RESPONSE TO FUTURE POLICY ON HIGHER EDUCATION TUITION FEES

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 welcomes the opportunity to comment on the Department of Employment and Learning (DEL) document on future policy on higher education tuition fees and student finance arrangements, which has been issued for consultation between March and June 2011. The Commission welcomes the level of information and detail in the consultation document and accompanying EQIA.

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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).
5 Department of Employment and Learning (March 2011), Public Consultation Document: Future policy on higher education tuition fees and student finance arrangements in Northern Ireland, and Equality Impact Assessment.
Human rights framework

3. The human rights issues engaged by higher education finance arrangements relate to whether changes in the system will have the effect of limiting access to students from poorer socioeconomic backgrounds and other vulnerable groups. To this end the Commission welcomes the inclusion by DEL within its three ‘key criteria’ for determining policy that of maintaining access to higher education for those from lower income backgrounds.⁶

4. The main provisions of the European Convention on Human Rights (ECHR) are directly accessible in the Northern Ireland courts under the Human Rights Act 1998. Under the First Protocol to the ECHR the UK has accepted an obligation that ‘no person shall be denied the right to education’. This has been interpreted as including, when a state takes a decision to provided higher education institutions, an obligation to provide an effective right of access to them.⁷ The right to education has also to be read with the prohibition on direct or indirect discrimination in the exercise of Convention rights (Article 14 ECHR). Rights under the ECHR need to be interpreted in accordance with other international standards accepted by the UK. There are a number of instruments, not directly accessible in the courts but binding on the UK in international law, which are relevant to higher education access, including the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). There are also ‘soft law’ recommendations, such as the Council of Europe Committee of Ministers Recommendation R(98)3 on access to higher education.

5. The nature of the obligations that the UK has accepted under the ICESCR requires their progressive realisation to the “maximum of available resources”.⁸ These rights include, under Article 13, the right of everyone to education and specifically the commitment, under Article 13(2)(c), that:

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⁶ As above, paragraph 5.32.
⁷ Leyla Şahin v Turkey (Application no. 44774/98), Grand Chamber judgment 10 November 2005, paragraph 137.
⁸ Article 2(1): “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

6. The UK has therefore entered into a commitment to the progressive introduction of free higher education. Further authoritative interpretation as to the scope of the rights in the ICESCR is provided by the UN Committee which oversees compliance with and implementation of its provisions. This includes addressing the nature of the duty to 'fulfil' the realisation of rights. The Committee has stated:

...The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal...\(^9\)

7. This indicates a duty to progressively introduce free education for those who would otherwise not be able to access it. The ICESCR framework acknowledges the constraints of 'available resources', but there is a duty not to take deliberate unavoidable steps backwards (the principle of non-retrogression). The ICESCR Committee has stated:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.\(^10\)

8. This is particularly relevant to measures which have the effect of increasing the cost of higher education to applicants. The Committee has already directly addressed this matter in relation to the UK, stating, in 2002, that:

\(^9\) Committee on Economic, Social and Cultural Rights (General Comments) The right to education (Art.13) 08/12/1999. E/C.12/1999/10, paragraph 47.

\(^10\) As above, paragraph 45.
The Committee notes with concern that the introduction of tuition fees and student loans, which is inconsistent with article 13(2)(c) of the Covenant, has tended to worsen the position of students from less privileged backgrounds, who are already underrepresented in tertiary education.11

9. The Committee urged the UK to take effective measures to ensure that the introduction of tuition fees and student loans did not have a negative impact upon students from less privileged backgrounds.12 In its most recent examination the Committee sought a review of the policy on tuition fees with a view to fully implementing the commitments under Article 13 of ICESCR. The Committee also recommended the elimination of unequal treatment between EU and non-EU students regarding fees.13

10. In relation to ‘soft law’ standards the Commission draws attention to Council of Europe Committee of Ministers’ Recommendation R(98)3 on access to higher education. This recommends that public funding and its support mechanisms should support ‘access’ to higher education (access meaning opportunity for fair and equal participation, along with the higher education population increasingly reflecting the diversity of society). It further recommends that financial support be provided for student subsistence with priority given to meeting the needs of those from lower income groups, along with financial arrangements recognising the additional needs of disabled students and students with children. The Committee of Ministers did not recommend the introduction of fees but stated that if fees are introduced it is desirable:

- to treat fees as a limited student contribution to the cost of higher education in partnership with the taxpayer, rather than as a substitute for public funding;
- to make the payment of the student contribution contingent on income, for example by a comprehensive scheme of financial aid covering the cost of fees for students on low incomes;
- to regulate fees at a comparable level in all public institutions;
- to commit any fee income to additional spending.14

12 As above, paragraph 41.
14 Council of Europe Committee of Ministers Recommendation no. R(98)3 on access to higher education (adopted 17 March 1998, 623rd meeting), section 8.
The present proposals from DEL

11. The consultation document sets out options in relation to a broad range of student support matters to a level of detail which will not be replicated here. The main elements of student finance can be summarised as tuition fees and loans, maintenance grants, maintenance loans and the repayment arrangements for loans. Maintenance grants are means-tested, with entitlements to full grants (of £3,475) dependent on a family income below £19,000, with the cut-off point for any grant being an income threshold of £41,000. Tuition fees, which have been variable from 2006, are currently capped at £3,290 per annum in Northern Ireland. DEL also appears to rule out cost reductions in higher education through reducing student numbers or the proportionate resourcing of higher education.

12. The consultation document outlines the two ‘Stuart Reviews’ commissioned by DEL Ministers, into higher education funding in Northern Ireland. The first of these, completed in March 2010 and published in October 2010, recommended that tuition fees be kept at current levels. The second Stuart report, issued in April 2011 after the ‘Browne Review’ in England into tuition fees, recommended an increase in the cap on Northern Ireland tuition fees up to £5,000 or £5,720.

13. DEL uses a seven-category code – the National Statistics Socio-Economic Classification (SEC) – for the class or occupational backgrounds of students, which ranges from 1 (higher managerial/professional) to 7 (routine occupations). DEL highlights that in a direct percentage comparison of SEC groups and higher education participation rates Northern Ireland compares favourably to England, Scotland and Wales, with higher participation rates and more students from socio-economic groups 4-7. DEL also cites evidence from

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15 This includes options relating to Northern-Ireland resident students studying outside of the jurisdiction.
16 Paragraph 1.9 of consultation document.
17 Conducted by Joanne Stuart, Chair of the Institute of Directors Northern Ireland.
18 The full set of categories is: 1 higher managerial and professional occupations; 2 lower managerial and professional occupations; 3 intermediate occupations; 4 small employers and own account workers; 5 lower supervisory and technical occupations; 6 semi-routine occupations; 7 routine occupations.
19 DEL outline that 2008-9 data shoes that 41.7% of Northern Ireland’s young full-time degree entrants were from socio-economic classifications 4-7 compared with only 32.4% in England and 28.2% in Scotland. DEL ‘A Consultation on a Regional Strategy for Widening Access to Higher Education’, March 2011, page 1.
the Stuart Review that indicates that SEC participation rates were not adversely affected by the introduction of variable tuition fees, but it is conceded that in the context of the present economic crisis this may change.  

14. The financial situation facing DEL, and hence the resources available, are set out as DEL facing a likely annual budget reduction of between £20-30 million for the next four years. DEL argues that its annual resource reduction “will be more than £140m per year by 2014-15 given rising unemployment and time-limited funding for research and innovation projects.” Hence DEL is looking for around half of this, some £68 million a year, to come from higher education spending.

15. DEL states that it is nevertheless committed to remaining the primary funder of higher education, and sets out five options for consideration. These range from ‘option A’ (which includes abolition of fees) to ‘option E’ (includes increases in fees to the £6-9k levels planned for England). DEL argues the status quo (option B) would leave a funding gap of £40m per annum, and abolishing fees (option A) would cost an extra £80m (£120m in total). Option E, of raising fees to £6-9k, assuming uptake, could generate an extra income of around £100m, yet DEL concedes that this would not only represent a significant shift in policy but could have a detrimental impact on access for low-income families.

16. Options C and D appear to have been those favoured by the former Minister. Both involve an increase in the tuition fee cap to £4,500 (option C) or £5,000-5,750 (option D), along with more generous income thresholds for entitlements to full maintenance grants (from £19,000 to £25,000), and an increase in the earnings threshold before loans have to be repaid (from £15,000 to £21,000, and over 30 rather than 25 years – but with a real interest rate rather than no interest.) Option D allows also for a modest increase in the maintenance grant for those entitled (from £3,475 to £3,750). Both would involve a shift in higher education funding from taxation towards the individual student, with a reduction of 20 per cent or 33 per cent in the teaching grant for the two respective options. DEL maintains that option C would generate £30m of additional income, largely addressing the financial pressures

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20 Paragraphs 1.3, 5.5
21 Consultation, paragraph 2.21.
22 For full details of the options see table on page 54 of the consultation document.
23 Paragraphs 5.10, 5.32.
24 Paragraphs 5.34-5.
of the budget settlement, and would allow maintenance of the high participation rate of students from lower socio-economic categories. DEL maintains that option D would generate an extra fee income of £40-60m, which would be sufficient to address the financial pressure of the budget settlement, and also allow for the increase of £275 in the maintenance grant, benefitting 15,000 lower-income students and helping to sustain access to education from lower income groups.  

17. The consultation document is accompanied by an Equality Impact Assessment (EQIA) which picks up on a range of issues including evidence of higher education disadvantage for disabled persons, under-representation of young Protestant males from lower socio-economic groups and from lower participation neighbourhoods, and difficulties for Muslims with a loans-based system.

Analysis of present proposals from DEL

18. The Commission is conscious of the context of a major policy shift in England involving a reduction of 80 per cent in the teaching grant to higher education and a significant transfer of higher education costs onto individual students. Such an approach conflicts with the duties under ICESCR and could be subject to legal challenge under ECHR duties interpreted in light of the ICESCR. It is welcome that in Northern Ireland, whilst such an approach is presented among options, DEL when issuing the consultation document appeared not to be considering following this route.

19. Nevertheless the proposed more modest increase in tuition fees does engage compliance with accepted duties under the ICESCR. The Commission appreciates that there are significant contextual differences between the decisions taken by the UK government and those open to the Northern Ireland administration. This includes not least that the ‘maximum available resources’ available to the Northern Ireland Executive have been limited by the UK Comprehensive Spending Review, a matter on which the Commission made

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25 See paragraphs 5.12-5.25.
26 Under Article 24(5) of the UN Convention on the Rights of Persons with Disabilities the UK has committed to ensuring “that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.”
27 For details see in particular paragraph 35 of the EQIA.
28 Consultation, paragraphs 37-40.
representations to the Treasury in the context of the realisation of duties such as those under the ICESCR. The Commission is also aware that the present competencies of the Northern Ireland Assembly may also limit the options available to DEL, for example in relation to considering alternatives such as a graduate tax. There would be other options that may be feasible however, for example, consideration of tuition grants for poorer students.

20. The Commission would urge DEL to supplement the existing evidence base and EQIA with a human rights impact assessment (HRIA) against the criteria set out earlier in this submission, reflecting the duties under the ICESCR and recommendations of the Council of Ministers.

21. Other matters which could be covered in such an exercise would be a broader analysis of the likely impact on the seven socio-economic groups. The figure given to highlight higher participation from lower socio-economic classifications in Northern Ireland than England is based on groups 4-7. This indicates that 41 per cent of primary degree entrants are from groups 4-7 in Northern Ireland. However, if group 4 is removed from the analysis this figure (for groups 5-7) drops considerably, to 27 per cent, representing a significant under-representation as groups 5-7 constitute 45 per cent of the population. It is also notable that overall student numbers did fall after the introduction of tuition fees, although this was the case in wealthier groups as well as for students from less well-off backgrounds. Analysis of the impact on individual categories may therefore help develop a broader picture of impact.

22. Analysis of the likely impact of fee increases could also include qualitative indicators as to whether the prospect of additional debt is likely to prove a disproportionate deterrent to persons from lower socio-economic classes. It is clear that wealthier students could avoid debt altogether by paying fees up front, yet some commentators argue that regardless of the long-term affordability of loan terms low-income families may, for understandable reasons, be more likely to be debt averse and hence deterred from accessing higher education.

23. There is also the issue of the extent to which the present options provide for free access to higher education for those

who would otherwise not be able to obtain access. Outside of scholarships the only provision envisaged for this appears to be the writing-off of fees for persons who do not meet the income threshold over the lifetime of the loan.

24. The proposals are also predicated on the achievement of £28m of ‘efficiency savings’ from the higher education sector, which DEL acknowledges is a challenging target but one that the sector is expected to deliver without impacting on the quality of services offered. However, it is not clear from the document where cuts will fall to meet this requirement. If the impact of such ‘efficiency savings’ was to limit particular forms of support to low income students it could clearly compound retrogression in the realisation of the right to education.

25. To conclude, the Commission would urge DEL to satisfy itself before increasing tuition fees that the test under ICESCR, set out earlier in this submission, for non-retrogression is met. Measures should only be introduced after the most careful consideration of all alternatives and should be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

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Northern Ireland Human Rights Commission
Temple Court, 39 North Street,
Belfast BT1 1NA
Telephone: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org

30 Paragraph 2.25 of consultation document.