

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



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

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© Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA

Tel: (028) 9024 3987

Fax: (028) 9024 7844

Textphone: (028) 90249066

SMS Text: 07786 202075

Email: information@nihrc.org

Website: www.nihrc.org

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INTRODUCTION

The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on measures which ought to be taken to protect human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland. The Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR) and other treaty obligations in the Council of Europe and United Nations systems.

The Commission, as the National Human Rights Institution for Northern Ireland, has a formal role in relation to monitoring and promoting compliance with human rights treaty-based obligations. These include the UK's commitments under the European Charter for Regional or Minority Languages ('the Charter'), and the present paper draws on the Commission's recent Parallel Report setting out its views on the UK's compliance with that instrument. In addition, in so far as is possible all legislation must be read and given effect in a manner compatible with the ECHR and it is unlawful for a public authority to act in a way that is incompatible with a Convention right.¹

The Inter-Departmental Charter Implementation Group (ICIG) led by the Department of Culture, Arts and Leisure (DCAL) has produced official guidance for public authorities in relation to duties under the Charter. This paper aims to address recurring questions relating to public authorities (particularly local government) seeking to discharge Charter obligations. The paper centres on general obligations and does not cover the specific duties in relation to the Irish language in the fields of education, broadcasting, the judiciary and transfrontier exchanges.

¹ Human Rights Act 1998, sections 3 and 6.

1. DEVELOPMENT OF MINORITY LANGUAGE RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

In a democratic society committed to human rights, the accommodation of existing [linguistic] diversity...becomes an important matter of policy and law.²

Positive obligations to promote minority languages, such as that alluded to above, are a relatively recent development. Historically indigenous languages across Europe and beyond had been suppressed by national or colonial projects of the powerful nation states. Such political projects were often monocultural and had seen 'linguistic unity' in their official language, and hence the development of a unilingual state, as a prerequisite to the dominance of their state-building or 'civilising' mission. In addition to directly coercive measures, what followed was often a familiar pattern of, first, banning the indigenous language within state institutions such as public office and the courts, and, subsequently, other institutions into which the state had expanded, notably the education system. The post-Second World War settlement saw steps to stem such practices. However, this was largely limited to the inclusion of provisions to ensure that persons were not discriminated against on the basis of language in the enjoyment of other human rights. The 1948 Universal Declaration of Human Rights stated:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, **language**, religion, political or other opinion, national or social origin, property, birth or other status.³

A similar provision appeared in the European Convention on Human Rights in 1950. This Convention made two other specific provisions on language in relation to persons arrested or before a court. However, neither are minority language rights per se but rather are procedural rights relating to due process of law, when the official language is not understood.⁴

Building on the Universal Declaration of Human Rights the UN adopted two legally binding Covenants in 1966, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights

² Organization for Security and Co-operation in Europe (OSCE) (1998) Oslo Recommendations regarding the linguistic rights of national minorities, preamble.

³ United Nations General Assembly (10 December 1948), Universal Declaration of Human Rights, Resolution 217A(III), Article 2.

⁴ ECHR Article 5(2) and Article 6(3).

(ICESCR). Both Covenants explicitly included language as a protected ground against discrimination. The ICCPR also went further by including explicit provision for minority rights:

In those States in which ethnic, religious or **linguistic minorities** exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, **or to use their own language.**⁵

This protection of minority language rights contains a largely passive formulation, not far removed from the concept of tolerance. Subsequently, this has developed over time to a requirement that states undertake proactive, positive action to protect and support minority languages within their own territories. In particular, there were significant developments in the 1990s with a 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities⁶ and two legally binding major Council of Europe instruments. The Framework Convention for National Minorities (FCNM)⁷ was opened for signature in 1995 and provides for individual rights in broad programme-type protections. The European Charter for Regional or Minority Languages was adopted in 1992 and entered into force in 1998.⁸ This instrument is framed to protect indigenous minority languages per se rather than directly generating individual rights. The UK is party to both instruments.

The explicit codification of language rights in such instruments mirror-images or reverses historical suppression by focusing on provision by public authorities including use in education, courts, parliaments and public services. This codification can be regarded as the logical extension of many core human rights concepts such as freedom of expression, non-discrimination and the right to private life.

1.1 The European Charter for Regional or Minority Languages

The Charter is a Council of Europe instrument and is nothing to do with the European Union. The Council of Europe, based in

⁵ International Covenant on Civil and Political Rights (ICCPR, adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 27.

⁶ UN General Assembly (18 Dec. 1992) Resolution 47/135.

⁷ Framework Convention for the Protection of National Minorities (FCNM), Council of Europe Treaty series no. 157.

⁸ European Charter for Regional or Minority Languages (ECRML - the Charter), Council of Europe Treaty Series no. 148.

Strasbourg (France), has 47 member countries covering virtually the entire European continent. It seeks to promote common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

The Charter does not cover the languages of migrants or sign language. This does not mean public authorities do not have duties in relation to users of these languages; obligations are present through domestic anti-discrimination legislation and other human rights commitments. While not the focus of this paper, further detail is provided below.

The practical provisions of the Charter are contained in Part II and Part III. **Part II contains general objectives and principles** by which public authorities are to base their policies, legislation and practice. **Part III contains specific undertakings** for measures in areas including education, public authorities, media, culture, economic and social life and transfrontier exchanges. The Charter takes an 'à la carte' approach whereby states can choose which languages they register, at what level and for which part of their jurisdiction. Part II applies to all languages registered by the state. The state must also specify its acceptance of at least 35 of around 100 optional commitments under Part III for a particular language. To do so, the language needs to enjoy a level of development and demand whereby such commitments can be fulfilled; as the language grows the state's commitments can be progressively increased.

The UK has registered the **Irish** language under Parts II and III of the Charter, accepting 36 specific Part III commitments. Welsh and Scottish Gaelic are also registered under Part III for their respective jurisdictions (with 52 and 39 commitments respectively).

Scots and, specifically in Northern Ireland, **Ulster Scots**, are registered under Part II of the Charter along with Cornish and Manx Gaelic (Isle of Man) in their respective jurisdictions.

1.2 Indigenous languages and the Charter, and obligations relating to 'non-indigenous' languages

The Charter only provides for indigenous languages and explicitly excludes the languages of migrants. There is also no scope for registering sign language. There is some debate as to how long it takes for a language to cease being a 'migrant' language: under the Charter this decision is left to the UK government. The linguistic traditions of the Irish Traveller community (known as Cant,

Gammon and Shelta) are also not registered under the Charter.

Indigenous languages can also be defined as the languages that were commonplace before the rise of what is now the dominant language (here, English). In this sense there are good reasons for affording specific protections to indigenous languages as provided for in the Charter, most notably that the instrument is designed to safeguard and protect the languages themselves and the cultural patrimony associated with them, rather than afford direct protections to individual users of the languages. The risk of a language dying out differentiates indigenous from most migrant languages; for example, Mandarin Chinese, as it is spoken by the best part of one billion people worldwide, does not need such protections. There are also questions of linguistic heritage and representation by the state. For example, specific commitments are made for Irish under the Charter in relation to signage or other material bearing place names; this is not surprising as many Northern Irish place names are English translations, or more commonly, transliterations, of the original in Irish. The usage of indigenous languages with public authorities is also regarded as crucial to both the status of such languages and the maintenance of a full spectrum of vocabulary. The explanatory report to the European Charter states:

...allowing the use of regional or minority languages in relations with [public] authorities is fundamental to the status of these languages and their development and also from a subjective standpoint. Clearly, if a language were to be completely barred from relations with the authorities, it would in fact be negated as such, for language is a means of public communication and cannot be reduced to the sphere of private relations alone. Furthermore, if a language is not given access to the political, legal or administrative sphere, it will gradually lose all its terminological potential in that field⁹

The formulation of specific protections for minority indigenous languages does not mean that there are no human rights duties in relation to minority ethnic and sign languages. Such duties are, above all, derived from protections against discrimination on grounds of ethnicity or disability. For example, 'banning' employees outright from conversing in their own language can be held as racial discrimination. There are certain procedural rights enshrined already within Articles 5(2) and 6(3) of the European Convention on Human Rights whereby, to ensure procedural fairness, the free assistance of an interpreter must be provided in court if the accused cannot comprehend the language used, and similarly the arrest and

⁹ European Charter for Regional or Minority Languages, Explanatory Report, para 101.

charges must be relayed in a language that he or she understands. Similarly, when English is not understood failure to provide an interpreter for essential services engages non-discrimination, and in a scenario such as emergency medical care, could engage Articles 2 (right to life) and 3 (inhuman and degrading treatment) of the ECHR. The Commission wishes to see this principle codified in a Bill of Rights for Northern Ireland, establishing, in respect of services essential to life health or security, a right to an interpreter or other assistance in a language (including sign language) that the service user understands.

In addition, there are other specific provisions for minority languages in other human rights instruments. There are cultural and identity rights of which language can be a core component; this could give rise to state obligations to encourage and facilitate the transmission of languages from parents to children, inherently linked to the human rights concept of dignity. Many rights are framed in relation to what it is reasonable and proportionate for a state to provide in accordance with the situation of particular languages. For example, the UK is party to the Framework Convention for National Minorities (FCNM), which contains a number of rights, including rights for the provision of part of education through minority languages and possibilities of using the minority language with public authorities. This is however a limited right, related proportionately to numbers, need and demand.¹⁰ So, for example, there will be a duty on the state where there are significant concentrations of Polish or Cantonese speakers to provide some own-language provision in the schooling system (which research indicates will also assist in English language learning). There is much less likely to be a duty for a lesser-used minority ethnic language spoken by a small number of persons. The FCNM also contains a duty on public authorities to have the names of persons recognised in their own language (thus preventing, for example, the imposition of transliterations such as recording Séamus as James).

1.3 The Irish language and Ulster Scots

Irish is registered under Part II and Part III of the Charter. Irish is one of the oldest languages in the world and belongs to the Celtic language group of Indo-European languages. Other languages in the Celtic branch are Breton, Cornish, Manx Gaelic, Scottish Gaelic and Welsh. Irish is the first official language of the Republic of Ireland and an official language of the European Union. The 2001

¹⁰ FCNM Articles 10, 11 and 14.

Census indicated that 10.4 per cent of the Northern Ireland population had “some knowledge of Irish”. The census data showed that Irish is used across Northern Ireland, although levels of knowledge vary slightly in different geographical areas.¹¹ Over 4,000 children are currently taught through the medium of Irish in schools in Northern Ireland: this figure has more than tripled in a 10-year period.¹² Research has shown significant advantages in terms of language development and other attainment measures for children in Irish-medium schools.¹³

Ulster Scots is registered under Part II of the Charter and is a regional type or variant of Scots. It is defined in the Belfast (Good Friday) Agreement implementation legislation as “the variety of the Scots language traditionally found in parts of Northern Ireland and Donegal”.¹⁴ Scots is from the Germanic language group and is closely related to English; there are a range of variants of Scots with no one standard form. The dominance of English over the centuries has led to a process of Scots being suppressed and converging with English. Speakers of Scots are effectively on a linguistic continuum with English at one end of the spectrum, English with a Scots flavour and, at the other end, persons whose Scots diverges more markedly from standard English. Scots is primarily a spoken tradition which has no standardised written format. Ulster Scots is found mainly in those parts of Northern Ireland that were settled by Scottish people, though its use is not confined to those of Scottish descent, and it is spoken by both Catholics and Protestants. Its main geographical areas in Northern Ireland are north Down, parts of Antrim and east Derry/Londonderry, although words and idioms from Ulster Scots are used in other parts of Northern Ireland.

¹¹ Council of Europe UK Third Periodical Report, MIN-LANG/PR (2009)2, p12.

¹² School Population for Primary and Post-Primary Pupils in Irish-medium Provision 1996/97–2007/08, Northern Ireland School Census, quoted in Department of Education (2008) Irish-medium Education Report, Table 3.2.

¹³ Analysis identified a pattern of Irish-medium children outperforming their counterparts in English-only schools, and demonstrated the cognitive gains and hence significant benefits of bilingualism: see: Iontaobhas na Gaelscolaíochta, ‘Groundbreaking research demonstrates underlying advantages of Irish-medium education’, press release, June 2009.

¹⁴ 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.

2. DUTIES FRAMEWORK FOR PUBLIC AUTHORITIES

2.1 Duties in relation to the Irish language under Part III of the Charter

The UK has made a number of binding commitments in relation to the Irish language in Northern Ireland under Part III of the Charter. Under Article 10 of the Charter these include, where justified, duties for public services to:

- provide for speakers to submit oral or written applications in Irish;
- allow public authorities to draft documents in Irish;
- permit/encourage the use of Irish as well as English in debates in Council chambers/the Northern Ireland Assembly;
- permit/encourage the use of traditional and correct forms of place names in Irish (in conjunction with English if needed).

The latter commitment in relation to place names is often read as applying to signage and logos containing place names, including the names of many local government districts.

Under Article 10 the UK has committed to public authorities providing translation or interpreting when required in order to discharge the above commitments. Under the same Article, commitments have also been made to allowing, where requested, the use or adoption of family names in Irish.

Also of particular relevance to local government are commitments under Article 12 in respect of public authorities that have a role in the field of cultural activities and facilities. These include:

- to encourage initiatives specific to Irish, and foster access to works produced in Irish;
- to ensure bodies responsible for organising or supporting cultural activities make appropriate allowance for incorporating knowledge and use of Irish in their activities;
- to promote measures to ensure such bodies have staff who have a full command of Irish as well as English;
- to encourage direct participation of representatives of users of Irish in providing facilities and planning cultural activities.

The UK has also entered into a range of specific commitments for public authorities in the fields of broadcasting, education, cross-frontier exchanges, and to encourage use of Irish in economic and social life.

2.2 Policy objectives and principles for Irish and Ulster Scots under Part II of the Charter

Part II of the Charter relates to both Irish and Ulster Scots and contains commitments to end past practices of restricting or excluding minority languages (e.g. rules stipulating 'English only' provision), as well as committing public authorities to linguistic diversity and to the promotion of respect, understanding and tolerance between linguistic groups. Part II also sets out principles and objectives which public authorities are to base their policies, legislation and practice, including:

- the recognition of minority languages as an expression of cultural wealth;
- the need for resolute action to promote minority languages in order to safeguard them;
- the facilitation and/or encouragement of the use of minority languages in speech and writing in public and private life.

This is along with other objectives and principles, including facilitating and promoting learning, research, links and exchanges, and ensuring that new or existing administrative divisions do not constitute an obstacle to the promotion of the minority languages.

These provisions apply to both Irish and Ulster Scots. This does not mean that exactly the same provision must be delivered for both: the Charter is explicit that each is to be treated in accordance with its own situation and within the areas it is used.¹⁵

Save for the specific provisions for Irish under Part III, the Charter is not prescriptive about the specific measures public authorities should adopt in, for example, taking resolute action to promote the language. Public authorities can therefore decide on the appropriate measures they wish to take to fulfil Charter commitments, provided that they do not conflict with the objectives or principles set out in the Charter or other instruments.

¹⁵ See paras 48-51 for further detail.

2.3 The Belfast (Good Friday) and St Andrews Agreements

The Belfast (Good Friday) Agreement 1998 also included a commitment to linguistic diversity which, drawing heavily on the language of the Charter, stated:

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 [minority] ethnic communities, all of which are part of the cultural wealth of the island of Ireland.¹⁶

The Agreement went on to list eight further specific UK Government commitments in relation to the Irish language, set in the context of the UK's subsequent ratification of the Charter. These included commitments "where appropriate and desired" to:

- take resolute action to promote the Irish language;
- facilitate and encourage the use of Irish in speech and writing in public and private life where there is appropriate demand;
- seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of Irish.

The development of proposals for a Bill of Rights for Northern Ireland emerges from the Agreement. In accordance with its own mandate set out in the Agreement and under domestic legislation,¹⁷ the Human Rights Commission, on 10 December 2008, delivered its final advice on the scope for a Bill of Rights for Northern Ireland to the UK Government. This included recommendation of a provision that:

... Public authorities must, as a minimum, act compatibly with the obligations undertaken by the UK Government under the European Charter for Regional or Minority Languages...¹⁸

¹⁶ Economic, Social and Cultural Issues, in Chapter 6, 'Rights, Safeguards and Equality of Opportunity', Belfast (Good Friday) Agreement, para 3.

¹⁷ Above, para 4; and Section 69(7), Northern Ireland Act 1998.

¹⁸ Northern Ireland Human Rights Commission (2008) A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008. Available: www.nihrc.org/bor. The advice also recommends the right for persons belonging to linguistic minorities to learn or be educated through their minority language where there are substantial numbers of users and sufficient demand.

The inclusion of this provision was in the context that the Charter is an instrument under which the state's commitments can be progressively increased. The intention is for an evolutionary approach to be undertaken and commitments strengthened in accordance with the developing needs of speakers. The Commission also recommended a freestanding right to non-discrimination, which would protect against language being used as a ground for discrimination.

In 2003, the British and Irish governments issued a Joint Declaration, within which the British Government reaffirmed that it "will continue to discharge all its commitments under the Agreement in respect of the Irish language".

The 2006 St Andrews Agreement between the British and Irish Governments committed the UK Government to introducing an Irish Language Act, working with the Northern Ireland Executive to enhance and protect the development of Irish, and affirmed that the UK Government believed in the need to enhance and develop Ulster Scots and would support the Northern Ireland Executive to take this forward.¹⁹ Some of these commitments were taken forward in legislation – the Northern Ireland (St Andrews Agreement) Act 2006 introduced a statutory duty on the Northern Ireland Executive to adopt strategies to "enhance and protect the development of the Irish language" and to "enhance and develop the Ulster Scots language, heritage and culture".²⁰ All of these commitments are awaiting implementation.

2.4 Minority language rights in UN and other Council of Europe instruments, including the European Convention on Human Rights

There are a range of human rights commitments to which the UK has entered. These include United Nations and Council of Europe instruments which are legally binding on the UK but not directly enforceable in the courts, although they can be relied on in court cases to assist in interpreting legislation. The main provisions of the European Convention on Human Rights are directly accessible in local courts having been given further effect by the Human Rights Act 1998. Authoritative but non-legally binding guidance can also be found in 'soft law' declarations of the United Nations and other bodies.

¹⁹ Annex B, point 5 (Irish) point 6 (Ulster Scots).

²⁰ Section 15 of the Northern Ireland (St Andrews Agreement) Act 2006, which inserts new section 28D to the Northern Ireland Act 1998.

As set out above, the protection of minority language rights has evolved over time from a more passive formulation, not far removed from the concept of toleration (“minorities shall not be denied the right [...] to use their own language”, Article 27, ICCPR), to a requirement that states undertake proactive, positive action to protect and support minority languages within their own territories. The development of a range of positive obligations on public authorities is a relatively recent development, with a number of instruments coming into force in the 1990s. Much of the development of minority language rights is in effect the elaboration and codification of long-standing human rights concepts. For example, freedom of expression has been held to include expression not only in the dominant, but also the minority language; the right to family life has been held to incorporate the right for an individual to use his or her name in his or her minority language in dealings with the state, and the concept of non-discrimination has included prohibition of discrimination on the grounds of language.

The directly binding duties under the Human Rights Act 1998 include that in so far as is possible all legislation must be read and given effect in a manner compatible with the European Convention on Human Rights, and it is unlawful for a public authority to act in a way which is incompatible with a Convention right.²¹

The jurisprudence of the European Court of Human Rights can be read as upholding a requirement for linguistic pluralism and minority rights. The Convention only permits interference with a number of rights relevant to minority languages when it is deemed “necessary in a democratic society”. The Court has elaborated that in outlining the hallmarks of a democratic society it has consistently “attached particular importance to pluralism, tolerance and broadmindedness”. The Court also asserted that “democracy does not simply mean that the views of the majority must always prevail”,²² so that the rights of minorities should not be overwritten by the objections of majorities. Where conflicts exist over minority rights, the role of public authorities is:

...not to remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other...²³

²¹ Human Rights Act 1998, sections 3 and 6.

²² See: *Barankevich v Russia* 2007 [paras 30-31].

²³ *Agga v Greece*, 2002 [para 60].

2.5 Duties and the policy development process

These duties under the Convention are particularly relevant in the policy development process. While there is at present no statutory duty to conduct a Human Rights Impact Assessment (HRIA), it is good practice to do so. The Office of First Minister and deputy First Minister has provided a template HRIA for Convention rights; adherence to this process reduces the risk that policy will be incompatible with the Convention. In addition to the Convention, it is advisable to screen and assess policy against other binding human rights instruments, especially when dealing with minority language policy, the framework and principles provided by the Charter and similar instruments.

Further, the duty to interpret legislation in a manner compatible with the ECHR is complemented by the legislative obligations in section 75 of the Northern Ireland Act 1998. Section 75(1) contains a statutory duty on most public authorities to promote equality of opportunity across nine grounds, and *subordinate to this* is a duty to have regard to the desirability to promote good relations on racial grounds or community background in section 75(2). The public authority must have arrangements for assessing its policy (a screening and Equality Impact Assessment, EQIA) and publish these along with details of measures considered to mitigate any identified 'adverse impact' of the policy, or alternative better suited policies (in relation to the duties of promoting equality of opportunity rather than good relations).

Formal advice on the section 75 process is provided by the Equality Commission for Northern Ireland, which has produced guidance on the duties and has oversight of anti-discrimination legislation (although none of the current domestic law includes language as a ground). However, while use of minority languages is not exclusive to any community, EQIA exercises often point to a differential whereby there are higher numbers of speakers within different section 75 categories. This can be used to examine indirect impacts of policy, so that duties may be found to arise to some extent in respect of minority language users. More generally in the policy appraisal processes, including any alternative policies or mitigating measures adopted, public authorities should be conscious that they **cannot act in a manner incompatible with Convention rights**, which include the jurisprudence on non-discrimination, pluralism and tolerance in relation to language and other minority rights.

3. NON-DISCRIMINATION ON GROUNDS OF LANGUAGE

3.1 Human rights law obligations

The Human Rights Act 1998 includes the prohibition on discrimination of Article 14 of the European Convention on Human Rights, which explicitly includes language as a non-discrimination ground:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, **language**, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The level of protection afforded by Article 14 is therefore limited to prohibition of discrimination by public authorities in matters that engage other Convention rights. The provision is not a freestanding right against discrimination, nor is it directly applicable to the private sector (unless carrying out public functions which fall within the remit of the Human Rights Act 1998).²⁴

The European Court of Human Rights has held that differential treatment on the grounds of language is only discriminatory if there is no objective or reasonable justification that pursues a legitimate aim. In effect, decisions by the Court concerning discrimination on the basis of language have related to questions of what it is reasonable and proportionate for a public authority to provide in particular circumstances. Where discrimination relates to another Convention right a public authority will need to objectively and reasonably justify a decision not to provide for a minority language, or it can be held to have discriminated.²⁵ A codification of this formulation is found in other instruments; for example, the Framework Convention for National Minorities (to which the UK is a party) states:

In areas inhabited by persons belonging to national minorities **traditionally or in substantial numbers, if there is**

²⁴ In the future such a right could be incorporated by the UK ratifying ECHR Protocol 12, through the introduction of a Bill of Rights for Northern Ireland inclusive of such a clause, through the inclusion of language as a ground in a single equality act for Northern Ireland or within non-discrimination provisions in an Irish Language Act (or in some combination of such measures).

²⁵ For jurisprudence, see *Belgian Linguistics* cases 1 EHRR 22552 (1968); *Cyprus v Turkey* (app. No 25781/94) 10 May 2001; and *Bulgakov v Ukraine* (app. No. 598994/00) 11 Sept. 2007.

sufficient demand, the Parties shall endeavour to ensure, **as far as possible** and within the framework of their education systems, that persons belonging to those minorities have **adequate opportunities** for being taught the minority language or for receiving instruction in this language. [Article 14(2), emphasis added]

The Commission is aware of instances whereby the formulation of this right appears to have been misinterpreted in relation to minority ethnic languages. In these instances an erroneous interpretation has arisen that equal provision must be made for all minority ethnic languages, leading to the misconception that to provide for one would open up liabilities for all other languages. The net result has been the suggestion that no languages should be provided for. This is a misinterpretation of the concept of non-discrimination: the legal formula clearly provides scope related to need and proportionality, so that the duty of a public authority is to set out an objective basis for decisions and provide provision where it is reasonable to do so.

Likewise, the Charter obligations do not mean that exactly the same provision must be made for, say, Irish as the minority language as for English as the dominant language (de facto, the 'official' language). Article 7(3) of the Charter does not permit 'unjustified distinctions', but does permit justified distinctions meaning, among other factors, that distinctions must not constitute an obstacle to the maintenance or development of minority languages.²⁶

3.2 Discrimination against English speakers?

Moreover, positive action to promote or provide for minority languages should not be taken as constituting discrimination against speakers of English. The principle of non-discrimination does not prevent public authorities from taking special measures for minority languages in order to promote full and effective equality, provided there is an objective and reasonable justification for such measures. The Charter states (at Article 7(2)):

The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.

²⁶ Charter Explanatory Report, para 72.

The Charter and other human rights instruments provide for linguistic pluralism rather than monolingualism; this protects dominant as well as minority languages. For example, under the Charter, commitments to allow Irish in debates in the Northern Ireland Assembly must not mean the exclusion of English from the debates; the Charter protects English as well as Irish speakers.

3.3 Differential treatment of Irish and Ulster Scots

Measures needed to safeguard Ulster Scots are not likely to be the same as those for Irish and vice versa. There is no onus from the human rights framework to provide exactly the same treatment for unrelated linguistic traditions at entirely different stages of development, but rather to provide proportionate and appropriate support to both.

While similar languages could be compared it is highly unlikely that the very fact of differential treatment for Irish and Ulster Scots would constitute 'discrimination' per se, as like is not being compared with like in any credible manner. Not only are both objectively different in linguistic terms, it is also difficult to envisage for Ulster Scots the development within the foreseeable future of the level of usage and demand for linguistic provision that currently exists for Irish in, for example, education, cultural life and the media. The Commission can only base its position on the objective reality that no such parity exists, and has voiced concerns about the potential for policy to take an erroneous approach to non-discrimination by requiring measures to allocate resources *equally*, rather than *equitably* and proportionately to need.

The duty of public authorities under the Charter is to treat the Irish language and Ulster Scots each in accordance with their own situation, and therefore to come up with protection and promotion measures appropriate for Irish and measures appropriate for Ulster Scots. In particular, public authorities should avoid refraining from taking action to support Irish simply because it is not possible, proportionate or necessary to implement an identical measure for Ulster Scots. These issues have been dealt with directly by the Council of Europe Committee of Experts on the Charter who have re-emphasised that Irish and Ulster Scots should each be protected and promoted in accordance with its own situation. The most recent monitoring report stated:

In the [2007] evaluation report²⁷ the Committee of Experts observed that inappropriate claims for parity of treatment between Irish and Ulster Scots in a number of instances led to the result that no measures were taken for either language, since it was not practically possible to apply the measures to Ulster Scots. The Committee of Experts encountered similar issues in the current monitoring round, in particular in the general support of the languages. For instance, the opinion was even presented to the Committee of Experts that before any further steps were taken to promote Irish, the Ulster Scots language should be brought to the same position.

The Charter is based on treating each regional or minority language in accordance with its specific situation. The situation of the two languages is quite different, and language measures specifically directed towards each language are needed...²⁸

The Charter has been very carefully framed so as to establish a correlation between the state's obligations and the existence of reasonable levels of demand in particular areas, and more broadly it is the duty of public authorities to respect, protect and fulfil through progressive realisation measures to promote recognised rights on an objective, fair and rational basis. The Council of Europe has been critical when this is not the case. For example, the Committee of Experts recently noted a former DCAL Minister's intention for strategies for the Irish language and Ulster Scots to "strive towards parity... including an equal amount of funding" between the two, and warned against such an approach:

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 Irish-speakers or Ulster Scots-speakers and will hold back the development of both...²⁹

3.4 Banning or restricting minority languages

...the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. [Preamble, the Charter]

²⁷ Council of Europe, Application of the Charter in the United Kingdom (ECRML (2007)2) para 32.

²⁸ Council of Europe (21 April 2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (2010)4, paras 16-17.

²⁹ As above, paras 20, 57 and Finding D.

One of the most basic of rights is the right to use a minority language in private or public life. Any restriction on such usage by a public authority engages Convention rights (primarily freedom of expression and non-discrimination on grounds of language) as well as the provisions of the Charter.

Restrictions by public authorities

The onus would be on the public authority to ensure that there is objective and reasonable justification for any restriction. An example was provided by a judicial review in 2005 to the Northern Ireland Prison Service Standing Orders, which had restricted the use of the Irish language on prison handicrafts to “a readily understood inscription”. The rationale was that the messages on all materials leaving the prison had to be checked. This was challenged by an Irish-speaking prisoner as a discriminatory violation of freedom of expression. Deeny J held that the rule did constitute unlawful interference in the freedom of expression protected by Article 10 ECHR, and instructed revision of the Standing Order. The ruling placed particular emphasis on the reasonableness and proportionality of the restriction, noting that as the prison service had Irish-speaking staff who could have read the inscriptions, there was no disproportionate burden on the authorities in checking that the inscriptions fell within prison rules.³⁰

Restrictions by private actors

In the absence of freestanding protection against discrimination on grounds of language, there is no direct protection against, for example, a private-sector employer banning employees from using their minority language with other fellow speakers in private conversations at work. The only recourse for victims is therefore via claims of indirect discrimination on other grounds, such as racial group or community background, based on a rule being provided that disproportionately impacts on categories of persons (or perceived categories) who are more likely to speak the minority language. For example, in Northern Ireland there are more people in the Irish, Catholic or nationalist categories who speak Irish than in the British, Protestant or unionist categories. This is not ideal, however, as Irish speakers are in fact a minority within all three of the Irish, Catholic and nationalist categories, and Irish speakers are by no means found exclusively within these three categories. Nevertheless, in the absence of direct protection against discrimination on the grounds of language, indirect discrimination protections have been harnessed to protect victims. One example arose when a multilingual employee in a pub was banned by the

³⁰ *Conor Casey v Governor of Maghaberry* [2005] NIQB 31.

employer from speaking Irish to Irish-speaking customers (but not from addressing customers in English or in his other languages). The employee lodged discrimination proceedings with the Fair Employment Tribunal. This case was supported by the Equality Commission and was settled by compensation to the victim without admission of liability.³¹

Restrictions in public authority signage

A further example of public authorities developing policy that restricts minority languages and engages human rights compliance is found in the sphere of signage. Notably from a human rights perspective a rule does not have to *explicitly* ban a minority language to be discriminatory; compliance could be assessed on the basis of whether such a rule had the *purpose or effect* of excluding the minority language. For example, 1949 local government legislation that prevented street signs in Irish did not explicitly ban the language but ruled that signs had to be in “English only”.³² Nowadays, this would conflict with provisions of the Charter that relate to the acknowledgment of place names in minority languages. In that context the Human Rights Commission has commented on the relatively recent adoption of policy by Belfast City Council that, in effect, prohibits the use of Irish in signage on all of the Council’s facilities. The policy stipulates that the name of the facility can be in English only, and that English is the only language permitted on signs inside Council properties, the sole exception being a multi-lingual welcome sign.³³ This policy generally conflicts with the spirit of the Charter and, to the extent that it prevents signage including place names in the traditional and correct form in Irish, it appears to be incompatible with Article 10(2)(g) of the Charter. The state’s acceptance of a commitment to allow or encourage the adoption of place names in Irish implies an obligation not to allow a subordinate organ of the state, in this instance a municipal council, to prohibit the practice. The Commission advised that the Council’s policy also appears to conflict with Article 7(1)(d) (facilitation and/or encouragement of the use of minority languages in public life), 7(2) (unjustified restrictions), 10(4) (translation as required), 12(1)(d) (in respect of premises where cultural activities take place) and 13(1)(d) (facilitation of the use of minority languages in economic and social life). In short, one minor and ill-considered municipal regulation could on a number of grounds have the effect of placing the United

³¹ *Aodhán Connolly v Botanic Inns*; see: Equality Commission for Northern Ireland (ECNI), *Decisions and Settlements Review 2005-6*, p45.

³² The former Public Health and Local Government (Miscellaneous Provisions) Act (Northern Ireland) 1949 (repealed by Local Government (Miscellaneous Provisions) Order 1995).

³³ Minutes of Strategic Policy and Resources Committee, Belfast City Council, 16 November 2007, referencing extension of the [September 2006] Language Policy.

Kingdom in breach of an international human rights treaty that it had ratified.

The principle of removing unjustified restrictions set out in Article 7(2) of the Charter, as applied to Irish in the UK, states:

The United Kingdom undertakes to eliminate, if it has not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of Irish and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of Irish aimed at promoting equality between the users of Irish and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.³⁴

There a similar commitment by the British government in the Belfast (Good Friday) Agreement which states:

...seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the [Irish] language³⁵

A further area in the field of non-discrimination is whereby inclusion of Irish language requirements in a job specification has been perceived as indirect discrimination on the basis of community background. However, if the criterion is a genuine requirement for the job and can be shown to be both justifiable and a proportionate means of achieving a legitimate aim, it would not constitute discrimination. The onus would be on the employer to demonstrate that this was the case, and for public authorities the very existence of the UK's positive obligations to promote the Irish language would assist in demonstrating such a case.³⁶

³⁴ Database for the European Charter for Regional or Minority Languages, Charter as applied to Irish in the United Kingdom; Article 7(2).

³⁵ Agreement reached in multiparty talks 'Economic, social and cultural issues', para 4.

³⁶ Further guidance on indirect discrimination in employment and justification of criteria can be obtained from the Equality Commission.

4. POSITIVE ACTION: PROMOTION THROUGH CORPORATE IDENTITY

As noted above, with the exception of the specific provisions for Irish under Part III, the Charter is not prescriptive about the measures public authorities may take to promote the language. Public authorities can therefore decide on the appropriate measures they wish to take to fulfil Charter commitments, provided they do not conflict with the objectives or principles set out in the Charter or other instruments.

A number of government departments and local authorities have decided to take this forward through promoting bilingual or trilingual corporate identities, through names, logos, stationery etc. In addition to this being a manner in which positive action can be taken to promote the minority language under Article 7 of the Charter, as local authority names invariably incorporate place names, the inclusion of an Irish form provides an opportunity to facilitate usage of “traditional and correct forms of place-names in regional or minority languages” as provided for by Article 10.

4.1 Promotion of minority languages and the rights of others

The Commission has on several occasions been asked to provide advice when organisations in fulfilling commitments to promote the Irish language, through for example bilingual policies, have subsequently received a complaint alleging that obliging staff to promote Irish violates their rights. One of these instances relates to local government – when the Council of Limavady/Léim a’ Mhadaidh consulted over the extension of the Council’s bilingual logo in early 2009.³⁷ The Commission concluded that promotion of minority languages in logos or corporate materials in Northern Ireland is entirely in step with the positive human rights obligations of the United Kingdom, and that official acknowledgement of a minority language cannot constitute a violation of the rights of those who do not use that language.

The Commission has advised that from a human rights perspective it is difficult to see any legitimate grounds for objecting to the Irish language being promoted by an employer or, more generally, a public authority. The Charter establishes that the right to use Irish

³⁷ Limavady Borough Council, *Extension of the Use of the Council’s Bilingual Logo* Equality Impact Assessment, Draft Report for Consultation, January 2009.

in private and public life is an inalienable right. In general, the promotion of Irish through corporate materials would seem entirely in step with the requirement that states undertake proactive, positive action to protect and support minority languages. Articles within the Charter require public authorities to base policies, legislation and practice on objectives and principles that, under Part II, include taking resolute action to promote Irish, and the facilitation of use of Irish in public life. Again the Charter is not prescriptive in relation to these duties as to what actions a local authority should take: the principles are permissive rather than prescriptive. There are however a number of more specific obligations from Part III, Article 10, in relation to local authorities and Irish. Article 7(2) of the Charter also make it clear that special measures in favour of Irish are not to be considered an act of discrimination against speakers of English.

4.2 Freedom of expression and ‘sensitivities’

On broader issues, the Commission has drawn attention to the fact that there is no “right to be offended” by another party exercising a right.³⁸ This is a general principle of freedom of expression (ECHR Article 10, which must be read in conjunction with ECHR Article 14 on non-discrimination on grounds that include language). The Commission is aware of arguments that there are ‘sensitivities’ regarding the Irish language. Indeed the UK government within the Belfast (Good Friday) Agreement encourages the Assembly to sustain commitments to the Irish language in a manner that ‘takes account of the desires and sensitivities of the community’ (albeit it is not clear if this refers to the Irish-speaking or English-speaking community.)³⁹ In general *restricting use or promotion of Irish* to accommodate the ‘sensitivities’ of others would be incompatible with freedom of expression. However, both ECtHR jurisprudence and the Charter provide a clear indication of how the sensitivities of non-speakers can be accommodated, namely through the prevention of monolingualism in the minority language. The promotion of linguistic pluralism implicit in ECtHR jurisprudence is reflected in and explicitly codified into the Charter. For example the UK’s commitment to allow Irish to be used in debates in the Assembly and Council chambers stands alongside an explicit provision that this has to be done without excluding the use of English. The same principle indicates that the sensitivities of non-

³⁸ *Handyside v UK* (app. no. 5493/72) (1976) 1 EHRR 737 [49].

³⁹ Agreement reached in multiparty talks ‘Economic, social and cultural issues’, para 4.

Irish speakers could be met by ensuring that English is not excluded from appearing alongside Irish in corporate identities.⁴⁰

As stressed throughout this paper, under the Human Rights Act 1998 the interpretation of legislation and actions of public authorities *must* be in a manner compatible with ECHR rights. These include the framework around linguistic diversity, respect for minority language rights and the principle that the duty of public authorities is “not to remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other”.⁴¹ This is important when considering alternative policies or mitigating measures further to an impact assessment of equality of opportunity. Approaches that seek to restrict any expression deemed ‘divisive’ may be particularly problematic if applied to minority languages, as they would only effectively permit monolingualism in English. In addition to addressing the matter that no recognised ‘right’ appears to be being violated by promoting Irish, there have also been assertions that taking special measures for Irish speakers constitutes indirect discrimination against others (but not by contrast an assessment that not taking such measures would constitute discrimination against Irish speakers on the same indirect grounds). It is also therefore worth re-emphasising that actions to promote Irish which either take account of its circumstances or merely provide a level of equality with English speakers are not to be considered discriminatory under the Charter. This is an issue that has also been dealt with directly by the Council of Europe:

The Committee of Experts has been informed about several instances, especially within local councils, where it was decided not to promote or use the Irish language as it may contravene section 75 of the Northern Ireland Act... The Committee of Experts emphasises that the adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not to be considered an act of discrimination against the users of more widely used languages.⁴²

⁴⁰ Article 10(2)(g): the only potential exception to this is when the traditional and correct forms of place names in Irish are used or adopted by public authorities. This can be done monolingually (in Irish only) unless it is ‘necessary’ to include English, for example, if the name is not sufficiently well known to be reasonably accessible to all. At present, given the backdrop of exclusion from Irish from signage this is likely to be the case, but may not be in the future.

⁴¹ *Agga v Greece* 2002 [para 60].

⁴² Council of Europe (2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (21 April 2010)4. paragraph 123.

Should objections to the use of Irish or other minority languages be based on intolerance or prejudice against the language, there is a positive duty on the state party to take measures to address this. This should be undertaken through measures that tackle intolerance, rather than penalising the minority language, for example, through linguistic diversity training. This is in keeping with the commitments to promote respect, understanding and tolerance of Irish contained in Article 7(3) of the Charter and the Belfast (Good Friday) Agreement.

The legal basis for complaints has been grounded in attempting to equate the promotion of a language with a symbol or an emblem. Symbols such as Union flags or Irish tricolours, portraits of the Queen or of the Irish President, which identify community allegiance have been subject to lawful restriction in Northern Ireland. It is difficult to see how a language could be seen in this category, not just because of the human rights obligations attaching to language, but also given that *a* language has to be used in the workplace for communication, and *any* language could be objected to. The section of the Belfast (Good Friday) Agreement that outlines positive commitments to the Irish language deals separately with the issue of the sensitivity of symbols and emblems for public purposes, establishing that symbols and emblems are to be treated distinctly from languages.

Appendix 1: The Charter, Article 10

Administrative authorities and public services

- 1 Within the administrative districts of the State in which the number of residents who are users of Irish justifies the measures specified below and according to the situation of Irish, the United Kingdom undertakes, as far as this is reasonably possible:
 - a (...)
 - iv to ensure that users of Irish may submit oral or written applications in Irish; or
 - (...)
 - c to allow the administrative authorities to draft documents in Irish.

- 2 In respect of the local and regional authorities on whose territory the number of residents who are users of Irish is such as to justify the measures specified below, the United Kingdom undertakes to allow and/or encourage:
 - (...)
 - b the possibility for users of Irish to submit oral or written applications in Irish;
 - (...)
 - e the use by regional authorities of Irish in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;
 - f the use by local authorities of Irish in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;
 - g 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.

- 3 With regard to public services provided by the administrative authorities or other persons acting on their behalf, the United Kingdom undertakes, within the territory in which Irish is used, in accordance with the situation of Irish and as far as this is reasonably possible:
 - (...)
 - c to allow users of Irish to submit a request in Irish.

- 4 With a view to putting into effect those provisions of paragraphs 1, 2 and 3 accepted by them, the United Kingdom undertakes to take one or more of the following measures:
 - a translation or interpretation as may be required (...)

- 5 The United Kingdom undertakes to allow the use or adoption of family names in Irish, at the request of those concerned.

Appendix 2: The Charter, Part II, Article 7

Objectives and principles

1. In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the Parties shall base their policies, legislation and practice on the following objectives and principles:
 - A. the recognition of the regional or minority languages as an expression of cultural wealth;
 - B. the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question;
 - C. the need for resolute action to promote regional or minority languages in order to safeguard them;
 - D. the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life;
 - E. the maintenance and development of links, in the fields covered by this Charter, between groups using a regional or minority language and other groups in the State employing a language used in identical or similar form, as well as the establishment of cultural relations with other groups in the State using different languages;
 - F. the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages;
 - G. the provision of facilities enabling non-speakers of a regional or minority language living in the area where it is used to learn it if they so desire;
 - H. the promotion of study and research on regional or minority languages at universities or equivalent institutions;
 - I. the promotion of appropriate types of transnational exchanges, in the fields covered by this Charter, for regional or minority languages used in identical or similar form in two or more States.
2. The Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.
3. The Parties undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in

particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective.

4. In determining their policy with regard to regional or minority languages, the Parties shall take into consideration the needs and wishes expressed by the groups which use such languages. They are encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to regional or minority languages.
5. The Parties undertake to apply, *mutatis mutandis*, the principles listed in paragraphs 1 to 4 above to non-territorial languages. However, as far as these languages are concerned, the nature and scope of the measures to be taken to give effect to this Charter shall be determined in a flexible manner, bearing in mind the needs and wishes, and respecting the traditions and characteristics, of the groups which use the languages concerned.