

# Reflections and Recommendations on the Identity and Language

(Northern Ireland) Bill 2022



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## Introduction

The Identity and Language (Northern Ireland) Bill was introduced in the House of Lords on the 25 May 2022. The contents of the Bill are based primarily on draft legislation published alongside the 2020 New Decade New Approach (NDNA) Agreement<sup>1</sup> and which were to be introduced before the Northern Ireland Assembly in 2020 as part of an ‘integrated package of legislation.’


Ultimately the contents of this package (which comprised three Bills and in particular an Irish Language Act) was never introduced and, in June 2021, the UK Government gave a commitment that if the Irish language legislation which had been promised under the NDNA was not introduced before the Northern Ireland Assembly by September 2021, that the legislation would be introduced in Westminster by October of that year.<sup>2</sup> After a failure to meet this self-imposed deadline, and under popular pressure from community and other interest groups, the UK Government reiterated its commitment to introduce Irish language legislation in Parliament in 2022 but declined to set a timetable to do so. When the Northern Ireland Assembly elections in May 2022 resulted in deadlock as the DUP prevented the appointment of a Speaker and First Ministers, and in the face of a legislature and Executive which were unable to function, the Identity and Language (Northern Ireland) Bill was finally introduced before the House of Lords later the same month.

The 2022 Bill replicates the main content and the broad objectives of the three separate legislative documents originally proposed under the NDNA, namely provision for Irish language rights, for the creation of an Ulster Scots/Ulster British Commissioner and the establishment of the Office of Identity and Cultural Expression. The reactions to the 2022 Bill have been largely positive in this respect and it has been greeted as a long overdue and welcome development in terms of

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<sup>1</sup> The Bill’s passage will be ‘backwards’ starting in the House of Lords and then moving to the House of Commons. The date for the Second Reading (general debate) on the bill in the Lords is scheduled for the 7 June 2022. Further stages, where amendments could be tabled in either house, will follow.

<sup>2</sup> Pursuant to the Good Friday Agreement (henceforth GFA), the UK Parliament retains the power (and is obliged to) legislate in areas devolved to the Northern Ireland Assembly where such intervention is required in order to meet treaty-based obligations. In this case the obligations imposed by the European Charter of Regional and Minority Languages. In 2021, the Committee of Experts (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



language rights – and Irish language rights in particular. While this is not incorrect – the 2022 Bill certainly represents a significant step forward relative to the legal and policy landscape which currently exists in respect of minority languages – there remain concerns over several aspects of the Bill. The report which follows outlines some central concerns raised by the text of the Bill (as introduced) and which were identified by participants in the final workshop of the New Foundations Irish Research Council funded project ‘Supporting Irish Language Use on a Cross-Community Basis - Recommendations and Insights’ in June 2022, including concerns raised by the community partner in the project, Turas.


### **(a) Language Rights Legislation or Language Policy?**

The vast majority of the community and civil society action for language rights in Northern Ireland which has reached a point of particular intensity over the last ten years has been directed at securing recognition of, and rights for, speakers of minority languages (particularly Irish) as part of a model similar to those in place in other jurisdictions in the United Kingdom and on the island of Ireland.<sup>3</sup> Certainly these pieces of legislation – notably those in Wales and Scotland – were viewed as representing minimum content requirements by the Committee of Experts (COMEX) of the European Charter for Regional or Minority Languages (ECRML). The Committee has publicly noted that in order for the UK to meet its obligations under the ECRML in respect of Irish in Northern Ireland comprehensive legislative provision for courtroom interpretation, education and communication between citizens and public bodies would be required. Indeed, in its report on the United Kingdom’s compliance with the ERCML 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.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> COMEX ‘Fifth report of the Committee of Experts in Respect of the United Kingdom’ 1380<sup>th</sup> meeting \*1 July 2020).



The 2022 Bill does not meet the thresholds envisioned by COMEX nor those imposed by minority languages legislation in Wales and Scotland. Indeed, what is notable when the 2022 Bill is 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.

## **(b) Fundamental Changes Proposed by the 2022 Bill**

The 2022 Bill seeks to secure the official recognition of Irish through the appointment of an Irish Language Commissioner, making provision for the development of best practices relating to use of Irish by public authorities (adherence to which will be overseen by the Commissioner) and by requiring public authorities to have ‘due regard’ to such standards. These aspects of the Bill are considered in further detail below, as are the shortcomings of the particular provisions which are intended to give effect to the proposed changes.

The most fundamental shift which the 2022 Bill will occasion if enacted is in the institutional treatment of the Irish language. Part 7B of the 2022 Bill officially recognises Irish, in s.78I. However, the Bill does not make Irish an official language. The models in other jurisdictions in the United Kingdom and on the island of Ireland for official recognition of minority languages take three broad forms with various legal thresholds for the protection of the language involved. The first, is modelled by the Republic of Ireland where Irish is recognised *de jure* in the constitution as the first and official language of the State protection for which is achieved through legislation, while remaining a *de facto* minority language.<sup>5</sup> The Republic of Ireland could thus be said to be the ‘strongest’ jurisdiction in terms of *de jure* protections - offering a constitutional recognition as well as legislative protection.

The second model, adopted in Wales, involves the protection of minority language rights through primary legislation which provides that Welsh is recognised as an

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<sup>5</sup> Where the language has both official protection through legislation and is recognised as the first official language of the nation under the constitution

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.<sup>6</sup> While the Welsh model lacks a constitutional basis as in the Republic of Ireland the *de facto* operation of the legislation in place, and the robust nature of the *de jure* standards the legislation imposes 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 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. Similar models based around language boards and period language plans had previously been employed in both Wales and the Republic of Ireland but were found to be ineffective.<sup>7</sup> 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.


Northern Ireland is not in a position, as a result of both political and sovereignty related reasons, to adopt a model underpinned by a constitutional guarantee as in the case of the Republic of Ireland. The text of the 2022 Bill indicates, if not the impossibility, then the political unfeasibility of a model which elevates Irish to an official status coequal 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 Bill thus grants the Irish language formal and 'official' recognition while noting that 'nothing in this part affects the status of the English language' and remaining silent as to the relative positions of Irish and English within this new order – the presumption being that Irish while an official language thus continues to occupy a secondary position and is not to be accommodated to the extent that, for example, Welsh is under the legislation in that jurisdiction.<sup>8</sup>

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<sup>6</sup> Welsh Language (Wales) Measure 2011, Part 1.

<sup>7</sup> See, Identity and Language (Northern Ireland) Bill 2022, Part 7C s.4.

<sup>8</sup> *Ibid*, s.78I(3).



It is worth noting, at this point, as a matter flagged by the participants in the workshop and the community partner, that minority language legislation in Northern Ireland is not, and in some respects cannot currently, aim for a ‘strong’ legislative model as in Wales. There are two primary reasons for this. The first, is that the level of political and popular support for Irish in Northern Ireland is not comparable to that received by Welsh in Wales. The second, is that in terms of fostering reconciliation and combatting sectarianism, a model which uses strong enforcement models is more likely to result in resistance rather than acceptance of the minority language.


A further, important change which the 2022 Bill will effect is the repeal of the Administration of Justice (Language) Act (Ireland) 1737 which, at present, prohibits the use of Irish in court documents and legal proceedings. However, as with the status granted to Irish under the 2022 Bill, the repeal perhaps promises more than it delivers. The 2022 Bill does not reproduce the language included in the draft legislation associated with the NDNA which suggested that languages other than English be permitted in legal proceedings where this was ‘necessary in the interests of justice.’<sup>9</sup> This is a welcome development, however, the text of the Bill, equally, does not require any positive actions or accommodations on the part of the State specific to legal proceedings e.g. provisions for interpretation in court, or the provision of statutes or other documents in Irish.<sup>10</sup> While the 1737 Act is thus repealed – and Irish is in theory permitted in judicial settings there is no indication of to what extent, if any, the use of Irish will be facilitated now that it is no longer prohibited.

These two, most basic, changes brought about by the Bill – the recognition of Irish as a language of the State, and the repeal of prohibitions on its use in legal settings – illustrate two themes which recur throughout the proposed text, namely a reflexive appeal to constructive ambiguity, and a repeated attempt to reconcile the need to afford political recognition to the Irish language with the need to ‘depoliticise’ the language and its users.

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<sup>9</sup> in particular s.78E(2)

<sup>10</sup> This is despite the obligations imposed on the government of the United Kingdom under Article 9(3) of the European Charter of Regional and Minority Languages which requires the most important national statutory texts and those relating particularly to users of these language unless they are otherwise provided.



In examining these themes, this report outlines three broad areas of concern identified by participants. The report which follows is concerned primarily with s.7B of the 2022 Bill which deals with the institutional recognition of, and support for, the Irish language in Northern Ireland and is based on discussions of the text of the Bill which was introduced before the House of Lords prior to debate or amendment.

The three primary areas of concern with the regulatory structures and legal protections provided under Bill's proposed scheme are,

- (i) The structure and regulatory independence of the Irish Language Commissioner and the Commissioner's ability to enforce the standards established under the Bill,
- (ii) Textual ambiguity and associated difficulties, and
- (iii) Resulting concerns surrounding the capacity of the Bill to strengthen reconciliation.

These concerns are examined by reference to the experiences of the participants, and standards of best practice identified in the Republic of Ireland, Scotland and Wales as well as existing research on the relevance of the issues identified to generating sustainable and effective models of language rights protection and enforcement



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# **Regulatory Independence and Enforcement**

## 1. Regulatory Independence & Enforcement

The primary means by which the 2022 Bill proposes to give effect to the newly granted recognition of the Irish language is through the creation of an Irish Language Commissioner (the Commissioner). Section 78J(1) provides that an Irish Language Commissioner will be appointed by the First Minister and deputy First Minister, who will hold office for a maximum of two consecutive five year terms (See schedule 9B).<sup>11</sup> 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 s.78K are slightly less clear, not least given that the section itself variously refers to ‘aims’,<sup>12</sup> duties,<sup>13</sup> and discretionary functions.

Under s.78K the aim of the Commissioner is to enhance and protect the use of Irish by public authorities in the provision of services to 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, s.78K(3) 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 be a function of the Commissioner, though the discretionary nature of its framing leaves

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<sup>11</sup> Schedule 9B, s.2(2).

<sup>12</sup> See s.78K(1).

<sup>13</sup> See s.78K(2).

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 standards referred to in s.78K(2)(a). These standards must be prepared by the Commissioner having had due regard to any guidance issued by the First Minister and deputy First Minister as well as such other public authorities the Commissioner considers appropriate.<sup>14</sup> The standards must then be reduced to writing,<sup>15</sup> and submitted to the First Minister and deputy First Minister who may, but are not obliged to, approve them.<sup>16</sup> Significantly, the standards may make different provision for different public authorities,<sup>17</sup> and must be reviewed at five year intervals.<sup>18</sup> The standards may be revised following this review or at any other time the Commissioner considers necessary or desirable.<sup>19</sup>

These standards operate as the central mechanism introduced by the proposed text which would facilitate Irish speakers in interacting with the State. Crucially, however, the Bill does not provide a right to interact with the State or its agents through Irish<sup>20</sup> or a uniform standard for the use of Irish by public authorities. While the best practices may provide for an active offer model participants noted that it may also be the case that such broadly drawn legislative powers result in equally broad standards which effect little change in real terms. This is a particular risk in circumstances

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<sup>14</sup> See, s.78L(4).

<sup>15</sup> S.78L(1).

<sup>16</sup> S.78L(2).

<sup>17</sup> S.78L(5)(a).

<sup>18</sup> S.78M(1).

<sup>19</sup> S.78(2).

<sup>20</sup> As is provided under the ECRML as well as under the Republic of Ireland's Official Languages Act 2003 and Official Languages Act (Amendment) 2021 and the Welsh Language (Wales) Measure 2011.

where the First and deputy First Minister are charged with determining the matters to which the Commissioner is obliged to have due regard.

The text of the Bill obliges public authorities only to have ‘due regard’ to any best practice standards published by the Commissioner<sup>21</sup> and to prepare<sup>22</sup> and publish a plan setting out the steps it intends to take to comply with these standards.<sup>23</sup> 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 and include in the ultimate decision a consideration of the relevant matters in the substance of the decision and the authority's reasoning. There is no indication of the practical mechanisms by which due regard will be measured under the Bill i.e. through the use of policy analysis or impact assessments. Participants in the research network established noted that the lack of any indication as to how due regard would be measured, as well as the failure to include State centralised services administered by Westminster (such as .gov.uk websites) to fall within the list of public authorities covered by the Bill were causes of concern.

Where a public authority fails to comply with its obligations under the 2022 Bill the Commissioner is also empowered to receive and consider complaints made to him under s.78O. In order to make a complaint, an individual must have been directly affected by the failure,<sup>24</sup> the complaint must be made in writing within three months of the day on which the individual first knew of the matters raised,<sup>25</sup> and the public authority must have been placed on notice of the complaint and be afforded a reasonable

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<sup>21</sup> S.78N(1).

<sup>22</sup> S.78N(4) the authority must consult with the Commissioner in making such a plan.

<sup>23</sup> S.78N(2) and may revise and republish the plan where it considers it necessary and desirable of its own accord or in accordance with new or revised standards issued by the Commissioner s.78N(3).

<sup>24</sup> S.78O(1)(a).

<sup>25</sup> S.78O(1)(b).

opportunity to consider and respond to the contents of the complaint.<sup>26</sup> 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.<sup>27</sup>

Where the Commissioner pursues an investigation into a complaint he 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.<sup>28</sup>

Two issues arose during discussions of the complaints mechanism. The first was the lack of clarity over whether a failure on the part of the public authority 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, the threshold of due regard is, as noted, sufficiently ambiguous that the complaints mechanism may be ineffective. If the latter, the risk is that plans may be drafted in a manner which deliberately under promises, or minimises, the requirements placed on the public authority – not least in circumstances where those requirements are self-imposed.

The potential for the complaints mechanism to be ineffective more generally is significant given that the penalties imposed under the Bill where a public authority fails to fulfil its obligations under the legislation are minimal. Where the Commission finds a public authority has failed in its obligations under the legislation it may issue recommendations as to how to remedy the failure (and future failures) and must lay the report of its findings before the Assembly.<sup>29</sup> Unlike in other jurisdictions, however, no financial penalty, monitoring or further review of compliance with


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<sup>26</sup> S.78O(1)(c).

<sup>27</sup> S.78O(2).

<sup>28</sup> S.78O(3).

<sup>29</sup> S.78O(5).



recommendations is outlined or required by the Bill's current text. While this may, initially, seem to be a flaw it was identified by the participants as being a perhaps necessary concession in circumstances where 'hard' or punitive models of enforcement could engender resistance. As against this, however, participants noted that where no enforcement was present, existing communities or bodies already supportive of Irish use, as well as those hostile to its use would continue to perpetuate existing patterns of 'sectarian' language divisions.


These sections of the 2022 Bill also suffer from the politicisation which was noted in the introduction. In particular, the provisions dealing with the Irish language include provisions whereby the standards for best practice developed by the Commissioner must be approved by both the First and deputy First Ministers. This threatens to produce a situation in which only minimal or compromised standards are agreed and the efficacy of the legislation is depleted as a result. This political approval also harms the independence of the Commissioner himself.

Under the 2022 Bill the Commissioner is appointed by the First and deputy First Minister for a term five years which may be renewed once. The Commissioner 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.<sup>30</sup> 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, however, was raised as an issue of concern by network participants during this research. Participants noted that terms of office are a crucial component of the independence of language commissioners, with the international association of language commissioners determining a term of ten years to be the preferable period,

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<sup>30</sup> Schedule 9B, s.2(4).



and other jurisdictions in the United Kingdom and on the island of Ireland providing for terms of six, seven and eight years respectively.<sup>31</sup> In the case of Northern Ireland, participants voiced the concern that a shorter term of office might prove problematic where its completion coincides with a period of political breakdown during which Stormont is not in session and no successor can be appointed. This leads to a further issue with the structure of the Commissioner as it is proposed under the 2022 Bill and which was of particular interest to network participants during workshop discussions.


The powers of the Commissioner are vested in the office holder as a corporation sole but, crucially, in only one office holder i.e. one Commissioner. This is unusual in circumstances where one of the central aims of the legislation should be, and are apparently intended, to ensure that neither Ulster Scots nor Irish are perceived as belonging exclusively to one particular community. In circumstances where only one Commissioner is appointed – necessarily representing only one community – this aim is, necessarily, hampered. A more concerning potential may be that a Commissioner who is not a citizen of Northern Ireland and thus lacks insight into the sentiments and needs of minority language communities in the jurisdiction may be appointed. Neither of these seem advisable or sustainable in terms of building popular support for the work of the Commissioner or maximising the potential of the office.<sup>32</sup>

Indeed, the primary question is why only one Commissioner can be appointed under the legislation – not least where it has become common in certain contexts to appoint a sole Commissioner but to provide in legislation for the appointment of a panel of several Commissioners

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<sup>31</sup> The Irish Coimisinéir Teanga holds office for a term of 6 years renewable once (Official Languages Act 2003, Schedule 2, s.20(1)). In Wales, the Commissioner holds office for a term of 7 years in Wales (see Welsh Language (Wales) Act 2011, Schedule 1, s.6(1)).

<sup>32</sup> As against this, some participants noted that a panel of commissioners might prove difficult in practice with one stymying the work of the Commission.



moving forward.<sup>33</sup> This design permits a single individual to be appointed immediately so that work can commence, while further individuals are brought on board on an ongoing basis. Generally, this approach has several advantages. The first is that it creates a greater diversity of perspectives among leadership, a useful feature in contexts involving new, and controversial, regulatory efforts but in particular in settings such as Northern Ireland where visible representation of those from different community backgrounds is particularly important in building consensus and co-operation.

The second benefit of multi-Commissioner structures is that where Commissioners' terms of office are staggered, it creates a rolling handover with at least one experienced Commissioner remaining in office as new Commissioners join. This is particularly important in newly formed bodies where creating and transmitting institutional learning is critical and where the provisions for staffing mean that staff who are not Commissioners are seconded to their roles from civil service Departments and may thus turnover at a relatively regular interval.

More generally, the staffing of any Commissioner's structure is important in that staff must be sufficient in number to permit the office of the Commissioner to fulfil its functions effectively and should, ideally, be selected in a manner which ensures at least a minimal level of independence. In the Republic of Ireland, the office of the language Commissioner is relatively small with a staff of ten individuals in addition to the Commissioner and there is, in theory, no reason why a small team cannot fulfil the functions assigned to the Commissioner. Under the 2022 Bill, the Commissioner may appoint such number of staff as he determines, and may determine the terms and conditions of their appointment.<sup>34</sup> However, it appears that these staff are intended to come

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<sup>33</sup> In this respect see Ireland's Data Protection Act 2018 which provides for the appointment of three Commissioners in s.15.

<sup>34</sup> *Ibid*, s.4.



on secondment from the Executive Office<sup>35</sup> or from the Office of Identity and Cultural Expression.

The Commissioner will also be funded by the Executive Office with the approval of the Department of Finance.<sup>36</sup> This funding structure, in combination with the seconding of staff and the deference to the First and deputy First Minister for approval of measures risks creating mechanisms for indirect political opposition and political pressure to be exerted on the office of the Commissioner in a manner than interferes with independence and compromises enforcement.

Perhaps based on an understanding of the risk of political interference Part 2 s.6 of the 2022 Bill empowers the Secretary of State (SoS) to direct Ministers of the Assembly, Departments or new bodies to act or to refrain from acting in a particular manner in circumstances where the SoS believes the action or inaction is interfering with effective operation of an identity and language authority or to another function.<sup>37</sup>

The powers granted to the SoS in this context were apparently included in the context of repeated political opposition to the passage of legislation providing for Irish language rights, and an apprehension that further opposition could hamper the operation of legislation following its introduction. The concurrent powers thus, presumably, seek to minimise or prevent political obstruction of the Commissioner's work in relation to appointments, approval of standards, issuing of guidance as well as practical matters which impact independence and enforcement such as funding and staffing, and the making of statutory regulations.<sup>38</sup> However, the extent to which this alternative mechanism is used will turn largely on


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<sup>35</sup> Ibid, s.5(1), (3).

<sup>36</sup> Ibid, s.8.

<sup>37</sup> See generally s.6(3) and the requirements outlined in s.6(4) as well as the obligation imposed by s.7(2) to comply with such directions by the SoS in Schedule 2.


<sup>38</sup> In this respect see, in particular, s.78F(5) and (6) and s.78P(2) and (3) on the power of the First and deputy First Minister to make regulations adding additional or removing authorities from the list of authorities subject to the Bill.



the SoS possessing both the political will to use their powers under the legislation and to refrain from restricting the activities of the Commissioner themselves. Indeed, in circumstances where there was (and is) concern that the Commissioner's work might be subject to such political pressure it is difficult to appreciate why repeated requirements for political approval have been retained thus far within the legislation, and why the Executive Office along with the First and deputy First Minister were chosen as the source of regulatory authority under the legislation.

During the course of this research network participants suggested that the more workable structure would be to replace the need for approval by the First and deputy First Minister with a provision that standards and guidance would be subject to presumptive approval and would not enter into force only in circumstances where the First and deputy First Minister acted within 30 days to restrain the entry into force of the measure in question. Participants also raised concerns over the manner in which staffing could hinder independence, noting that the use of short term contracts would create difficulties in building and retaining institutional knowledge (in particular during the initial phases of the Commissioner's development) and could dissuade individuals with experience in language rights policy and advocacy from involvement in the office as they would be required to assume the risks associated with such contractual precarity.

The final concern raised by the network participants was the absence of an appeals mechanism in the text of the 2022 Bill. The Bill makes no reference either to an internal, 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 Bill are largely light-touch measures and do not attract direct financial penalties this could be considered unsurprising. However, in discussions, this emerged as a point of concern on two basis. The first, was that it implicated weak enforcement and a potential risk to access to justice (albeit in circumstances where no



hard rights were involved) as it offered no mechanism for review of error through a standard, statutory, form. The second was that the absence might harm the legitimacy of the system of complaints in and of itself, creating a perception that it was a measure which lacked the power to vindicate the interests of minority language speakers not only in theory but also in practice.



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# **Textual Ambiguity**

## 2. Textual Ambiguity

A further issue of concern raised repeatedly during the workshop with network participants was ambiguity surrounding three issues namely,

- (i) The meaning of ‘due regard’ in circumstances in which it was not defined elsewhere in the legislation,
- (ii) The absence of deadlines or time limits for activities under the proposed legislation, and
- (iii) The lack of clarity over the intended content of best practice standards and the uniformity (or lack of uniformity) in their application to public authorities.

The meaning of ‘due regard’ is dealt with in the previous section and may be alleviated by amendments to the Bill which introduce a higher standard or greater clarity on the standards or issues to which the First and deputy First Minister can require the Commissioner to have such regard.

However, as noted by network participants, the experience of the Republic of Ireland was instructive. In that jurisdiction, previous legislation provided that public authorities were required to provide services ‘depending on resources’ – a standard that proved ineffective largely as a result of the lack of a precise threshold which could be imposed through the requirement.

The absence of particular time limits for appointments, approvals, and decisions under the 2022 Bill also poses a significant issue in terms of efficacy, permitting political actors to abstain from action while maintaining plausible claims of future compliance with the terms of the legislation. The absence of time limits in the legislation was a particular surprise to members of the network who had engaged in the legislative consultation processes which was understood to have informed the Bill and who had specifically noted the need for such deadlines in order to ensure that the

legislation could be pressed into action and did not become a paper tiger which remained in force in theory but dormant in practice.

The most concerning ambiguity within the text, however, is the failure to specify thresholds for the form or the content of the best standards to be formulated and applied by the Commissioner, or to state in what manner or for what reasons the best practice standards could or should be applied differently to various public authorities as s.78P(2) suggests is possible. Minimal requirements for the specification of standards were previously proposed by one of the network participants in the form of those present in the Welsh Language (Wales) Measure 2011 which provides,

## 26. The Commissioner to specify standards

*(1) The Commissioner may, by regulations —*

- (a) specify one or more service delivery standards,*
- (b) specify one or more policy making standards,*
- (c) specify one or more operational standards,*
- (d) specify one or more promotion standards,*
- (e) specify one or more record keeping standards, and*
- (f) make other provision about such standards.*

*(2) In specifying standards, the Commissioner shall specify 3 categories of public authorities based on their level of contact with the public-*

- (a) Public authorities which have the highest level of engagement with the public;*
- (b) Public authorities which have an intermediate level of engagement with the public; and*
- (c) Public authorities which have a minimal level of engagement with the public;*


*the Commissioner may before specifying these categories, consult any other persons that the Commissioner thinks it appropriate to consult.*<sup>39</sup>

However, no similar provision was included in the text of the 2022 Bill introduced to the House of Lords. This would seem to address the perceived need to differentiate between public authorities and to assign particular compliance thresholds to different categories of public authorities, while also clearly establishing objective and justified basis for any divergence in treatment. In particular, it would seek to maximise efficacy in very quotidian terms by placing compliance obligations on public authorities proportionate to their visibility and influence in terms of interactions of citizens with the State. This approach avoids a situation in which there is high compliance with best practices by bodies which are not readily visible or frequently interacted with (thus providing little appreciable difference to Irish users in their day to day interactions with the State) and simultaneously low compliance on the part of those authorities which are very visible and with which citizens must interact on a regular basis.

Importantly, the provision also clearly delineates that best practice standards are not uniformly applicable to a range of activities but must be tailored to fit the area or action at issue. This differentiation is not drawn in the 2022 Bill nor does it appear to be averred to. To a certain extent, in considering the absence of further specific provision as to the form or content of best practices under the proposed legislation it may be reasonable to assume that the drafters were seeking to appeal to the potentials of constructive ambiguity which would allow the legislation to be passed on the basis that extended negotiations regarding particular provisions would not be required. However, while this approach can and has assisted in reaching agreement in Northern Irish politics on previous

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<sup>39</sup> See, <https://www.legislation.gov.uk/mwa/2011/1/part/4/chapter/2/enacted?view=plain> accessed 18 June 2022.



occasions it is peculiarly unsuited to situations in which legislative provisions are intended to ground statutory regulation.





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# **Reconciliation and Identity**

### 3. Reconciliation and Identity

In addition to the portions of the 2022 Bill which deal with the Irish language, Part 7A of the Bill provides for attendant issues of national and cultural identity,<sup>40</sup> establishing the Office of identity and cultural expression,<sup>41</sup> and creating ‘national and cultural identity principles.’<sup>42</sup> In circumstances in which legislation in Northern Ireland dealing with language rights must be to ensure that minority language rights do not become proxies for sectarian sentiment this aspect of the Bill is particularly important. The principles outlined in 7A and to which public authorities<sup>43</sup> carrying out functions in Northern Ireland are required to have ‘due regard’<sup>44</sup> establish that everyone in Northern Ireland is free to,

- (i) choose, affirm, maintain and develop their national and cultural identity and<sup>45</sup>
- (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,<sup>46</sup> 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.<sup>47</sup>

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<sup>40</sup> A person’s national and cultural identity is a reference to a person’s religious belief, political opinion or racial group, s.78F(3).

<sup>41</sup> S.78G.

<sup>42</sup> S. 78F.

<sup>43</sup> On the meaning of public authority see Schedule 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 obliged to enforce, see s.78F(4)(b).

<sup>44</sup> S.78F(1)

<sup>45</sup> S.78F(1)(a)(i).

<sup>46</sup> S.78F(1)(a)(ii).

<sup>47</sup> S.78F(1)(b).

The aims of the Office are outlined in s.78H are the promotion of cultural pluralism and respect for diversity, the promotion of social cohesion and reconciliation between different national and cultural identities, and increasing the capacity and resilience of the citizens of Northern Ireland 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 national and cultural identity principles, monitor and promote compliance with those principles and report to assembly about compliance with duty.<sup>48</sup> In addition, the Office is empowered, but not obliged, to,

- (a) publish and revise guidance duty to uphold principles including best practice for complying with same and other matters relating to national and cultural identity,
- (b) undertake, commission or support research into matters relating to national and cultural identity,
- (c) provide, commission or support educational programmes, engagement and training,
- (d) provide grants to persons with aims like those described in s.78H(1), and
- (e) cooperate with persons with aims like those described in s.78H(1).

The structure, functions and powers of the Office are detailed in Schedule 9A to the 2022 Bill which provides that the Office will consist of a Director and a maximum of five further members<sup>49</sup> to serve for a maximum of two consecutive five-year terms.<sup>50</sup> Staff are appointed by the Office with the

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<sup>48</sup> The obligation is imposed by s.78H(2).

<sup>49</sup> Schedule 9A, .s.2.

<sup>50</sup> Ibid, s.3.

approval of Executive Office and the Department of Finance.<sup>51</sup> While the powers of the Office are broad,<sup>52</sup> it is funded by the Executive Office with the approval of the Department of Finance<sup>53</sup> and reliant on both the Executive Office and the Department for financial and staffing requirements. In many respects, therefore, similar concerns regarding independence arise in respect of the Office and the Commissioner.

The point of particular significance which emerged during this research, however, is the obfuscation surrounding the extent to which the principles outlined in s.78F 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 has been suggested by the Committee on the Administration of Justice that the language of this section should reflect not ambiguously drawn thresholds which would permit restrictions of free expression on the basis of the subjective and perhaps prejudicial or intolerant thresholds but should instead impose a limitation on the basis of human rights standards.<sup>54</sup> The Committee’s recommendation is 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.”<sup>55</sup>

This sentiment was echoed by network participants who also raised some concern over the apparent separation of culture and identity, and language under the 2022 Bill – with Ulster Scots culture and identity being elevated apparently at the expense of language, while in the case of Irish the language was elevated without a reciprocal emphasis on language and

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<sup>51</sup> Ibid, s.5(5). The Executive Office and the Department may also provide “assistance” in the form of staff, facilities or services to assist the Office (s.6(1)), including seconding staff to the Office (s.6(2)).

<sup>52</sup> Ibid, s.8 providing that the Office may do ‘whatever the Office considers is appropriate for facilitating, or incidental or conducive to, the exercise of the Office’s functions, other than borrowing money.’

<sup>53</sup> Ibid, s.10.

<sup>54</sup> See, Committee on the Administration of Justice, ‘Briefing Note on Identity and Language (Northern Ireland) Bill (May 2022).

<sup>55</sup> Ibid, [30].



culture. There was some uncertainty among participants as to which, if either, of these models of protection was more beneficial but there was a concern that differential treatment of both languages and their user groups could reinforce existing perceptions of who “belonged” within the category of Irish or Ulster Scots user.


This was an area of particular concern for participants with experience in community engagement in Northern Ireland who noted that cross-community cultural activities (notably the placenames project at Queens University Belfast) were successful precisely because the potential for reconciliation through promoting a cross community sense of ownership of the Irish language was strongest at points where language and culture interacted and sectarian identities broke down.

The importance of fostering a legislative landscape which does not reinforce, but rather seeks to diminish, perceptions that certain languages are exclusively part of the heritage of certain communities must be the central aim of legislation dealing with minority languages in Northern Ireland, and the creation of the Office evidences an awareness that issues of identity and language may possess a capacity to generate tension and to reinforce and reinvigorate oppositional definitions of linguistic and community identity. However, the differential provision for Irish and Ulster Scots poses a risk to the potential of the 2022 Bill in terms of reconciliation.

This is particularly the case where the UK government, concurrent with the introduction of the Bill, issued a declaration implying it would recognise Ulster Scots speakers as an ethnic minority group.<sup>56</sup> As the Committee for the Administration of Justice notes, this raises the question of whether political recognition of Ulster Scots speakers as a distinct ethnic group has legal implications – including whether the duty to facilitate ‘understanding’

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<sup>56</sup> Ibid, [25].



of Ulster Scots in the education system under the proposed legislation will, in practice, be re-interpreted as facilitating and encouraging teaching of particular political perspectives on Ulster Scots speakers as an ethnic group belonging to a particular community.

More fundamental, and more concerning is that s.1(3) of s.78F of Part 7A the 2022 Bill 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 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 Bill 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.



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# **Recommendations for Best Practice**

## 4. Recommendations for Best Practice Standards

Based on the concerns noted above and having regard to the contents of official languages legislation in Wales, Scotland and the Republic of Ireland, the following recommendations emerged from the discussions of network participants during this research,

### (a) Structural Division of Standards

The standards of best practice adopted under the legislation should, in keeping with the Welsh model specify and differentiate between,


- (a) service delivery standards,
- (b) policy making standards,
- (c) operational standards,
- (d) promotion standards, and
- (e) record keeping standards.

More broadly, best practice should require consideration and incorporation of the following issues.

### (b) Active Offer & Information Provision

1. Any approach adopted should be on the basis of an ‘active offer’ model which places the requirement to offer services in Irish on the public authority in question,
2. Communications and publicity undertaken by a public authority should be made in both languages,
3. Those communicating with a public authority by phone or in person should be informed at point of contact the languages they may use in interacting with the authority,




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4. If these languages do not include Irish, they must be furnished with reasons for this omission, and the same justification must be set out in writing and be publicly available,
  5. Official documentation should be available for completion and submission in both English and Irish and should be considered valid if completed in either language regardless of the language of the form,
  6. Signage in shared, public spaces and tourist venues should display both Irish and English place names,
  7. Documentation, signage or other communications or publications which include both languages should include the Irish and English portions in font of equal size, colour and prominence,

### **(c) Prospective Measures**

8. In the plans prepared by public authorities, the authorities should not repeat the same quantitative or qualitative aim in successive plans or list as a future aim a measure or objective already achieved,
9. Where the same or similar aims are included in successive plans the public authority should be required to provide an explanation explaining that this has occurred because of a failure to secure this aim during the period of the previous plan and what different approaches will be taken to achieve it on this occasion,
10. Public authorities should also be required to report on the maintenance of those aims and objectives already achieved in their plans,

### **(d) Equivalent Duties**


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11. If different standards are to be applied to different public authorities this should be done on a prospective, systematic and standardised basis rather than as part of a responsive, *ad hoc* approach,
  12. Those public authorities which are most visible to the public and which have the highest level of interaction with members of the public should not be exempted from, and should be required to adhere to higher, standards of best practice,

### **(e) Equivalent Treatment**

13. Those who use or seek to use Irish in their interactions with a public authority should not be denied service,
14. Where the services provided by public authorities are available through both languages, the service provided through Irish should be of equivalent quality to the service provided through English,


### **(f) Active Capacity Building**

15. A best-efforts approach should be used to staff all positions within the Commissioner's office, and to staff a proportion of the Office of Identity and Cultural Expression with individuals who have the language competences necessary to interact with members of the public in their chosen minority language,
16. Contracts offered to individuals in both the Commissioner's office and the Office of Identity and Cultural Expression should offer security and fair conditions which permit those who take the posts to do so without concern over precarity. Terms of employment should be for a minimum of five years mirroring that of the Commissioner or the Office of Identity and Cultural Expression,
17. The Commissioner himself should possess a high level of competence in Irish,

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18. The opportunity to participate in Irish language education courses (including courses which are through the medium of Irish but engage children in sports, arts or other activities) should be provided free of charge to children in State funded schools in school settings and/or through online resources,
  19. Optional language courses and assessment in Irish should be provided free of charge to employees of public authorities and their immediate families,
  20. Optional courses on points of interest convergence (e.g., place names, sport, nature and the environment, folklore and local history) which highlight the shared linguistic inheritance of communities in the jurisdiction, or are conducted partly or wholly through Irish, should be offered free of charge through local authorities to residents of the authority area and to employees of the authorities and their immediate families,
  21. The Commissioner and the Office of Identity and Cultural Expression should contribute to public consultations which will impact, and intervene as an interested party in cases involving, the Irish language,

### **(g) Education**

22. The Commissioner and the Office of Identity and Cultural Expression should provide clear means by which academic researchers, civil society organisations and non-governmental bodies can communicate with them and seek their input or co-operation on research, activism or other work which intersects with the work of the Commissioner or the Office,
23. Ongoing funding and support should be made available to continue the Queens University Belfast placenames project and to study areas characterised by the convergence of common culture and language including the intersections between Ulster Scots and



Irish, and links between linguistic communities from various traditions in Scotland

24. The community partner noted that financial and academic incentives had operated effectively in promoting language learning among communities where language competence had been lost and recommended that specific bursaries and supports be provided for individuals from communities not understood or characterised as Irish-speaking.
25. Any financial incentive, direct or indirect subsidy to support language learning should be subject to an impact assessment to ensure that it will be effective in promoting engagement on a cross community basis rather than merely catering to pre-existing groups,
26. As part of this assessment careful consideration should be given as to whether means testing is appropriate or effective and its potential to exclude potential learners,
27. Pastoral or supplementary academic supports should be provided to those undertaking study through bursary or scholarship schemes, in particular where the chosen individuals are first general University attendees,
- 28.** Educational classes and classes on areas of interest convergence should take into consideration the divergent meanings attributed to 'beginner' language competence as between those who have never been exposed to Irish and those who have some exposure but little daily engagement with the language.



**5**


# Conclusion

## Conclusion

The 2022 Bill represents a ‘first generation’ piece of minority language legislation in that it neither seeks to impose strict, rights-based standards nor punitive deterrent sanctions. In this respect, the legislation falls short of the legislative standards promised under the St Andrew’s Agreement and which activists within the jurisdiction have called for as well as the legal provisions that COMEX has urged must be implemented in order for the United Kingdom to comply with its obligations under the ECRML. This divergence was, however, characterised by participants as being part of the necessary compromise to ensure that Irish is not viewed as an externally imposed obstacle and does not retrench resistance to minority languages.

The Bill as it was introduced before the House of Lords lacks clarity in both its objectives and the measures and mechanisms through which it proposes to achieve them, and is characterised by a recourse to political approval and general policy which lacks the specificity of comparable legislation in other jurisdictions in the UK and on the island of Ireland. The main function of the Bill, and its incontrovertible success, is its provision of legal and institutional recognition of Irish as a language within Northern Ireland. This may, in certain respects, seem to be a moderate, or even insufficient, achievement. However, it is significant for three reasons.

First, it provides a new *status quo* in accordance with which it may gradually become not only unremarkable but expected to encounter Irish in institutional settings and in which engagement with the language may, as a result, become progressively apolitical. Second, and relatedly, the Bill affirms the existence of a multilingual population within the jurisdiction and recognises their entitlement (albeit not in the language of rights) to affirm their linguistic identity not only in private spaces but in public ones. These are both significant developments on an individual basis for Irish speakers but also at a societal level for advancing reconciliation in a manner which



fosters the development of a multilingual society. Third, and finally, the proposed legislation would provide an institutional model which can be developed further by amendment to comply more fully with the requirements of the ECRML. In this respect, the proposed legislation may operate as a minimum benchmark which will be hard to displace.

In this, final, respect participants noted that while some participants viewed the Bill as the first step in moving towards the ideal of a Welsh model of language rights legislation, it also emerged in discussion that given the need to foster popular tolerance, and support, for minority languages the progression of language rights was likely to follow a polycentric rather direct trajectory. In this respect the participants emphasised the following guiding principles in supporting Irish language use on a cross community basis,

- (i) Accessibility rather than compulsion should be central to language learning opportunities,
- (ii) Incentives rather than strict enforcement should be employed in order to engage tolerance rather than promote resistance,
- (iii) Culture and language should be seen as interwoven rather than divisible and should be used to promote public engagement with Irish, and
- (iv) Divergences between the supports needed by various communities should be acknowledged and provided for.



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