic/nationalist (and 'disloyal') – in perpetuity.

This reality, however, has changed markedly over recent years. ... Essentially, this involves two parallel demographic shifts – the rise in the proportion of Catholic population and the rise in the proportion of the BME/'Other' population... ⁶⁶

- 2.58. This report notes that by the time of the 2011 census, convergence had largely taken place with 'Protestants' and 'Catholics' constituting 42% and 41% of the population respectively. But the combined share of both groups had dropped from "almost 100 per cent to 82 per cent" with the 'other' category having grown to 18%. Dr McVeigh notes that:

⁶⁶ Robbie McVeigh 'Sectarianism: Key Facts' Equality Coalition 2019, page 17.

The 'Other' proportion falls substantially once people are asked their religion or 'religion brought up in'. This is what is characterised as 'community background' in other contexts and it accords with notion that the labels 'Protestant' and 'Catholic' are a proxy for ethnicity in Northern Ireland. [that]...some people the identification as 'Other' indicates resistance to pigeonholing within traditional sectarian categories.

- 2.59. All ethnic boundaries are of course fluid and complex, with many people having multiple identities.⁶⁷ In discussing the context of demographic transition, the report highlights the significance of a state founded on a majority-minority dynamic becoming a jurisdiction of different minorities. In this context the report also states:

....numerical majorities do not imply power majorities. Contemporary Northern Ireland is in a situation of transition and flux. It bears emphasis that in the new demographic context, Catholics may well find what women have known for many years – that being in the majority does not necessarily guarantee any protection from discrimination and inequality. Contrariwise, of course, new issues may well emerge from Protestant minority status.⁶⁸

- 2.60. In relation to ethnic minority communities outside the two 'community background' categories data is not straightforward. NI has largely followed previous UK monitoring categories which encompass tick boxes based on colour, Commonwealth origin and Irish Travellers. These indicators are limited in their scope for new migrant communities largely from the EU for which other indicators such as country of birth and citizenship ('passports held') are used.
- 2.61. The ethnicity categories 2011 census recorded 1.8% of the NI population (32,400) people as being from a BME background, although this does not include many EU migrants selecting the 'white' box that overall constitutes the remaining 98.2%. The Country of Birth statistics show 2.51% of persons were born in EU countries other than the UK and Ireland, the largest national grouping were Polish-born persons constituting 19,700 persons.⁶⁹ Although NI has benefited from significantly increased inward migration since the onset of the peace process (that has reduced since the Brexit referendum), NI remains the least ethnically diverse region of the UK.
- 2.62. How does therefore Ulster Scots as an ethnicity fit into this? How would recognition as such under the Framework Convention impact on ethnic monitoring categories, fair employment monitoring, or high level strategies such as the racial equality strategy?

⁶⁷ Dr McVeigh states: "the enduring example of 'mixed marriages' make 'community background' a complex notion. But traditionally this mixing was often no antidote to sectarian differences and sectarian discrimination: people often crossed sectarian boundaries, but the boundaries remained as fixed as ever. Thus, sectarian identities in Northern Ireland have always involved a complex interaction of self- and other- definitions. In reality, the labels 'religion' or 'political opinion' are inappropriate to a category which effectively constructs the identities 'Protestant' and 'Catholic' as ethnicities. This is increasingly captured by the notion of 'community background' which insists that people have a Protestant or Catholic 'background' even if they repudiate these labels for themselves" As above p19.

⁶⁸ As above, page 17.

⁶⁹ NISRA Census 2011 'Key Statistics for Northern Ireland: December 2012' Table KS201NI: Ethnic Group, Table KS204NI: Country of Birth and NI Assembly Research and Information Service Census 2011: Detailed Characteristics of Ethnicity and Country of Birth at the Northern Ireland level NIAR 631-13 (2013).

- 2.63. Should the number of persons expressing an Ulster Scots identity be translated into identification as an ethnic group, it could constitute 18% of the population (over 300,000 persons) on the basis of the previous figures.
- 2.64. Given the uncomfortable division among statutes will ethnic monitoring of Ulster Scots be considered under Fair Employment (FETO) monitoring or the RRO? If FETO, under what indicator - as neither religious belief or political opinion seem relevant? What are the broader implications for ethnic monitoring of FETO 'community background' will Ulster Scots be considered a separate category to Protestant / Catholic (etc.)? Or in the context of multiple identity will it be seen as additional with existing practices of monitoring community background being maintained? Will that be tenable if a person wishes to only self-identify as an Ulster Scot? What will happen to the residual method of designating community background in this context, as a tool to tackle discrimination?
- 2.65. This enters the question of community background monitoring and self-identification under the FCNM. The NIHRC in its NDNA advice stresses the principle under the Framework Convention of self-identification in reference to the NDNA commitment to recognise Ulster Scots as a national minority.⁷⁰
- 2.66. The issue of self-identification under the Framework Convention has already been one of the issues that has led to significant contestation in the Northern Ireland context. This has in particular raised the question as to whether the 'residual method' of designating 'community background' as a key tool to combat discrimination is compatible with the principle of self-identification. The FCNM committee has found with reservations that it is compatible, but should be kept under regular review.⁷¹ The issue of self-identification as Ulster Scots enters into this context.
- 2.67. There is also the issue of recognition of multiple identities, i.e. could Ulster Scots be recognised as both a linguistic and ethnic minority, constituting two separate groups (in the same way Irish and Irish speakers, or Welsh and Welsh speakers presently are). The next section examines how the concept of national minority has been treated in international law.

⁷⁰ NIHRC 'Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraph 2.8.

⁷¹ ACFC/OP/III(2011)006 (3rd Opinion on the UK) adopted on 30 June 2011, paragraph 44-48

3. Minorities and International human rights law

Ethnic, religious or linguistic minorities in the UN human rights system

3.1. A specific minority rights provision is found Under Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR) as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

- 3.2. A similar formulation is found in another core UN human rights treaty – the Convention on the Rights of the Child (which also references persons of indigenous origin).⁷² The UK is party to both treaties. There is also a 1992 UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*.
- 3.3. The core concept of minority at UN level common to the two treaties is, therefore, reference to *ethnic, religious or linguistic* minorities. There have been a number of attempts over years to come up with a definition of minorities in this context. The background of this is detailed in a recent 2019 study by the UN Special Rapporteur on Minority Issues, Dr Fernand de Varennes. The Report was produced in light of the “*absence of consistency in understanding who is a minority is a recurring stumbling block to the full and effective realization of the rights of minorities.*”⁷³
- 3.4. The more overarching term ‘national minorities’ is not used in the core UN treaties that instead specify ethnic, religious or linguistic minorities. The use of the term ‘national minorities’ has been more common in the European context.⁷⁴
- 3.5. One of the definitions of ethnic, religious or linguistic minority put forward was by a previous Special Rapporteur Francesco Capotorti in 1977. This however included qualification of being a national of the state in question, which would exclude migrant communities (earlier proposed definitions had also required ‘loyalty’ to the State). The 1977 definition (and others) also qualified minority to a group in a ‘non dominant position’ which would preclude application of minority rights to, for example, White South Africans under apartheid.⁷⁵

⁷² Article 30 “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.” See also Article 17(d): Article 17 ‘States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall... (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

⁷³ UN Doc A/74/160 Special Rapporteur on Minority Issues ‘Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’ 15 July 2019, paragraph 21.

⁷⁴ As above, paragraph 42 and footnote 8.

⁷⁵ Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

<https://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx>

- 3.6. The UN Human Rights Committee in 1994 produced a General Comment on the rights of minorities, interpreting the provisions of Article 27 ICCPR and providing a description of who it considered to be a member of a linguistic, religious or ethnic minority. Key elements of this description, as well as clarifying application of the concept does not require citizenship of the State, are summarised in the 2019 UNSR study as including that the criteria are factually based and that:

...existence of an ethnic, religious or linguistic minority is not determined by a State or dependent on some form of recognition. It is established by objective criteria.⁷⁶

- 3.7. The UNSR study also draws out further additional elements as to who can be considered a minority from the subsequent communications of the Human Rights Committee. This includes that: *“The ‘territory’ to consider in determining whether or not a group is a linguistic, religious or ethnic minority is the entire State, and not one of its subunits”* and that *“One of the objective criteria, if not the main one, for determining whether a group is a minority in a State is a numerical one. A minority in the territory of a State means it is not the majority”*.⁷⁷

- 3.8. In light of the above the Special Rapporteur provides the following working definition of minority:

An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status.⁷⁸

Definition of National Minority under the Framework Convention

- 3.9. The use of ‘national minority’ in international law dates back to the era of the League of Nations. The term is also included as one of the protected grounds against discrimination in Article 14 ECHR. The term is clearly not meant to be a markedly different concept to that of ‘minority’ under UN instruments. At the time of the formulation of what would become the Framework Convention in 1995, the Council of Europe’s European Commission for Democracy through Law (the Venice Commission) noted there was no generally accepted definition of the concept of a minority. The Venice Commission noted, however, that some elements had certainly been identified including *“the standard if not universal classification of minorities into three groups: ethnic minorities, linguistic minorities, and religious minorities; any of these three criteria may be present or, more often, they may be in part cumulative.”*⁷⁹

⁷⁶ UN Doc A/74/160 Special Rapporteur on Minority Issues ‘Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’ 15 July 2019, paragraph 48.

⁷⁷ As above, paragraph 52.

⁷⁸ As above, paragraphs 53 and 59.

⁷⁹ Report on the replies to the questionnaire on the rights of minorities, in: “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, 1994, p. 45 cited in CDL-PI(2018)002 European Commission for Democracy Through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports Concerning The Protection Of National Minorities (Strasbourg, 11 November 2017).

- 3.10. In light of the lack of a universal definition of ‘minority’ and the impossibility at the time of arriving at one capable of mustering general support among all Council of Europe member states, no definition of the term ‘national minority’ was included in the Framework Convention.⁸⁰ One particular source of contention was application to non-citizens.⁸¹ The FCNM was drawn up at a time of, among other matters, the disintegration of Yugoslavia. The focus has more recently included the context of the treatment of migrant communities across Europe. The object and purpose of the instrument remain the same. The FCNM addresses society as a whole and is a tool to accommodate increasing pluralism through minority protection, based on the *“principle that the protection of national minorities is essential to stability, democratic security and peace. Its main purpose is to prevent interethnic tensions and to promote dialogue in open and inclusive societies.”*⁸²
- 3.11. The lack of a definition does not give State Parties a free hand to arbitrarily determine which groups it will afford protection to. The Advisory Committee has rejected the ‘superficial conclusion’ that the lack of definition of National Minority in the FCNM means that the scope of its application *“is in practice left solely to the discretion of states parties.”* The Advisory Committee acknowledges that State Parties do have some ‘margin of appreciation’ but that this must be exercised *“in line with the obligation to interpret a treaty in good faith and in the light of its object and purpose”* under the Vienna Convention on the Law of Treaties.⁸³ To this end the Council of Europe Commission for Democracy through Law (the Venice Commission) has stressed that international practice in the field should be taken into consideration and that *“In particular, the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions”*⁸⁴
- 3.12. The Advisory Committee also stresses the FCNM is a living instrument whose *“interpretation must evolve and be adjusted regularly to new societal challenges”* noting that *“[m]ultiple identities and increasing mobility, for instance, have become regular features of European societies.”* The Committee also notes *“categorisation of the minority as a static and homogeneous group may reinforce stereotypes and does not pay adequate attention to the broad diversity and intersectionality that exists within minorities, as within all groups.”* The Committee describes the principle of ‘self-identification’ as a cornerstone of minority rights, that should not be disregarded by membership of a national minority being externally imposed.⁸⁵
- 3.13. As set out in the FCNM Explanatory Report the principle of self-identification:

⁸⁰ FCNM Explanatory Report, paragraph 12.

⁸¹ The Advisory Committee has ultimately rejected this distinction, holding that the inclusion of a citizenship requirement may have a restrictive and discriminatory effect see ACFC/56DOC(2016)001 ‘The Framework Convention: a key tool to managing diversity through minority rights’ Thematic Commentary No. 4 The Scope of Application of The Framework Convention for The Protection Of National Minorities’ Adopted on 27 May 2016, paragraph 29.

⁸² ACFC/56DOC(2016)001 ‘The Framework Convention: a key tool to managing diversity through minority rights’ Thematic Commentary No. 4 The Scope of Application of The Framework Convention for The Protection Of National Minorities’ Adopted on 27 May 2016

⁸³ As above, paragraphs 5-6.

⁸⁴ CDL-AD (2002) 1 (Venice Commission) Opinion on Possible Groups of Persons to which the Framework Convention for the Protection Of National Minorities Could Be Applied In Belgium. (Strasbourg, 12 March 2002), paragraph 1.

⁸⁵ ACFC/56DOC(2016)001 ‘The Framework Convention: a key tool to managing diversity through minority rights’ Thematic Commentary No. 4 The Scope of Application of The Framework Convention for The Protection Of National Minorities’ Adopted on 27 May 2016, introduction and paragraphs 5,9, 11, 38.

...does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.⁸⁶

3.14. The Venice Commission has set out that such objective criteria linked to identity (such as language, traditions, cultural heritage or religion, etc.) is also combined with a subjective element – the desire to preserve the specific elements of this identity. The Commission has pointed to such criteria providing scope for states to develop their own definitions “*provided they do not rely on arbitrary or unjustified distinctions, which would be the source of discrimination.*”⁸⁷

3.15. The Advisory Committee for its part has stated that a person's free self-identification should only be questioned in ‘rare cases’ where it is not based on good faith. The Committee specifies that self-identification:

...that is motivated solely by the wish to gain particular advantages or benefits, for instance, may run counter to the principles and purposes of the Framework Convention, in particular if such action diminishes the intended benefits and rights available to persons belonging to national minorities.”⁸⁸

3.16. In general, in assessing the scope of application of the Framework Convention by State Parties “*the Advisory Committee has considered it to be its duty to assess whether the approach taken to the scope of application is in good faith and does not constitute a source of arbitrary or unjustified distinction among communities with regard to access to rights.*”⁸⁹

3.17. Notably the Advisory Committee has stressed that *formal recognition* of a National Minority by a State Party should not be a pre-requisite to access minority rights, criticising such approaches as ‘exclusionary’ and incompatible with the principles of the FCNM. Notwithstanding this, the Committee has noted that the de facto inclusion of groups as beneficiaries “*often forms part of an evolutionary process that eventually may lead to formal recognition. Beginning with the free self-identification of individuals who are acknowledged by society as forming a distinct – albeit equally valued – minority.*”⁹⁰ The Committee does again stress that formal recognition is of declaratory rather than constitutive character and access to minority rights should not depend on it.

3.18. In general the Advisory Committee has consistently encouraged States to base equality promotion and other special measures further to FCNM on ‘comprehensive data’ relating to the specific situation and access to rights of

⁸⁶ FCNM Explanatory Report, paragraph 35.

⁸⁷ CDL-AD(2007)001, Report on non-citizen and minority rights, §§12-13 and 144. cited in CDL-PI(2018)002 European Commission for Democracy Through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports Concerning The Protection Of National Minorities (Strasbourg, 11 November 2017). The Advisory Committee has also stated that the “general equality principle [under FCNM] is called into question when altogether different principles or disproportionately different protection mechanisms are applied to the various minorities, or when separate government bodies are responsible for the protection and promotion of their respective rights.” ACFC/56DOC(2016)001 ‘The Framework Convention: a key tool to managing diversity through minority rights’ Thematic Commentary No. 4 The Scope of Application of The Framework Convention for The Protection Of National Minorities’ Adopted on 27 May 2016, paragraph 42(emphasis added).

⁸⁸ ACFC/56DOC(2016)001 ‘The Framework Convention: a key tool to managing diversity through minority rights’ Thematic Commentary No. 4 The Scope of Application of The Framework Convention for The Protection Of National Minorities’ Adopted on 27 May 2016, paragraph 10.

⁸⁹ As above paragraph 26.

⁹⁰ As above paragraphs 27-28.

national minorities (including experience of intersectional multiple discrimination). The Committee has urged that “*particular attention must be paid to members of the most disadvantaged segments of society, that is those who have been disempowered economically, socially or geographically, due to their size or because of past experiences of conflict.*”⁹¹

Application of the FCNM to groups in a dominant or co dominant position

3.19. A particular situation considered has been whether FCNM should apply to groups in a ‘dominant’ or ‘co-dominant’ position in a State Party. This matter was specifically considered in 2002 in an Opinion from the Venice Commission in relation to the application of the Framework Convention to Belgium, in relation to the French and Dutch/Flemish speaking communities and other groups. (Belgium had signed but to date is yet to ratify the FCNM).

3.20. The Venice Commission concluded that groups who find themselves in a dominant or co-dominant position should *not* be considered a minority in the sense of the Framework Convention. The Commission advised that the object and purpose of the FCNM related to protections designed to:

...avoid that a group of persons, numerically inferior to the rest of the population, should be obliged to yield under pressure of the majority of the population by virtue of the operation of the democratic institutions themselves - and to surrender its religious, linguistic, cultural and historical characteristics.⁹²

3.21. The Commission reasoned that an interpretation of the Framework Convention in line with the General Rule of Interpretation in Article 31 of Vienna Convention on the Law of Treaties “*suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection.*” Concluding that: “*it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, de jure or de facto, in a dominant or co-dominant position.*”⁹³

3.22. The Venice Commission describes a ‘co-dominant position’ as typically found in:

... States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations, mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups, to the extent that they are in a co-dominant position.

⁹¹ As above paragraph 66.

⁹² CDL-AD (2002) 1 (Venice Commission) Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied In Belgium. (Strasbourg, 12 March 2002), paragraph 5.

⁹³ As above, paragraph 6 & 7.

The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions.⁹⁴

The interpretation of the scope of the FCNM by the UK

‘Racial Group’ and the UK approach

- 3.23. As alluded to in the introduction the UK has largely relied on the concept of ‘racial group’ originally under the Race Relations Act 1976 in Britain, defined around “colour, nationality (including citizenship) and ethnic or national origins”.⁹⁵
- 3.24. The Advisory Committee has in general welcomed the UK approach as broad. The Committee has noted it covers ‘ethnic minority communities’ and that the interpretation of ‘racial group’ by the courts has included the Scots, Irish and Welsh (due to national origins) and Roma, Gypsies, Irish Travellers, Sikhs and Jews (ethnic origins).⁹⁶
- 3.25. From its first assessment of the UK in 2001, however, the Committee did query the limitations of UK approach with specific reference to ensuring inclusion of the Muslim community and other religious minorities.⁹⁷ The Committee also subsequently queried the risk of over reliance on the concept of ‘racial group’, and specifically the consequent reliance on specific case law to ensure inclusion. This was in specific reference to Gypsies and Travellers in Scotland, who had been recognised as a minority by the Scottish Executive, but not had not been established as a ‘racial group’ by the Scottish Courts.⁹⁸

The recognition of Cornish as a national minority

- 3.26. From this first assessment the Committee also queried the exclusion of Cornish from the scope of the Framework Convention. The Committee noted that the UK expressly did not consider the people of Cornwall as a national minority, but that it had received ‘substantial information’ from persons self-identifying as such as “*to their Celtic identity, specific history, distinct language and culture.*”⁹⁹
- 3.27. In the second assessment in 2007 the Committee noted the UK has not accepted representations, which had ‘gained in magnitude’ over the years, from Cornish organisations and individuals concerning inclusion of the Cornish people under FCNM. The UK had *de facto* recognised Cornish speakers as a linguistic minority, through registration of Cornish under the ECRML. The Advisory Committee therefore encouraged the UK to consider the claims of Cornish people under the

⁹⁴ As above, paragraphs 8 & 9

⁹⁵ And subsequently the superseding Equality Act 2010. These Acts did not extend to Northern Ireland but the same concept of ‘racial group’ is found within the Race Relations (Northern Ireland) Order 1997, albeit that this NI statute explicitly includes Irish Travellers and explicitly excludes groups defined by religious belief or political opinion.

⁹⁶ See ACFC/INF/OP/I(2002)6 (First Opinion on the UK) paragraph 14; and FCNM (Fourth Opinion on the UK) paragraph 14.

⁹⁷ ACFC/INF/OP/I(2002)6 (First Opinion on the UK) paragraph 15.

⁹⁸ ACFC/OP/II(2007)003 (Second Opinion on the UK) paragraphs 29, 32, & 35.

⁹⁹ ACFC/INF/OP/I(2002)6 (First Opinion on the UK) paragraph 16.

Framework Convention, which it consider as deserving further examination, in consultation with the persons concerned.¹⁰⁰

- 3.28. The Committee's third examination of the UK in 2011 again referenced representations from Cornish organisations and individuals for inclusion under FCNM seeking additional legal guarantees and support for distinct cultural and linguistic identity. The Committee called on the UK authorities to "engage in dialogue with persons identifying with groups currently not covered by the Framework Convention to evaluate their claims".¹⁰¹
- 3.29. In 2014 the UK issued a statement formally recognising Cornish as an ethnic group (specifically as 'a Celtic People' within England). However, the UK declined to state and deferred to the courts as to whether Cornish people would be protected as a 'racial group' under the Equality Act 2010.¹⁰²
- 3.30. This left the somewhat unsatisfactory situation whereby 'formal' recognition had taken place but no move was made to put consequent legal guarantees into legislation. The Advisory Committee in response acknowledged the recognition as an "important step" but called on the UK authorities to take all "*legal, policy, and financial steps necessary to ensure access to the rights provided by the Framework Convention to persons belonging to the Cornish minority...*"¹⁰³

Application to Ulster Scots, the Irish language and the 'two main communities'

- 3.31. There is no equivalent narrative in the reports in relation to recognition of Ulster Scots as a national minority. In contrast to Cornish there are no recorded representations from Ulster Scots organisations or individuals, no reference from the UK authorities and no recommendations of the Committee addressing the matter.
- 3.32. Despite language not being a ground under 'racial group' the UK (as well as the Committee) have however *de facto* recognised linguistic minorities, including Ulster Scots and Irish speakers for the purposes of the Framework Convention.
- 3.33. From the first assessment of the UK there are references to representations from Ulster Scots speakers and to Scots and Ulster Scots as languages (as well as the Irish language, Welsh, Scottish Gaelic). These cover matters such as broadcasting in Ulster Scots, use of the language in private and public, teaching Ulster Scots language and literature and Ulster Scots speakers and the inclusion of Ulster Scots within the census languages question.¹⁰⁴ Issues for Ulster Scots speakers are also covered in subsequent monitoring rounds, including reference to the St Andrews strategy for Ulster Scots language, culture and heritage.
- 3.34. The Council of Europe Committee of Ministers produces brief Resolutions following Advisory Committee Opinions containing key recommendations. In 2012 following the third monitoring cycle, a recommendation was made for the authorities to continue and design to implement measures to encourage Ulster Scots speakers to use the language in the public sphere and in relations with local

¹⁰⁰ ACFC/OP/II(2007)003 (Second Opinion on the UK) paragraphs 30, 33 & 36.

¹⁰¹ ACFC/OP/III(2011)006 (Third Opinion on the UK), paragraph 32 & 34.

¹⁰² <https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>

¹⁰³ ACFC/OP/IV(2016)005 4th Opinion on the UK, Summary and paragraph 19.

¹⁰⁴ ACFC/INF/OP/I(2002)6 (First Opinion on the UK) paragraphs 18, 38, 67-8, 70-2, 92 & 118.

administrative authorities in Northern Ireland.¹⁰⁵ Recommendations for measures relating to Ulster Scots speakers have also regularly been made in relation to compliance with UK commitments under the Council of Europe European Charter for Regional or Minority Languages. The recognition of Scots and Ulster Scots speakers as a linguistic minority is therefore already well established.

- 3.35. In terms of ethnic groups, the application of the Framework Convention to NI has had a specific focus on minority ethnic groups, including migrants and Travellers. In relation to the approach to what are termed the ‘two main communities’ in NI, the approach of the UK and Advisory Committee has been to give *de facto* acknowledgement of engagement with the provisions of the Framework Convention, without referring to either specifically as a ‘national minority.’ There is therefore significant discussion on matters such as self-identification, housing, education, power sharing, police composition, integration, relations between the ‘two main communities’ and fair employment monitoring (which the Committee wishes to see extended to cover ethnic origin and nationality).¹⁰⁶
- 3.36. The Advisory Committee deals with issues of sectarianism (e.g. referencing that *“housing segregation along sectarian lines is still very common and it impacts on housing solutions for other ethnic minorities.”*)¹⁰⁷
- 3.37. The Committee has also raised specific concerns that *“to treat sectarianism as a distinct issue rather than a form of racism is problematic, as it allows it to fall outside the scope of accepted anti-discrimination and human rights protection standards”*. It has also been highly critical of the exceptionalist interpretation of the ‘good relations’ duty in NI in a non-human rights compliant manner. The Committee has consequently recommended that the NI authorities interpret good relations in a manner that does not prevent access to minority rights and properly define “good relations” and “sectarianism” in legislation *“drawing on international standards relating to racism and human rights in general”*.¹⁰⁸

The Bill of Rights Forum and proposed extension to all ‘communities’

- 3.38. There has long been contestation over the application of the Framework Convention in Northern Ireland to the ‘two main communities’ including specific attempts to widen its scope. These discussions have engaged similar questions to those addressed above by the Venice Commission in relation to application to dominant or co-dominant groups.
- 3.39. Such discussions have in particular taken place in relation to the Bill of Rights for Northern Ireland, and the question of it incorporating provisions from the Framework Convention. This has specifically included the contention that minority rights be attached to all ‘communities’ in NI rather than minorities in order to ensure both of the two main communities are covered. On the back of earlier work by the first Human Rights Commission¹⁰⁹ the Bill of Rights Forum in

¹⁰⁵ Resolution [CM/ResCMN\(2012\)22](#) on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom (*Adopted by the Committee of Ministers on 12 December 2012*).

¹⁰⁶ ACFC/OP/IV(2016)005 4th Opinion on the UK, Summary and paragraph 29.

¹⁰⁷ As above, paragraph 88.

¹⁰⁸ As above paragraphs 86-90.

¹⁰⁹ As alluded to earlier for a detailed narrative on this question see: Christopher McCrudden ‘Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Inglorious Role of the OSCE High Commissioner for National Minorities’ in Judges, Transition, and Human Rights (John Morison, Kieran McEvoy,

2007 took views as to whether the following provision should be recommended for inclusion in the GFA-mandated Bill of Rights:

The law in Northern Ireland shall give effect to the Framework Convention on the Protection of National Minorities. The term 'national minority' shall be interpreted to cover all cultural, ethnic, linguistic and religious minorities and communities in Northern Ireland.

- 3.40. The Bill of Rights Forum had been established further to the St Andrews Agreement 2006 to deliberate on the content of a Bill of Rights and was composed of the five main political parties and representatives of civil society.
- 3.41. The inclusion of the above provision was not supported by civil society representatives on the Forum (from the human rights, children and young people, disability, ethnic minority, older persons, sexual orientation, trade union and women's sectors).¹¹⁰
- 3.42. The human rights sector, represented by CAJ, expressed 'fundamental reservations' about "*the rights of a minority being treated as synonymous with rights of a community*". CAJ drew attention to the term minorities having a particular connotation in international human rights law to provide for specific provision for minorities; that the attachment of minority rights to dominant groups did not figure in international standards and raised concerns that the proposal would '*undermine any of the rights that minority communities have as a result of the Framework Convention*'. The ethnic minority sector in similar terms opposed the use of the term 'community' to replace 'minority' on grounds that "*The use of "community" undermines the minority protection under international law and distorts the entire section of the recommendations*".¹¹¹
- 3.43. In relation to the political parties the two nationalist parties also opposed the inclusion of the provision. Sinn Féin argued that it could be used "*prejudicially to protect the rights of majorities over the rights of minorities, in a manner that distorts the legal intent of the international instruments on which many of the provisions are based*." The SDLP opposed the provision "*on the basis that 'minority' should not be used interchangeably with 'community' to extend minority rights to majority communities*." The provision was supported by the DUP and Ulster Unionist Party who jointly argued it was more reflective of the FCNM, and "*noted their grave disappointment at the approach taken by other parties to the FCNM*". The Alliance party also supported inclusion of the provision.¹¹²
- 3.44. The provision was not included in the subsequent NIHRC final advice to the Secretary of State for Northern Ireland on the content of the Bill of Rights.¹¹³ The UK is yet to legislate for the Bill of Rights but NDNA led to the establishment of a specific *Ad Hoc* Assembly Committee to further consider the matter.
- 3.45. It should be noted that the provision considered by the forum also appears to contemplate the concept of National Minority encompassing a "Cultural Minority"

Gordon Anthony (Eds)) Oxford 2007 and Elizabeth Craig 'The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights process' NILQ 60(2): 201–11.

¹¹⁰ Bill of Rights Forum Final Report: Recommendations to the Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland (31 March 2008), pages 70-1.

¹¹¹ As above, pages 72-3.

¹¹² As above, pages 71-3.

¹¹³ NIHRC Advice to the Secretary of State on the Bill of Rights for Northern Ireland, 10 December 2008.

in addition to ethnic, linguistic and religious minorities. We are not aware of any precedent for this in the application of the Framework Convention across the Council of Europe member states. 'Cultural identity' is an essential element (alongside others) of the identity of a member of a national minority (see Article 5(1) FCNM). Shared cultural identity and traditions are also key elements of ethnicity alongside other indicators. This is not however the same as the idea of minority status (in the sense of UN or Council of Europe treaties) purely on the basis of affinity or interest in a particular form of art of music etc. The above provision would have therefore also extended the scope of minority rights in a subjective and exceptionalist manner.

4. Conclusions

- 4.1. The UK entered into a commitment to recognise Ulster Scots as a national minority in the context of political negotiations, within which no policy documents or records exist as to the intended nature of the undertaking, should it have been specified. In contrast to Cornish, there has also been no presentation of the claim or dialogue and discussion in relation to Ulster Scots as a national minority with the FCNM Committee to date. The work on how to take forward the NDNA commitment is therefore having to be done after the fact.
- 4.2. The most straightforward way to progress the commitment would be for a formal UK statement recognising Ulster Scots as a linguistic minority under the FCNM. Such UK recognition has already long been established under the GFA, ECRML and in a *de facto* sense under the FCNM. Such a statement could reflect what has long been an emphasis from representatives of speakers and public authorities that Ulster Scots speakers are drawn from across the community in NI. Whilst such recognition itself may be declaratory (and not required for a group to access FCNM rights), to avoid the question of an arbitrary or unjustified distinction consideration should be given to the comparable situation of other indigenous minority languages in the UK. This is not least the Scots language in Scotland where a significant anomaly could be created in formal recognition of speakers of a variant of a language as a linguistic minority, but not other speakers of the same language.
- 4.3. Clearly such a commitment would be meaningless in advancing the rights of speakers unless followed by concrete action. The consequent implications of formal recognition of Ulster Scots speakers coming within the scope of FCNM as a linguistic minority include legislative steps to protect against discrimination. This would be best achieved by exploring how 'language' can most effectively be added as a protected ground to NI anti-discrimination legislation. Solely adding Ulster Scots linguistically as a protected ground would risk creating an arbitrary and unjustified distinction in protection given the situation of the Irish language in NI. The competence for doing this would appear to normally fall to the NI Department for Communities. Legislative protection could also be taken forward with broader benefits through a consolidated single equality act, also engaging the NI Executive Office. The same question would arise in relation to the protection of comparable linguistic minorities in Great Britain for which there should be engagement with the Scottish and Welsh administrations.
- 4.4. A second manner in which the commitment could be progressed would be for the UK to now consider recognising Ulster Scots as an ethnic group within the scope of

the FCNM. An initial body of work to this regard should entail public consultation and broader engagement with organisations and individuals identifying as Ulster Scots to ascertain if there is a significant desire to self-identify as an ethnic group.

- 4.5. Other issues that should be worked through are the risks articulated by the Human Rights Commission in relation to the proposed conflation of the Ulster Scots Commissioner's remit with Ulster Britishness, should definitional parameters of the Ulster Scots grouping shift from cross community speakers to indicators of ethnic origin, Protestant religion and Britishness. Should consultation reveal a desire of self-identification of Ulster Scots as an ethnic group, consideration should be given to how best to address this issue.
- 4.6. A further consideration in this context would be the extent to which Britishness, and British citizenship, is a core part of Ulster Scots identity and the extent to which the concept is also seen as synonymous with the Protestant /unionist community in general. In such a context, recognition as an ethnic minority would appear to fall outside the scope of the FCNM.
- 4.7. This scenario would not preclude recognition as a linguistic minority, where this question does not arise given the clear dominance of the English language over all others. A further key risk in relation to shifting recognition of Ulster Scots towards ethnicity is whether this is likely to further marginalise Ulster Scots linguistically, with a shift away from focus on measures to safeguard and protect the language, along with further digression from collaborative language planning in relation to the Scots language in Scotland.
- 4.8. In relation to legislative protection recognition as an ethnic group should bring Ulster Scots within the scope of the Race Relations (NI) Order 1997 (RRO). It would be helpful if this issue is addressed rather than fudged (as was the case with Cornish). This would include addressing the implications for the already complex interface between the RRO and Fair Employment legislation. This would include ensuring effective monitoring against discrimination can continue, and addressing the FCNM recommendation to ensure such monitoring is extended to other ethnic groups. Again, given the additional complexities this raises, single equality legislation that is yet to be progressed by Stormont may be the most viable vehicle for this. In addition to the aforementioned Department for Communities the competence for this usually would fall within The Executive Office.
- 4.9. It would be remiss not to caution against the risk of a 'fudge' or an approach that embeds NI exceptionalism. The FCNM has already cautioned against this in relation to matters such as defining sectarianism and good relations. A vague and declaratory statement with no intention of following through with legislative or other measures, will not lead to greater protection of minority rights related to Ulster Scots, in particular its safeguarding and protection linguistically. It would also risk rendering recognition as a purely political tool, out with the specifics of carefully crafted minority rights provisions in the FCNM, to stake claims that may engage the rights of others. This risk is embedded in the particular track record of past interventions against initiatives for the Irish language on grounds equivalent measures would (or could not) be taken for Ulster Scots, to the detriment of both. There are broader risks with an exceptionalism approach that resurrect past NI proposals to bring groups within the scope of the Framework Convention that were neither minorities or were solely constructed as having a different 'culture',

rather than being ethnic, religious or linguistic minorities. A large member state of the Council of Europe setting such a precedent could have could have repercussions well beyond our borders in a populist European context whereby minority rights are again being questioned and under threat.

- 4.10. Boundaries are not fixed and 'national minorities' of course have multiple, complex and evolving identities. The Framework Convention is intentionally described as a living instrument to accommodate evolving circumstances. To date the NDNA commitment appears to have been little noticed except by those directly involved in the process. It does, or at least should, however, prompt a significant body of work, not least from the NIO, who have set an ambitious target of completing the process by the end of 2020. The usual timeframe for consultation on new policies under Equality Schemes is twelve weeks, meaning such a process should be imminent should this timetable be stuck to.

5 August 2020