

## **Submission from the Committee on the Administration of Justice (CAJ) to the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities on the fifth State Report of the UK**

**March 2022**

1. The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in NI by ensuring that the government complies with its international human rights obligations.
2. CAJ is the UK member of the International Federation of Human Rights (FIDH) and is co-convener, alongside the trade union UNISON, of the Equality Coalition which is a network of over 100 equality NGOs and trade unions campaigning for equality in Northern Ireland (NI).
3. CAJ regularly engages with Council of Europe and United Nations treaty bodies and welcomes the opportunity to provide comment to the Advisory Committee on the Framework Convention for the Protection of National Minorities ('the Framework Convention') in response to the 5<sup>th</sup> State Report of the UK.
4. This response covers commentary on the UK's commitments in relation to Northern Ireland (NI) and focuses on the following areas:
  - **Application of Framework Convention in NI** ('two main communities'; migrant and minority ethnic communities; linguistic minorities.)
  - **Institutional framework for the Framework Convention in NI** (Executive and Legislative power; ECHR, NI Bill of Rights other rights safeguards; Human Rights and Equality Commissions; Petition of Concern; 'Call in' local government; 'St Andrews Veto' at the NI Executive; Good Relations duty.)
  - **Response to previous Advisory Committee Recommendations** (Good Relations duty; Hate Crimes Review and definition of sectarianism.)
  - **Irish language legislation and strategic framework** (Irish language legislation and strategy; Bilingual road signage; Local government naming review; street signage.)
  - **Ulster Scots speakers and the Framework Convention** (Ulster Scots Strategy; NDNA proposals for an Ulster Scots/Ulster British Commissioner; NDNA UK commitment to recognise Ulster Scots as a national minority.)
  - **Racial profiling and impacts of Brexit on migrant and minority ethnic groups** (Hostile environment and public services; Selective passport checks in the UK-Ireland 'Common Travel Area (CTA); Reciprocal Rights of the CTA; Irish government CTA passport and border controls.)

# **Application of Framework Convention in Northern Ireland**

## **Application to the ‘two main communities’**

5. The Belfast/Good Friday Agreement 1998 (GFA) refers to NI’s ‘two main communities.’ Protestant and ‘Roman’ Catholic are widely used as ethnic indicators for NI ‘community background’ (rather than being necessarily reflective of whether persons are practicing a religion). ‘Religious belief’ is a protected characteristic in NI equality law aimed at tackling sectarian discrimination<sup>1</sup> alongside ‘political opinion’ which encompasses ‘unionist’ (with reference to the Union with the UK) and (Irish) nationalist. Citizenship and national identity are also indicators of community background.<sup>2</sup> Both States in the citizenship provisions of the GFA have recognised “*the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose.*”<sup>3</sup>
6. The application of the FCNM to the ‘main communities’ is and remains complex. The (Irish) nationalist community is historically a minority in NI but generally do not self-identify as such due to affinity to the whole (island of) Ireland, where Irishness is the majority identity. The (UK) unionist community have historically been in the majority in NI, and have affinity to Britishness, the majority identity of the State. There is presently significant demographic change with a decline in the numbers of unionists and an increase in nationalists and ‘others’ – the latter being reflective of both a growing migrant community but also growing numbers of persons who do not wish to self-identify as unionist or nationalist (but who may nevertheless face discrimination for perceived community background).
7. Demographically Northern Ireland is moving to a situation where no group will be in a majority. However, we do not believe a situation of unionist-nationalist ‘co-dominance’ has been reached. In part, this is due of past unionist political dominance continuing to being reflected in the status quo<sup>4</sup> and the extent to which this is retained by the present institutional arrangements for Executive and Legislative power which to date have led to considerable power of veto being presently vested in the largest unionist party alone (further detailed below). Whilst poverty remains an issue for all communities, nationalists continue to face higher levels of deprivation and inequality in areas including housing.<sup>5</sup> It is helpful that the Advisory Committee continue to generally comment on the application of the Framework Convention in Northern Ireland, not least as its object and purpose is to assist with many of the issues and challenges faced in this jurisdiction.

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<sup>1</sup> See Fair Employment and Treatment (NI) Order 1998 and Section 75 Northern Ireland Act 1998.

<sup>2</sup> Neither are presently included in anti discrimination legislation relating to sectarianism. Anti-racism legislation in NI (Race Relations (NI) Order 1997) excludes any group “defined by reference to religious belief or political opinion” (see Art 5(3)(b)). Legislation outlawing incitement to hatred includes religious belief, colour, race, nationality (including citizenship) or ethnic or national origins as protected grounds, which encompass sectarian incitement as well as other forms of racism.

<sup>3</sup> British Irish Agreement Article 1(vi) (UK Treaty Series no. 50 Cm 4705). The GFA is composed of a bilateral (UK-Ireland) treaty as well as a multiparty agreement.

<sup>4</sup> One example of this, relating directly to Article 11 of the Framework Convention, would be in the continued ‘English-Only’ policy for placenames on road signage dealt with later in this submission.

<sup>5</sup> For analysis and statistical information see Dr Robbie McVeigh ‘Sectarianism: The Key Facts’ (Belfast: Equality Coalition, December 2019) [https://www.equalitycoalition.net/?page\\_id=38](https://www.equalitycoalition.net/?page_id=38)

## **Migrant and minority ethnic communities**

8. Ethnic diversity of numerically smaller minorities significantly increased in the period from the GFA to Brexit. There were a number of more longstanding ethnic minority communities in Northern Ireland but there was increased inward migration in the context of the peace process and the then economic upturn. This included significant numbers of EU migrant workers, particularly those from countries that acceded to the EU during the enlargements in 2004 and 2007. There are also significant numbers of frontier workers -resident in the border counties of the Republic of Ireland- many of whom are not British or Irish citizens.
9. The Fourth Opinion on the UK recommended that the current equality monitoring that takes place under ‘fair employment’ legislation (on grounds of religious belief and political opinion), be extended to cover ethnic origin and nationality.<sup>6</sup> We understand a significant and welcome body of work has been undertaken in the NI Executive Office as part of the Racial Equality Strategy to progress this commitment, but there is yet to be legislative change to bring it into effect.
10. Irish Travellers also remain a minority group facing significant disadvantage in NI, with the Advisory Committee recommending for immediate action that a “a multi-agency taskforce on Traveller sites in Northern Ireland to cater to the needs of Irish Travellers” be established.<sup>7</sup> The NHRI<sup>8</sup> (the Northern Ireland Human Rights Commission) has subsequently produced a detailed assessment on the issue.<sup>9</sup>
11. The UK continues to apply ‘Hostile Environment’ policies as part of its immigration regime, which have led to substantial racial discrimination. In Northern Ireland the boundary between immigration law (a retained power by the UK Executive and Legislature) and areas of law which are transferred competencies to the Northern Ireland authorities (housing, health, education, social security, driving etc), has been complex. We recently commissioned a detailed legal report which has set out actions the Belfast institutions could take to roll back the UK Hostile Environment policies in this jurisdiction.<sup>10</sup> We have also called for an augmented Racial Equality strategy that could include such objectives.
12. We are concerned that practices of racial profiling in accessing public services have increased since the Brexit referendum.<sup>11</sup> We also have long-term concerns regarding racial profiling and ‘informal’ border controls on domestic journeys from Northern Ireland to the island of Great Britain and across the land border on the island of

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<sup>6</sup> ACFC/OP/IV(2016)005 4th Opinion on the UK, Summary and paragraph 29. The Committee also recommended that the duty to determine community background of the workforce be carefully monitored against progress made to achieve fairness in the workplace, in the context that it impinges on the right to self-identification under Article 3(1) of the Framework Convention. (paragraphs 29, 34).

<sup>7</sup> ACFC/OP/IV(2016)005 4th Opinion on the UK, paragraph 70.

<sup>8</sup> National Human Rights Institution.

<sup>9</sup> NIHRC ‘Out of Sight, Out of Mind’: Travellers’ Accommodation in NI, March 2018

<https://nihrc.org/publication/detail/out-of-sight-out-of-mind-travellers-accommodation-in-ni-full-report>

<sup>10</sup> CAJ Can Stormont Rollback the Home Office ‘Hostile Environment’? Legal Research Report 2022

<https://caj.org.uk/2022/02/23/can-stormont-rollback-the-home-office-hostile-environment-legal-research-report/>

<sup>11</sup> For analysis see: Queens University Belfast BrexitLawNI Policy Report: Brexit, Xenophobia and Racism in Northern Ireland, 2018 p14 <https://brexitlawni.org/library/resources/policy-report-xenophobia-and-racism/>

Ireland, as well as high levels of in country immigration checks. The UK has made a welcome commitment within the NI/Ireland Protocol to the (UK-EU) Withdrawal Agreement to ‘no diminution’ in certain GFA rights as a result of Brexit, which does have potential, if interpreted in good faith, to prevent diminution in certain rights of minorities in NI.

## Linguistic Minorities

13. It is welcome that linguistic minorities in NI, with specific reference to the speakers of Irish and Ulster Scots, have long been recognised as falling under the scope of the protections of the Framework Convention. Speakers of both are drawn from across the community.
14. Following the GFA the constitutional framework in Northern Ireland was to move away from ‘English-only’ type policies of the past to one that expressly embraces linguistic diversity. The GFA refers specifically to the Irish language and Ulster Scots speakers as well as migrant languages.<sup>12</sup> The GFA also led to the establishment of a Language Body as part of the North South Ministerial Council with two autonomous agencies for Foras na Gaeilge for the Irish language and the Ulster-Scots Agency (Tha Boord O Ulstèr-Scotch).<sup>13</sup>
15. As a result of the GFA the UK entered into specific commitments under the European Charter for Regional or Minority Languages (ECRML) registering a number of specific commitments under Parts II & III for the Irish language. Scots in Scotland and its Ulster variant in NI (Ulster Scots) are registered under Part II.
16. Despite these commitments it is notable that the core obligation under Article 4 of the Framework Convention to protect national minorities against discrimination has not been realised in relation to linguistic minorities. There is presently no anti-discrimination legislation covering ‘language’ as a protected characteristic, save for limited protection under the domestic incorporation of the ECHR.<sup>14</sup>
17. The Committees’ Fourth Opinion recommended for immediate action the adoption of Irish language legislation and other measures to ensure progress on language rights of the Irish speaking minority. The reporting period has seen continued obstruction of these rights, which have become a ‘touchstone’ equality issue in Northern Ireland. A ministerial decision in December 2016 to cut a modest (around €60kEUR) and much commended Líofa bursary scheme (that allowed the children of low-income families to attend summer schemes in the Irish-speaking Gaeltacht to further language

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<sup>12</sup> GFA Economic, Social and Cultural issues, paragraph 3 “All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.”

<sup>13</sup> <https://www.northsouthministerialcouncil.org/language-body>

<sup>14</sup> The domestic incorporation of the ECHR in NI law is provided for through the (UK) Human Rights Act 1998, with Article 14 ECHR encompassing non-discrimination on grounds language, but when parasitic on other ECHR rights. The UK is not party to Protocol 12 ECHR and the free standing right to non discrimination. Whilst the UK has argued that language can be implicit in ‘racial group’ in anti-discrimination law, this category would not cover Irish and Ulster Scots speakers in NI.

acquisition), was a significant factor in the collapse of the powersharing institutions in early 2017.<sup>15</sup>

18. The institutions were not re-established until early 2020 further to the New Decade New Approach deal (NDNA) between the British and Irish governments, following lengthy negotiations with the parties in the former NI Executive.<sup>16</sup> This included draft legislation to establish an Irish language Commissioner, and also an ‘Ulster Scots/Ulster British’ Commissioner. The NHRI has strongly cautioned against the linkage of Ulster Scots to Britishness, as it would tie Ulster Scots to a specific political identity.
19. The most recent ECRML recommendations for Ulster Scots are to adopt a strategy to promote the language “in education and other areas of public life” and to establish “cultural relations with other linguistic groups.”<sup>17</sup>
20. The January 2020 NDNA deal includes a commitment by the UK government, without further elaboration, to *“Recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities”*.
21. At face value the commitment seems academic (or a re-emphasis) as the UK, as well as the Committee have long recognised Scots (including Ulster Scots) speakers as a minority, not least under the Framework Convention itself.<sup>18</sup> Freedom of Information requests reveal the UK Government holds no documents on the background to the NDNA commitment. Records from the Ulster Scots Agency set out an understanding the original ‘political intent’ of the NDNA commitment was to move away from language, with the head of the Ulster Scots Agency indicating a preference to instead designate Ulster Scots as an ethnic minority.<sup>19</sup>
22. The Ulster Scots Agency subsequently developed proposed ‘cultural markers’ for Ulster Scots as a group. These included affinity to the Ulster Banner (the flag adopted by the former 1921-1972 unionist government) which would openly tie Ulster Scots to a particular political constituency.<sup>20</sup>
23. The UK has not indicated any intention of moving away from its present recognition of Ulster Scots speakers as a linguistic minority, and the issue is not mentioned in the current UK State Report to the Committee. To date there has been no consultation with either Ulster Scots speakers or those with broader Ulster Scots identity as to whether they would wish to instead self-identify as an ethnic group. We have broader concerns that any such move would damage initiatives to support and safeguard Ulster Scots linguistically, and that the tying of Ulster Scots to majority identities could place at risk the minority protections enjoyed by Ulster Scots speakers (see below Ulster Scots section of this submission).

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<sup>15</sup> A full account of this is provided in the Equality Coalition report “Sectarianism: Key Facts”

<https://caj.org.uk/2020/02/17/sectarianism-the-key-facts/>

<sup>16</sup> <https://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow>

<sup>17</sup> Fifth report of the Committee of Experts in respect of the United Kingdom, CM(2019)84-final

<sup>18</sup> 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.

<sup>19</sup> Ulster Scots Agency note of meeting with NIHRC, 21 March 2021.

<sup>20</sup> Minutes of Board Meeting of the Ulster Scots Agency, 30 June 2020, item 9.

# Institutional framework for the Framework Convention in NI

## Executive and Legislative power

24. The present power sharing system through the Northern Ireland Assembly and Northern Ireland Executive is a product of the Belfast/Good Friday Agreement (GFA) 1998. The previous Northern Ireland Parliament, which ran from the establishment of Northern Ireland in 1921 until its suspension in 1972, was under the continuous control of the Official Unionist party. Subsequently from 1972-1998, following the onset of the Northern Ireland conflict, there was a period of ‘direct rule’ from the UK Government, under which there were several attempts at power sharing administrations.
25. The GFA established the Northern Ireland Assembly as a power sharing unicameral legislature presently composed of 90 Members of the Legislative Assembly (MLAs). MLAs have to designate as ‘unionist’, ‘nationalist’ or ‘other’. There is no broader provision for minority groups beyond this. The power sharing Executive has consisted of mainly five parties led by the largest unionist party, the DUP, and the largest nationalist party, Sinn Féin, who are entitled to the offices of joint First and deputy First Ministers respectively. Other parties in the Executive are the UUP (‘unionist’), SDLP (‘nationalist’) and Alliance (‘other’). Other NI Ministers are allocated in accordance to proportionate party strengths, save the Justice Minister, who to date has been appointed by the Assembly on the basis of a cross-community vote and is presently held by the Alliance party.
26. Under the GFA, the UK Parliament retains competence to legislate in areas devolved to the Northern Ireland Assembly where required in order to meet treaty-based obligations.<sup>21</sup>

## ECHR, NI Bill of Rights other rights safeguards

27. Power sharing under the GFA was to be underpinned by a rights-based framework to constrain Executive and Legislative power, centred on the incorporation of the ECHR (which was completed but is now under threat from the UK Government)<sup>22</sup> and a supplementary Bill of Rights for Northern Ireland. The Bill of Rights is to be legislated for by the UK Parliament and contain additional rights as advised by the NI Human Rights Commission in 2008.<sup>23</sup>
28. The NI Bill of Rights (on the basis of the NHRI advice) would have incorporated into Northern Ireland law provisions of the Framework Convention that do not currently enjoy domestic effect. However, the UK has not legislated for the Bill of Rights. The 2020 NDNA deal started a new process for developing the Bill of Rights with an Ad Hoc Committee of the Northern Ireland Assembly. The work of the Committee was

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<sup>21</sup> Paragraph 33(b), Strand 1 GFA, providing that the UK Parliament will: “legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern Ireland”. The UK Minister for NI also retains powers to direct an NI Minister to take or refrain from taking action to ensure compliance with the UKs international obligations. Such directions are through legally binding Orders- see s26 Northern Ireland Act 1998: <https://www.legislation.gov.uk/ukpga/1998/47/section/26>

<sup>22</sup> See: <https://caj.org.uk/2022/03/10/caj-responds-to-human-rights-act-consultation/>

<sup>23</sup> <https://nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland>

impeded but it nevertheless produced a final report.<sup>24</sup> Four of the five parties (Sinn Féin, UUP, SDLP & Alliance) stated their support for the Bill of Rights in this process, and there is broad cross-community support for the Bill of Rights.<sup>25</sup> The present UK Government however declined to take forward the Bill of Rights.

29. There have been a range of other rights-based commitments of the peace settlement that have not been implemented. In 2021 we produced a mapping report detailing the status of implementation of such commitments.<sup>26</sup>

### **Human Rights and Equality Commissions**

30. Following the GFA the NI Human Rights Commission and Equality Commission were established in NI as a NHRI and national equality body respectively. For over a decade the UK government has cut the funding to these bodies, to the extent that the UN accreditation committee has recently refused to reaccredit the NI Human Rights Commission with its 'A' status.<sup>27</sup>

### **The Petition of Concern**

31. The Petition of Concern mechanism triggers a requirement for votes to require parallel unionist-nationalist consent. It was originally envisaged in the GFA as a safeguard to protect minority rights. The Petition of Concern was linked to conformity with 'equality requirements' and a Special Procedure Committee ('*Ad Hoc Committee on Conformity with Equality Requirements*'), to scrutinise the compliance of Assembly legislation or other measures with, in particular, the ECHR and the NI Bill of Rights.
32. In practice however these provisions were not properly put into place and use of the Petition of Concern (particularly by the DUP) to block equality and rights initiatives, and for party political purposes, brought the mechanism into disrepute.
33. The NDNA deal consequently provided for some reform to the Petition of Concern mechanism,<sup>28</sup> to 'return it to its intended purpose'.<sup>29</sup> However, NDNA records that "Most parties supported wider reform of the Petition of Concern."<sup>30</sup> This would have been in the form of the NHRI being granted a power of adjudication on the validity of a Petition of Concern as regards equality and human rights standards. This was not taken forward.
34. The tainted nature of the mechanism is illustrated by no Petitions of Concern being tabled in during 2020 or 2021 following the restoration of the institutions. The DUP did table one Petition of Concern in 2022 to seek to block a bill promoting Integrated Education. This however failed due to insufficient numbers of MLAs from other parties

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<sup>24</sup> <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/reports/report-of-the-ad-hoc-committee-on-a-bill-of-rights/>

<sup>25</sup> <http://www.humanrightsconsortium.org/uk-must-now-deliver-ni-bill-rights-following-majority-assembly-support/>

<sup>26</sup> CAJ '[The unimplemented rights commitments of the peace settlement 23 years on from the Belfast/Good Friday Agreement: A mapping exercise](#)' March 2021

<sup>27</sup> See [GANHRI Sub-Committee on Accreditation Report – October 2021](#)

<sup>28</sup> [Reforms were implemented by the Northern Ireland \(Ministers, Elections and Petitions of Concern\) Act 2022](#)

<sup>29</sup> NDNA, part II paragraph 9.

<sup>30</sup> NDNA, part II paragraph 11.

supporting the Petition.<sup>31</sup> Whilst the Petition of Concern has therefore largely been dormant other vetoes have been actively used during this mandate.

### **'Call in' – local government**

35. Following local government reform there has been a 'call in' mechanism in municipal Councils in Northern Ireland since 2014. This mechanism has provided that key decisions by Councils can be 'called in' by 15% of representatives. If a 'call in' meets the criteria a vote be reconsidered and only approved if passed by a 'qualified majority' of 80% of municipal representatives. As well as procedural grounds the criteria for doing this is when the decision in question would:  
*"disproportionately affect adversely a section of inhabitants' of the local government district".<sup>32</sup>*
36. Decision making on this criteria is expressly tied to a legal opinion holding that this threshold has been met, otherwise a qualified majority vote is not required. Councillors tabling a 'call in' are required to state the nature of the alleged 'adverse impact' and which section of the community it impacts.
37. Secondary legislation was presented to the Assembly in 2016 by the competent minister that would have tied the definition of 'disproportionately affect adversely' in the Call In to decisions that risked incompatibility with the ECHR, EU law or equality provisions of the Councils' Equality Scheme.<sup>33</sup> Whilst this legislation was supported by four of the five parties (Sinn Fein, UUP, SDLP & Alliance) it was blocked by the DUP tabling a Petition of Concern.
38. Whilst the opportunity to expressly tie the power to human rights and hence protect minorities was therefore missed, the concept of 'adverse impact' is found in equality law and refers to objective discriminatory detriment. Recently, however we have been concerned by the upholding of a 'call in' in Belfast City Council. In this instance it was held that the provision of bilingual (Irish-English) signage in a Council leisure centre not only constituted an 'adverse impact' but that the impact was 'disproportionate' and hence the criteria for call in met.<sup>34</sup> We are concerned that the 'call in' mechanism far from being a safeguard risks becoming a further veto mechanism deployed against minority rights.

### **'St Andrews Veto' at the NI Executive**

39. The St Andrews Agreement 2006 made changes to the GFA including the introduction of new veto over the exercise of powers by individual NI Ministers.
40. The 'St Andrews Veto' augmented the role of the NI Executive to require most ministerial decisions outside the terms of a Programme for Government to instead require a decision by the full Northern Ireland Executive if they were 'controversial' or 'significant'. Three ministers could also require an Executive vote to be taken on a

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<sup>31</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-60682540>

<sup>32</sup> [s41 of the Local Government Act \(Northern Ireland\) 2014](#) and related [regulations](#)

<sup>33</sup> (proposed) The Local Government (Standing Orders) Regulations (Northern Ireland) 2016

<https://www.legislation.gov.uk/nidsr/2016/9780338004468>

<sup>34</sup> <https://www.belfastlive.co.uk/news/belfast-olympia-leisure-centre-irish-22719218>

'cross community' basis (in which 'Other' Ministers have no vote).<sup>35</sup> The criteria of 'significant' or 'controversial' do not relate to rights-based thresholds, and indeed include most minority rights issues, given they are politically contested and hence 'controversial'.

41. In the year following NDNA (when the adoption of a programme for government had also been prevented) this veto was invoked six times by DUP ministers to veto ministerial decisions. On three occasions it was used to block provision for early medical abortion services (required by a UN CEDAW ruling); and twice to block public health measures to deal with the coronavirus pandemic. In previous mandates DUP ministers used the veto to block a consultation on same sex equal marriage, and also policy proposals on Irish language legislation and Irish and Ulster Scots strategies.<sup>36</sup> This veto therefore can and has obstructed measures to progress minority rights.
42. Another veto at the level of the NI Executive is a provision whereby the inclusion of ministerial proposals on the agenda for the NI Executive must be agreed by both the First and deputy First Minister giving, in practice, either a veto.<sup>37</sup> This veto has been used numerous times in the present mandate, this includes – according to a UK report to COMEX – the blocking from the Executives' agenda of Ministerial submissions to take forward statutory strategies to promote Irish and Ulster Scots.<sup>38</sup>

### The 'Good Relations' duty as a veto

43. The Advisory Committee has raised previous concerns regarding the use of the 'good relations' duty under Section 75 of Northern Ireland Act to block equality and minority rights initiatives on grounds they would create political tensions.
44. Whilst there has been some progress on definition this has continued to be a problem. An example was provided in an assessment conducted by the Northern Ireland Office on proposals to provide abortion services in NI further to the UN CEDAW ruling. In this assessment the Northern Ireland Office had held abortion services would constitute 'adverse impacts' on 'good relations' on grounds of religious belief and political opinion. The decision was reversed following a complaint from CAJ, trade unions and women's rights and LGBT groups.<sup>39</sup>
45. More recently CAJ and Irish language groups have been concerned by a proposal by Belfast City Council on an otherwise progressive street sign policy. The Council proposes that *every* application for a bilingual street sign should be potentially subject to a separate assessment to ascertain if there are 'adverse impacts' on 'good relations' from bilingual signage. This is, according to the good relations section of the proposed

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<sup>35</sup> For further information see: <https://caj.org.uk/2020/11/18/stormonts-vetoes-in-the-context-of-a-pandemic-an-equality-coalition-briefing-note/>

<sup>36</sup> For further detail see [CAJ Written Evidence to the UK Parliament Public Bill Committee: Northern Ireland \(Ministers, Elections and Petitions of Concern\) Bill](#)

<sup>37</sup> See paragraph 2.11 of the NI Ministerial Code <https://www.northernireland.gov.uk/topics/your-executive/ministerial-code>

<sup>38</sup> [MIN-LANG \(2021\) IRIA 1, paragraph 176](#). For further examples see [CAJ Written Evidence to the UK Parliament Public Bill Committee: Northern Ireland \(Ministers, Elections and Petitions of Concern\) Bill](#)

<sup>39</sup> Screening Decision Review Request on the [Provision of a new legal framework for accessing abortion services in NI](#). submitted on behalf of CAJ, NIPSA, UNISON, NIWEP, Transgender NI, Here NI, Alliance for Choice, NIRWN and ICTU.

policy, is to accommodate the ‘concerns’ of those ‘who do not support languages other than English’. The mitigating measure proposed is a requirement that bilingual signage *“is supported by the community in that area and is not opposed by a significant proportion of that community.”* We have raised concerns that such a process of majority consent would be incompatible with minority rights and constitute a further misuse of the ‘good relations’ duty.<sup>40</sup>

## Response to previous recommendations of FCNM

### Good relations duty

46. A recommendation for immediate action from the previous monitoring cycle related to the good relations duty urging the Northern Ireland Executive to *“to implement the ‘good relations’ duty as provided under the Northern Ireland Act 1998 in a manner that does not run counter to the equality duty and that does not prevent access to rights of persons belonging to all national and ethnic minorities.”*
47. The Committee raised concerns that a static interpretation of the notion of ‘good relations’ had prevented reform of equality legislation and hampered efforts to put adequate focus on other smaller national and ethnic minorities. The Committee also noted policy on the Irish language, whilst less sensitive in society, had become a ‘hostage’ of good relations policy which aims at avoiding tensions. The Committee noted that the ‘good relations’ duty on occasions appeared to take priority over wider equality and minority rights issues blocked on grounds they would lead to ‘community tensions.’ Drawing attention to the tight definition of good relations in law in Great Britain<sup>41</sup> the Committee noted the lack of proper definition in law in Northern Ireland noting this allowed good relations to *“be used rather as a ‘tool’ to set aside politically contentious issues, such as legislating on the Irish language, and to justify a “do-nothing” attitude, eventually based on ‘perceptions’ rather than objective criteria.”*<sup>42</sup>
48. The competent NI government department (The Executive Office) released documentation to CAJ under freedom of information on how it had dealt with the Committee’s recommendations. The recommendation to implement the good relations duty in a manner that does not run counter to equality and minority rights is unfortunately given scant attention by the Department. The Departmental response contains no analysis of the impact of the application of good relations duty in policy appraisal and appears either dismissive of the concerns raised or not to have comprehended them. It is limited to referencing the existence of the *Racial Equality and Together: Building a United Community Strategy*, and a general reference to the

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<sup>40</sup> For further detail see: Submission to Belfast City Council Equality Impact Assessment (EQIA) of proposed policy on Dual Language Street Signs, February 2022 <https://caj.org.uk/2022/02/25/submission-on-belfast-city-councils-proposed-policy-on-dual-language-street-signs/>

<sup>41</sup> The Equality Act 2010 in Great Britain explicitly frames the focus of the good relations duty as “tackling prejudice and promoting understanding”.

<sup>42</sup> ACFC/OP/IV(2016)005 4th Opinion on the UK (adopted on 25 May 2016) paragraphs 7, 11, 84, 85

Department's experience that 'good relations programmes do not stand in conflict with another.'<sup>43</sup>

49. On a more helpful note, during the reporting period the European Commission against Racism and Intolerance (ECRI) General Recommendation 2 has provided an authoritative interpretation of 'good relations' in international standards:

Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance.<sup>44</sup>

50. The Equality Commission for Northern Ireland, which has a statutory function to advise on the Section 75 duties, has also promoted the '*tackling prejudice, promoting understanding*' definition from the Equality Act 2010 in Great Britain. In addition, also drawing on legislation in Britain in guidance to NI Councils, the Equality Commission elaborates that: "*Good relations can be said to exist where there is a high level of dignity, respect and mutual understanding; an absence of prejudice, hatred, hostility or harassment; a fair level of participation in society.*"<sup>45</sup>
51. An official Commission on Flags, Identity Culture and Tradition (FICT), a product of previous political agreements and sponsored by the Executive Office and published in December 2021, also raises the lack of definition of 'good relations' in NI law, drawing on the definition in Great Britain, and the representations of the Equality Commission on the utility of this definition. The FICT commission consequently recommends that "the legal duty of Good Relations should be clearly defined in law." and that "the delivery of Good Relations interventions, has reductions of sectarian and race hate incidents as key outcomes."<sup>46</sup>
52. The Equality Commission has the statutory function to advise on the scope of the good relations (and broader statutory equality duty). The Commission could replenish its advice to public authorities to clarify that good relations considerations in equality schemes policy appraisal is not about focussing on the notion of assessing 'adverse impacts' on good relations, but rather about taking proactive steps to promote good relations in line with the above definitions.

**In the absence of movement from the NI Executive the Advisory Committee may wish to encourage the Equality Commission in its advisory capacity to public authorities on the 'good relations' duty to ensure policy appraisal focuses on proactive steps to promote good relations in line with international standards, rather than the notion of public authorities subjectively assessing 'adverse impacts' on good relations.**

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<sup>43</sup> Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities 4th Opinion on UK – NI Executive Office Comments, released to CAJ under Freedom of Information Request TEO / 2021 – 0119.

<sup>44</sup> [ECRI General Recommendation no 2 \(revised\), explanatory memorandum](#), para graph 21

<sup>45</sup> Equality Commission advice on Good Relations in local Councils' 2015

<sup>46</sup> <https://www.executiveoffice-ni.gov.uk/publications/commission-flags-identity-culture-and-tradition-final-report> paragraphs, 3.25-28 and recommendations 3.38-39

## Hate Crimes Review, and definition of sectarianism

53. A recommendation for immediate action from the Committee related to countering "*the climate of inter-ethnic prejudice and hate speech.*" There has been some significant progress on this issue through the completion of a judge-led independent review into Hate Crimes law in Northern Ireland. This issue also provides a vehicle to progress a further recommendation for immediate action, namely defining "*sectarianism in legislation, drawing on international standards relating to racism and human rights in general; and to ensure that sectarian crimes are dealt with in the criminal justice system in a way equivalent to other forms of hate crime.*"
54. The NI Department of Justice commissioned an independent judge-led review of hate crime legislation in 2019. CAJ was part of the expert working group of the review. Judge Marrinan published his *Final Report from his Review of Hate Crime Legislation in Northern Ireland* in December 2020.<sup>47</sup> In July 2021 the Department largely accepted the recommendations with some subject to further consultation.<sup>48</sup> The first phase of consultation is currently underway,<sup>49</sup> with a view to an overarching hate crime bill being introduced into the NI Assembly in the new 2022 mandate.
55. The hate crimes review recommends that NI should introduce a hate crimes law, on an 'aggravated offences' model covering all existing criminal offences.<sup>50</sup> The review also recommends strengthening 'incitement to hatred' legislation in NI ('stirring up hatred offences').<sup>51</sup>
56. The hate crimes review (and Department) agree present protected characteristics will be retained. In current aggravated sentences provisions and incitement to hatred legislation these include racial group (colour, race, nationality, (including citizenship) or ethnic or national origins) and religious group.<sup>52</sup> Sexual orientation and disability are also protected grounds in both. As such, the proposals will encompass protected grounds relating to the Framework Convention with the exception of language.
57. In addition to consulting on a 'misogyny aggravator' the Department is also consulting on the addition of a 'Sectarianism aggravator' for sectarian prejudice. As set out in the consultation: *The provision of a statutory sectarian aggravator will ensure that any offence motivated by sectarianism is recognised by the criminal justice system in sentencing and will provide the judiciary with powers to increase a sentence within the maximum level of the offence penalty.*<sup>53</sup>
58. A benefit of this approach of expressly targeting sectarianism is that a definition of sectarianism will be required in the legislation. The Department is presently consulting on the merits of adopting elements of a recommended definition of sectarianism proposed

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<sup>47</sup> <https://www.justice-ni.gov.uk/publications/hate-crime-legislation-independent-review>

<sup>48</sup> <https://www.justice-ni.gov.uk/publications/review-hate-crime-legislation-ni-departmental-response>

<sup>49</sup> <https://www.justice-ni.gov.uk/consultations/consultation-hate-crime-legislation-northern-ireland>

<sup>50</sup> To date, from 2004, there has only been limited protection in NI through an aggravated sentence model.

<https://www.legislation.gov.uk/nisi/2004/1991/article/2> There was general consensus during the review that this model has not been effective.

<sup>51</sup> Presently found in Public Order (NI) Order 1987: <https://www.legislation.gov.uk/nisi/1987/463/part/III>

<sup>52</sup> <https://www.legislation.gov.uk/nisi/2004/1991/article/2> &

<https://www.legislation.gov.uk/nisi/1987/463/part/III>

<sup>53</sup> <https://www.justice-ni.gov.uk/consultations/consultation-hate-crime-legislation-northern-ireland>

by a working group on Scottish law. Elements of this definition include ‘membership (or presumed membership) of a Roman Catholic or Protestant denominational group” and more curiously “a social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation”. They also include “hostility towards members of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.”<sup>54</sup>

59. There are some merits to this definition, as it extends the present limitation of protection against sectarian hate offences beyond religious group in aggravated sentences legislation,<sup>55</sup> to incorporate nationality and other ethnic indicators. The notable omission in the proposed definition, in relation to fully covering grounds in the Framework Convention, is the absence of ‘language’ as a protected group, in order to ensure that persons facing sectarian hostility on the basis of being Irish or Ulster Scots speakers are covered. The proposed definition also does not link to international standards relating to racism as recommended by the Advisory Committee.<sup>56</sup>
60. A welcome recommendation of the Hate Crimes Review is recommendation 15 that the legislation creates *“a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space”*. The Department of Justice plans to subject this recommendation to further consultation later in 2022.
61. This recommendation can address the ongoing problem in Northern Ireland of sectarian and racist expression in public space, often placed with paramilitary involvement. This includes the use of paramilitary and other flags as a form of sectarian and racist intimidation from housing, as well as a broader pattern of paramilitary involvement in hate crime.<sup>57</sup> In 2017, a Thematic Review of Policing Race hate crime by the Northern Ireland Policing Board stated: *“hate crime will not be addressed unless and until all agencies are able and willing to acknowledge and discuss the issues, including the reported threat from paramilitary groups targeting minority ethnic communities.”*<sup>58</sup>

**The Advisory Committee may wish to recommend that the proposed definition of sectarianism in the forthcoming hate crimes bill is inclusive of the ground of**

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<sup>54</sup> <https://www.justice-ni.gov.uk/consultations/consultation-hate-crime-legislation-northern-ireland> paragraphs 7.12-16.

<sup>55</sup> This is not the case in NI incitement to hatred legislation whereby victims of sectarian incitement can rely on other indicators including nationality, ethnic origin etc.

<sup>56</sup> 4<sup>th</sup> Opinion on UK para. 86: *“In its previous opinion, the Advisory Committee also drew the attention of the authorities to the fact 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. The fact that there is no legal definition of sectarianism and that it is taken rather to indicate discriminatory attitudes and opposition between the two main political/religious communities has insulated the terms from the broader equality framework. However, during its visit the Advisory Committee was informed by the authorities that no progress on the definition of sectarianism is expected in the short term.”*

<sup>57</sup> For further detail see section on ‘Paramilitary racist violence and intimidation in Northern Ireland’ in [the CAJ submission to the UN Committee on the Elimination of All Forms of Racial Discrimination on the 21-23 Periodic Reports of the UK](#), July 2016

<sup>58</sup> [race-hate-crime-thematic-review.PDF](#) ([nipolicingboard.org.uk](http://nipolicingboard.org.uk)) see also [Racially motivated crimes now exceed sectarian ones in Northern Ireland | Northern Ireland | The Guardian](#)

**language and draws on international standards on relating to racism. The Committee may also wish to encourage the Department of Justice to implement Recommendation 15 of the Hate Crimes review on a new statutory duty to take reasonable steps to remove hate expression from public space.**

## **Irish language legislation and strategic framework**

62. There continues to be significant support and growth in the usage and learning of the Irish language.<sup>59</sup> There has also been significant progress in supportive attitudes and actions towards the language across the community, this includes growth in interest and learning in the language across the community.
63. However, there continues to be obstruction at a political level of the delivery of key previously agreed commitments to the Irish language. There are also continued examples of hostility and intimidation of Irish speakers. This is seen in the defacement of Irish on hundreds of bilingual signs erected by some Councils, some of which have been recorded as sectarian incidents.<sup>60</sup> The first Irish-medium nursery in East Belfast, which is mainly unionist, received strong support from a local Primary School and others in the area, with the primary school agreeing to host the facility. However, the nursery, Naischol na Seolta, was forced to relocate, a statement set out that “*Due to an ongoing social media hate campaign against some individuals and the integrated Naiscoil na Seolta, it is with great sadness that it is choosing to relocate to an alternative location.*”<sup>61</sup>
64. In the previous monitoring cycle, the Advisory Committee put forward the following recommendation for immediate action, “*Adopt appropriate legislation protecting and promoting the Irish language and take measures to ensure progress on language rights of persons belonging to the Irish minority.*” The Committee also made a recommendation regarding bilingual (Irish-English) signage, these issues are dealt with below.

## **Irish language legislation and strategy**

65. The 2006 (UK-Ireland) St Andrews Agreement committed the British Government to introducing an Irish Language Act “reflecting on the experience of Wales and Ireland.” In relation to the fulfilment of undertakings under the ECRML the Committee of Ministers had recommended comprehensive Irish language policy for Northern Ireland for which the preferred option was through legislation that provided statutory rights for Irish speakers.<sup>62</sup>

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<sup>59</sup> For further details and statistical indicators, including language profiles by municipality, see part II <https://caj.org.uk/2021/04/30/submission-2021-independent-review-of-local-government-boundaries-and-names/>

<sup>60</sup> See ‘Bilingual signs vandalised 300 times in five years costing councils almost £40,000’

<https://www.belfastlive.co.uk/news/northern-ireland/bilingual-signs-vandalised-300-times-22666841>

<sup>61</sup> <https://www.irishnews.com/news/northernirelandnews/2021/07/28/news/first-irish-language-school-in-east-belfast-to-relocate-after-hate-campaign--2402397/>

<sup>62</sup> Recommendation CM/RecChL(2014)3 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by the United Kingdom, (Adopted by the Committee of Ministers on 15 January 2014), recommendation 2.

66. The St Andrews agreement also placed a statutory duty on the NI Executive to “adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language” (as well as a separate Ulster Scots strategy).<sup>63</sup>
67. In the Fourth Opinion, the Committee regretted there had been little progress on the Irish language bill or strategy, ‘not notwithstanding public support’ and noting the barrier of a “lack of political consensus, in particular among Unionist politicians who openly indicated that they would oppose the proposals.” The Committee consequently recommended that the UK government should engage in dialogue to create the political consensus needed to adopt the legislation, whilst also noting views of civil society that the legislation could be introduced by the UK Parliament using parallel legislative competence.<sup>64</sup> Such a move would be consistent with the framework for legislative competence under the GFA as the UK Parliament is to legislate when necessary to implement treaty based obligations.<sup>65</sup>
68. A draft 2015-2035 Irish Language Strategy was published in 2015 by the Communities Minister, alongside an Ulster Scots Strategy.<sup>66</sup> The two strategies did not ultimately come before the NI Executive for adoption until March 2016, where a vote to adopt them was not carried. Previous attempts to include the strategies on the agenda of the Executive meeting had been blocked.<sup>67</sup> In March 2017, further to a judicial review application by Conradh Na Gaeilge, the NI High Court found that the NI Executive had acted unlawfully in not adopting an Irish language strategy.<sup>68</sup>
69. Into the mandate of 2016 there were also regressive acts towards the Irish language with DUP Ministers adopting ‘single language policies’ (‘English-only’ policies) in their departments. This included the Department of Education which had previously adopted an Irish language policy (last revised in 2009) which contained extensive measures for promotion and bilingual provision, in accordance with international standards.<sup>69</sup> A new DUP Education Minister took office on the 25 May 2016. In June 2016, the Irish language policy was subject to review and an entirely new draft ‘languages policy’ had been produced. No consultation or equality screening took place, nor does there appear to have been any engagement with Irish language speakers or advisory bodies. No records were kept as to what prompted the sudden

<sup>63</sup> <https://www.legislation.gov.uk/ukpga/1998/47/section/28D>

<sup>64</sup> ACFC/OP/IV(2016)005 4th Opinion on the UK, recommendations and paragraphs 103-105.

<sup>65</sup> Paragraph 33(b), Strand 1 GFA, providing that the UK Parliament will: “legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern Ireland”. The UK Minister for NI also retains powers to direct an NI Minister to take or refrain from taking action to ensure compliance with the UKs international obligations. Such directions are through legally binding Orders- see s26 Northern Ireland Act

<sup>66</sup> Ulster Scots: <https://www.communities-ni.gov.uk/publications/ulster-scots-language-heritage-and-culture-strategy-2015-2035> Irish: <https://www.communities-ni.gov.uk/publications/irish-language-strategy-2015-2035>

<sup>67</sup> See paragraph 16 of Application by [Conradh Na Gaeilge for Judicial Review](#), [2017] NIQB 27.

<sup>68</sup> Application by Conradh Na Gaeilge for Judicial Review, [2017] NIQB 27.

<sup>69</sup> Among other matters, the policy commits to bilingual DE signage [5.1]; receiving and responding to correspondence / submissions in Irish [5.3]; inclusion of Irish in logos/letterheads; bilingual school circulars and consultation documents; bilingual press releases; bilingual DE schools/parent correspondence; promotional materials; bilingual Inspectorate reports/materials when sent to Irish medium schools [5.5]; bilingual advertisements [5.6]; the use of Irish in ministerial business [5.7]; provision for telephone communication / meeting in Irish. The policy also references employment of two Irish language officers [5.9/5.10]. (*Polasaí Gaeilge Na Roinne Oideachais/ Department of Education Language Policy for Irish*).

review and re-writing of the policy. Department of Education records state that the new policy changed the language for the administration of the department's functions from English and Irish, to 'English only'. It also led to a monolingual logo being adopted and dropping a trilingual (English-Irish-Ulster Scots) logo. The new policy was expeditiously approved by the end of the summer following further interventions by the Minister and his special advisor removing commitments to translate certain documents into Irish, including for Irish Medium Schools. Consequently, a Departmental email states that material that had already been translated into Irish for Irish medium schools (the school omnibus survey) would have 'to go in English only now' due to the new policy.<sup>70</sup>

70. The failure to deliver on commitments to the Irish language were key factors in the collapse of the devolved institutions in 2017 (until 2020). The aforementioned decision to cut a modest bursary scheme to allow children from low incomes to attend summer Gaeltacht courses is often cited as the 'straw that broke the camels back' in relation to the collapse of the government. The delivery of previous commitments to legislate to protect the Irish language became a touchstone issue in relation to negotiations to re-establish the institutions. There were regular mass mobilisations by the Irish speaking community, particularly young persons, organised by the An Dream Dearg group calling for the Acht na Gaeilge Anois (Irish Language Act now).
71. In 2018 a deal was briefly reached between the DUP and Sinn Féin for an Irish language act which was to proceed as part of a three bill legislative package including provisions for Ulster Scots and a broader linguistic and cultural diversity bill. The DUP however quickly withdrew its support and the legislation was not introduced.<sup>71</sup>
72. Ultimately the British and Irish Governments, with the NI Parties, negotiated the *New Decade New Approach* (NDNA) deal to re-establish power sharing on the 9th of January 2020. Also published alongside NDNA was combined draft legislation, consisting of three bills along the lines that had been part of the 2018 DUP-Sinn Féin agreement, including an Irish language bill.
73. The Irish language bill would establish an Irish Language Commissioner and takes a 'Standards-based' approach, whereby the Commissioner issues Irish Language Standards to NI public authorities.
74. In our view this, in principle, is a solid model for progress and is similar to the model in Wales, however the proposed framework is much weaker. The Irish language standards are not binding, and NI public authorities are only to take them into account (have 'due regard'). Whilst the Commissioner is to be an independent body, Ministers will have a significant role, including a requirement on the First and deputy First Ministers to both approve any standards before they are issued.<sup>72</sup>

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<sup>70</sup> DE internal email 23 August 2016. Information obtained under Freedom of Information requests, for a full narrative of the 'single language polices' in Education and other NI authorities see <https://caj.org.uk/2020/02/17/sectarianism-the-key-facts/>

<sup>71</sup> For a full journalistic account of these events see: <https://eamonnmallie.com/2018/02/new-light-shone-draft-agreement-eamonn-mallie/>

<sup>72</sup> Analysis of the draft Legislation published with the New Decade, New Approach document – CAJ January 2020 <https://caj.org.uk/2020/02/04/analysis-of-the-new-decade-new-approach-agreement/>

75. In 2021, the Committee of Experts (COMEX) on the Charter urged the adoption of “*comprehensive law and a strategy on the promotion of Irish in Northern Ireland*” as a recommendation for immediate action. COMEX whilst welcoming the NDNA commitments including on legislation stated they would only partially fulfil the UK’s undertakings towards the Irish language in Northern Ireland. COMEX stated that even once the NDNA legislation and other commitments<sup>73</sup> were taken forward there would remain “a need for a comprehensive Irish Language Act.”<sup>74</sup>
76. NDNA committed to the three bills (including the Irish language bill) being introduced to the NI Assembly by April 2020.<sup>75</sup> However the legislation was not introduced. In June 2021, the UK Government gave a commitment that if the Irish language and accompanying legislation was not introduced into the NI Assembly by September 2021, it would introduce the legislation in the UK Parliament by October 2021. By November 2021 this had not happened. The UK Government faced fresh calls from over 40 Irish language groups to legislate, but opposition from the DUP.<sup>76</sup> Into 2021 the UK Government reiterated its commitment to legislate in the UK Parliament but has not set a timetable to do so.<sup>77</sup>
77. In relation to the duty to adopt the Irish language strategy, as alluded to above, the UK authorities have confirmed progress on a proposed timeline for same was blocked for a time from the agenda of the NI Executive.<sup>78</sup> In March 2022, however, there was significant progress in the publication of Irish Language Strategy Expert Advisory Panel Recommendation Report by the Department of Communities.<sup>79</sup> The resignation of the First Minister in February 2020 means at present there is no NI Executive in place to adopt the strategy. Elections are scheduled for the 5 May 2022.

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<sup>73</sup> The broader legislative package would repeal the Administration of Justice (Language) Act (Ireland) 1737 which had the purpose and effect of preventing the use of Irish in any court documents. It would be replaced by a limited provision placing a duty on a court (i.e., in the hands of a judge) “to the extent necessary in the interests of justice” to facilitate the use by a person of a language other than English.[ Repeal of Administration of Justice (Language) Act 1737 78E.—(1) The Administration of Justice (Language) Act (Ireland) 1737 is repealed.(2) A court must, to the extent necessary in the interests of justice, ensure that appropriate arrangements are made to facilitate the use by a person in proceedings before the court of a language other than English.” Repeal of Administration of Justice (Language) Act 1737 78E.(1) The Administration of Justice (Language) Act (Ireland) 1737 is repealed.(2) A court must, to the extent necessary in the interests of justice, ensure that appropriate arrangements are made to facilitate the use by a person in proceedings before the court of a language other than English.”] NDNA also commits for births, marriages and deaths to be registrable through Irish, and for wills to be validly made in Irish, as an option and matter for individual choice. NDNA Annex E paragraph 5.13.

<sup>74</sup> MIN-LANG (2021) 3 COMEX evaluation of the UK, Paragraph 26, recommendation 2a.

<sup>75</sup> As part of an “integrated package of legislation” that will pass through the Assembly simultaneously. The (unstated) reasoning behind this was to ensure one bill (the Irish language bill) is not blocked whilst the others proceed.

<sup>76</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-59306740>

<sup>77</sup> <https://www.independent.co.uk/news/uk/uk-government-northern-ireland-stormont-irish-dup-b1990983.html>

<sup>78</sup> MIN-LANG (2021) IRIA 1, paragraph 176.

<sup>79</sup> <https://www.communities-ni.gov.uk/publications/irish-language-strategy-expert-advisory-panel-recommendation-report>

**The Advisory Committee may wish to urge the UK to introduce Irish language legislation, reflecting the approach recommended by COMEX, in the UK Parliament in line with the framework provided for under the GFA.**

### **Bilingual signage (Article 11(3))**

78. In its Fourth Opinion the Committee noted that local councils had limited powers to erect bilingual street signs with ‘patchy’ implementation and some councils having very restrictive policies making it ‘virtually impossible’ to erect bilingual signage. It also was noted it remains a criminal offence to erect an unofficial Irish street sign. The Committee noted there was no provision for bilingual signage for roads and other placenames. The Committee stressed “*the use of bilingualism on signage and other public displays should be promoted where possible as a positive tool of integration to convey the message that a given territory is shared*” and recommended closer dialogue on signage among government and local authorities.<sup>80</sup>
79. The vast majority of placenames in Northern Ireland are derived from the Irish language, with a number of placenames also derived from Scots. Many placename signs in the jurisdiction are simply English transliterations from the original place name in Irish. Academic research has mapped placename origins.<sup>81</sup>
80. In addition to the duties under Article 11(3) of the Framework Convention providing for the display of “*traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications*”, the UK has also entered into commitments under the European Charter for Regional or Minority Languages (as applied to Irish in the UK) under Article 10(2)(g) on:

“...the use or adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in Irish.”
81. The most recent COMEX report found that obligations under the ECRML (Article 7.1.c) to take “resolute action to promote Irish” were “not fulfilled”, and obligations under Article 10(2)(g) on the use of place names in Irish (alongside English) were only partially fulfilled (in the context of some street sign provision by some Councils).
82. The following section covers three issues relating to public bilingual signage:
  - **Road Signage:** a monolingual ‘English-only’ policy has been retained. Whilst there was discussion with the Minister who was amenable to change, the matter would be deemed ‘controversial’ by those opposed to bilingual signage. A decision would therefore fall to be taken by the full NI Executive.
  - **Review of Local Council and Ward Names (and boundaries)** a periodic statutory review of the names of local Councils and municipal electoral wards is taking place. This is a key opportunity to officially adopt bilingual place names. The Commissioner, however, is presently recommending the retention of an English-only naming policy

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<sup>80</sup> ACFC/OP/IV(2016)005 4th Opinion on the UK, paragraphs 111-2.

<sup>81</sup> The Northern Ireland Place-Names (NIPN) project at Queens University Belfast in association with Land and Property Services, the Arts and Humanities Research Council and Foras na Gaeilge, has for some time researched the linguistic origins of NI place names in Irish and Scots and has built up a detailed database. <http://www.placenamesni.org/>

for all Councils and is not currently recommending bilingual naming of any wards, albeit is seeking further views on a small number of wards in the Belfast city area.

- **Street signage:** there continues to be mixed progress, with a number of Councils adopting progressive bilingual policies in line with international standards; others however retain processes that retain a *de facto* ‘English-Only’ approach.

### Bilingual Road signs

83. Road signage is in the remit of the NI Department for Infrastructure, and there is no provision for bilingual signage.
84. Through the Equality Coalition we engaged with the Infrastructure Minister on provision for bilingual signage with a focus on adding the original form of placenames when they were derived from Irish or Ulster Scots. The Minister was sympathetic to considering change. However, as previously stated, the ‘St Andrews Veto’ can prevent competent Ministers from taking decisions deemed ‘controversial’, which are instead to be taken at the full NI Executive. Three Ministers can then require such votes to only pass if there is both a unionist and nationalist majority. In the current context these structures prevent progress on this issue, as any proposal from the competent Minister would likely be vetoed.
85. The Department last consulted on a change of policy in 2011, proposing a limited scheme for Irish and Ulster Scots to be added to some road signs. This proposal was ultimately not proceeded with, in part as it faced legally untenable claims that such signs would constitute ‘discrimination’ or an ‘adverse impact’ on ‘good relations.’<sup>82</sup>

### Local Government Boundaries and Naming Review

86. Legislation provides the appointment of a Local Government Boundaries Commissioner to review and make recommendations as to the *names* of NI district Councils and Wards (as well as their boundaries and number).<sup>83</sup> The present review opened in February 2021 with a consultation in June 2021. Final proposals were recently consulted on in early 2022.
87. This review presents an opportunity for the official bilingual adoption of the names of local Councils (all of whom contain Irish-originated placenames) and small electoral districts (wards) many of which are derived from Irish. CAJ and representatives of Irish speakers Conradh na Gaeilge put forward the proposal to Commissioner that “*traditional and correct forms of placenames in Irish (and Scots where applicable), are provided alongside the English language names of districts and wards.*” We put in joint submission focusing on the broad legal framework, largely derived from treaty-based standards and detailed statistics providing evidence of growing usage and demand in relation to the Irish language.<sup>84</sup>
88. The Commissioner’s present *Revised Recommendations* state that the responses to the consultation dealt extensively with the language issue. This includes respondents

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<sup>82</sup> Relevant extracts of the Advisory Committees Critique of this issue are cited in: <https://www.communities-ni.gov.uk/publications/guidance-european-charter-regional-or-minority-languages>

<sup>83</sup> Part IV of the Local Government Act (Northern Ireland) 1972

<sup>84</sup> <https://caj.org.uk/2021/04/30/submit-2021-independent-review-of-local-government-boundaries-and-names/>

who expressed ‘strong support’ for the use of bilingual Irish-English names and also respondents who advocated strongly ‘against the use of any language other than English.’<sup>85</sup> The official body for the promotion of Irish, Foras na Gaeilge, provided a written submission supporting the use of Irish across all local council areas.

89. The *Revised Recommendations* reject this overall proposal for the official recording of names in Irish (alongside English) across all local government districts.<sup>86</sup> Instead, in general the *Revised Recommendations* advocate continuing an overarching ‘English only’ policy for district and ward names. The rationale presented by the Commissioner for this is that any change should first await NDNA and the establishment of the Irish Language Commissioner. In the absence of NDNA implementation the *Revised Recommendations* cite a line from an unrelated court case that English remains the majority language in Northern Ireland as the appropriate starting point for consideration of the issue. We find these reasons unconvincing, not least as the local government review Commissioner is not among the bodies that would fall under the remit of the proposed Irish Language Commissioner.<sup>87</sup>
90. The Belfast City Council area report from an Assistant Commissioner does recommend the adoption of bilingual English-Irish names for seven listed wards due to cited evidence of bilingualism within the locality. The consultation also recorded opposition from a section of respondents to bilingual English-Irish naming on grounds it would create “unrest”, be “divisive” and that the “proposed bilingual languages are dead.”<sup>88</sup> The Commissioner in her report agreed there was merit in the bilingual naming of the seven wards this and whilst not including same as a revised recommendations, sought further views, with an apparent focus on what the Irish language names should be.<sup>89</sup>

### **Street Signage**

91. Legislation from the era of the former Northern Ireland Parliament (1921-72) which banned Irish in street signage was repealed in the early stage of the peace process and replaced with legislation that provides a general permissive power to Councils to provide bilingual signage subject to the views of residents in a street.<sup>90</sup> The absence of a more codified approach in legislation means the level of provision tends to follow the political makeup of the Council. There are examples of both good and bad practice.
92. In 2016, one year on from the reorganisation of local government in NI, CAJ and Conradh Na Gaeilge issued a joint report covering the status of compliance by Councils

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<sup>85</sup> [Revised Recommendations](#), paragraphs 4.6-7.

<sup>86</sup> Revised Recommendations paragraph 5.9: ‘Foras na Gaeilge provided a written submission to my Provisional Recommendations in support of the use of names in Irish across all local government districts.’

<sup>87</sup> See <https://caj.org.uk/2022/03/03/response-to-consultation-on-the-revised-recommendations-of-the-local-government-boundaries-commissioner/>

<sup>88</sup> Report of the Assistant Local Government Boundaries Commissioner for the Proposed District of Belfast City, Brendan Patterson, Assistant Local Boundaries Commissioner, November 2021, para 4.6.

<sup>89</sup> For further detail see: <https://caj.org.uk/2022/03/03/response-to-consultation-on-the-revised-recommendations-of-the-local-government-boundaries-commissioner/>

<sup>90</sup> Article 11 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1995

at that point.<sup>91</sup> This report included analysis of Belfast City Council's policy which at the time which had very high thresholds for bilingual signage.<sup>92</sup>

93. Since that time, however, Belfast City Council adopted a progressive draft policy on Street Signage. The new policy for a bilingual sign can be triggered by a single resident with a subsequent threshold of 15% support from residents of the street to require approval. The welcome aim of the policy is to "*To promote regional and minority language rights, and to benefit and enhance the diverse linguistic communities within the city, through the adoption of dual language street signs as and where appropriate.*" The policy is in the process of being adopted and we retain concerns about procedural proposals to 'good relations' test each sign to majority approval (see earlier in this submission), yet if passed the policy will represent significant progress.<sup>93</sup>
94. A number of other NI Councils have also adopted progressive bilingual street signage policies including Derry and Strabane Council, Mid Ulster, Fermanagh and Omagh, Newry Mourne and Down.<sup>94</sup>
95. Other Councils continue to make no provision or have extremely restrictive policies. An example is provided by Antrim and Newtownabbey Council. During the reporting period this Council took the following actions:
  - On the 26 February 2018, in response to a request for five English-Irish bilingual street signs, the Council voted to reinstate an 'English only' street signage policy.
  - CAJ and Conradh na Gaeilge advised the Council that this policy was unlawful. The Council maintained its actions were lawful until Judicial Review proceedings in September 2018 when the Council rescinded the policy, agreed to pay the applicants costs, and stated that a "new, more detailed policy would be drafted for the Council to consider".
  - In June 2019 the Council used legislation designed to regulate commercial advertisements to threaten to prosecute an 85-year-old woman for the presence of a small Irish sign on her property.<sup>95</sup>
  - Following the media coverage of this issue a draft policy was presented to a Council committee in September 2019. However, the proposal appeared designed to make it virtually impossible to obtain a bilingual sign. It would have required 50% plus of all residents to sign a petition to trigger a process of a council survey requiring a two thirds majority with all persons not responding automatically assumed to be *opposed* to bilingual signage. Even when these thresholds were met the Council could still

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<sup>91</sup> See <https://caj.org.uk/2019/03/15/local-councils-obligations-and-the-irish-language-a-framework-for-compliance/>

<sup>92</sup> The Council retained overriding discretion on the provision of a bilingual sign but each application required:  
- An initial petition needed with one-third of persons on electoral register in street;  
- A postal survey will then be conducted requiring a two thirds majority, any forms not returned will be categorised as opposed to bilingual signage.

<sup>93</sup> See <https://caj.org.uk/2022/02/25/submit-on-belfast-city-council-proposed-policy-on-dual-language-street-signs/>

<sup>94</sup> For details see appendix of: <https://caj.org.uk/2022/03/14/submit-to-antrim-and-newtownabbey-borough-council-consultation-on-dual-language-street-signage/>

<sup>95</sup> <https://www.irishnews.com/news/northernirelandnews/2019/06/18/news/council-threatens-to-prosecute-85-year-old-woman-over-irish-language-street-sign-1644039/>

veto the request, and if any bilingual sign was produced the policy required the Irish text to be smaller than the English text. In light of concerns the Council did not proceed with this policy.

- In January 2022, in light of further applications for bilingual street signs, the Council commenced consultation on a new proposed policy. The main elements of this proposed policy are as follows:
- Process can only be triggered by a Petition from one third of streets residents.
  - Council can then canvass views of resident by post. A two thirds majority is required.
  - The full Council will then take a decision on the application at its apparent discretion.
  - Beyond the legal requirements on the views of residents, no further criteria are set out for a Council decision.
  - The Council retains power to unilaterally depart from and change its criteria at any point including after an application has been submitted.
  - There is a limit of three applications to Council per month and residents who are refused a bilingual sign are precluded from then reapplying for three years.

96. We have issued a response to this consultation.<sup>96</sup>

**The Advisory Committee may wish to recommend the official adoption of local government district and ward names in a bilingual manner; movement away from exclusively monolingual road signage and a revised framework for street signage that places a greater onus on Councils to provide bilingual signage.**

## Ulster Scots speakers and the Framework Convention

97. The UK recognised Ulster Scots in the linguistic diversity provisions of the 1998 Belfast/Good Friday Agreement (GFA). The GFA implementation treaty for the North South Ministerial Council included the establishment of a Language Body with two agencies, the second of which was the Ulster-Scots Agency (Tha Boord O Ulstèr-Scotch). This bilateral treaty defines Ulster Scots as “*the variety of the Scots language traditionally found in parts of Northern Ireland and Donegal*”.<sup>97</sup>
98. The NI Human Rights Commission has set out that Scots, including the Ulster variant, is a largely spoken language from the Germanic language group that is on a linguistic continuum with English. There is some level of mutual comprehension with English, save in more maximumly differentiated forms. The Commission notes that Ulster Scots is mainly found in certain parts of Northern Ireland where there was Scottish settlement, but that “*its use is not confined to those of Scottish*

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<sup>96</sup> <https://caj.org.uk/2022/03/14/submission-to-antrim-and-newtownabbey-borough-council-consultation-on-dual-language-street-signage/>

<sup>97</sup> [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.

*descent, and it is spoken by both Catholics and Protestants.”<sup>98</sup>* Research by the Ulster Scots Academy maps four distinct dialect areas in the north of Ireland where Ulster Scots is spoken today.<sup>99</sup>

99. Following the GFA the UK registered Scots for Scotland and Ulster Scots for Northern Ireland under Part II of the ECRML. COMEX did question the separate registration of Scots and Ulster Scots, when they are the same language.<sup>100</sup>
100. The most recent ECRML recommendations for Ulster Scots are to adopt a strategy to promote the language “*in education and other areas of public life*” and to establish “*cultural relations with other linguistic groups*.<sup>101</sup>”
101. The Advisory Committee (as well as the UK authorities) has long recognised that Ulster Scots speakers as a linguistic minority are within the scope of the Framework Convention. In the First Opinion on the UK the Advisory Committee referred to representations from Ulster Scots speakers and to Scots and Ulster Scots (as well as the Irish language, Welsh, Scottish Gaelic). These covered matters such as broadcasting in Ulster Scots, use of the language in private and public, teaching Ulster Scots language and literature and the inclusion of Ulster Scots within the census languages question.<sup>102</sup>
102. In its Resolution on the Third Opinion on the UK, the Committee of Ministers (as well as commenting on the Scots language in Scotland) urged the continued design and implementation of measures to encourage Ulster Scots speakers to use their languages in the public sphere and in relations with local administrative authorities in Northern Ireland.<sup>103</sup> The most recent Fourth Opinion on the UK referred to the Ulster Scots strategy.<sup>104</sup>

### **Ulster Scots Strategy**

103. Further to the (UK-Ireland) 2006 St Andrews Agreement, which ended the then suspension of the power sharing institutions, legislation placed a statutory duty on the

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<sup>98</sup> 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.

<sup>99</sup> The Mapping of Ulster-Scots, Philip Robinson: “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.”

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

<sup>100</sup> 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.

<sup>101</sup> Fifth report of the Committee of Experts in respect of the United Kingdom, CM(2019)84-final

<sup>102</sup> ACFC/INF/OP/I(2002)6 (First Opinion on the UK) paragraphs 18, 38, 67-8, 70-2, 92 & 118.

<sup>103</sup> 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*).

<sup>104</sup> See for example ACFC/OP/IV(2016)005 4<sup>th</sup> Opinion on the UK (adopted on 25 May 2016) paragraph 103 and ACFC/SR/IV(2015)004 rev (4<sup>th</sup> Report by UK) Framework Convention, 2015, Page 40.

Northern Ireland Executive to adopt a strategy to “enhance and develop the Ulster Scots language, heritage and culture.”<sup>105</sup>

104. To date no Ulster Scots strategy has ever been formally adopted.
105. Initially the commitment fell to DUP culture ministers. Its implementation, however, was held back by an intention to instead merge the Ulster Scots strategy with the counterpart strategy for the Irish language with the express purpose of seeking artificial parity for Ulster Scots with Irish. COMEX were highly critical of this approach stating that:

... *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.*<sup>106</sup>

106. COMEX had previously raised concerns 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.” COMEX reiterated that each be treated in accordance with its own ‘quite different’ specific situation and calling for measures “specifically directed towards each language” to ensure protection and promotion in accordance with their specific needs.<sup>107</sup>
107. Around the same time, the Advisory Committee also raised concerns that “some representatives of the authorities” considered that promoting the Irish language discriminated against persons belonging to the majority population.<sup>108</sup>

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<sup>105</sup> Section 28D(2) Northern Ireland Act 1998 inserted (8.5.2007) by Northern Ireland (St Andrews Agreement) Act 2006 (c. 53), ss. 2(2), 15, 27(4)(5)

<sup>106</sup> 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.

<sup>107</sup> As above, with reference to both the 3<sup>rd</sup> and 2<sup>nd</sup> monitoring round.

<sup>108</sup> “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

108. Following these interventions by the treaty bodies the proposals for such a merged single strategy were dropped. In the subsequent mandate, in 2012, the new Sinn Féin Culture Minister did develop and put out for public consultation separate Irish and Ulster Scots strategies. Following the closure of public consultation in 2013, and then again in 2014, the strategies were issued to all Ministers in the NI Executive for comment, however only some Ministers responded.<sup>109</sup> The *Strategy to Enhance and Develop the Ulster Scots Language, Heritage and Culture 2015 – 2035*' was then published and formally launched in January 2015 (alongside the Irish language strategy).<sup>110</sup>
109. As alluded to by the Advisory Committee in its Fourth Opinion the UK, opposition to formally adopting an Irish language strategy, also led to the Ulster Scots strategy failing. Following publication in 2015 the strategies were prevented from being placed on agenda of the NI Executive until 2016 when they were voted down.<sup>111</sup>
110. The NI Executive then collapsed in 2017. It did not resume until the NDNA deal in early 2020. A UK report to COMEX in 2021 stated that a proposed timeline for delivering both the Irish and Ulster Scots Strategies has been issued to the NI Executive but that the NI Executive has not agreed yet to include it on its agenda for consideration.<sup>112</sup> At the time of writing an expert advisory panel report has just been produced on the Ulster Scots Strategy and opened for a short consultation.<sup>113</sup>

### **NDNA proposals for an Ulster Scots/Ulster British Commissioner**

111. During the negotiations that led to NDNA a submission was made by the head of the Ulster Scots Agency seeking an additional £140 million in funding for Ulster Scots.<sup>114</sup> 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 were expressly associated with Protestant/unionist/loyalist culture, rather than specifically with Ulster Scots.<sup>115</sup>
112. The 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 GBP sought reflected a calculation of the amount previously spent on Irish. However, the vast majority of the money spent on the Irish language relates to the provision of Irish-medium education. This is a false cost

on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006 (adopted 30 June 2011), para. 147.

<sup>109</sup> See paragraph 16 of Application by [Conradh Na Gaeilge for Judicial Review](#), [2017] NIQB 27.

<sup>110</sup> Ulster Scots: <https://www.communities-ni.gov.uk/publications.ulster-scots-language-heritage-and-culture-strategy-2015-2035> Irish: <https://www.communities-ni.gov.uk/publications.irish-language-strategy-2015-2035>

<sup>111</sup> See paragraph 16 of Application by [Conradh Na Gaeilge for Judicial Review](#), [2017] NIQB 27.

<sup>112</sup> MIN-LANG (2021) IRIA 1, paragraph 176.

<sup>113</sup> <https://www.communities-ni.gov.uk/consultations/consultation-expert-advisory-panels-recommendations-report-ulster-scots-language-heritage-culture>

<sup>114</sup> 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>

<sup>115</sup> 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.

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. As previously stated the contention of ‘discrimination’ if there is not an artificial parity between Irish and Ulster Scots is not new. The recent Panel Report on the Ulster Scots Strategy in its section on public resources also refers to ‘equity’ in both funding and broader provision.<sup>116</sup>

113. The NDNA package did not include the requested funding. Rather, as a result of negotiations between the parties, one of the bills in the NDNA draft legislation package would make provision for an Ulster Scots / Ulster British Commissioner with the main function being “*...to enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland.*”
114. The function of the Commissioner would be to increase awareness of Ulster Scots services and provide advice/guidance to NI public authorities on language arts and literature within its remit. There would be some overlap with the Ulster Scots Agency in this work. The Ulster Scots/ Ulster British Commissioner would also provide advice on application of certain human rights treaties, including the Framework Convention (also the ECRML and UN CRC), for which there is some overlap with the NHRI. CAJ produced a detailed narrative and critique of the three NDNA bills.<sup>117</sup>
115. A contextual concern is that the presentation of the legislative package is underpinned by the political imperative of providing a ‘counterweight’ to the Irish language bill, rather than thought through tailored measures designed to safeguard and develop Ulster Scots.
116. Unlike the Irish language bill there was no prior official consultation on the proposal for an Ulster Scots and Ulster British Commissioner that Ulster Scots speakers could input into. At their request CAJ delivered information sessions to a range of Ulster Scots groups who had been unsighted on the proposals until their publication in NDNA.
117. The bill would place a statutory duty on the NI Department of Education “*to encourage and facilitate the use and understanding of Ulster Scots in the education system.*” This provision could assist in progressing duties under Article 7(1)(f-g) of ECRML and the CM recommendation, provided it ultimately relates to the teaching of Scots *as a language*.
118. The Human Rights Commission has been highly critical of the conflation of Ulster Scots and Ulster Britishness in the proposed bill. With Ulster Scots speakers drawn from across the community, the Commission raised concerns that the extension risked tying Ulster Scots to a particular political affiliation. The Commission warned that whilst Ulster Scots is a recognised linguistic minority:

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<sup>116</sup> Recommendations for an Ulster-Scots Language, Heritage & Culture Strategy // Report of the Expert Advisory Panel, February 2022, p17. “Where public resources are being allocated, then each of our cultural traditions should be treated on the basis of equity and this is about more than money. As well as public funding, it is about such things as access to the media and inclusion in the education system because education and the media are especially important in affirming and promoting cultural traditions.”

<sup>117</sup> Analysis of the draft Legislation published with the New Decade, New Approach document – CAJ January 2020 <https://caj.org.uk/2020/02/04/analysis-of-the-new-decade-new-approach-agreement/>

...‘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.<sup>118</sup>

119. 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 had previously emphasised that: “*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*”.<sup>119</sup>
120. The 2021 COMEX report considers issues in the alignment of the mandates of the Irish language and Ulster Scots/Ulster British Commissioner. This can be traced back to the submission by the NHRI and relates to two issues. The first is that the mandate of the Irish language Commissioner is to “protect and enhance” compared to the duty to “enhance and develop” given to the Ulster Scots/British Commissioner. The NHRI recommends alignment of a “promote and protect” formulation for both. The second is that the NHRI queries why the Ulster Scots Commissioner function of advising on the Framework Convention and other treaties is not also vested in the Irish language commissioner.<sup>120</sup>
121. Due to the blocking of the introduction of the Irish language act in the NI Assembly, the UK Government has committed to taking the legislative package through the UK Parliament. Reportedly, it appears that part of the delay in doing so relates to the question of whether the UK Government will follow the recommendation of the NHRI and remove the linking of Ulster Scots to ‘Ulster British.’ According to a BBC report there is agreement from Sinn Féin for the Commissioner only to focus on Ulster Scots, whereas the DUP wish to instead name the office as the Ulster British Commissioner.<sup>121</sup> At the time of writing it is not clear if the UK Government has reached a decision on the matter. There is currently no date for introduction.

### **NDNA UK commitment to recognise Ulster Scots as a National Minority**

122. Separate to the language bills, in a different section of NDNA on UK commitments, the British government undertakes to:  
Recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities.<sup>122</sup>

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<sup>118</sup> NIHRC ‘Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraph 2.14.

<sup>119</sup> As above paragraphs 2.15-6.

<sup>120</sup> NIHRC [Submission to the Committee of Experts on the European Charter for Regional and Minority Languages on the Interim Report of the United Kingdom of Great Britain and Northern Ireland February 2021](#), paragraphs 19-22.

<sup>121</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-60317736>

<sup>122</sup> NDNA, Annex A: UK Government Commitments to Northern Ireland, paragraph 24.

123. This may seem an odd statement as Ulster Scots speakers have long been recognised by the UK as falling under the scope of the Framework Convention as a minority from the first monitoring cycle. As the Advisory Committee will know whilst formal recognition is not a requirement of the Framework Convention it may assist where a state party has previously contended a group does not fall under the Framework Convention, as was the case with the UK 2014 statement recognising Cornish as a 'Celtic people'.<sup>123</sup>
124. A formal statement could of course reinforce the status of Ulster Scots speakers as falling under the protections from the Framework Convention. It could help improve visibility and prompt further protections. It would be difficult, however, to justify a distinction in doing this for Ulster Scots and not Scots in Scotland. If recognition did lead to concrete measures (such as protections for Ulster Scots speakers from discrimination in NI on grounds of language) it would be difficult to see objective justification for not also extending this to Irish speakers.
125. Given that the concept of minority under international human rights law encompasses elements of an ethnic, religious or linguistic minority, an alternative reading of the UK commitment would be an intention to change the form of recognition of Ulster Scots away from language to that of recognition of an ethnic minority group. Unlike the lengthy dialogue over Cornish, however, there is no reference to or dialogue on this issue in previous Advisory Committee or UK state reports. The published '*Strategy to Enhance and Develop the Ulster Scots Language, Heritage and Culture 2015 – 2035*' also makes no reference to this issue. There has not been any official consultation with Ulster Scots speakers or others with Ulster Scots identity prior or subsequent to the NDNA commitment as to whether they would wish to self-identify as such.
126. The UK commitment on recognition is separate to the commitments in NDNA regarding the legislation establishing the Commissioner that relates to Ulster Scots. The recognition commitment appears to be the result of a political side deal with the DUP, for which no background information at all is available.<sup>124</sup>
127. Records from the Ulster Scots Agency disclosed under freedom of information do set out an understanding that the original 'political intent' of the NDNA commitment was to move away from recognition of Ulster Scots as a language. The head of the Ulster Scots Agency indicates an initial preference to designate Ulster Scots as an ethnic minority group.<sup>125</sup>
128. One issue that arises is that the community encompassed by recognition of Ulster Scots as an *ethnic group* would likely be different to that of *Ulster Scots speakers*. As referenced above, speakers are drawn from across the community in areas of 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

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<sup>123</sup> As above. See also: <https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>

<sup>124</sup> In response to a Freedom of Information request the competent UK government department stated that it did not hold a single document on the issue prior to the NDNA commitment 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 information was held for the period of NDNA negotiations from April 2019-January 2020, beyond one internal email string.

<sup>125</sup> Ulster Scots Agency note of meeting with NIHRC, 21 March 2021.

ethnic and national origin of Scottish descent and of Protestant religion. This would align Ulster Scots to a particular section of the community in a way that is not presently the case, and also link to majority identity.

129. This is compounded by ‘cultural markers’ tentatively developed by the Ulster Scots Agency for Ulster Scots recognition as a national minority under the Framework Convention having an openly political element to them. The markers include ‘political outlook’ as an indicator of Ulster Scots as well as elements more conventionally associated with indicators of ethnicity and attendant culture.<sup>126</sup>
130. The tying of Ulster Scots to a particular political constituency of unionism and loyalism is most notable in the Agency agreeing that affinity to the Ulster Banner (the flag adopted by the former 1921-1972 unionist government) should be included as a ‘cultural marker’ of Ulster Scots. The Minutes of the meeting record a proposal from the chair that:

“...in light of the significance of the Ulster Banner to the Ulster-Scots community and the extent to which we proposed to rely on it and the Arms of the NI Parliament from which it is derived in the marking of the NI Centenary, that it should be included on the list of cultural markers [for an Ulster Scot]. This was unanimously agreed.”<sup>127</sup>

131. Tying Ulster Scots to unionism politically and moving away from language, would link Ulster Scots to what has been the majority community. This also arises with the connection to Britishness. We would be concerned if the existing recognition of Ulster Scots speakers under the Framework Convention was put at risk in linking Ulster Scots to majority identity in this way.
132. The Ulster Scots Agency initially declined to release the above information to CAJ under Freedom of Information legislation. A special board meeting of the Agency was held to consider the request. Concerns were expressed about sharing the above information with a third party organisation “*ahead of concluding a consultation exercise with the wider Ulster-Scots community.*” Reference was made to “*difficult conversations which had already been had amongst the Board on this matter and the need to have similarly frank discussions within the community in order to reach a broad consensus.*”<sup>128</sup> The information was released on appeal. In the context of obligation under equality law the Agency did then agree it would have to conduct a public rather than closed consultation. By December 2021 the Agency appeared however to have abandoned the exercise.<sup>129</sup>
133. In addition to the issues of self-identification and the tying of Ulster Scots to a distinct political identity, we are also concerned that a rush to push Ulster Scots recognition away from language (and its attendant culture) could divert support and attention away from required resolute action to safeguard Ulster Scots linguistically, in a context

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<sup>126</sup> The full list is: Scottish Origin; Language/Literature; Religion; Philosophy and Political Outlook; Festivals; Music; Dance; Sport and Food. *Minutes of Board Meeting of the Ulster Scots Agency, 30 June 2020, item 9.*

<sup>127</sup> Minutes of Board Meeting of the Ulster Scots Agency, 30 June 2020, item 9.

<sup>128</sup> Ulster Scots Agency Board - Special Meeting to consider Freedom of Information Request 11/05/21

<sup>129</sup> Email to CAJ 9/12/22 from Ulster Scots Agency which confirms “Work has not been progressed in this area due other business pressures”

where many of the existing commitments to Ulster Scots speakers under the ECRML remain unfulfilled.

134. Shortly after NDNA, a Parliamentary Question from a DUP MP indicated that the UK intended to implement the commitment ‘before the end of 2020’.<sup>130</sup> The UK did not elaborate on what form this would take. CAJ in August 2020 provided a detailed working paper on the implications of the UK’s NDNA commitment to recognise Ulster Scots as a national minority.<sup>131</sup> The UK authorities appear to have done further work on the matter in 2020 and records from the Ulster Scots Agency in March 2021 show that according to officials in the NI Department of Communities the UK Government had taken the position that Ulster Scots designation under the Framework Convention only applied to language.<sup>132</sup>
135. In May 2021, a further question on the NDNA commitment to the UK Parliament from the cross-community Alliance party sought confirmation that it remained UK Government policy to continue to recognise Ulster Scots speakers as a linguistic minority. The response from the UK Minister was limited to stating that Government was continuing to work on delivering the NDNA commitment.<sup>133</sup>
136. The current UK State Report to the Advisory Committee makes no reference to the NDNA commitment on Framework Convention Recognition. In relation to Ulster Scots, references are limited to other elements of the NDNA package and aspects of UK Government support to Ulster Scots linguistically.<sup>134</sup>
137. Whilst the 2015-2035 Ulster Scots Strategy makes no reference to the NDNA Framework Convention recognition, the commitment is referenced in the recent new expert advisory panel report published in February 2022. Two members of the five strong panel, including the current head of the Ulster Scots Agency are former DUP elected representatives and served as special advisors to DUP Ministers and may therefore have particular insight into the original political intent of the NDNA commitment.
138. The February 2022 panel report references the recognition of the “linguistic part of our Ulster-Scots identity” under the GFA and European Charter, and states that NDNA contained the next substantive steps forward for rights protection on cultural identity and Ulster Scots in particular. In relation to Ulster Scots as a National Minority it references the NDNA commitment as the “first recognition of the [Ulster Scots] identity in its entirety (not just limited to language)” and recommends the UK implement the commitment within six months.<sup>135</sup>
139. There is no elaboration as to the suggested form this recognition should take. In places the advisory panel appears to consider Ulster Scots as an ethnic group,

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<sup>130</sup> WPQ HC 48671 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-18/48671/>

<sup>131</sup> <https://caj.org.uk/2021/02/08/submission-responding-to-uk-ecrml-update/>

<sup>132</sup> Note of Ulster Scots Agency Meeting with NIHRC, 8 March 2021.

<sup>133</sup> <https://questions-statements.parliament.uk/written-questions/detail/2021-05-11/555>

<sup>134</sup> ACFC/SR/V(2021)009 Fifth Report submitted by the United Kingdom Pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities. 4 November 2021

<sup>135</sup> Recommendations for an Ulster-Scots Language, Heritage & Culture Strategy // Report of the Expert Advisory Panel, February 2022, p 58-59, 63.

although this term is not used. Instead, there are references to recognition as a national minority of the ‘Ulster Scots community’ or ‘Ulster Scots identity’.<sup>136</sup> Our understanding, however, is that there must be some element of an ethnic (though this is intimately connected to culture), religious or linguistic minority nature to be able to claim to constitute a national minority, rather than basing same on the issue of *cultural identity* alone. The panel report also refers to Protestant religious denomination as a component of Ulster Scots identity.<sup>137</sup> There is also a recommendation that the Irish Government recognises Ulster Scots as a national minority, albeit it is also not clear if this is a reference to Ulster Scots *speakers* or to Ulster Scots as an ethnic group.<sup>138</sup>

**The Advisory Committee may wish to provide assurances that Ulster Scots speakers will continue to fall under the scope of the protections of Framework Convention as a linguistic group. It may also wish to stress the importance of Article 3 self-identification in any process by the UK authorities to seek to change the nature of current recognition.**

## Racial profiling and impacts of Brexit on migrant and minority ethnic groups

### The ‘Hostile Environment’ and public services

140. Through joint academic research with the two Northern Ireland universities, we recorded concerns from migrant communities about an increase in racial profiling and questioning of entitlements in accessing both essential public and some private (e.g. banks) services as part of the UK’s ‘Hostile Environment’ measures. We heard testimony such practices had increased since the 2016 Brexit referendum, despite actual changes in entitlements not occurring until the end of the Brexit transition period in December 2020.<sup>139</sup>
141. The Hostile Environment polices introduced largely by the 2014 and 2016 Immigration Acts remain in place despite the Windrush Scandal. The context of Brexit means they have now been extended to many more persons and the framework for entitlements has become far more fragmented between different cohorts of persons in NI.<sup>140</sup> CAJ recently commissioned and published a detailed legal opinion setting out the extent to which in their areas of competence (including housing, driving, social security,

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<sup>136</sup> Recommendations for an Ulster-Scots Language, Heritage & Culture Strategy // Report of the Expert Advisory Panel, February 2022, p24, p25 (see also p15).

<sup>137</sup> As above, p36 “Presbyterianism is a key element of the story of the Ulster-Scots identity and religious faith. There are in the region of 500 Presbyterian congregations of various denominations in Northern Ireland. Each of those congregations, in terms of their heritage, could identify as an Ulster-Scots community.”... It should also be remembered that not all Ulster-Scots are Presbyterians and not all Presbyterians are Ulster-Scots. Although many will have Presbyterian heritage, today, a proportion are members of other denominations too. This is exemplified in Fermanagh, where riding or reiving families, who relocated from the Scottish Borders, tended to join the Church of Ireland.”

<sup>138</sup> As above p63.

<sup>139</sup> See: BrexitLawNI Policy Report: Brexit, Xenophobia and Racism in Northern Ireland September 2018, p25-6.

<sup>140</sup> See <https://thedetail.tv/articles/brexit-the-complex-new-boundaries-between-different-groups-of-citizens-in-northern-ireland> and the Divided by the Rules: Post Brexit citizenship status report: <https://caj.org.uk/2019/06/27/post-brexit-citizenship-status-divided-by-the-rules-conference-report/>

employment and health) the regional Northern Ireland Assembly and Executive could roll back elements of the Home Office hostile environment.<sup>141</sup>

### Selective passport checks in the UK-Ireland ‘Common Travel Area’

142. The UK and Ireland have operated a ‘Common Travel Area’ (CTA) – essentially a free movement zone with no passport controls between the two states – for most of the time since the partition of Ireland in 1921.<sup>142</sup>
143. There is a lack of legal certainty in the increasingly fragmented arrangement. Indeed, the increased focus on the CTA following Brexit led the Human Rights Commission to assess that the CTA was ‘written in sand’ and required, among other matters, a bilateral treaty.<sup>143</sup>
144. The land border on the island of Ireland is now in general an open and invisible border. It is 500km long with over 200 crossing points.<sup>144</sup> The UK estimates there around 110 million annual crossings in total and the Centre for Cross Border studies estimates that between 23,000 and 30,000 people work across the border.<sup>145</sup> It is fair to describe most of these journeys as ‘local’ journeys.<sup>146</sup>
145. The militarised security infrastructure on the border was dismantled as a result of the GFA and its implementation agreements. Customs and regulatory controls were also removed as a result of shared EU membership. The spectre of a return to a ‘hard border’ on the island became one of the most, if not the most, significant issue in the UK/EU Brexit negotiations. Ultimately, the UK-EU Withdrawal Agreement treaty included a NI/Ireland Protocol. The objectives of the Protocol are set out in Article 1(3) as follows:

This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

146. There are a range of provisions in the Protocol dealing with the movement of goods. The Protocol provision dealing with the *movement of people* is found in Article 3, specifically on the Common Travel Area. This expressly defers to the UK and Ireland to make CTA arrangements, compatibility with EU law. The UK is also under a specific

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<sup>141</sup> <https://caj.org.uk/2022/02/23/can-stormont-rollback-the-home-office-hostile-environment-legal-research-report/>

<sup>142</sup> The CTA also includes the Channel Islands and Isle of Man which are part of the British State but self governing territories which are not part of the UK. The CTA was suspended entirely from 1945-1952 initially due to the Second World War, and passport controls were in place between Northern Ireland and Great Britain. More recently temporary entry controls were introduced to deal with the Covid-19 pandemic.

<sup>143</sup> <https://nihrc.org/news/detail/new-research-recommends-uk-irish-treaty-is-best-solution-to-ensure-common-t>

<sup>144</sup> An official joint (north-south) mapping exercise on the land border determined there were 208 border crossings. This is notably more than the 137 crossings on the EU’s eastern frontier ‘[Ireland has 208 border crossings, officials from North and South agree](#)’ Irish Times 26 April 2018.

<sup>145</sup> Northern Ireland Affairs Committee ‘[The land border between Northern Ireland and Ireland](#)’ HC329 [6-7].

<sup>146</sup> See e.g. the respondents in a study listing the following reasons “social reasons (visiting family or friends), shopping, work or business, sports and entertainment, holiday and travel, healthcare, and education” in Katy Hayward (November 2017) [Bordering on Brexit: Views from Local Communities in the Central Border Region of Ireland/Northern Ireland](#) Centre for International Borders Research & Queen’s University Belfast. Page: 47.

duty to ensure CTA provisions continue to apply without prejudicing, in particular, free movement to and from the Irish State. This provision should be read compatibility with the overall purpose of the Protocol, including specifically '*to avoid a hard border*' on the island of Ireland. This is the only provision in the Protocol that addresses the avoidance of a hard border relating to the movement of people.

147. For some time concerns of racial profiling have manifested themselves in relation to 'informal' or selective *ad hoc* passport checks on certain passengers on CTA journeys including in and out of Northern Ireland. Such checks which often lack any clear legal basis have involved at times quite blatant racial discrimination, with persons (including British and Irish citizens) singled out on the basis of skin colour or other ethnic indicators.
148. This covers persons traveling across the open land border between Northern Ireland and the Irish State on what are often short local journeys and also on UK domestic journeys from NI ports and airports to Great Britain.
149. In 2018 following a country visit to the UK Tendayi Achiume the UN Special Rapporteur on contemporary forms of racism reflected the concerns of communities regarding racial profiling on CTA routes. The Rapporteur reflected general concerns among migrant communities regarding their post-Brexit status and specifically recorded and recommended:

In Northern Ireland, groups expressed concerns that even a policy that committed to no routine passport checks in the Common Travel Area might result in non-routine checks due to racial profiling of transiting minorities. I **recommend** that the UK adopt immigration policies in advance of and following its exit from the EU that shield EU and non-EU migrants from the threat of racial and ethnic discrimination.<sup>147</sup>

150. The situation with the movement of peoples can be divided into the two areas of passport control powers and prior immigration permission in both jurisdictions.

## UK passport controls in the CTA

151. At present UK primary legislation expressly provides that local journeys in the CTA, including over the land border, are not to be subject to (passport) 'control'.<sup>148</sup>
152. Back in 2008 the UK Home Office produced a White Paper proposing to abolish the CTA as a free movement zone.<sup>149</sup> A subsequent bill<sup>150</sup> sought to entirely repeal the provision that prevents passport control in the CTA. The policy envisaged blanket checks on air and sea routes from the Irish State to Great Britain (and it was suspected

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<sup>147</sup> <https://www.ohchr.org/en/statements/2018/05/end-mission-statement-special-rapporteur-contemporary-forms-racism-racial?LangID=E&NewsID=23073>

<sup>148</sup> The statutory basis for passport & immigration control into the UK is presently found in the Immigration Act 1971. See in particular Para 4 Schedule 2 on duties to produce passports on request. However, elsewhere in the Act – section 1(3) a specific provision *expressly prevents* these passport control/ questioning powers being used on journeys within the CTA. Section 1(3) provides that: "*Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to [passport] control under this Act...*"

<sup>149</sup> Home Office "Strengthening the CTA" White Paper

<sup>150</sup> The Borders, Immigration and Citizenship bill

from NI to Great Britain) and ‘intelligence-led’ checks on the land border – but only on non-British and Irish citizens.

153. Ministers acknowledged they wanted to change the law, as there was otherwise no ‘legal cover’ for passport controls in the CTA. When pressed on what ‘intelligence-led’ meant a Minister stated, “*we target the odd bus, minibus or taxi, because our experience has shown that those are much more likely to be a threat.*”<sup>151</sup> The second chamber of the UK Parliament then voted out the change and the prohibition on use of passport control powers under the 1971 Act remains.<sup>152</sup>
154. The UK Home Office nevertheless has conducted selective passport checks on CTA routes with regular complaints of racial profiling.<sup>153</sup> The Home Office has argued such checks do not involve statutory powers and are voluntary ( or ‘consensual’). Official Home Office Guidance also sets out that the checks rely on the voluntary cooperation of passengers.<sup>154</sup> We have however not come across a single case where uniformed officers asking selected passengers for passports have told them the checks are voluntary.
155. In the post-Brexit context, despite the primary legislation precluding passport checks in the CTA not changing, the Home Office in September 2021 issued new Guidance.<sup>155</sup> This appears to state passengers are now ‘required’ to carry and produce passports on most CTA routes bar the land border. A Northern Ireland MP sought clarity on this in the UK Parliament. The response confirms a Home Office view that producing passports or identity documents is now compulsory, but that there will be selective rather than blanket checks.<sup>156</sup> At present no ID has been generally required for ferry journeys and many persons travel without passports and will be unaware of the change in policy through guidance. Most airlines do require ID, although not necessarily that ‘required’ by the Home Office. We are concerned that this approach on air and sea routes has no legal basis and will likely lead to further racial profiling of passengers on such routes.

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<sup>151</sup> [https://hansard.parliament.uk/Lords/2009-03-04/debates/09030469000370/BordersCitizenshipAndImmigrationBill\(HL\)](https://hansard.parliament.uk/Lords/2009-03-04/debates/09030469000370/BordersCitizenshipAndImmigrationBill(HL))

<sup>152</sup> [https://hansard.parliament.uk/Lords/2009-04-01/debates/09040160000488/BordersCitizenshipAndImmigrationBill\(HL\)](https://hansard.parliament.uk/Lords/2009-04-01/debates/09040160000488/BordersCitizenshipAndImmigrationBill(HL))

<sup>153</sup> See for example: <https://www.itv.com/news/utv/2018-05-10/man-stopped-four-times-at-ferry-because-he-was-black> and BBC News: Belfast City Airport: Black woman 'stopped for looking foreign' <https://www.bbc.co.uk/news/uk-northern-ireland-36846314>

<sup>154</sup> “Home Office IOs [immigration officers] do not have all of their normal powers to carry out immigration controls in respect of persons travelling within the common travel area (CTA). Operation Gull relies on the voluntary cooperation of the travelling public. Officers are entitled to carry out intelligence led operations designed to intercept persons who should not be in the country on the basis of cooperation from the general public. However, individuals are under no obligation to comply... (p20) [Enforcement visits casework guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/)

<sup>155</sup> <https://www.gov.uk/guidance/travelling-between-the-uk-and-ireland-isle-of-man-guernsey-or-jersey>

<sup>156</sup> Stephen Farry MP UIN 44479 <https://questions-statements.parliament.uk/written-questions/detail/2021-09-07/44479/> “As now, there will be no routine immigration controls on Common Travel Area (CTA) journeys and none whatsoever on land journeys between Ireland and Northern Ireland. However, intelligence-led operations to target potential abuse of CTA routes will continue.” ... “We are therefore confirming the documents people will be required to present when entering the UK from another part of the CTA as part of an intelligence-led immigration control if they are encountered by a Border Force officer.”

156. We are conscious that to be ECHR compliant powers to ask for documents and associated questioning by law enforcement officers must be '*in accordance with the law*' (including some clear basis in law) to avoid arbitrary and discriminatory checks.<sup>157</sup>
157. We also warned that the post-Brexit scenario could lead to NI becoming 'one big border' with increased in country checks carried out on persons in NI, with a view to preventing onward travel to Great Britain. A UK Parliamentary Committee has recommended that "*the residents of Northern Ireland should not be subject to more onerous documentary checks*" than persons in Great Britain.<sup>158</sup> However, recent data revealed that Belfast has a proportionality higher rate of 'in country' immigration checks when compared to 11 other UK cities, including London. In response to questions about these figures, the Home Office referred to the need to police the CTA.<sup>159</sup> There has also been a notable increasing deportation of EU citizens in NI.<sup>160</sup>

**The Advisory Committee may wish to ask the UK to cease selective passport controls on internal UK and CTA routes, given the invariability of racial profiling in such operations, as well as taking steps in general to prevent racial profiling in 'in country' immigration operations.**

### **UK immigration requirements for CTA journeys**

158. Persons entering Northern Ireland on a local journey over the land border from the Irish State do not presently require prior immigration permission ('leave to enter') – subject to certain exceptions, including visa nationals.<sup>161</sup>
159. This means at present nationals of states requiring UK visas lawfully resident in the Irish border counties with Northern Ireland face an invisible 'hard border' that cannot be crossed without the expensive and complex process of visa acquisition for even short local journeys. This includes journeys to access essential public services, some of which are provided on a cross-border basis – including cancer treatment.
160. At present however most Irish, EU26/EEA, British and other non-visa nationals from outside the EEA can freely cross into NI without any prior process. For EU/EEA citizens since Brexit, as was already the case with other non-visa nationals, this permission in such circumstances is restricted to entry as a visitor and certain activities such as work are restricted when entering the UK this way.<sup>162</sup> However, this system has allowed non-visa nationals (including EU citizens) resident in border areas in the Irish State to enter Northern Ireland and live fluid, cross border lives.
161. The UK is however seeking to change this through the introduction of an Electronic Travel Authorisation (ETA) system whereby such persons will now need prior

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<sup>157</sup> With reference to Gillan and Quinton v UK on 'Section 44' stop and search powers.

<sup>158</sup> NI Affairs Committee [The land border between Northern Ireland and Ireland \(parliament.uk\)](#)

<sup>159</sup> [Belfast: Pattern of immigration checks raises profiling concerns | United Kingdom News | Al Jazeera](#)  
<https://www.thedetail.tv/articles/concerns-over-disproportionately-high-levels-of-immigration-checks-in-belfast>

<sup>160</sup> <https://thedetail.tv/articles/record-number-of-eu-citizens-deported-from-northern-ireland-in-2016>

<sup>161</sup> Immigration Act 1971, s1(3), and The Immigration (Control of Entry through Republic of Ireland) Order 1972. In the context of Brexit the UK has legislated to increase the categories of persons crossing the land border who are required to first obtain immigration permission see the: [The Immigration \(Control of Entry through Republic of Ireland\) \(Amendment\) Order 2021 \(legislation.gov.uk\)](#)

<sup>162</sup> <https://www.gov.uk/standard-visitor>

permission to cross the land border or face a potential prison sentence for doing so. The system will not apply to British or Irish citizens but will apply to other EU nationals and citizens of other countries who are not UK visa nationals and do not already have a UK immigration status.<sup>163</sup>

162. To date EU and other non-visa nationals who live in the Irish border counties have been able to freely cross the land border on what are often short local journeys to visit friends, family, attend shops go to the beach etc, will face a 'hardened border'. The context of an open border means many persons will be unaware they are committing a serious and imprisonable offence for having crossed the border without prior ETA permission. The proposals will likely lead to significant numbers of members of border communities finding themselves in an irregular situation.
163. The UK sought to legislate for the ETA proposals through its controversial Nationality and Borders bill. An amendment in the second chamber of the UK Parliament (House of Lords) has removed the requirement for an ETA for journeys over the land border. This followed an amendment by Baroness Margaret Ritchie (formerly an NI SDLP MP) and a vote which was carried by 141 to 107.<sup>164</sup> A former NI Secretary of State described the proposed application of ETA to the land border as "*daft and potentially dangerous*" adding "*The border doesn't exist in the ordinary sense of a border - it's not like a border anywhere else... What's been ignored in drawing up this silly proposal is that it ignores entirely what's been agreed in the last quarter of a century under the Good Friday Agreement.*"<sup>165</sup> In an earlier debate Viscount Brookeborough stated that "*What the Government are talking about is simply unworkable and disastrous.*" UK Ministers have not resiled from their intention to introduce ETA on the land border.<sup>166</sup> At the time of writing the first chamber of the UK Parliament has voted to reinstate the provisions which are now subject to dispute between the two houses.<sup>167</sup>
164. UK Ministers have also denied that the provisions constituted 'a hard border' and denied they were incompatible with the Protocol. The Human Rights and Equality Commissions have however called for the removal of the ETA requirement on the land border citing conflict with the Protocol. In particular the Commissions raised concerns regarding compatibility with the UK commitment under Article 2 of the Protocol to "no-diminution" in certain GFA rights as a result of Brexit.<sup>168</sup>

### **The 'reciprocal rights' of the CTA**

165. Incrementally for around 50 years since the accession of both the UK and Ireland to what is now the EU, equality of treatment for British and Irish citizens, as well as other

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<sup>163</sup> <https://caj.org.uk/2022/01/28/briefing-note-nationality-and-borders-bill-eta/>

<sup>164</sup> <https://hansard.parliament.uk/lords/2022-03-08/debates/20397778-861E-4D27-B358-53B067DE72A3/NationalityAndBordersBill>

<sup>165</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-60675143>

<sup>166</sup> <https://hansard.parliament.uk/lords/2022-03-08/debates/20397778-861E-4D27-B358-53B067DE72A3/NationalityAndBordersBill>

<sup>167</sup> [https://www.irishtimes.com/news/ireland/irish-news/non-irish-eu-citizens-crossing-border-face-travel-clearance-requirement-after-mps-vote-1.4833667?utm\\_source=dlvr.it&utm\\_medium=twitter&utm\\_campaign=HP-SubDesc](https://www.irishtimes.com/news/ireland/irish-news/non-irish-eu-citizens-crossing-border-face-travel-clearance-requirement-after-mps-vote-1.4833667?utm_source=dlvr.it&utm_medium=twitter&utm_campaign=HP-SubDesc)

<sup>168</sup> Publication - Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill | Northern Ireland Human Rights Commission

EU citizens, was largely underpinned by EU free movement law. This included rights to work and access services etc. Such EU law continues to apply in Ireland for EU citizens and family members, but no longer applies in the UK post-Brexit save for British citizens in Ireland and those EU citizens resident or frontier working in the who have retained EU rights under Part 2 of the EU-UK Withdrawal Agreement.<sup>169</sup>

166. One consequence of both states seeking to plug the gap left by the removal of EU free movement law from the UK, and British citizens ceasing to be EU citizens was the advent of the concept of ‘reciprocal rights’ of the CTA. The areas generally covered by ‘CTA reciprocal rights’ are set out in a 2019 UK-Ireland non-binding Memorandum of Understanding.<sup>170</sup>
167. The advent of ‘CTA reciprocal rights’ is generally to resolve the issue of ensuring continued free movement (including rights to work, reside access services etc) for Irish citizens into Britain, and British citizens in Ireland. Consequently, reciprocal CTA rights have been expressly developed as largely applying only to British and Irish citizens. This could lead to a situation whereby a cross border public services previously open to a broader cohort of persons residing in the alternate jurisdiction are now only accessible to British and Irish citizens.

**The Advisory Committee may wish to ask the UK to conduct an assessment of the impact of excluding national minorities resident in the border area who are not British or Irish citizens from the ‘reciprocal rights’ of the CTA, in particular in relation to cross border services.**

### **Irish government CTA passport and border controls**

168. The main statutory basis for passport control into the Irish state is found in Section 11 of the Immigration Act 2004 (as amended) which requires persons to carry and produce passports when entering the State.<sup>171</sup> However, there is an express exemption to those duties for journeys across the land border. The exemption only applies however to persons who are Irish citizens, British citizens, and persons exercising EU rights (in practice EU/EEA citizens and their family members).<sup>172</sup>
169. As it is clearly not possible to tell who is Irish or British or exercising EU rights by looking at them, these checks, usually on cross border busses, have also taken place on the basis of quite blatant racial discrimination. This is either as to who is asked for passports, or who is expected to be carrying them.<sup>173</sup>

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<sup>169</sup> Irish citizens in NI were discouraged from doing so, and NI-born Irish citizens precluded from doing so by the UK, there was a specific scheme for ‘persons of NI’ to retain EU rights be joined by family members.

<sup>170</sup> For example, on cross-border health care see paragraph 9 Ireland-UK Memorandum of Understanding concerning the Common Travel Area and associated reciprocal rights and privileges (2019) “*The CTA affords British citizens residing in Ireland and Irish citizens residing in the UK the right to access emergency, routine and planned publicly funded health services in each other’s state, on the same basis as citizens of that state.*”

<sup>171</sup> <https://revisedacts.lawreform.ie/eli/2004/act/1/section/11/revised/en/html> Passports or equivalent travel documents.

<sup>172</sup> See subsections s11(4) and s11(5).

<sup>173</sup> Under s11(5) as amended. Originally this section only exempted Irish and British citizens. this was amended in 2011 to add persons exercising EU treaty rights, in light of *Ebere Dokie v. DPP*. The reference to British citizens was removed but added in again following Brexit.

170. This has led to the alarming circumstance whereby many black persons (including Irish citizens) resident in Northern Ireland who travel on cross border busses consider it necessary to carry passports, whereas white Irish citizens do not.
171. The Irish Deputy Police Commissioner has confirmed that at times the Garda (Irish police) will target particular nationalities, on occasions on the basis of information provided by the UK authorities.<sup>174</sup>
172. Northern Ireland residents who require visas to enter the Irish state also face a 'hard border' in not being able to travel across the land border without first acquiring a visa. This is not the case with non-visa nationals including EU citizens.

**The Advisory Committee may wish to ask the UK authorities to clarify CTA immigration cooperation with the Irish authorities in relation to cross border passport checks.**

**CAJ, March 2022**

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<sup>174</sup> See Policing Authority live stream recording, - February 2022 at 2:16 re cross border immigration checks  
<https://www.youtube.com/watch?v=rGQfi07xM9M&t=8170s>