Response to Department of Culture, Arts and Leisure on Proposed Irish Language Legislation

1. 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 legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland. In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.

2. The Commission is responding in this paper to the consultation document issued by the Department of Culture, Arts and Leisure (DCAL) on 13 March 2007, which outlined indicative clauses for an Irish Language Bill. This followed an earlier consultation on a document issued in December 2006.

Relevant international standards

3. The Commission’s response is informed by two key Council of Europe instruments, the Framework Convention for the Protection of National Minorities (the Framework Convention), and the European Charter for Regional or Minority Languages (the Charter). In addition the Commission has had regard to the following standards:

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1 Northern Ireland Act 1998, s.69(1).
2 Ibid., s.69(3).
3 Ibid., s.69(4).
4 Ibid., s.69(6).
a. the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities;
b. provisions of the International Covenant on Civil and Political Rights (ICCPR);
c. provisions of the European Convention on Human Rights (and the Human Rights Act 1998), in particular Articles 10 and 14;
d. the UN Declaration on the Rights of Persons Belonging to National Minorities; and

The Commission’s position

4. The Commission’s position on language policy, practice and legislation is based on two fundamental principles. The first is that we endorse a rights-based approach; the second is that our bottom line is full conformity with international human rights commitments entered into by the United Kingdom in treaties, notably, in this context, the Framework Convention and the Charter.

5. While these principles have informed the present response in relation to the Irish language, they will be applied similarly in relation to any future consultation responses or other advice in respect of Ulster Scots or other language issues.

6. One matter that flows from the second principle is that, should the Assembly agree on an approach that contravened the international standards, or fail to agree on any approach, this Commission would then look to the United Kingdom Parliament to take responsibility for ensuring respect, protection and fulfilment of the commitments entered into by the state.

7. These international obligations include, in addition to human rights treaties, the following provision in the St Andrews Agreement (October 2006):

   Government will introduce an Irish Language Act reflecting on the experience of Wales and Ireland and work with the incoming Executive to enhance and protect the development of the Irish Language.

5 All of these documents are available on request from the Commission.
8. “Reflecting on the experience of Wales” requires legislators to take note of the scope of the Welsh Language Act 1993, the official promotion of bilingualism, and the fact that in Wales the Welsh language benefits from a much wider application of Charter undertakings than has to date been the case for Irish in Northern Ireland. Similarly, “reflecting on the experience” of the Republic of Ireland means that the Assembly should take account of the Constitution’s designation of Irish as an official language (formally, though not in practice, the first official language), with all that flows therefrom in terms of support for the language’s development and, in particular, the right of everyone to choose Irish as their medium of communication with any public authority.

The DCAL proposals

9. The question for the Commission, then, is whether the legislative proposals put forward by DCAL (a) indicate a rights-based approach, and (b) give full effect to the specific obligations recognised in this matter by the state. The proposals are deficient in both respects.

10. The ministerial foreword to the March document in fact indicates a substantial retreat from the rights-based approach favoured by a vast majority of respondents to the December 2006 consultation. The March document is limited to proposing clauses to establish a regime of “Irish language schemes” and an office of Commissioner to monitor and encourage their implementation; it is about systems and services, not about rights. The Minister describes the indicative clauses as representing “a middle ground approach” that “will not meet the expectations of those who wish to see the strongest possible legislative provision promoting and protecting the Irish language”. The schemes approach is said to be aimed at “building consensus over a period of time”.

11. A long-term search for consensus is not an appropriate basis on which to conceptualise the protection of human rights, most especially where the rights of linguistic or any other minorities are concerned. The priority for any administration committed to governance based on human rights must be to legislate and direct resources as necessary to recognise, respect, protect and fulfil human rights, having particular regard to minority rights. If it is ever the case that there is any lack of understanding or consensus around rights, the administration should nevertheless legislate, and thereafter can and should work assiduously to gain the widest possible public acceptance of those rights. This is what has happened in Wales, where general acceptance of language rights has developed over the years following the enactment of the legislation. The broadest possible consensus is of course much to
be desired, but the achievement of consensus is not a precondition for giving people access to their rights.

12. The protection of national minorities has evolved over the last 50 years from a 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 cultures within their own territories. For example, the Framework Convention states in Article 1: “The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority.” That Convention goes on to stipulate a number of areas, including in relation to language, where the state party recognises its obligation to take special measures to ensure effective equality and participation.

13. The most comprehensive list of principles in relation to the protection of language as it is understood in contemporary Europe can be found in the Charter. On ratification, a state must stipulate the minimum measures it will apply, so that these are effectively recognised as the rights of the relevant linguistic minority, with the state accepting all the duties required to ensure enjoyment of those rights. Over time, the state may adopt additional measures, and on each occasion that the implementation process involves such steps, these in turn signify rights and duties. Although the Charter is not framed as a series of proclamations of individual rights, its application in the national context must give rise to entitlements for individuals and groups, and the most effective approach in implementation through domestic law is one that moves beyond the language of duties and entitlements to speak explicitly of rights.

14. The list of 36 Charter paragraphs to be applied in respect of Irish (given at Annex C of the December 2006 DCAL consultation paper), while worded in terms of activities or policies to be pursued by the state, is in its practical outworkings more or less indistinguishable from the concept of individual rights. The Commission’s preference would be for reworking Charter (and other relevant treaty) commitments to provide a clear statement of individual rights, rather than duties from which rights may only be inferred. Where a state wishes to give legislative effect to its Charter commitments, there is of course no requirement for it to use exactly the same terminology in domestic law as in the international instrument; where an obligation on the state party can best be secured and understood by defining the corresponding right and making it justiciable, that is a perfectly valid and satisfactory way of securing the treaty’s purpose. That, indeed, is the obvious way to proceed in
a state where a substantial body of rights law already exists, and it is the approach recommended by the Human Rights Commission. But even with its focus on duties, the Charter can be described as offering a rights-based approach, and the general objectives and principles that it enunciates are wholly consistent with the notion of language rights as human rights.

15. Those principles, expressed or understood similarly in other international human rights instruments, include the following:

   a. recognition of regional or minority languages as an expression of cultural wealth;
   b. respect for the geographical area of each regional or minority language;
   c. the need for resolute action to promote such languages;
   d. facilitation and/or encouragement of the use of such languages, in speech and writing, in public and private life;
   e. provision of appropriate forms and means for the teaching and study of such languages at all appropriate stages;
   f. promotion of relevant transfrontier exchanges;
   g. prohibition of all forms of unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger its maintenance or development;
   h. promotion by states of mutual understanding between all the country’s linguistic groups.6

Language schemes

16. While the “language schemes” set out in the legislative proposals could, over time, contribute to the progressive realisation of the right to access public services via the Irish language, such schemes offer a more limited potential when they are constructed outside a human rights framework. A rights-based Irish Language Act would offer a more compelling and more effective approach than schemes that merely set out vague targets, with a low threshold for compliance, and then periodically require the agencies concerned to document their progress, or the lack of it. Schemes could, of course, be incorporated into a rights-based Act, in the sense of requiring authorities to plan for and resource the delivery of the relevant rights; but what the DCAL draft appears to present is a vision of the state conceding such delivery of Irish language services as may command general tolerance. Language rights are apparently seen as belonging in a negotiable arena of public policy, where political consensus is the highest value.

6 www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/1_The_Charter/_summary.asp
17. If the non-rights-based schemes approach is to be adopted, the schemes must offer real content, including clear timetables for achieving standards. There should also be an expectation that the range of public bodies required to have schemes should extend over time, with such support as might be required to enable smaller bodies to develop and deliver services. As DCAL states, the language scheme model is not inconsistent with the Charter, nor with the legislation in force in neighbouring jurisdictions; but as noted above, the Charter is also consistent with a rights-based Act, and the latter approach would require a significantly higher baseline than might be expected from schemes alone.

18. Proponents of the equality schemes required under s.75 of the Northern Ireland Act 1998, a regime quite comparable to the language schemes, would acknowledge that they do not of themselves prevent, expose or punish individual violations of non-discrimination rights, though over time they may, if pursued with enthusiasm, improve the culture and performance of an organisation. Just as it is not possible to ‘police’ compliance with every equality scheme, at the present time it is difficult to envisage how the state might monitor compliance with Irish language schemes across the large number of public sector bodies in Northern Ireland. To do so effectively would require substantial inspection machinery, with access to significant expertise that may not be readily available. An approach based on enabling individuals to exercise rights in their dealings with public bodies would allow rights holders themselves to challenge, and seek remedies for, any failure to respect their rights.

19. If the legislation proceeds on the less satisfactory language scheme model, the Commission’s concern is that the content of the schemes should deliver as much as possible of what would more easily be secured through the rights-based approach. Provided that all the schemes had a meaningful baseline, a standardised format, the same periodicity and a centrally collated information base, and that they obliged public bodies to show real progress over defined timescales (with no retrogression), they could contribute to a rational and measurable development of Irish language provision.

20. The schemes approach could allow for a higher baseline and more ambitious targets to be set for region-wide public authorities than for smaller bodies based in areas where there was little demand for Irish-language services. The Charter and other standards permit account to be taken of demand, but this should not be seen as an ‘escape clause’; the objective must be to move towards a situation where all authorities respect language rights. If schemes drawn up for smaller bodies envisage an unreasonably low standard of service
without clear commitments to improvement, then action needs to be taken at a higher level than the individual authorities to address the shortfall; for example, provision by sponsor Departments in the case of NDPBs, pooled provision, or ‘buying in’ of centrally resourced services.

The Commissioner

21. The Irish Language Commissioner proposed to oversee the schemes does not appear to have all the attributes required to ensure that the schemes approach will in practice deliver as much as would be secured through the alternative of a rights-based Act. Such an oversight office needs to have, or be complemented by, complaints handling and enforcement functions, rather than a simple monitoring and advisory role. It could usefully be given a range of functions comparable to those of the NIHRC, including advisory and promotional work, investigatory powers and the ability to assist individuals in bringing cases. The office ought also to be able to bring cases in its own name, without a victim requirement, and to intervene in cases, and it should be constituted with as much reference to the UN Paris Principles7 as may be achieved in a single-person agency, so as to ensure effectiveness and independence. The Commissioner needs to be empowered to provide a more effective access to rights than the expensive remedy of judicial review.

22. Without proper resourcing and a suitable range of powers and functions, and given that each scheme would, as envisaged in the consultation document, be a product of negotiation, it is quite likely that the Commissioner would have to expend a great deal of effort to secure anything above the minimum possible levels of commitment from each body. Unless the Commissioner were able to be quite directive, a multiplicity of schemes would arise across the public sector, possibly even to the extent that each would be unique. A person wanting to use Irish in dealings with a particular body would most likely not know whether or to what extent the body was prepared to accommodate that. It would also be very difficult for anyone to understand how far advanced the public sector was at any given point in providing Irish language services, without cross-tabulating a vast amount of data possibly presented in non-standardised formats, and it would be even more difficult to track progress from year to year, especially if the schemes differed in periodicity.

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7 Principles relating to the status and functioning of national institutions for protection and promotion of human rights, adopted by the General Assembly in 1993.
23. As an alternative to charging the Commissioner with so active a role in the development of schemes, consideration should be given to a separately resourced board or agency, such as exists in Wales (though it is currently under review) and in the Republic.

Omissions in the proposals

24. The March document fails completely to address a number of areas that need to be considered in the context of commitments already made under the Charter. The omissions largely correspond to matters that would be likely to feature prominently in any rights-based Act drawn up to cover the commitments already entered into under international human rights law. There is, for example, no mention of education, covered by nine undertakings under Article 8 of the Charter. While educational provision falls outside the remit of the Department of Culture, Arts & Leisure, it would be opportune to consolidate Irish language education rights into the present proposals rather than require further enactments.

25. Other matters that fall to the devolved authorities, and that are covered by Charter undertakings, yet fail to find expression in the DCAL draft, include the right to use Irish in the Assembly and in local government (Article 10(2) of the Charter), and rights in relation to personal names, placenames and signage (Art. 10(2) and 10(5)).

26. Other omissions, for example in relation to broadcasting and to duties on public bodies outside the remit of the devolved institutions, would appear to flow from the fact that the Assembly rather than Westminster is envisaged as the legislative instance. This Commission would expect the Government to put before Parliament any additional measures needed to supplement that which the Assembly may provide, particularly in relation to the full realisation of commitments made under the Charter.

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