

Equality Commission for NI

Discussion paper on Language rights in NI

Introduction

This paper has been prepared as a discussion document on legislative options for language protection. It considers how a number of other jurisdictions have incorporated language protection into their legal system. It considers language issues specific to NI and discussed some wider considerations.

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The Equality Commission will be making recommendations to Government on the grounds and scope¹ for the protection against discrimination that should be incorporated in a Single Equality Act. This paper raises some issues in respect to possibilities for the extension of language protection. It does not set out the Commissions final thinking as it is intended to stimulate debate on the subject.

¹ Scope refers to the areas that the law covers e.g. employment, goods, facilities and services, education, housing, social protections and social advantages etc.

Background

The Equality Commission has a general duty to keep anti-discrimination legislation under review and recommend to government changes to the protection against discrimination in NI.

With the creation of a single Equality Commission the debate about diversity and multi-identity has developed in NI and the proposals for a single Equality Act has raised the fundamental question of what additional grounds could be included in a comprehensive SEA. This has been fuelled by the public statutory duty and the inclusion of nine grounds in s75 of the NI Act 1998². In addition the EU Framework Directive has broadened the scope of protection to include new grounds³.

In line with the general developments in the framework for the protection from discrimination there have been a number of developments in the area of language rights.

The Race Relations (NI) Order 1997 introduced protection from discrimination on racial grounds and to some extent provided for a limited protection on the use of language(s). see below

The Disability Discrimination Act 1995 introduced protections for disabled people and thus raised the issue of the protection from discrimination against those who use British and Irish Sign Languages.

The Good Friday (Belfast) Agreement 1998 committed the British Government, *in particular in relation to the Irish language*⁴, to take resolute action to promote the language⁵.

The European Charter for Regional or Minority languages 'The Charter'⁶ and the Framework Convention for the Protection of National Minorities 'the Convention'⁷ have placed specific obligations on Government in respect to Irish and Ulster-Scots. The Charter is wholly concerned with the promotion of languages and is non-rights based. The Convention is promotional and rights based.

Article 4(Convention):

² religious belief, political opinion, racial group, age, marital status, sexual orientation, gender disability, dependants.

³ sexual orientation by 2 December 2003 and age, at the latest by December 2006

⁴ *emphasis added*. The Agreement was signed before the UK signed the European Charter for Regional or Minority languages. When signed, Ulster-Scots was included in Chapter Two of the Charter.

⁵ the Good Friday (Belfast Agreement) 1998, Chapter 'Rights, Safeguards and Equality of Opportunity'. Para 4, page 19.

⁶ Came into force on 2 July 2001

⁷ Came into force on 1 February 1998

'The parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.'

The Convention, however, does not create 'actionable' rights for individuals and it is up to the Government to pass laws to give the protection envisaged in Article 4. Courts in NI and GB will rarely take an international Convention/Charter into account in interpreting legislation unless the legislation specifically implements the agreed Convention/Charter. Thus if there was legislation covering language in NI the Convention and Charter may have more significance.

Monitoring of the Convention and the Charter are by periodical reports to the Council of Europe. There are no sanctions detailed in either the Convention or Charter for failure to comply and there exists options for States to denounce the Convention and Charter.

Languages in NI

English is the predominant language spoken in Northern Ireland. According to recent research there are over 70 minority ethnic languages spoken in Northern Ireland⁸. The 2001 Census recorded that there 167,490 people in NI with some knowledge of the Irish Language, an increase of over 25,000 since the 1991 Census. There was no 2001 Census question on Ulster-Scots and there has been no research carried out to establish the current extent of the Ulster-Scots speaking population⁹. Edmund (2000) quotes a public opinion survey in which 21% of the sample surveyed rated Ulster-Scots language and culture as an important aspect of their identity¹⁰. Irish Travellers have their own languages. There are two dialects of this called Cant and Gammon. There is a difference of opinion within the Traveller community about whether these 'secret' languages should be promoted to the wider community. This language is shared by in excess of fifty thousand Irish Travellers living in Ireland, the UK and the USA¹¹. Currently the language consists of a vocabulary, which is used, in simplified English grammatical structure¹². In respect to minority ethnic people living in Northern Ireland there exist a varying degree across communities of English language proficiency, both written and verbal. This often depends on whether the person is first generation or second, the length of time living in NI and the country of origin, as some countries will have English language compulsorily taught at school

⁸ Holder Daniel. In Other Words? Mapping Minority Ethnic Languages in NI. Multi-Cultural Resource Centre 2003. page 27

⁹ Edmund, John. A Strategic Plan for the Promotion of the Ulster-Scots language. The Ulster-Scots language Society July 2000. Page 9.

¹⁰ Ibid. page 11.

¹¹ Noonan Paul. Cultural Rights and the Linguistic Identity of Irish Travellers in Northern Ireland. Unpublished

¹² Ibid.

and/or spoken together with the mother tongue. Holder (2003) identifies that there are differing levels of competency in English amongst minority ethnic men and women in NI¹³. Sign language in Northern Ireland can be either British or Irish sign language. These are very different languages from each other and there are an estimated 3000 British sign language users and up to 1000 Irish sign language users¹⁴.

Current legal protection

See separate paper

The role of equality legislation

Equality legislation can be seen to have two functions. Firstly to tackle unlawful discrimination and secondly, to promote equality of opportunity, which in some cases is linked to the promotion of good relations. In tackling unlawful discrimination legislation has to differing extents placed duties 'not to discriminate' on employers, on providers of goods, facilities and services and specifically to those providing education and managing or disposing of premises. It has also to some extent, most notable in fair employment, placed positive duties on employers to monitor, review and to take affirmative action where fair participation is not being provided for.

In the area of promotion, duties have historically been the reserve of the Equality Commission or its predecessors, apart from the area of race relations, where district councils had a general statutory duty to carry out its functions with due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations. This promotional duty has been extended with the Northern Ireland act 1998, which places positive duties on public authorities to promote equality of opportunity on nine equality grounds and good relations on a smaller number of grounds.

This extension of positive duties on public authorities can be seen as a result of the limitations of a purely non-discrimination approach to equality legislation in eliminating discrimination.

It is therefore clear that equality legislation has developed two strands; non-discrimination and mainstreaming equality. In considering the extension of the legislation to other grounds e.g. language it is important to consider each and both of these approaches so as to enable the legislation to be fit for the purpose.

¹³ op. cit see page 33 & 35

¹⁴ RNID figures quoted in training seminar by Focus Project, Disability Action 2000

Language as an equality ground

The concept of 'Language' as a ground for protection against discrimination creates some conceptual difficulties. 'Language' is not as easily identified as a 'characteristic' that exists in other areas of the law e.g. religion, politics, sex, disability, which share a common distinguishing and largely unchanging characteristic. Language can be learned or forgotten and is therefore not a fixed characteristic. Even so, this should not preclude a consideration as to whether protection could be extended for this group. The Commission in its most recent advice to the Government on the Single Equality Act discussed a number of other similarly difficult concepts that should be considered for protection including socio-economic status. This category has already been included in advice from the Equality Authority to the Irish Government for protection. Indeed language is already protected in the legislation of a number of jurisdictions including Quebec and Canada.

It remains however that language rights in the widest sense are not as clearly definable as other protections which are based upon tangible and mostly fixed characteristics, although there are arguments that race legislation could be extended to include indigenous and minority ethnic languages. See above

In discussing whether there should be 'language protection' within anti-discrimination legislation it is important to identify the activities that should be protected. It is important to distinguish whether protection from discrimination (e.g. dismissal or harassment or non-recruitment because a person has a qualification in Irish/Ulster-Scots or a specific sign language or uses the language in their private communications at work. etc) should be given for people who speak a specific language or who are identified with a specific language and full protection to use their language or choice or need in every day contacts (in employment work or the receipt of goods, facilities and services). It may be possible to outlaw direct discrimination e.g. harassment, non-recruitment and dismissal and cover the right to use language by a reasonable adjustment duty.

Reasonable adjustment and language

Disability legislation has a unique approach in the 'reasonable adjustment' approach. This was introduced as an alternative to including indirect discrimination in the disability legislation. As a result the duty arises in relation to the individual and their environment they are in and is linked to 'reasonability'. There is the additional 'anticipatory' duty in relation to goods, facilities and services, where providers of these have to consider the would-be or potential customer. These duties only arise, however, where there exists barriers which put the disabled person at a substantial disadvantage. This approach would clearly not assist those who wish to use Irish or Ulster-Scots as they are most likely to understand English. Sign language users are

already covered by the DDA 1995 and would similarly benefit from this provision. Minority ethnic languages could benefit from having the disability type model of 'reasonable adjustment' although they are already covered by the 'indirect discrimination' protections in the RRO.

Reasonable accommodation is applicable to all grounds in the Canadian approach to anti-discrimination law.

To extend some sort of reasonable adjustment for languages could take three approaches:

- Firstly a link to the substantial disadvantage approach which would protect sign language users and minority ethnic speakers, who do not understand English.
- Secondly, an increasing 'reasonable adjustment' duty on employers/service providers where demand/need can be shown to be high. This could be linked to some sort of formula or Code of Practice which includes guidelines on assessing demand.
- Thirdly, an anticipatory duty for service providers to develop services where demand/need can be shown in the locality. This however should not take away from a general duty to promote and extend the recognition of language.

Codes of Practice and language

The Equality Commission has powers to produce Codes of Practice in other equality grounds covering a range of situations including employment, the provisions of goods, facilities and services and accommodation. Employers and service providers have found these very useful in explaining the law. In addition Codes of Practice have a quasi-judicial status in that a tribunal/court will take into account the failure to observe any of the Codes provisions in proceedings. Such a development in the area of language law may assist in clarifying duties that arise in relation to the protection from discrimination and promotion of different languages in society.

Examples from other Jurisdictions

The Welsh Language Act (C.38)

The Welsh Language Act 1993 replaced previous legislation and made a number of amendments to existing legislation which created barriers to the promotion and use of the Welsh Language in Wales. The introduction to the Act states:

'An Act to Establish a Board having the function of promoting and facilitating the use of the Welsh language, to provide for the preparation by public bodies of schemes giving effect to the principle that in the

conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality, to make further provisions relating to the Welsh language, to repeal certain spent enactments relating to Wales, and for connected purposes.'

The Welsh Language Act does not deal with discrimination on the grounds of language nor does it give actionable rights to individuals.

The Act is concerned with promoting the language through the formation of a language board with responsibilities for promoting and facilitating the use of the Welsh Language, advising Government on matters concerning the Welsh Language, to advise those carrying out public functions on the principle of equality between English and Welsh and to advise others providing services on the use of Welsh in dealing with the public.

Importantly s5(2) of the Act states that purpose of the public sector duty is

'so far as it is both appropriate in the circumstances and reasonably practicable...the English and Welsh Languages should be treated on a basis of equality'.

The main vehicle for the promotion of the Welsh language is through 'language equality schemes' in line with guidelines produced by the Welsh Language Board, similar to the approach under s75 NI Act 1998 that exist in Northern Ireland. The scope of the duty to prepare schemes is similar to the Race Relations (amendment) Act 2000 in GB where only those public authorities that are notified by the Board are to prepare and submit a language equality scheme.

One significant difference between s75 and the Welsh Language Act is that the Secretary of State has powers to give directions, following and investigation of a complaint, to public authorities to comply with the duty.

Gaelic language Bill - Scotland

The introduction to the Gaelic Language (Scotland) Bill states:

'An Act of the Scottish Parliament to require certain public bodies to publish, maintain and implement plans giving effect to the principle that in the exercise of the functions of those bodies the Gaelic and English Languages should be treated on the basis of equality; and to make connected provisions in relation to the powers of the Scottish Public Services Ombudsman.'

The Bill proposes that all public authorities so designated should produce a Gaelic Language plan within two years, the purpose of which, similar to that under the Welsh Language Act :

'so far as it is both appropriate in the circumstances and reasonably practicable...the Gaelic and English Languages should be treated on a basis of equality'.¹⁵

The Bill¹⁶ proposes to extend the matters, which the Ombudsman is entitled to investigate to include the operation of the duty and compliance with the language plan.

The Bill included a proposed schedule for the minimum content of a language plan.

Importantly the Bill¹⁷ proposes the duty to be initially restricted to public authorities exercising functions in certain areas of Scotland.

An analysis of how language is promoted/protected in Canada/Quebec

The Canadian 'Official Languages Act'¹⁸ has the purpose ensure respect for English and French, to ensure equality of status and equal rights and privileges as to their use in all federal institutions, including providing services to the public. It is also designed to support the development of English and French linguistic communities and sets out the powers, duties and functions of federal institutions.

The Act covers the publication of all laws in both languages, the administration of justice. It also covers communication with and services of public authorities, language of work, participation of both language communities and for the promotion of both languages. The Act creates the position of Commissioner of Official Languages who's duties include the investigation of a failure to comply with the legislation. The Act also gives individuals a right to complain to the courts after the completion of any investigation by the Commissioner, following a complaint. The courts are given the power to award 'any remedy as it considers appropriate and just in the circumstances'¹⁹.

The Québec Charter of Human Rights and Freedoms includes protection on the grounds of language. This is personally actionable or through Québec Human Rights Commission who may investigate and attempt to arbitrate the problem or reach a settlement. The Commission may, if unable to settle the case bring it to a tribunal on behalf of the individual. The remedies available to the courts are

¹⁵ s1(3).

¹⁶ s4.

¹⁷ Explanatory notes to the Bill point 5, page 2.

¹⁸ R.S., 1985,c31 (4th Supp)

¹⁹ s77(4)

generally financial compensation or a prohibition notice (not to discriminate).

In Canada there tends not to be cases of harassment brought on the basis of language. Although separate protection exist for language these may be brought under the racial grounds provisions. There have however been cases brought where bi-lingualism has been required for employment in the federal government institutions. These have invariable lost.

Ireland

The Constitution of the Republic of Ireland 1937 states that the Irish Language is the first official language and English is the second official language.

At present 'The Official Languages Bill 2002' is before the Dáil. This Bill proposes a wide range of duties on public authorities in respect to the Irish Language. Most importantly it gives people the right to conduct their business with public authorities in Irish. The Bill proposes the establishment of an Irish Language Commissioner whose role will include monitoring of the efforts by public authorities to comply with the duties. It will not give individuals redress for non-compliance.

The North/South Language Bodies

The Good Friday (Belfast Agreement) 1998 recognised the importance of the Irish Language, Ulster-Scots and minority ethnic languages in NI.

The North/South Co-operation (implementation Bodies) Order 1999 set up The North/South Language Body. The Language Body is a single body reporting to the North/South Ministerial Council, but composed of two separate and largely autonomous agencies: the Irish Language Agency, Foras na Gaeilge, and the Ulster-Scots Agency, Tha Boord o Ulster-Scotch.

The fact that the Language body is made up of two largely autonomous agencies creates a potential difficulty for it to expand its role to have a strategic role in promotion of languages holistically.

Good relations and language

An important aspect of Language policy is the interrelationship between different language communities. 'Good relations' has always been an integral consideration in the area of race relations. 'Good relations' considerations have, in NI, been extended, by the public statutory duty, to include religion and political opinion. In considering a legislative

framework for the promotion and protection from discrimination on the grounds of language there may be clear advantages of introducing a 'good relations' aspect to any duties on public authorities. This would ensure that public authorities considered aspects of good relations including mutual understanding, co-operation, communication and partnership with and between different language communities.

Indeed the UK Governments initial periodical submission on the EU Charter for Regional or minority languages reaffirmed the commitments contained in the Agreement:

'The UK Government and the NI Assembly are committed through the Belfast Agreement to 'recognise the importance of respect, understanding and tolerance including in Northern Ireland the Irish Language, Ulster Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the Island of Ireland.'

The commitments in the Agreement weigh heavily on the need for respect, understanding and tolerance, taken together with the commitment to resolutely promote Irish and Ulster-Scots it would seem that a form of a 'good relations' duty arising through legislation would be a logical outcome, and one which would meet the demands of the Agreement and the Charter and Convention.

The proposed Bill of Rights

The Northern Ireland Human Rights Commission²⁰ has been asked to consult and advise Government on a Bill of Rights for NI, to reflect the particular circumstances of Northern Ireland. In consulting on a Bill the Commission established nine advisory Working Groups, one of which was on languages. This Working Group reported to the commission on 7 February 2001²¹.

The NIHRC have proposed that language is included within a Bill of Rights for NI. The proposed Bill includes a general equality clause²²

'Everyone has the right to be protected against any direct or indirect discrimination whatsoever on any ground such as...language...'

The Northern Ireland Human Rights Commission in their proposals on the Bill of Rights²³ came to the provisional view that

²⁰ s69(7) NI Act 1998

²¹ a copy of the report is available at www.nihrc.org

²² Clause 4(4) Making a Bill of Rights for Northern Ireland, a consultation by the NIHRC September 2001

²³ *Making A Bill of Rights for NI - A Consultation by the NIHRC* September 2001. Chapter 13, p 81.

'...it is better to guarantee rights for all language users and to make the extent of those rights dependent on the extent to which the language is used and understood in the community.'

The Commissions proposals therefore make no distinction between Irish and Ulster-Scots, and other languages.

In addition Clause 13(2) states that the right to communication with a public body through an interpreter, translator or facilitator should be based upon a necessity test i.e. when it is necessary for translation into in a language that he or she understands.

The interrelationship of the Bill of Rights and other legislation

It is important to consider the interaction of a Bill of Rights and any other legislative language protection that may be created. Should the SEA include a language protection then the Bill of Rights would have to be dovetailed so that definitions and scope of protection where the same otherwise a two tier level of protection could be created, where an employee of a public authority could use the Bill of rights to protect their employment rights but someone in the private sector could not.

Options for language protection in NI

This document has set-out the approached to protecting language in a number of jurisdiction and has considered a range of potential issues to be considered when discussion language protection.

The first question that arises is whether there should be protection against discrimination based on a language ground. If so the question arises should this include direct discrimination including harassment, indirect discrimination and/or a reasonable adjustment duty. Arising from this is whether the template that exists in other areas of discrimination law is applicable to language or do definitions need to be redrafted or amended (see discussion on reasonable adjustment).

Secondly, as there exist a Language Act in Wales and proposal for such Acts in Scotland and Ireland, is language protection better provided for in a Language Act for NI. If so is there still a role for outlawing discrimination based upon language within the Single Equality Act (SEA) and leave the promotional role for a language act.

Instead of including language in a SEA it may be possible to amend the legislation in the SEA to give a wider definition of 'ethnic or racial group' to include other defined categories such as language communities or even specific communities such as the Irish and Ulster-Scots communities.

In NI we have s75 NI Act which operates similarly to the Welsh Language Act, with its language scheme. Would it be useful to simply add language to the nine grounds within the NI public statutory duty? If so, then the Equality Commission would be the obvious body to police compliance with the duty.

In terms of a promotional role we have a North/South Language body but its functions are largely carried out by two separate organisations. Should there be a recommendation for a change in the way these work so that they could develop an integrated approach to the strategic development of all language policy in NI? Alternatively could there be a promotional role for the Equality Commission?

A role for the Equality Commission

Depending on the extent of the protection against discrimination on the grounds of language there could be a number of roles for the Equality Commission. This ranges from one of enforcing rights²⁴ given in the SEA on the grounds of language, a promotional role in advising employers and service providers on developing language policies, a power to draw up a Code of Practice or Guidance on languages for use by employers and service providers etc. and a role in developing 'good language relations' so as to develop respect, understanding and tolerance of the different languages in use in NI.

If language was added to the nine grounds already covered by the Public Sector Statutory Duty, the Commission would have duties similar for the other grounds, although there is the potential that not every public authority would be expected to produce a language scheme²⁵.

Conclusion

This discussion document has raised a number of possibilities for the protection of language rights. Whatever the final recommendations of the Equality Commission to the Government these need to be practical and command the support of those in Government. It remains however that there are developments in Ireland, Wales and Scotland. There exists a strong argument for a Language Act for NI so as to achieve a sense of parity North-South-East and West. This is strengthened by the Good Friday (Belfast Agreement) 1998 and the commitment to resolute promotion of language rights. However, there is also an argument that as we have the public sector statutory duty, language could be added to the nine grounds. This would assist mainstream language with other equality considerations.

²⁴ To include support for complainants, taking actions in the commissions name, carrying out formal investigations and dealing with discriminatory advertisements.

²⁵ This could be initially limited to health, education, social services etc.

There are constant concerns regarding resources for the promotion and protection of language in our society. There are also other requirements to meet international commitments.

In developing an infrastructure for the protection and promotion of languages in NI it may be possible to introduce anti-language discrimination provisions to the SEA, a promotional role for a public body which involves developing guidance on languages, the approval and monitoring of language schemes and the promotion of good language relations. This could include all languages in use in NI albeit that different duties may arise in relation to specific languages. This multi-lingual approach may lead to more co-operation, dialogue and understanding between the various language communities thus developing increased inter-dependence and mutual support, a key element to good relations.

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