

**Submission from the  
Committee on the Administration of Justice (CAJ)  
on second consultation on  
Irish language legislation for Northern Ireland**

**June 2007**

***Introduction***

The Committee on the Administration of Justice (CAJ) responded to the previous consultation, and since several of the comments made on that occasion still apply, the submission is attached again for convenience. We would like to thank the Department for appearing to reflect carefully on the many comments received in the first consultation, and it was helpful to get some of the feedback that was supplied in this second consultation phase. There are however a number of outstanding concerns with the proposed legislation that we comment on in more detail below.

The most important reservation we have with the draft legislation is that, as the minister has chosen to take the “scheme” approach rather than a “rights” approach, there are a number of important gaps and ambiguities. As we indicated in our preliminary submission, a mix of rights language, and service provision by way of schemes – which was the model proposed by Pobal – seemed to offer the most comprehensive approach, and it is unfortunate that the department did not pursue this, albeit introducing proposed changes as and when it considered it necessary.

***Irish Language Commissioner***

The first problem with the formulation of the Commissioner’s responsibilities is the fact that, having laid down a relatively broad remit of “*enhancing and protecting the use of the Irish language in connection with the provision of services to the public by public authorities in Northern Ireland*” (para 2.1), the functions are then very narrowly drawn. The Commissioner has little practical work to do other than to draw up guidelines for, and then oversee implementation of, a scheme system and the schemes merely specify “*the measures which (a public body) proposes to take as to the use of the Irish language in connection with the provision of (its) services*”. There appears to be no duty imposed on public authorities themselves to contribute to the enhancement or protection of Irish, and certainly no suggestion that language *rights* are being codified.

Furthermore, while the Commissioner is authorised to propose legislative amendments, the legislation is essentially focused on Schemes, and it therefore may be government’s intention to restrict the Commissioner’s authority to the improvement of these arrangements, rather than anything more fundamental?

Indeed, although the Commissioner appears to be being given a relatively broad remit, it is somewhat ambiguous as to whether he/she could review the Act (para 2.4a), or make reports to the Secretary of State on the adequacy and effectiveness of the Act (section 2.4b), if those remarks were to go beyond the limited Scheme-related powers assigned by the Act. For example, would the Commissioner be acting out-with his/her authority by proposing that the enhancement and protection of the language required that educational measures be incorporated into the legislation?

If, as is implied on page 7 of the consultation document, an incremental approach to language legislation is being proffered in line with Welsh experiences, paras 2.3 – 2.5 must at the very least be amended to clarify that the Commissioner can make legislative proposals that go to the heart of his/her remit of enhancing and protecting the language. For example, para 2.4b might be amended as follows “*make reports to the Secretary of State on the adequacy and effectiveness of the Act, recommendations as to amendments to this Act, and on other matters related to the enhancement and protection of the use of Irish language which in the opinion of the Commissioner are necessary or desirable*”.

A second problem in this part of the draft legislation is to be found in para 2.2 that appears to make the number of Irish language speakers wanting a particular service the only determinant. As indicated in our preliminary submission, one of the key reasons that CAJ argued for a rights-based approach was recognition that discrimination of users of the Irish language is not merely a historical phenomenon. How would this quantitative criterion have been applied to the staff person who wanted to speak on the phone in Irish to family members (see case studies in annex 2 of CAJ March submission)? Would the staff member concerned have had to provide evidence as to the number of civil servants falling into this category?

It is also noteworthy that this power to use numbers as the sole determinant is vested in both the Irish Language Commissioner and the Secretary of State, without any distinction being made between them. This seems to imply that either, or both, authorities could use the issue of numbers as a “trump” card. Linguistic protection is needed precisely because of the limited numbers of people using a language (English for example is not in need of any special legislation in Northern Ireland). It is deeply worrying to think that numbers alone can determine whether a person can exercise their right to speak their language of choice.

### ***Duty of public authorities to prepare schemes***

CAJ did not have an opportunity to compare this list of proposed authorities with other legislative provisions. We note, however, that the Northern Ireland Human Rights Commission is included in the list, but the Equality Commission for Northern Ireland is not.? This seems strange both because it implies that the NIHRC is more “governmental” in nature than might be expected of a national human rights institution that is UN Paris Principles compliant, and

because the Equality Commission might be thought to have a particular interest in issues of non-discrimination and equality provision. We presume that the distinction lies in the legislative texts that gave rise to these bodies, but it would nonetheless be worth clarifying the thinking in this regard.

### ***Role of Secretary of State***

In para 4.2, and throughout the text, reference is made to the authority vested in the Secretary of State. It is not clear which of these proposed duties would, in due course, be devolved to the departmental minister, or to OFM/DFM, and/or what role, if any, the Assembly might be expected to play? See for example, para 9.9 – would the Commissioner unhappy at the failure of, say, a department to comply with its Scheme, have to negotiate the next steps with the Secretary of State, the minister for DCAL, the minister of the department concerned, or the executive?

### ***Remedies***

Are we to understand that the Commissioner can only entertain a complaint if it concerns a breach of a language scheme? If so, can the department clarify if any of the case-studies that CAJ included in its earlier submission would be likely to fall within the brief of the Commissioner? Since the Schemes are presumably intended to focus primarily on services provided to the public, it is not at all clear to us that the behaviour of public bodies vis-à-vis their staff, or in their recruitment of staff, would automatically be covered within the Schemes. If we are correct, we believe that the Commissioner's powers to provide remedies to complainants are too circumscribed.

### ***Court proceedings***

We are unclear about the distinctions being drawn as between Irish and other languages? For example, in relation to para 11.2a, a non-English speaking French defendant would presumably have to notify the court that they would require interpretation, and such provisions are guaranteed by international human rights protections. But we are unaware of the provision set out in para 11.2b being applied to other language speakers? Irish speakers should not be given fewer rights than other language speakers, so this text either needs to be changed. Alternatively, if this is not the intention, there needs to be an opportunity to ensure that regulations are compliant with the various language rights protections that the UK government has signed up to. In this regard, should the para 11.3 be amended to the effect that the Lord Chancellor "shall" rather than "may" make provision by regulation for such issues?

CAJ has not studied the 1737 legislation – is it only section 1 that needs to be re-defined in this way (para 11.9), or does the whole text stand as a testament to a historic disdain for the Irish language that would be much better to repeal completely? Any historic legislation that is intended to isolate and

discriminate against a particular language should be repealed, as its repeal would give an important signal about the changed environment for linguistic rights. If the annulment of primary legislation of this kind has to be undertaken by Westminster rather than a devolved Stormont Assembly, this may imply that the whole document be submitted to Westminster – that certainly was the original stance taken by government.

### ***Schedule 1***

CAJ notes that the department will set the Commissioner's remuneration and allowances (para 4), and that the remuneration, conditions of service, and the appointment of staff by the Commissioner are all requiring departmental approval (para 5). Indeed, with regard to the Commissioner's staffing arrangements, two departments have to give approval (para 5.5). This level of control is worrying in terms of both the perception and possibly even the reality of departmental control over what ought to be an independent body. We have not sufficiently explored how this conflict of interest is mediated in other arrangements; but we can note here that the Irish Language Commissioner will lose extensive credibility if the office is thought to be constrained in its operation by departmental budgeting controls.

### ***General***

Overall, this draft legislation appears very limited. The department notes that the "vast majority" of initial consultees were in favour of legislation, with only a "small minority" opposed. While numbers alone should not be the determinant of government action (as noted earlier with regard to para 2.2 of the draft legislation), it seems strange that the paper then talks about the "pronounced" divergence of views, and considers that a "middle ground approach" is necessary. Instead, CAJ would concur with the statement that Irish language protections "do not pose a threat" to anyone. This message would have been all the more unambiguous if government had chosen to take a more rights-based approach as CAJ urged previously.

In particular, no clear justification has been given for not including education, broadcasting, or local government services within the remit of this legislation.

The Schemes approach taken in the draft legislation is very limited and seems to bear little relevance to the supposed remit of a Commissioner who is expected to enhance and protect the use of the Irish language. Whilst the second consultation document seems to imply a strong developmental and evolutionary approach to the Irish language, this is not provided for in the legislative text. As it currently stands, there is no expectation that government departments and public bodies should also take on a responsibility for enhancing and protecting Irish, and it is unclear whether the Irish Language Commissioner will have sufficient freedom of movement to write this objective into the guidelines for schemes. Without such an objective, the Schemes will

rapidly become mechanistic procedural tools rather than the vehicle by which the public can increasingly assert their rights to use Irish.

Some of these inadequacies could be addressed if the Commissioner were given the authority to monitor the use of Irish language more generally, and if he/she could engage with complaints of the kind exemplified in the case-studies in CAJ's earlier submission.

In essence, the language of the consultation document is (rightly in our view) upbeat about the contribution that Irish language protections could make. We, agree with the quote taken from the submission by the Equality Commission, to the effect that: "*the notion that providing equality or protection for one group limits their availability for another is both unfounded in itself and acts to the detriment of all who seek to live in a society that is fair and equitable and should be avoided in the drafting of public policy*" (page 3 EQIA). That is why, we found the draft legislation disappointing since it neither reflected the rights-based approach that CAJ had urged, nor the progressive incremental approach that the department implied it was taking. We would urge reconsideration of a number of elements along the lines outlined above.