



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Response to Consultation by the Northern Ireland Courts and Tribunals Service on In-Court Interpretation Services

Summary

The Courts and Tribunals Service has asked for views on how the courts provide interpreters for people who use languages other than English, including sign language. The Human Rights Commission advises that interpreting can help to protect human rights.

The human rights standards include:

- Article 6 of the European Convention on Human Rights, which protects the right a fair trial, and
- Article 14 of the Convention, which forbids discrimination.

The Commission:

- says when an interpreter should be provided;
- advises on how to ensure the quality of interpreters, and
- opposes the ban on using the Irish language in courts.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ providing legal advice and representation in human rights proceedings,² and advising on whether a Bill is compatible with human rights.³ In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies. In accordance with its mandate, the Commission also delivered advice to government on the content of a Bill of Rights for Northern Ireland on 10 December 2008.⁴
2. The Commission welcomes the opportunity to provide its views on the proposed court interpreting policy, whose overall objective fulfils positive human rights obligations. This response will largely focus on whether the policy fulfils obligations accepted by the UK under ECHR Article 6 (right to a fair trial), with cross-reference to ECHR Article 14 (prohibition of discrimination) and other instruments. The Convention is given further effect in domestic law by the Human Rights Act 1998.
3. Court interpreting is a vital component in the front line of ensuring a fair trial, and more broadly the interests of justice in a democratic society. Court interpreting can only protect such interests if the interpreters are impartial, highly professional, linguistically competent (in both the source and target languages and the necessary interpreting skills), and are properly prepared, briefed and bound as to the parameters of the role within which they operate. Quality assurance and professional codes of conduct are therefore important elements in assuring the right to a fair trial, and hence preventing injustice which can lead to a miscarriage of justice or prompt the need for a costly re-trial. This is more so the case in Northern Ireland (as elsewhere in the UK and Ireland) where legal interpreting remains a largely unregulated and relatively new profession. The Commission's response will examine not only the direct provision of court

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.70.

³ *Ibid*, s.69(4).

⁴ *Ibid*, s.69(7).

interpreting but also the measures taken to quality assure such interpreting.

The 1737 Act

4. The consultation document refers to the Administration of Justice (Language) Act (Ireland) 1737 and states that this requires that “all court proceedings in Northern Ireland, including any documentation relating to those proceedings, must be in English, except where an individual does not speak or understand English”. It would be helpful if the Courts and Tribunals Service could set out in further detail how the present application of the 1737 Act provides for this. The Courts and Tribunals Service will be aware that, at the time of writing, a Court of Appeal judgment is awaited *In the Matter of an Application by Caoimhín Mac Giolla Catháin for Judicial Review*⁵ - an application challenging the prohibition of the use of the Irish language in courts further to the 1737 Act, which was dismissed by the High Court in July 2009.

5. In the Commission’s view the prohibition of the use of Irish in the courts is likely to be incompatible with the ECHR. It also conflicts with the commitments in the Belfast (Good Friday) Agreement 1998 to facilitate and encourage the use of Irish, and to remove restrictions which discourage or work against the maintenance of Irish, and the UK Government’s commitments under Article 7(2) of the European Charter for Regional or Minority Languages to eliminate “any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language”. The Council of Europe’s Committee of Experts (COMEX) which is the monitoring body for the European Charter recently made a declaration to this effect stating:

The active prohibition of the use of Irish in court is a restriction relating to the use of the language. The UK authorities have not provided any justification for this restriction. The Committee of Experts believes that this restriction endangers the maintenance and development of Irish. Based on the available information, the Committee of Experts considers that the prohibition of the use of Irish in court in Northern Ireland by the 1737 Act is an unjustified restriction relating to the use of Irish, endangering the development of the language.⁶

⁵ [2009] NIOB 66.

⁶ Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle), ECRML (2010)4 21st April 2010 Paragraph 121 (see also paragraphs 117-120).

6. As the Courts and Tribunals Service will be aware, the present policy will have to be reviewed and amended in light of any change to the 1737 Act. The rest of this submission will address the issues of court interpreting into minority ethnic and sign languages which are central to the consultation.

Obligations under the ECHR and other instruments

7. The ECHR contains provisions relating to *minority language rights* (most notably, Article 10 freedom of expression, Article 8 the right to family life and Article 14 prohibition on discrimination on grounds of language)⁷ and *procedural rights* (contained in Article 5, relating to explanations of reasons for arrest, charges and criminal accusations; and Article 6, right to a fair trial).⁸ The context of the present consultation, and therefore the focus of the response, principally relates to the procedural rights found in ECHR Article 6, read with the prohibition on discrimination in Article 14.

8. Article 6(1) of the ECHR (right to a fair trial) provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair...hearing.

9. Article 6(3) provides:

⁷ See the jurisprudence of the ECtHR (including *Belgian Linguistics* cases 1 EHRR 22552 (1968); *Cyprus v Turkey* (app. No 25781/94) 10 May 2001; *Burghartz v Switzerland*, 18 EHRR 101 22 Feb 1994 and *Bulgakov v Ukraine* (app. No. 598994/00) 11 Sept. 2007). See also ICCPR jurisprudence (see *Ballantyne, Davidson, McIntyre v Canada* UN Human Rights Committee Communications Nos.359/1989 and 385/1989 of 31 March 1993; *Coeriel and Aurik v The Netherlands* UN Human Rights Committee Communications of 2004 No.453/1991; *Lovelace v Canada*, UN Human Rights Committee Communication 24/1977 UN Doc A/36/40). There has relatively recently been a broader codification of minority language rights within specific human rights instruments and declarations (Council of Europe Framework Convention for the Protection of National Minorities and European Charter for Regional and Minority Languages, OSCE Oslo Recommendations regarding the Linguistic Rights of National Minorities and UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities).

⁸ The Commission uses this rights framework to conceptualise rights in this area, rather than the 'language of choice v language of need' framework which does not fully encapsulate the range of language rights and also runs the risk of being read in such a way that, contrary to international standards, the former category is seen as inferior.

Everyone charged with a criminal offence has the following minimum rights:

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defence;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

10. Article 14 of the ECHR (prohibition of discrimination) provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

11. In summary, in accordance with Article 6 there are therefore three levels of protection:

- first, non-English speaking defendants in a criminal trial have an explicit right to the free assistance of an interpreter (Art. 6(3)(e));
- second, in a criminal trial all defendants have a right to free legal assistance when they have insufficient means to pay and the interests of justice so require (Art. 6(3)(c)), along with a right to call defence witnesses under the same conditions as prosecution witnesses (Art. 6(3)(d));
- third, all criminal defendants or persons whose civil rights and obligations are being determined have a right to a fair hearing without discrimination (Art. 6(1) and 14).

12. The UK is also party to similar standards under Article 10 of the Framework Convention for National Minorities and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Access to justice on the basis of equality is also found within Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and

Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). Protection against discrimination on grounds of ethnicity and disability is also provided under domestic legislation, namely the Disability Discrimination Act 1995 and Race Relations (Northern Ireland) Order 1997 (as amended).

Proposed Court Interpreting Policy

13. The consultation document sets out the following structure for court interpreting provision under the policy:

Nature of Trial	Interpreter provided for	Providing body ⁹	Funding body
Criminal Courts Including Youth Court Proceedings ¹⁰	Defendants	First appearance in PPS prosecution jointly by: PSNI & PPS	PSNI
		All other appearances: Court Service	Court Service / PPS / NIO
	Prosecution witnesses	PPS (or other prosecution agency ¹¹)	PPS/other prosecution agency
	Defence witnesses	Defence	Defence
Civil and Family Courts	Parties in Civil and Family Hearings (except below)	Parties themselves	Parties themselves
	domestic violence / children or committal cases	Court Service	Court Service
	Non-committal cases including possession	Court Service if judge directs or party has no resources to fund	Court Service
Inquests	Witnesses	Court Service (when directed by Coroner)	Court Service
Tribunals	Parties	Court Service, only if: judge/adjudicator/ legal chair requests or party has no resources to fund;	Court Service / Sponsoring Department

14. The Commission has identified the following issues for further clarification by the Courts and Tribunals Service, which will be dealt with in turn below:

⁹ Acronyms as follows: Police Service for Northern Ireland (PSNI), Public Prosecution Service (PPS) and Northern Ireland Office (NIO).

¹⁰ For youth defendant: as per criminal trials, with provision also for parent/carer if required; arrangements for prosecution and defence witnesses not set out, but presumed to be the same as in criminal courts.

¹¹ E.g. TV licensing, Driver & Vehicle Licensing, Crown Solicitors Office (extraditions).

- Spoken and Sign Language interpreting: differentials
- Criminal and Civil Proceedings: ambit and fair trial
- Quality Assurance: Courts and Tribunals Service provision
- Quality Assurance: other providers

Spoken and Sign Language interpreting: differentials

15. The policy makes specific reference to “foreign language” interpreters, sets out arrangements for their provision and then indicates that the same provision will apply to “British Sign Language (BSL) interpreters or other Language Service Professionals (LSP) for deaf and hearing impaired defendants”. For clarity, it may be best to also make explicit reference to Irish Sign Language (ISL) and, more broadly, to integrate sign language interpreting within the overall definition of interpreting for the purposes of the policy. At present, the Sign Language seems to be an ‘add on’ rather than an integral part of the policy.

Criminal and civil proceedings: ambit and fair trial

Ambit of ‘charged with a criminal offence’

16. Article 6(3)(e) sets out an explicit right for a defendant who cannot understand or speak the language used in court to have the free assistance of an interpreter. The proposed Court Interpreting policy provides that an interpreter will be provided to the defendant and paid for by a public authority in criminal courts.
17. Although the right to a fair trial in Article 6(1) applies to civil rights determinations as well as criminal proceedings, the ‘minimum’ rights enumerated in Article 6(3) apply only to persons ‘charged with a criminal offence’. However, European Court of Human Rights (ECtHR) jurisprudence established some time ago that this concept should not necessarily refer only to the state’s domestic definition of a criminal charge. In *Engel v The Netherlands*¹² the ECtHR set out criteria for determining whether proceedings constituted a criminal charge under Article 6; these included consideration of domestic classification but also the nature of the offence and the nature and severity of potential penalties. These criteria have been applied in subsequent judgments, and domestic jurisprudence has determined that the severity of the penalty

¹² (1976) 1 EHRR 647.

(which can bring civil proceedings within the definition of criminal charges for the purposes of the Convention) extends beyond deprivation of liberty.¹³

18. A UK case of note is *Benham v UK*¹⁴ which involved imprisonment for refusing to pay the 'poll tax'. Despite English law determining that only civil proceedings had taken place, the ECtHR in finding a violation of the Convention determined that as the proceedings were brought by a public authority, had a punitive component and involved a relatively severe penalty, they fell within the ambit of 'criminal offence' for the purposes of Article 6(3).
19. Therefore an individual facing civil proceedings could rely on Article 6 in the domestic courts (and ultimately the ECtHR) to claim a violation of Article 6, if the Court were to determine that the civil proceedings do indeed reach the threshold under the ECHR and their Article 6(3) rights have not been afforded to them. There are a number of parallels can be drawn between determinations such as that of *Benham v UK* and other civil procedures regimes providing for Civil Penalties, for example, measures dealing with Anti-Social Behaviour. The ambit of the Article 6(3)(e) right therefore stretches beyond the criminal courts.
20. The Courts and Tribunals Service appears to deal with this by committing to provide interpreters in committal cases when an individual's liberty is in jeopardy, and in non-committal cases when the judge so directs or when the party cannot avail of the resources to pay. This section of the policy is placed under the heading Family and Civil Courts and could benefit from redrafting for clarity.
21. The Commission would urge the Courts and Tribunals Service to set out in detail its consideration of the ambit of Article 6(3) in relation to civil proceedings, and how the Service feels the proposed limited provision of interpreters will meet the 6(3) requirements. It would also seem appropriate that, in

¹³ For further analysis, see Sullivan, Clare 'The United Kingdom Identity Cards Act 2006: civil or criminal?' *International Journal of Law & Information Technology*, 2007, 15(3), 320-361 citing *Öztürk v Germany* (1984) 6 EHRR 409, *Bendenoun v France* (1994) 18 EHRR 54, *AP v Switzerland* (1997) 26 EHRR 541, *Lauko v Slovakia* (1998) ECHR 26138/95, *Georgiou and Another (t/a Marios Chipperry) v UK* (Application no 40042/98) (2001) STC 80 and *Air Canada v UK* (1995) 20 EHRR 150. In relation to the severity of penalty extending beyond deprivation of liberty, Sullivan cites: *Han & Yau, Martins & Martins, Morris v Commissioners of Customs and Excise* (2001) 1 WLR 2253, para 60.

¹⁴ (1996) 22 EHRR 293.

addition to the stated exemptions, a test explicitly based on the criteria set out in ECtHR jurisprudence should be provided for in determining whether an interpreter will be provided and paid for in civil proceedings.

Fair trial

22. In addition to the explicit rights set out in Article 6(3), there is also the general requirement of a fair trial in Article 6(1), which can be read with the prohibition on discrimination in Article 14. Implicit in the right to a fair trial is the doctrine of equality of arms. The policy proposal is that accused persons should provide and fund interpreting for their own defence witnesses.¹⁵
23. It would be open to the accused to argue that, if they did not have the resources to provide their own interpreter, their defence, and therefore the right to a fair trial, could be damaged. Further, when a person is 'charged with a criminal offence' the right to free legal assistance under Article 6(3)(c) is also engaged. The Courts and Tribunals Service may anticipate that interpreters in such circumstances would be provided for through legal aid, which itself would provide the appropriate test for determining if an accused person has insufficient resources. This matter should be clarified in the final policy document. It would be particularly helpful if the final policy document would detail the Legal Services Commission's practice in this regard.
24. There may also be circumstances of non-provision of interpreters in civil cases where there are insufficient resources among parties to cover the cost and this may impact on equality of arms, and therefore a fair trial and, more generally, the interests of justice. At present, while a mechanism has been created for judicial direction at Inquests and Tribunals, and in the aforementioned circumstances (save for general exemptions for cases involving domestic violence

¹⁵ There are likely to be instances when the defence witness is the only person requiring interpreting in a particular language in the court room. There will also be instances when the interpreting requirement will be shared by the defendant and their defence witnesses (or indeed the prosecution). The policy does not appear to allow for the interpreter used by the defendant to be used by defence witnesses (and it is unclear as to whether the same interpreter could be used by the prosecution). It is possible that this would be permitted, or that the Court would regard this as constituting a conflict of interest (as would be the case if the interpreter had previously interpreted for the defendant in a police station). The policy document and any interpreter code of conduct should be explicit on this matter.

and children), no scope exists for judicial direction for interpreter provision in Family or Civil Courts.

25. In addition to oral interpreting, the right to a fair trial in ECHR Article 6 also requires the written translation of essential documents (or important parts within them).¹⁶ We note that the proposed Courts and Tribunals Service policy does not deal with translation. The final policy document could set out what the arrangements are for translation of essential documents to ensure compliance with the jurisprudence of the ECtHR.

Quality assurance: Courts and Tribunals Service provision

26. In addition to the actual provision of interpreters, ensuring their competence to interpret is also required by the ECHR; failure to provide a professionally qualified interpreter has been held to have breached Article 6. The obligations require that the interpreting and translation be of a high enough standard to ensure that the defendant understands the case against them and is able to mount a defence. Where the need for an interpreter is disputed, the onus is on the trial judge, as the guardian of fairness in the proceedings, to establish whether the accused understands and speaks the language of the Court adequately.¹⁷
27. There has been movement at European Union level to codify legal interpreting standards and practices. In March 2010, the European Commission tabled a proposal for a Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings.¹⁸ This proposed EU Directive aims to set out minimum standards for interpreting in criminal proceedings (including for those with hearing or speech impediments) along with an explicit right to interpreting of "a quality sufficient to safeguard the fairness of criminal proceedings". Also provided for, is a procedure to find out whether suspects understand the Court language, and explicit provision for training of judiciary and court staff.¹⁹ The UK and Ireland may, or may not, decide to participate in the adoption and application of the Directive. On the initiative of a number of EU member states, a preparatory act for a

¹⁶ See *Kamasinski v Austria* 19 December 1989, A series 168 [74].

¹⁷ See *Kamasinski v Austria* 19 December 1989, A series 168; *Brozicek v Italy* (app no. 10964/85) [1989] ECHR 23; *Cuscani v UK* [2002] (app. No 3277/96).

¹⁸ COM (2010) 2010/0050 (COD), 9 March 2010; superseding a similar proposal put forward as draft Framework Decision on 8 July 2009 (COM (2009) 338, 8 July 2009).

¹⁹ As above, Articles 2 and 5.

Directive has now been published in the Official Journal of the European Union.²⁰

28. The Explanatory Memorandum accompanying the proposed Directive cross-references recommendations in the European Commission, *Report of the Reflection Forum on Multilingualism and Interpreter Training*.²¹ This report outlines a general framework for standards on legal interpreting. This includes recommended linguistic proficiency standards mapped to the highest levels (C1 and C2) of the Common European Framework of Reference for Languages, along with requirements for interpreting and other related skills, and the application of a Professional Code of Conduct and Guidelines to Good Practice. The Report also outlines a framework for the content of interpreter training including legal language, terminology, and the range of linguistic registers most commonly used in legal contexts (e.g. interrogation, testimony, sentencing).²²
29. The Courts and Tribunals Service sets out in the consultation document a number of quality assurance measures. These include:
- **Training and qualifications:** The minimum qualification level for Courts and Tribunals Service interpreters will be Open College Network [OCN] 3 in Community Interpreting (usually required in magistrate courts, Crown Court Arraignments, Tribunals pleas and others). For more complex cases, including Crown Court trials, the Diploma in Public Service Interpreting (DPSI) will be required; for sign language membership of the Register of Sign Language Interpreters (MRSLI) is the qualification pre-requisite.
 - **Professional conduct:** provision is made to swear in interpreters through an oath that they will faithfully and accurately interpret and take direction from the judge; there are also measures to prevent interpreters from having a conflict of interest through other interpreting work in relation to the accused person.
 - **Complaints:** complaints about interpreters can be dealt with by customer services.
30. The Commission welcomes the intention of the Courts and Tribunals Service to quality assure its interpreting and has a number of questions and recommendations in this regard:

²⁰ OJ C 69/2, 18 March 2010.

²¹ Available at [as of 7 April 2010]: http://ec.europa.eu/commission_barroso/orban/docs/FinalL_Reflection_Forum_Report_en.pdf.

²² At p12.

- **Training and qualifications (interpreting methodology):** A number of interpreting courses including those under OCN accreditation may follow the advocacy approach to interpreting. This involves greater scope for intervention by an interpreter into the dialogue to address matters such as power and information differentials. This method of interpreting is often effective in a public service (e.g. medical care) environment, but regarded as inappropriate for a court setting where a more restrictive approach involving minimal intervention is usually adopted. Interpreters can of course be trained in, and switch between, different methods. The policy could clarify whether training relating to such methodology (though an interpreting qualification or additional professional development, induction, guidance etc.) is a prerequisite for interpreting under the policy, and more broadly if the Courts and Tribunals Service provides, or intends to provide, induction or professional development opportunities.
- **Training and qualifications (legal terminology/registers):** Equally the policy could set out the extent to which accepted qualifications (or subsequent professional development) will have to contain a component on Northern Ireland legal terminology before being deemed acceptable. This could be made clear both in relation to OCN qualifications and the requirement for the DPSI in more complex cases (in particular, would it be sufficient if the DPSI were taken under English or Scottish law?). As above, any particular provision the Courts and Tribunals Service itself provides or intends to provide (whether through professional development or written guidance) could also be outlined in the policy.
- **Professional standards:** There are a number of additional quality assurance measures which could be considered and set out by the Courts and Tribunals Service. These include training for judiciary and other court staff, codes of practice and guidance for interpreters and users, and a clear language identification procedure to ascertain if an interpreter is required and to check that the correct language/dialect is being provided for.

Quality assurance: other providers

31. While the proposed policy sets out the above quality assurance standards for Courts and Tribunals Service-provided interpreters, it is less clear whether or how such standards would apply to interpreters provided by others under the policy. If these providers were not applying the same minimum quality of interpreting, or their interpreters were operating under different codes of practice or norms, this could impact on the fairness of the trial and, more

broadly, the interests of justice. In circumstances where the Service is not *providing* the interpreter, there may still be a case for measures to ensure that there is still a degree of *regulation* over the interpreter within the court interpreting policy.

32. There are a range of other public authorities named in the policy as responsible for providing interpreters, including the PSNI, NIO, PPS and other prosecuting bodies. If there were Memoranda of Understanding with these and other named bodies in relation to the court interpreting policy, these could be summarised or appended to the policy. Clearly, if these public authorities did not fulfil their anticipated roles within the policy there would be considerable gaps in relation to interpreter provision for which the state could be held in violation of Article 6. This could also be the case if the named bodies did not subscribe to similar minimum quality assurance measures.
33. There are also instances where the defence counsel or parties themselves are to provide interpreters. It would be helpful to outline the approach to be taken to standard-setting for such cases. This could include any guidance provided by the Courts and Tribunals Service to parties, and any understanding reached with the legal professions in relation to quality assurance on this issue.

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