DRAFT

PS/Mr Hanley (B&L)
PS/Mr Fell
PS/PUS
Mr Semple
Mr Thomas
Mr Alston
Mr Bell
Mr D.A. Hill
Mr McCusker
Mr McCartney (DFP)
Mr Baillie (NICS)
Ms McAlister

TO: PS/SECRETARY OF STATE (B&L)

FROM: D.J WATKINS
US CENT SEC
29 OCTOBER 1992

COUNCIL OF EUROPE CONVENTION ON REGIONAL OR MINORITY LANGUAGES

1. The Secretary of State wrote to the Lord Chancellor on 2 September informing him of the outcome of the Government's review of policy on the Irish language and seeking his agreement to the amendment of the Administration of Justice (Language) Act (Ireland) 1737. A copy of the Secretary of State's letter, which sets out the background to the proposed policy change is attached at **Appendix 1.** The Lord Chancellor replied on 13 October and his letter is attached at **Appendix 2.** The purpose of this submission is to offer comments on the Lord Chancellor's response and advice on how the Secretary of State might reply.

COMMENTS

2. The Lord Chancellor's agreement in principle to removal of the barrier to use of Irish in court is welcome and an announcement of the Government's decision to proceed on those lines may be made at an appropriate time. The primacy of judicial discretion in future arrangements is accepted.

3. The Lord Chancellor's proposal to treat Irish on the same basis as non-indigenous languages is at variance with Government's approach to the language. Permission to use Irish in court is an almost entirely symbolic issue and his proposal is likely to offend Irish language interests and sections of the wider nationalist constituency, including the SDLP. The proposal does not constitute a barrier to ratification of the Convention but the matter is sufficiently sensitive to warrant recommending further consideration by the Lord Chancellor's office, particularly since the cost implications are likely to be very small. The alternative of removing the matter from judicial discretion and enshrining it in legislation is not considered appropriate.

4. The Lord Chancellor has offered two options for removing the barrier: repeal of the legislation in the context of a miscellaneous statute law repeal, or a review of the Act. The issues surrounding the options are discussed at **Appendix 3.** The choice of option for removing the barrier and the arrangements for implementing it are for discussion by officials of Central Secretariat and the Lord Chancellor's office. Advice will be offered to Ministers in due course.

5. The Secretary of State is advised to write to the Lord Chancellor: welcoming his agreement in principle to removal of the legislative barrier; indicating that an announcement to that effect will be made at an appropriate time; requesting him to consider further the manner in which judicial discretion may be exercised; and noting that officials will liaise to produce proposals for implementing legislative change.

6. A draft letter for the Secretary of State's consideration is attached at **Appendix 4.**

D.J. WATKINS

Appendix 3.

OPTIONS FOR REMOVING THE LEGISLATIVE BARRIER

The Lord Chancellor has offered two options - repeal of the legislation in the context of a miscellaneous statute law repeal or review of the Act leading to amendment.

The first, which is his preferrred option, would leave the Northern Ireland statute book silent on the matter of language in court proceedings and judicial discretion would automatically prevail. We are content with the mechanism proposed but do not believe that it is possible to avoid association of the repeal with Irish.

The second option, a review of the Act, would permit the Lord Chancellor by way of amended legislation, to stress the supremacy of judicial discretion, or to make other provision regarding the use of language in courts. This could however attract even more attention to the issue and contribute to the politicisation effect which the Lord Chancellor is anxious to avoid.

Underpinning both options is the Lord Chancellor's concern to protect the status quo. This involves two strands - upholding the principle of judicial discretion and maintaining current practice. The Government has already indicated its support for the principle and this aspect is therefore not at issue. There are several points to consider concerning practice.

The question of what, if anything, constitutes current practice in respect of Irish is not immediately clear from

the letter. The Lord Chancellor states that "the general practice of the judiciary has been to permit the use of Irish through an interpreter provided at public expense only where the Irish speaker is incapable of conducting the proceedings in English". This is somewhat misleading since in point of fact there has been only one recorded case of formal use of Irish in judicial proceedings, when a witness was permitted to give evidence in Irish via an interpreter provided at his own expense. The Lord Chancellor relies on this instance also as evidence that the 1737 Act has not inhibited the exercise of judicial discretion to permit the use of Irish where appropriate. The reference to "general practice in respect of Irish" in fact is based on the general practice in respect of languages other than English (or Welsh in Wales).

In the case of non-indigenous languages, for reasons connected with the right to a fair trial, publicly-funded interpreting services are provided to ensure that an individual clearly understands what is taking place. The civil right to a fair trial is, however, distinct from the issue of freedom of choice to use a regional or minority language in defined circumstances, which is central to the philosophy of equality of esteem underlying the Convention.

The Lord Chancellor's concern to establish that in future judicial discretion will operate to place Irish on the same basis as non-indigenous languages is at variance with the spirit of Government's approach to the language and may give offense to Irish language interest groups and sesctions of the wider nationalist community, including the SDLP.

By contrast, freedom of choice in giving oral evidence is among the matters already protected by the Welsh Language Act 1967 and interpreters are provided at public expense. The Lord Chancellor in July this year approved extension of the protection to other elements of judicial proceedings, such as

written evidence, provided this was accompanied by a translation supplied by the Welsh Office.

It is not clear why the Lord Chancellor should endorse provisions in respect of one regional language, which by virtue of scale of demand may involve considerable resource implications, while resisting a much less comprehensive arrangement in respect of another, in relation to which demand has been negligible to date and is likely to remain limited.

Applying disparate treatment to two regional languages within the same jurisdiction would not of itself constitute discrimination nor prevent the UK from ratifying the Convention. However, unless such disparate treatment was explicable in terms of objectively justifiable reasons the way might be opened for an argument that the restriction on the Irish speaker is more likely **not** to be justified .