



The Identity and Language (Northern Ireland) Act 2022 and compliance with the European Charter on Regional and Minority Languages

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ABSTRACT

The Identity and Language (Northern Ireland) Act was passed on 6 December 2022. The contents of the resulting Act are based primarily on draft legislation published alongside the 2020 New Decade New Approach Agreement that was introduced before the Northern Ireland Assembly in 2020 as part of an integrated package of legislation. The 2022 Act represents the first provision that has been made to recognise minority languages in Northern Ireland and offers the first opportunity to reflect critically on the commitment to minority language rights in Northern Ireland – and how those commitments reflect the requirements of the European Charter for Regional and Minority Languages. This article argues that the Act fails to satisfy the minimum criteria of the Charter, but nevertheless represents positive progress towards achieving minimum benchmarks in terms of minority language rights and policy which may be supplemented in coming years.

Keywords: language rights; Irish language; Ulster Scots; Northern Ireland; minority languages; regional languages.

INTRODUCTION

There has been a constant demand from minority language speakers in Northern Ireland for recognition, and rights in respect of, their languages. Irish-speaking communities, in particular, have consistently campaigned for recognition of the existence of historically multilingual, and indeed monolingual, Irish-speaking communities in Northern Ireland and have demanded rights to use their language in public spaces and in their interactions with the Northern Irish state.

In this respect, the demands of minority language speakers, and advocates, in Northern Ireland are far from exceptional. Minority language rights legislation has been enacted in other jurisdictions in the United Kingdom (UK) and on the island of Ireland since the

early 1990s.¹ These laws – notably those in Wales and Scotland – were understood to represent a fulfilment of the minimum content requirements² outlined by the Committee of Experts (COMEX) of the European Charter for Regional or Minority Languages (ECRML) to which the UK became a signatory in 2000. In this respect, Northern Ireland's position on language rights has long been anomalous – representing a noted failure on the part of the UK to implement the requirements of the ECRML.

Indeed, evaluations by the COMEX of the UK's compliance with the ECRML in Northern Ireland have repeatedly remarked on the failure of the UK as a party to the Charter to implement the ECRML's requirements in Northern Ireland in respect of Ulster Scots and Irish. In its evaluations of the UK's implementation of the ECRML, the COMEX has noted the inconsistent approach to minority language protection as between the various jurisdictions within the UK³ and the failure to provide a comprehensive language policy in Northern Ireland.⁴ The COMEX report of 2010 appears to identify a particular turning point in that year when, following the St Andrews Agreement, 'languages seem to have become hostages to party politics' and the positive developments which were previously reported in protecting and promoting Irish in Northern Ireland were 'put on hold' or even reduced.⁵ Indeed, in subsequent reports the COMEX noted that there continued to be a lack of political support for minority rights in Northern Ireland and that there continued to be 'unjustified restrictions' on the use of Irish as well as a general failure on the part of the UK to engage with the work of the Committee.⁶

1 The Welsh Language Act 1993, and the subsequent Welsh Language (Wales) Measure in 2011, as well as Scotland's Gaelic Language (Scotland) Act 2005 and the Republic of Ireland's Official Languages Act 2003 as amended in 2021.

2 See the section headed 'The Requirements of the ECRML' below.

3 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' evaluation report on the United Kingdom and the Isle of Man' (24 March 2004) 57.

4 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' second evaluation report on the United Kingdom and the Isle of Man' (14 March 2007) 62.

5 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' third evaluation report on the United Kingdom and the Isle of Man' (21 April 2010) 58.

6 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' fourth evaluation report on the United Kingdom and the Isle of Man' (15 January 2014) 36.

In its 2021 evaluation of the UK's implementation of the ECRML, the COMEX repeated its longstanding concern that laws still in effect in Northern Ireland were discriminatory in respect of linguistic minorities (in this respect the COMEX specifically cited the Administration of Justice (Language) Act (Ireland) 1737) and noted the repeated failure of the UK to give effect to the commitments included in the Charter – and as part of its own domestic law in the form of the New Decade New Approach Agreement (NDNA), the Northern Ireland Act 1998 and, previously, under the St Andrews Agreement.

In its 2021 evaluation, the COMEX particularly noted that the measures proposed by the NDNA (some of which have subsequently been given effect by the 2022 Act) were insufficient – in particular in respect of the Irish language. The COMEX noted that the measures set out in the 2020 NDNA 'while welcome, do not offer the comprehensive approach a law [in the form of an Irish Language Act] and strategy would provide'⁷ and made specific recommendations as to the steps necessary to fully fulfil the obligations imposed by the Charter in addition to those proposed under the NDNA.⁸ The next ECRML report was undertaken in July of 2023. It was against that background that the Identity and Language (Northern Ireland) Bill was introduced in the House of Lords on 25 May 2022.

The contents of the Identity and Language (Northern Ireland) Act, which has now been passed, are based primarily on draft legislation published alongside the NDNA in 2020⁹ and which was to be introduced before the Northern Ireland Assembly in 2020 as part of the fulfilment of the agreement reached in the NDNA. However, the draft legislation which was attached to the NDNA in 2020 took the form of a specific Irish Language Act with further general legislative provisions for minority language rights more broadly. Ultimately, that legislative package was never introduced, and, in June 2021, the UK Government gave a commitment that if the Irish language legislation promised under the NDNA was not introduced before the Northern

7 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' fifth evaluation report on the United Kingdom and the Isle of Man' (22 March 2021) 7.

8 Ibid 6–8 and 13–14.

9 The Act's passage thus proceeded in a 'backwards' fashion – starting in the House of Lords and then moving to the House of Commons. The date for the Second Reading (general debate).

Ireland Assembly by September 2021, then the legislation would be introduced instead in Westminster by October of that year.¹⁰

After a failure to meet this self-imposed deadline, and under popular pressure from community groups and civil society in Northern Ireland, the UK Government reiterated its commitment to bring Irish language legislation to Parliament in 2022 but declined to set a timetable to do so. When the Northern Ireland Assembly elections in May 2022 resulted in deadlock, the Identity and Language (Northern Ireland) Bill was finally introduced before the House of Lords on 25 May 2022 and was passed on 6 December 2022.

The 2022 Act replicates the main content and broad objectives of the legislation proposed under the NDNA, making provision for Irish language rights, for the creation of an Ulster Scots/Ulster British Commissioner and for the establishment of the Office of Identity and Cultural Expression. In this respect, the Act has been greeted as a long overdue, and welcome, development in terms of language rights – and Irish language rights in particular. Nevertheless, the Act does not meet the thresholds envisioned by the COMEX for compliance with the ECRML.¹¹ Indeed, what is notable in respect of the 2022 Act, when viewed as a whole, is that it more strongly resembles a language policy than a piece of language rights legislation – affording minority language speakers few specific rights and adopting a light-touch regulatory approach characterised by discretionary action and ambiguously defined standards.

THE REQUIREMENTS OF THE ECRML

The ECRML is the European Convention for the protection and promotion of historical regional or minority languages used by traditional minorities. The Charter provides objectives and principles to be applied by states in providing for and engaging with regional and minority languages within their jurisdiction. These objectives and

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- 10 Pursuant to the Good Friday Agreement, the UK Parliament retains the power to (and is obliged to) legislate in areas devolved to the Northern Ireland Assembly where such intervention is required to meet treaty-based obligations. In this case the obligations imposed by the European Charter of Regional and Minority Languages. In 2021, the COMEX on the Charter urged the adoption of ‘comprehensive law and a strategy on the promotion of Irish in Northern Ireland’ as a recommendation for immediate action.
 - 11 Indeed, in its report on the UK’s compliance with the ECRML, the COMEX noted that even in the cases of Wales and Scotland, which make extensive provision for minority language use in interactions between citizens and the state, and in institutional settings, there remained shortcomings: COMEX, ‘Fifth report of the Committee of Experts in Respect of the United Kingdom’ 1380th meeting (1 July 2020).

principles, which are enumerated in article 7, include the need on the part of states to:

- (a) recognise that regional and minority languages are a source of cultural wealth,
- (b) respect the geographic areas associated with particular languages to ensure administrative divisions do not constitute an obstacle to the languages,
- (c) recognise the need for resolute action to promote regional and minority languages,
- (e) facilitate or encourage the use of regional and minority languages in speech and writing and in public and private life,
- (f) maintain and develop links between groups using the same or similar regional and minority languages and establishing cultural relations with other regional and minority language groups,
- (g) provide appropriate forms and means for the teaching and study of regional and minority languages at all appropriate stages,
- (h) provide facilities enabling non-speakers of regional and minority languages living in an area where it is used to learn the relevant language,
- (i) promote study and research on regional and minority languages at universities and equivalent institutions, and
- (j) promote appropriate transnational exchanges for regional and minority languages which are used in other states.

The Charter also commits member states to undertaking to,

- (a) eliminate unjustified distinctions, exclusions, restrictions or preferences respecting the use of regional and minority languages intended to discourage or endanger the maintenance or development of those languages.
- (b) promote, by appropriate measures, mutual understanding between all linguistic groups within the Member State,
- (c) take into consideration the needs and wishes expressed by the groups using regional and minority languages,
- (d) apply, *mutatis mutandis*, the principles outlined in Article 1 to non-territorial languages but with such provision to be determined in a flexible manner and bearing in mind the needs and wishes, and respecting the traditions and characteristics, of the groups which use the languages concerned.

In addition, the Charter provides certain minimum requirements in respect of the provision of education (in article 8), judicial authorities (article 9), administrative and public services (article 10), media

(article 11), cultural activities and facilities (article 12), economic and social life (article 13), and trans-frontier exchanges (article 14) within the territories where regional and minority languages are used, or where the number of residents using the regional and minority languages justifies the provision of that service and according to the situation of each of the languages involved. This framing of the minimum requirements of the Charter is altered under article 10 in respect of administrative and public services which are subject to a reduced obligation that regional and minority languages be facilitated ‘as far as this is reasonably possible’ and in article 11 which acknowledges that the obligations under that article are imposed only to the extent that public authorities are competent and have power or play a role in the field of media, ‘and respecting the principle of the independence and autonomy of the media’.

THE RECOGNITION OF MINORITY LANGUAGES AND COMMUNITY IDENTITY

The most fundamental shift which the 2022 Act has occasioned is in the institutional treatment of the Irish language. The 2022 Act secures official recognition of Irish through section 2 which inserts part 7B into the Northern Ireland Act 1998 and, in section 78J, ‘provide[s] official recognition of the status of the Irish language in Northern Ireland’. Despite this, the Act does not make Irish an official language, rather it is a legally recognised one.

Part 7B also provides for the appointment of an Irish Language Commissioner,¹² the development of standards of best practice relating to the use of Irish by public authorities,¹³ and details obligations which will require public authorities to have due regard to such standards.¹⁴ In addition, section 4 of the Act repeals the Administration of Justice (Language) Act (Ireland) 1737 which, until the point of the commencement of the 2022 Act prohibited the use of any language other than English in court proceedings and had been consistently relied upon, including as recently as 2010, in proceedings before the Northern Irish courts.¹⁵

12 In 2022 Act, s 78K.

13 In *ibid* s 78M.

14 In *ibid* s 78O.

15 *Re Caoimhín Mac Giolla Catháin’s Application* [2010] NICA24. For a discussion of the associated litigation in Northern Ireland concerning Irish language rights see, Timothy Jacob Owens, ‘Litigating Irish language rights in the United Kingdom’ (2021) Public Law 747.

In addition, the Act provides, in section 3, for the insertion of part 7C into the Northern Ireland Act 1998 and for the appointment of a Commissioner for Ulster Scots and the Ulster British Tradition.¹⁶ The Commissioner is tasked with promoting awareness of Ulster Scots, publishing guidance for public authorities on developing and encouraging Ulster Scots, and requiring public authorities to have due regard to such guidelines.

Two issues are immediately apparent on examining parts 7A and 7B. The first is the conflation of linguistic and community or political identities, and the second is the ambiguous status of both Irish and Ulster Scots under the Act.

Conflation of linguistic and community identities

The immediately apparent issue in examining parts 7A and 7B is the divergence as between the position of Northern Ireland's two minority languages. In particular, provisions relating to Irish in Part 7A are defined by reference to the language writ large, while the provisions relating to Ulster Scots in part 7B specifically link the language to a particular national, and perhaps also political, tradition and culture. As a result, although Irish is not explicitly linked to a distinct political or national tradition in part 7A, it seems (implicitly) to stand in contradistinction to Ulster Scots and the Ulster British Tradition and therefore is implicitly aligned with a nationalist and, presumably, 'Irish' tradition. This framing, while perhaps unintentional, is deeply unhelpful in seeking to depoliticise minority language use – not least in circumstances where Irish has been deliberately politicised in debates concerning language rights in Northern Ireland.¹⁷

In this respect, the objectives and principles of the ECRML outlined in article 7 specifically note that parties to the Charter undertake to eliminate 'unjustified distinction, exclusion, restriction or preferences relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it'.¹⁸ Framing Ulster Scots as linked to an Ulster British tradition in an apparently exclusive manner and, by implication, associating Irish with the alternative traditions within Northern Ireland is arguably subversive of this objective.

16 In s 78R of the 2022 Act.

17 For an overview of the context for this politicisation see, Róisín Á Costello, "To be British, Irish, or both": understanding language rights as a tool for reconciliation in Northern Ireland' (2022) 33 *Irish Studies in International Affairs* 172, 175-179.

18 Art 7(2) ECRML.

To some extent the establishment of the Office of Identity and Cultural Expression,¹⁹ which will create and oversee the implementation of the ‘national and cultural identity principles’, may represent an attempt to avert the kind of identity-based bright-lining otherwise implied by the grouping of Ulster Scots with the Ulster British tradition.²⁰ The principles, to which public authorities²¹ in Northern Ireland are required to have ‘due regard’ pursuant to the Act,²² establish that everyone in Northern Ireland is free to:

- (i) choose, affirm, maintain and develop their national and cultural identity and²³
- (ii) express and celebrate that identity in a manner than takes account of the sensitivities of those with different national and cultural identities and respects the rule of law,²⁴ and
- (iii) that public authorities should encourage and promote reconciliation, tolerance and meaningful dialogue between those with different national and cultural identities with a view to promoting parity of esteem, mutual respect and understanding, and cooperation.²⁵

The aims of the Office of Identity and Cultural Expression as outlined in section 78G are the promotion of cultural pluralism and of respect for diversity, the promotion of social cohesion and furthering reconciliation between different national and cultural identities, and increasing the capacity and resilience of Northern Irish citizens to address issues regarding national and cultural identity by supporting and promoting the celebration of the cultural and linguistic heritage of those living in Northern Ireland. In seeking to achieve these aims the Office is required to promote awareness of the national and cultural identity principles, monitor and promote compliance with those principles and report to the Northern Irish Assembly regarding compliance with the duties imposed on public authorities.²⁶

However, the potential of these principles to ameliorate the identarian divisions which are implicit in section 7B is questionable

19 2022 Act, s 78G.

20 Ibid s 78F.

21 On the meaning of public authority see sch 3 to the Public Services Ombudsman Act (Northern Ireland) 2016. Strangely, the definition of public authority exempts the Office of Identity and Cultural Expression from the meaning of public authority, thus, apparently, exempting it from the principles which it is obliged to enforce: see s 78F(4)((b) of the 2022 Act.

22 2022 Act, s 78F.

23 Ibid s 78F(a)(i).

24 Ibid s 78G(a)(ii).

25 Ibid s 78F(b).

26 The obligation is imposed by ibid s 78I(2).

given the ambiguity surrounding the extent to which the principles are enforceable in contexts where the expression or celebration of a particular identity fails to take ‘account of the sensitivities of those with different national and cultural identities’. It was suggested by the Committee on the Administration of Justice that the language of this section should impose a limitation on the basis of human rights standards, rather than adopting such an ambiguous threshold permitting restrictions of free expression on the basis of the subjective and perhaps prejudicial or intolerant beliefs.²⁷ The Committee’s recommendation was for the insertion of language which would require that national and cultural identity should be expressed ‘in a manner compatible with the rights of others’, however, this wording was not adopted.²⁸

More fundamental, and more concerning, is that section 78F of part 7A defines ‘national and cultural identity’ by reference to ‘a person’s religious belief, political opinion or racial group’. While these indicators are employed in existing equality legislation in Northern Ireland and are not objectionable *per se*, their use in the section, coupled with the failure to note ‘language’ as a marker of national and cultural identity, mean that linguistic identity is apparently excluded from consideration under this portion of the 2022 Act unless it co-exists with a religious or political identity.

The apparent result is that the protection is of Unionist or Catholic Irish speakers separately, but not of Irish speakers irrespective of background – reinforcing rather than minimising the divisions between distinct communities. The differential provision for Irish and Ulster Scots and the manner in which they are linked with particular traditions is thus problematic in terms of article 7 ECRML and its objective of promoting mutual understanding between all linguistic groups.

Perhaps more unusually, the approach would appear to be at odds with that taken in article 14 of the Human Rights Act 1998 which explicitly includes language as a ground of non-discrimination. The issue here is not so much that section 78F of the Act may be fundamentally ineffective – the same formulation of words has (as noted) been used elsewhere in equality-related legislation. Rather, the concern is that, by omitting language as a ground of discrimination the Act effectively reinforces a position which requires a person to identify themselves as a *Protestant* Irish speaker or a *Unionist* user of Ulster Scots, or a *BAME* (black, Asian, and minority ethnic) Irish language

27 See Committee on the Administration of Justice, ‘Briefing Note on Identity and Language (Northern Ireland) Bill (May 2022)’.

28 Ibid [30].

user in order to be successful under the section. This would seem to run contrary to the objectives of article 7 ECRML because it effectively requires individuals to show they have been subject to discrimination on an additional ground of sensitivity and does not permit a claim that linguistic identity alone might ground a legitimate basis for objection under the section.

Ambiguity surrounding the status of Irish and Ulster Scots

The second issue raised by the text of the 2022 Act is that neither Ulster Scots nor Irish is, in fact, granted a specific status. The repeal of the 1737 Act now ensures that neither Ulster Scots nor Irish are, *de jure*, unrecognised (or unrecognisable) languages, and the 2022 Act recognises both languages as having *de facto* standing as recognised languages through the standards to be enforced by their respective Commissioners. However, neither language is specifically stated to be an official language, but rather is implicitly positioned as such. While this constructive ambiguity perhaps avoids debates about the potential displacement of English as the official, and sole official, language of the jurisdiction, it also leaves both minority languages in a legally undefined position. Moreover, it is unusual given the models for recognition adopted in other jurisdictions in the UK and on the island of Ireland.

The model for recognition in other parts of the UK and on the island of Ireland can be generally characterised as taking one of three broad forms. The first, modelled by the Republic of Ireland, involves the recognition of a minority language (Irish) on a constitutional basis as *de jure* the first and one of the two official languages of the state, with a status practically equal to, but symbolically higher than, English even while the Irish remains *de facto* a minority language. In this model, the constitutional protection of the language is achieved largely through legislation, with a strong but generally supplementary role for constitutional judicial review. This model could be said to be the ‘strongest’ in terms of *de jure* protections – offering constitutional recognition as well as legislative protection (which in the case of the Republic of Ireland are layered on the protections provided by European Union membership). However, in placing the *de facto* minority language on an official footing this approach does have the effect of removing the language from the scope of the protections afforded by the ECRML which applies to languages that are not official languages but are traditionally used within a given territory of a state

by nationals of the state who form a group numerically smaller than the rest of the state's population.²⁹

The second model, adopted in Wales, involves the protection of minority language rights through primary legislation. The Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011 provide that Welsh is recognised as an official language equal in status to English. Significantly, the legislation recognises the right of Welsh speakers to live their lives through Welsh and to be accommodated in that aim.³⁰ While the Welsh model lacks a constitutional basis as in the Republic of Ireland, the *de facto* operation of the legislation, and the robust nature of the *de jure* standards it imposes – requiring accommodation of a life lived through Welsh (rather than the tolerance of Welsh speakers, or providing such a right only in those areas which are predominantly Welsh speaking) – mean this model is, arguably, the most effective in terms of minority language protection in practice.

Gaelic in Scotland is also afforded official status and is entitled to equal respect under the Gaelic Language (Scotland) Act 2005. However, the legislation in that jurisdiction employs a system based on periodic language plans which provide broad aims in terms of the promotion of Gaelic and the provision of advice to individuals and public bodies on the language's use rather than imposing duties and affording rights to language users – as is the case in Wales or the Republic of Ireland. Similar models based around periodic language plans were previously employed in both Wales and the Republic of Ireland but were found to be less effective than binding, statutory enforcement measures. In this respect, the Scottish model arguably represents the weakest means of minority language rights protection in both the *de jure* and *de facto* terms, tending towards a policy-based rather than a legal framework.

Northern Ireland is not in a position, as a result of reasons of both politics and sovereignty, to adopt a model underpinned by a constitutional guarantee as in the Republic of Ireland. Indeed, the text of the 2022 Act indicates, if not the impossibility, then certainly the political unfeasibility of a model which elevates Irish to an official status co-equal with English in circumstances where the language has been politicised and co-exists with the jurisdiction's other minority language of Ulster Scots.

In the circumstances, the 2022 Act thus grants the Irish language, and to a lesser extent Ulster Scots, a politically feasible level of

29 Irish remained the language of the majority of the population on the island of Ireland, by some estimates, until the mid-1800s and was definitively the dominant language in use among the population until the late 1700s. See Costello (n 17 above) 175–176.

30 Welsh Language (Wales) Measure 2011, pt 1.

recognition while noting that that recognition does not affect the status of the English language³¹ and remaining silent as to the positions of Ulster Scots, Irish and English in relationship with each other in the new order. The presumption in the circumstances is that Ulster Scots and Irish, while recognised, continue to occupy a secondary position and are not to be accommodated to the extent that, for example, Welsh is under the legislation in that jurisdiction. This is certainly the position in practice given the absence of specific rights for individual speakers under the 2022 Act and the focus, instead, on broad policy provisions.

What is particularly interesting in examining these models, and their potential application to Northern Ireland, is the COMEX's recommendation in its 2021 evaluation that the optimal means of protecting the Irish language in particular and fulfilling the UK's obligations under the ECRML would be the adoption of specific Irish language rights legislation (likely similar to the Welsh model) which incorporated public authority obligations but also afforded specific rights to individuals, *and* that such an Act should be introduced alongside an Irish language strategy which would function in a manner similar to the Scottish language plans.³² The ideal model for minority rights protection in Northern Ireland, certainly as envisioned by the COMEX, is not the model adopted but one which is a mix of the second and third models above as part of a protective infrastructure which encompasses both 'soft' policy-based measures and 'harder' legal standards in the form of individual rights.

ADMINISTRATIVE PROVISION FOR THE PROMOTION OF MINORITY LANGUAGES

One of the primary changes introduced by the 2022 Act is the appointment of an Irish Language Commissioner, who will oversee the development of, and compliance of public authorities with, standards of best practice relating to the use of Irish – in particular by requiring public authorities to have 'due regard' to the standards.³³ Section 78J of the 2022 Act provides that an Irish Language Commissioner will be appointed by the First Minister and deputy First Minister, and will hold office for a maximum of two consecutive five-year terms.³⁴

31 2022 Act, s 78J.

32 Council of Europe 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Expert's fifth evaluation report on the United Kingdom and Isle of Man' (2021) 7–8.

33 2022 Act, s 78J.

34 Ibid sch 9B, s 2(2).

Under the legislation, the Commissioner will oversee the development and implementation of ‘best practices’ regarding the use of the Irish language by public authorities. Beyond this, the functions of the Commissioner outlined in section 78L are slightly less clear, not least given that the section itself variously refers to ‘aims’,³⁵ duties³⁶ and discretionary functions.

Under section 78L the aim of the Commissioner is to enhance and protect the use of Irish by public authorities in the provision of services to the public or a section of the public. In doing so the section notes that the Commissioner must:

- (a) prepare and public standards of best practice,
- (b) monitor and promote compliance with those standards, and
- (c) investigate complaints.

This would appear to indicate the duties of the Commissioner in service of the aim described. Beyond this, section 78L permits the Commissioner to provide advice, support and guidance to public authorities on the use of Irish and the standards of best practice. This does appear to refer to functions of the Commissioner, though the discretionary nature of the framing leaves open the question of whether it is for the Commissioner to actively advise authorities or whether such advices will be given only where they are sought.

The primary function of the Commissioner then is the preparation and oversight of the implementation of the best practice standards³⁷ which must be reduced to writing,³⁸ and submitted to the First Minister and deputy First Minister who may, but are not obliged to, approve them.³⁹ Significantly, the standards may make different provision for different public authorities such that authorities in predominantly Irish-speaking areas may adopt more strongly bilingual (or trilingual) policies within their own areas.⁴⁰ The standards are to be reviewed at five-year intervals⁴¹ or at such other time as the Commissioner considers necessary or desirable.⁴² In this respect, the structure of best practice implementation and review under the 2022 Act retains some features of the language strategy or plan system previously in place in the Republic of Ireland and still in place in Scotland. However, it falls short of the precise provision for

35 See *ibid* s 78L.

36 See *ibid* s 78L(2).

37 See *ibid* s 78L(4).

38 *Ibid* s 78M.

39 *Ibid* s 78M(2).

40 *Ibid* s 78M(5)(B).

41 *Ibid* s 78N.

42 *Ibid*.

a regional, integrated language strategy which the ECRML notes was previously promised under the NDNA.⁴³

The position of Ulster Scots under section 78R does not replicate the requirements applied to Irish. Though there is an Ulster Scots and Ulster British Commissioner, they are tasked only with promoting awareness of services provided in Ulster Scots,⁴⁴ providing and publishing advices and guidance for public authorities,⁴⁵ and handling complaints where a public authority has not had due regard to such guidance.⁴⁶ While the compliance threshold for both languages is thus the same, imposing an obligation to have ‘due regard’, the aims and objectives of both Commissioners as regards their specific languages are distinct.

Crucially, the Act does not provide speakers of either minority language a right to interact with the state or its agents through their chosen language nor does it apply a uniform standard for the use of the relevant minority language by all public authorities. While the best practices (in the case of Irish) and guidelines (in the case of Ulster Scots) may provide for an ‘active offer model’ in which individuals are actively offered the opportunity to use their choice of language when interacting with public authorities, it may also be the case that the broadly drawn functions and powers under the legislation result in equally broad standards and guidance documents which, under the auspices of ‘due regard’, effect little change in real terms.

The requirement to have due regard in UK law requires public authorities to consider specific matters, generally provided in legislation or policy. As such, it is not a duty to achieve a specific result but to reflect on, and include in, a consideration of the relevant matters in the authority’s reasoning in the substance of the ultimate decision.⁴⁷ There is no indication of the practical mechanisms by which due regard will be measured under the Act, namely, through the use of policy analysis or impact assessments, nor indeed is there specific reference, within the portions of the Act dealing with the Irish language, to the ECRML – though reference is made to the ECRML in respect of Ulster Scots in section 78S(a). In this respect, the extent to which ‘due regard’ will produce practical changes is somewhat questionable.

The absence of a statutory appeals mechanism to challenge the actions of public authorities where they fail to comply with the standards established by the Commissioner is also of concern as it

43 NDNA, annex E, s 5.21.3 and see Council of Europe (n 32 above) 6.

44 2022 Act, s 78S.

45 Ibid s 78S(2).

46 Ibid s 78T.

47 See the analysis of the concept provided by Colton J in *In re a Decision of the Department of Health* [2022] NIKB 21, [102].

means that any challenge will presumably be based on an application for judicial review – a process which will focus the law’s attention not on the substance of the minority language rights standards themselves but on the procedural processes or steps which are alleged to have been breached. As is discussed further below, the barriers to access in terms of mounting such challenges have been raised as an issue of concern by stakeholders.

The only review mechanism which is provided by the 2022 Act is by way of a complaint to the relevant Commissioner.⁴⁸ On receiving a valid complaint the Commissioner must investigate the complaint or provide the complainant with a written statement of the Commissioner’s reasons for not launching an investigation.⁴⁹ Where the Commissioner pursues an investigation into a complaint they must notify the public authority in writing of the complaint, afford the authority a reasonable opportunity to comment on the matters raised, and furnish both parties with a report setting out the Commission’s findings.⁵⁰

There is some ambiguity as to whether a failure on the part of a public authority which may be complained of will be occasioned by a failure to make a plan which has due regard to the standards issued by the Commissioner or a failure to fulfil the requirements of the best practices-based operational plan the authority has drafted for itself. If the former is the case, the threshold of due regard is sufficiently ambiguous that the complaints mechanism may be ineffective. If the latter is the case, the risk is that a strategy of minimal provision will develop in order to evade complaints – not least in circumstances where the standards are self-imposed. In particular, it is unclear the extent to which complaints mechanisms under the Act will ensure or bolster compliance with article 10 ECRML which seeks to actively expand the range and offering of public services by administrative authorities in minority languages. The thresholds and objectives outlined in article 10 require staffing and recruitment to ensure users of minority languages can submit oral and written applications and other documents to public authorities and receive replies in those languages,⁵¹ to ensure communications with the public employ minority languages⁵² and to allow the use of regional or minority language family names.⁵³

48 In respect of Irish, see s 78P, and, in respect of Ulster Scots, see s 78T of the 2022 Act.

49 See *ibid* s 78P(2) and s 78T(2).

50 See *ibid* s 78P and s 78T.

51 ECRML, art (10)(a)(i) .

52 *Ibid* art 10 and, in respect of areas where the number of minority speakers justify such steps, see the higher requirements imposed by art 10(2).

53 *Ibid* art 10(5).

The penalties imposed under the Act where a public authority fails to fulfil its obligations are also minimal. The primary penalty is the laying of a report before the Assembly detailing the findings of the investigation which concluded there had been a failure, and a discretionary power to make recommendations as to how the failure may be remedied.⁵⁴ Unlike in other jurisdictions, no financial penalty, monitoring, or further review of compliance with recommendations is outlined or required by the Act's current text. In some respects, the enforcement structure of the Act is thus the same as the ECRML which is premised on a system of periodic reporting and final reports. However, the enforcement structure does not represent a system which is committed to the kind of resolute action in respect of the promotion of minority languages described by article 7 ECRML as one of the Charter's primary objectives.

This political approval which is inbuilt in the Act also threatens the independence of the Commissioners. Under the 2022 Act both Commissioners are appointed by the First and deputy First Minister for a term of five years which may be renewed once.⁵⁵ The Commissioners can be removed prior to the end of this term only with the agreement of the First and deputy First Minister and by means of a notice in writing for one of the stated causes provided in the legislation.⁵⁶ While this creates some risk that a lack of political agreement could lead to an ineffective Commissioner remaining in office, this is balanced against the relatively short term of office.

The term of office itself has been repeatedly flagged by language commissioners at an international level as being a crucial component of their independence, with the International Association of Language Commissioners determining a term of 10 years to be the preferable period in office, and other jurisdictions in the UK and on the island of Ireland providing for terms of six, seven and eight years respectively.⁵⁷ In the case of Northern Ireland, the term proposed is thus short when compared with neighbouring jurisdictions – and particularly so in circumstances where there is a real possibility that governmental breakdown may coincide with the period of reappointment thus leaving no Commissioner in place. This potential is exacerbated further by the

54 See 2022 Act, s 78P(4) and s 78T(4).

55 Sch 2 inserting sch 9B into the Northern Ireland Act 1998, s 2(2); sch 3 inserting sch 9C into the Northern Ireland Act 1998, s 2(2).

56 2022 Act, sch 9B, s 2(4); sch 9C, s 2(4).

57 The Irish Coimisinéir Teanga holds office for a term of six years, renewable once (Official Languages Act 2003, sch 2, s 20(1)). In Wales, the Commissioner holds office for a term of seven years (see Welsh Language (Wales) Act 2011, sch 1, s 6).

appointment, in the case of both languages, of only one Commissioner such that no panel of Commissioners is in place and where the term in office of one Commissioner ends no Commissioner will be in office until and unless another is appointed.

While the ECRML does not provide for minimum or indeed recommended terms for language Commissioners, the divergence of the Act from internationally recognised best practice is challenging to justify, not least given the periodic breakdowns of government in Northern Ireland which, if they coincided with the end of a Commissioner's term in office, might leave the offices unstaffed.

EDUCATION AND MINORITY LANGUAGES

Article 8 ECRML provides for a bifurcated process as part of which there are significant obligations for educational provision in areas or territories where the regional or minority language is traditionally used and lesser obligations outside that area.

Within territories where the regional or minority language is traditionally used, parties to the Charter are obliged to make pre-school or a substantial part of pre-school education available in the relevant regional or minority languages, to favour and encourage measures which would provide for such provision, to make the same provisions in respect of primary and secondary education or to provide for the teaching of relevant regional/minority language as an 'integral part' of the curriculum. The Charter further commits parties to provision of technical and vocational education, adult, and continuing education as well as university education in minority or regional languages, and to provide facilities for the study of such languages at university level. The Charter also, specifically, requires the basic and further training of teachers needed to implement these measures and to establish a supervisory body to monitor the measures taken.⁵⁸

In areas where such regional or minority languages are not traditionally used the Charter obliges parties to undertake, where the number of language users justifies it, to allow, encourage or provide teaching in or teaching of the regional or minority language at all appropriate stages of education.⁵⁹ On the basis of the provision made in the 2022 Act it must be presumed that this, more minimal, obligation represents the threshold which the UK Government considers itself bound to satisfy in providing for minority language education. And yet, the designation of parts of Northern Ireland as *not* 'traditionally'

58 ECRML, art 8.

59 Ibid art 8(2).

Irish-speaking represents at best a fundamental misunderstanding of the historical prevalence of Irish and Irish speakers throughout the jurisdiction and, at worst, a wilful ignorance as to the role and prevalence of Irish in the jurisdiction on a historical basis.

Minimal provision is made in section 78J(2) of the 2022 Act in respect of Irish-medium education. That section provides that the official recognition of Irish permitted by the Act is in addition to any provision made for Irish-medium education.⁶⁰ The Education (Northern Ireland) Order 1998 Act imposes a statutory duty on the Department of Education to encourage and facilitate Irish-medium education. In furtherance of this aim, in 2000 the Department of Education established *Comhairle na Gaelscolaíochta* to encourage and facilitate the development of Irish-medium education as required by the 1998 Order. In addition, in 2001 *Iontaobhas na Gaelscolaíochta* was established. *Iontaobhas* operates as a trust for Irish-medium education, with a fund of £1.25 million. Significantly, however, *Iontaobhas* can provide funding only for primary and secondary schooling activities and not for pre-school.

No provision is made in the 2022 Act, or existing legislation, for the teaching of Irish as an ‘integral part’ of the curriculum in Northern Ireland. The additions made by the 2022 Act fail to significantly alter the position in relation to minority language education in Northern Ireland or to more substantively align the position of minority language education in Northern Ireland with the one envisaged under the ECRML.

In respect of Ulster Scots, section 5 of the 2022 Act provides for the amendment of the Education (Northern Ireland) Order 1998⁶¹ by inserting section 89A which provides that:

It shall be the duty of the Department to encourage and facilitate the use and understanding of Ulster Scots in the education system.

This mirrors the existing obligation in respect of Irish under the 1998 Order and, in as much as it represents the adoption of a position of parity, it is a welcome development. What is unclear, however, is the extent to which the provision under the 2022 Act imposes an obligation in respect of teaching Ulster Scots as a language or as part of a tradition. This potential has been raised, in particular, by a statement made by the UK Government, concurrent with the introduction of the Bill, implying it would recognise Ulster Scots speakers as an ethnic minority group.⁶²

As the Committee for the Administration of Justice has noted, a recognition of Ulster Scots speakers as an ethnic minority raises a

60 2022 Act, s 78J(2)(2).

61 Education (Northern Ireland) Order 1998 SI 1998/1759 (NI 13).

62 Ibid [25].

question over whether such recognition would result in the duty to facilitate ‘understanding’ of Ulster Scots under section 5 being re-interpreted as requiring the teaching of political perspectives on Ulster Scots speakers as an ethnic group belonging to a particular community. This reading would certainly appear to be the contextually intended one given the coupling of Ulster Scots and the Ulster British tradition elsewhere in the Act. This is particularly concerning given that it runs contrary to the objectives of eliminating unjustified distinctions regarding minority languages and their maintenance or development as outlined in section 7 ECRML.

As in the case of Irish, there is no detailed provision for the specific or substantive obligations which the statutory duty imposed by the newly inserted section 89A would provide. Fundamentally, this also raises questions about the extent to which the regime which exists, and which is proposed more generally, complies with the ECRML – and in particular the higher threshold which the Charter imposes where a language is ‘traditionally’ used within the territory in question.

USE OF MINORITY LANGUAGES IN LEGAL PROCEEDINGS

One of the most heavily contested aspects of minority language rights in Northern Ireland has long been the continuing force of the Administration of Justice (Language) Act (Ireland) 1737 and its prohibition of Irish and indeed all other languages which are not English in legal proceedings. This position has long been contrary to the obligations imposed by article 9 ECRML which requires states to facilitate and permit the use of minority languages in criminal and civil proceedings generally, and in particular in those judicial districts in which the number of residents using the regional or minority languages justifies it.

In particular, the Charter provides that, where the conditions outlined in article 9 are present, the courts should, at the request of a party to the action, conduct the proceedings through the relevant minority language, allow those appearing before them to use such a language, not consider evidence received in that language inadmissible solely by reason of the language in which it is tendered to court, and to produce relevant documents in such a language and provide, where necessary, for the provision of interpreters and translation.⁶³

The 2022 Act does not make any provision in respect of these thresholds or practices – nor does it reproduce the language that was

63 ECRML, art 9(c) further provides for rules in respect of minority language use in administrative matters.

included in the draft legislation associated with the NDNA and which suggested that languages other than English be permitted in legal proceedings where this was ‘necessary in the interests of justice’.⁶⁴ Instead, the 2022 Act provides only for the repeal of the 1737 Act. The effect this will have in practice is unclear absent further changes to the Rules of Court and the provision of resources to enable bilingual proceedings, pleadings and associated matters as envisaged under the ECRML. While the repeal is thus a welcome development, the text of the Act does not require any positive actions or accommodations on the part of the state specific to legal proceedings.⁶⁵ The effect of the 2022 Act is thus that Irish and Ulster Scots are, in theory, permitted in judicial settings but there is no indication of to what extent, if any, their use will be facilitated in practice now that they are no longer prohibited.

In addition, the differential framing under the ECRML with provision of greater supports where numbers using a minority language so justify is, in itself, problematic for a jurisdiction such as Northern Ireland where the population of speakers is diffuse and judicial discretion may vary significantly as between areas even in close geographic proximity to each other, and perceptions of the ‘disruptive’ impacts of minority language may be based more on perceived politicisation rather than substantive administrative concerns.

A separate concern relating to judicial proceedings has been raised by other research on the 2022 Act⁶⁶ – specifically the absence of an appeals mechanism in respect of a finding by either Commissioner that a public authority has not complied with its obligations in respect of the national and cultural identity principles outlined in section 78F or the standards of best practice. The Act makes no reference either to an internal or statutory appeal against the findings of an investigation undertaken by the Commissioner nor to any other mechanisms of judicial or quasi-judicial review. In circumstances where the enforcement mechanisms provided under the Act are largely light-touch measures and do not attract financial or other penalties, this may be unsurprising.

However, this omission is an issue of concern, first because it implicates an absence of (or hurdle to) access to justice where the Commissioner and/or a public authority is seen as having failed in

64 See in particular 2022 Act, s 78E(2).

65 This is despite the obligations imposed on the UK Government under ECRML art 9 which requires the most important national statutory texts and those relating particularly to users of these language unless they are otherwise provided.

66 Róisín Á Costello, *Reflections and Recommendations on the Identity and Language (Northern Ireland) Bill 2022* (Irish Research Council/Dublin City University 2022) 18.

respect of their obligations under the Act. The level of knowledge, social and financial capital and time required to avail of judicial review, for example, is significant, and the absence of an explicit process for statutory appeals is likely to reduce the capacity of the public to enforce accountability under the legislation.

The absence of a statutory appeals mechanism is also an issue of concern because, as other research has noted, the absence of such a mechanism may be harmful to the legitimacy of the system of complaints established under the 2022 Act in and of itself – creating a perception that the Act is a paper tiger.⁶⁷ It is perhaps here that the impacts of the abandonment of the previous system of a stand-alone Irish Language Act, alongside an Irish Language Strategy, become most apparent. The 2022 Act's potential to facilitate compliance with, and achievement of, the objectives and obligations included in article 9 ECRML is largely a matter delegated to policies which are not yet in place, albeit that the provisions of the legislation do permit such policies to be implemented following the repeal of the 1737 Act.

CULTURAL ACTIVITIES AND FACILITIES

Article 12 ECRML provides that parties to the Charter undertake to foster cultural activities and facilities which encourage and promote access to minority languages and cultural production within those languages, as well as dubbing and other methods which will make cultural materials produced in other languages available in the minority language, to encourage the generation of published works in the minority language, to provide terminological research services.

The 2022 Act makes little mention of cultural activities as a stand-alone matter – though it makes repeated reference to cultural identities. A significant addition to the 2022 Act during the course of its debate and amendment, however, was the inclusion of section 8 which provides for the creation of the Castlereagh Foundation which will have, as its primary objective, the funding and support of academic research into identity, including national and cultural identity in Northern Ireland. It is difficult to say whether the creation of the Foundation contributes to the fulfilment of the provisions of article 12 ECRML or whether the provisions of section 8 should be understood, instead, as representing a contribution towards the objectives of the Charter and the promotion of study and research of minority languages as outlined in article 7(h).

⁶⁷ Ibid 18–19.

The creation of the Foundation is certainly welcome. Academic initiatives such as the Northern Irish placenames project⁶⁸ have proved both academically rich and publicly popular initiatives both in their own right and as a means of reconnecting communities of all traditions to the languages of their homeplaces and depoliticising minority languages by promoting a sense of ownership. To some extent, existing bodies such as *Forás na Gaeilge* and non-governmental agencies such as *Conradh na Gaeilge* also contribute to the achievement of the goals outlined by article 12 ECRML. What is needed and what these various efforts cannot provide, however, is a state-led and integrated approach to cultural engagement and promotion of minority language cultural efforts as envisaged by article 12.

CONCLUSION

The 2022 Act represents a ‘first generation’ piece of minority language legislation in that it neither seeks to impose strict, rights-based standards nor punitive deterrent sanctions where the standards it does provide for are breached. The Act also occupies an unusual position in both eschewing the strict requirements of a piece of language rights legislation while also offering little of the detail that would characterise a policy-led language rights approach through a minority language rights ‘language strategy’.

In this respect, the 2022 Act falls short of the provisions for language rights promised under the St Andrews Agreement and the NDNA but, more fundamentally, falls short of the provisions that the COMEX urged should be implemented in order for the UK to comply with its obligations under the ECRML following its most recent review of Northern Ireland’s commitments under the Charter, in 2021. In many respects, the main function of the Act, and its incontrovertible success, is its provision of legal and institutional recognition of both Irish and Ulster Scots in Northern Ireland. This may seem a moderate, or even insufficient, achievement. However, it is significant in as much as it establishes a context in which it may become unremarkable to encounter minority languages in institutional settings in Northern Ireland and an attendant depoliticisation of minority languages in the jurisdiction may be achieved.

Perhaps most significantly, the Act provides a statutory baseline which can be amended and supplemented to comply more fully with the requirements of the ECRML. Certainly, in its present form, the Act does not give full voice to the obligations which the Charter imposes upon parties – whether its lesser thresholds (applicable to areas with

68 See [Northern Ireland Placenames Project](#).

low densities of minority speakers or which are not traditionally home to minority language communities) or its higher thresholds (in respect of areas ‘traditionally’ home to minority language speakers) are used as a benchmark. Despite this, the establishment of the Castlereagh Foundation and the explicit repeal of the 1737 Act, in particular, indicate the most significant sea change in thinking about and committing to minority languages in Northern Ireland since the state’s foundation.