

Briefing note on Identity and Language (Northern Ireland) Bill House of Commons (Second Reading)

October 2022

Summary

- CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond.
- The [Identity and Language \(Northern Ireland\) Bill](#), first introduced into the House of Lords, has its Second Reading scheduled in the House of Commons for the 12 October 2022.
- The bill follows and generally reflects draft legislation published alongside the 2020 [New Decade New Approach](#) (NDNA) deal, which contained three bills on the Irish language, Ulster Scots/Ulster British Commissioner and a third to establish an Office of Identity and Cultural Expression.
- CAJ [produced a detailed analysis of the draft NDNA legislation](#). A [briefing was also produced for Second Reading in the House of Lords](#).
- CAJ's main interest in the Bill relates to compliance with treaty-based obligations to both Irish and Ulster Scots speakers as linguistic minorities. CAJ is generally supportive of the Bill in its progression of long-standing commitments to legislate to protect the Irish language and insofar as it can progress treaty-based obligations for Ulster Scots.
- This Second Reading Briefing focuses on key questions in relation to the implications of changes and matters that were the subject of amendments to in the House of Lords.
- In relation to the Office for Cultural Identity and Expression:
 - The implications of the change of the Office to a multi-member commission, attributed to its remit of funding distribution.
 - The qualification of cultural expression to the 'sensitivities' of others.
 - The addition of the Castlereagh Foundation to the Office's remit, in light of the lack of any documentation on its role and compliance with provisions of the Belfast/Good Friday Agreement.
- In relation to the Commissioner for the Ulster Scots and Ulster British Traditions, the implications on the provisions of the bill of the Government's recent policy change to move beyond language and recognise Ulster Scots in terms of ethnicity ('a distinct people').
- In relation to the Irish Language Commissioner the potential to address weaknesses in the legislation that could frustrate the purpose of the Commissioners role, in particular the requirement for the First and deputy First Ministers to approve each and every best practice Irish Language Standard.

Background

1. The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. The [Identity and Language \(Northern Ireland\) Bill](#) was introduced into the House of Lords on the 25 May 2022 and completed passage on the 13 July 2022. It is scheduled for Second Reading in the House of Commons on the 12 October 2022.
3. The bill generally reflects draft legislation published alongside the 2020 [New Decade New Approach](#) (NDNA) deal, which contained three bills on the Irish language, Ulster Scots/Ulster British Commissioner and a third to establish an Office of Identity and Cultural Expression. CAJ [produced a detailed analysis of the draft NDNA legislation](#) at the time. A [briefing was also produced for Second Reading in the House of Lords](#).
4. Further to the Belfast/Good Friday Agreement the UK ratified the European Charter for Regional or Minority Languages (ECRML) making specific undertakings for the Irish and Scots languages (including the Ulster variant of Scots). The UK has also long recognised both Irish and Ulster Scots speakers as linguistic minorities under the Framework Convention for National Minorities. Duties to legislate to protect the Irish language are derived from UK commitments in the 2006 St Andrews Agreement, as well as broader treaty-based obligations including the ECRML.
5. CAJ is generally supportive of the Bill in its progression of these long-standing commitments to legislate to protect the Irish language and insofar as it can progress treaty-based obligations for Ulster Scots.
6. **This briefing raises a number of questions it for clarification at Second Reading stage that largely derive from changes to the Bill from NDNA or amendments.**

Commissioner's focus on rights of linguistic minorities across the NI community

7. First, we would like to emphasise that the original genesis of the bill and the two Commissioners is to progress rights of two minority linguistic groups. Both the Irish and Ulster Scots speaking communities are rights-holders as linguistic minorities and both have consistently emphasised that speakers of both languages are drawn from across the community.
8. Irish language speakers and advocates have long emphasised that the Irish language does not belong to a particular section of the community or political affiliation.¹
9. The Northern Ireland Human Rights Commission, in its official advice on the Bill highlights that the Ulster Scots Agency emphasises "*Ulster-Scots language is spoken in different areas of Ireland by both Protestants and Roman Catholics alike*" and that the "*Ulster-Scots Language Society highlights that its constitution stipulates that it is 'non-political and non-sectarian'.*" The Commission in this context raises concerns regarding the conflation of Ulster Scots and Ulster British in the Bill, in that it "*could undermine developments in respect of Ulster Scots language and culture*".²
10. In this context we would disagree with the position put forward by Lord Morrow during the Second Reading of the Bill in the House of Lords that the Irish language commissioner and Ulster Scots/Ulster British Commissioner, should be conceptualised as a nationalist and unionist commissioners, with each focusing on the 'interests' of the unionist and nationalist community respectively.³

Changes to the NDNA legislation in the bill and House of Lords amendments

The Office of Identity and Cultural Expression

11. We have identified three issues relating to the Office for Identity and Cultural Expression that would merit further clarification, namely:
 - The change of the Office to a multi-member commission.
 - The qualification of cultural expression to the sensitivities of others.
 - The addition of the Castlereagh Foundation to the Office's remit.
12. In relation to the first matter the current bill changes the format of the Office to that of a body corporate (i.e. a multi member commission for the purpose of decision making power), whereas the NDNA legislation had vested all the power of the Office in its Director (corporation sole). Under NDNA there would be a Director as the office holder and officers (staff). Under the current bill this is changed to a Director and

¹ See for example: LINDA ERVINE: 'The Irish language belongs to everybody who wants to learn it and has a rich Protestant heritage' <https://www.newsletter.co.uk/heritage-and-retro/heritage/irish-language-advocate-reminds-us-that-gaelic-has-rich-protestant-heritage-3571869>

² NIHRC 'Advice on the Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraph 2.14-6. <https://www.nihrc.org/publication/detail/ulster-scots-ulster-british-provisions-of-the-northern-ireland-act-1998-amendment-no-3>

³ HL Hansard Volume 822: c1n 1114 debated on Tuesday 7 June 2022
[https://hansard.parliament.uk//lords/2022-06-07/debates/3AA07DD8-C905-4F1E-A7EE-C95D314E01FB/IdentityAndLanguage\(NorthernIreland\)Bill\(HL\)#contribution-9FBF3A27-8BEB-455A-BB55-428CCA0F5049](https://hansard.parliament.uk//lords/2022-06-07/debates/3AA07DD8-C905-4F1E-A7EE-C95D314E01FB/IdentityAndLanguage(NorthernIreland)Bill(HL)#contribution-9FBF3A27-8BEB-455A-BB55-428CCA0F5049)

five other members (schedule 1 para 2 Bill as brought from HL). All are to be appointed by the First and deputy First Ministers.

13. To date it appears no Ministerial explanation has been given for this change during the debates on the bill. We understand from a briefing from NIO officials on the bill that the change is due to it being considered more appropriate for a body distributing considerable funding to be a multi-member body. The office does have a grant making function although it is unclear what the anticipated budget for this will be.

MPs may wish to seek formal clarification from Ministers as to the rationale of the change of format of the Office of Identity and Cultural Expression, the levels of funding it is anticipated it will provide, and safeguards

14. A second issue relates to a potentially problematic provision in the Bill⁴ (derived from the NDNA draft) in the form of a qualification in the National and Cultural Identity Principles' that the promotion of such an identity must "take account of the sensitivities" of those with different identities.
15. Without further definition the concept of the 'sensitivities' of others is subjective. It would not be compatible with human rights standards if it restricted free expression purely on the basis of the prejudice and intolerance of others to such expression (i.e. a 'right not to be offended'. We argued that a simpler and human rights compliant limitation provision would have been to instead state that national and cultural identity should be expressed "in a manner compatible with the rights of others".
16. Concerns were raised to this end in the debates in the House of Lords by both Baroness Suttie⁵ and Baroness Hoey, with the latter suggesting that the appropriate test should be tied to the ECHR⁶.
17. There was no response from the Minister Lord Caine to these questions at the Second Reading Debate. The matter was subsequently the subject of an amendment tabled by Baronesses' Ritchie and Goldie which would have substituted 'sensitivities' for a qualification based on the recognised rights of others.⁷
18. The amendment was resisted by the Minister who stated that it would not reflect and would deviate from the intention behind the qualification based on

⁴ clause 1(1), inserting s78F(2)(a)(ii)

⁵ ["Embracing cultural and linguistic diversity should not, however, lead to prejudices against "the other". Can the Minister confirm that "sensitivities" of others will not be interpreted as encompassing the prejudice or intolerance of others to another's national or cultural identity? Can he also confirm that the provision should be read as a qualification only on cultural expression when interfering with the recognised rights of others?"](#)

⁶ ["... what does taking account of sensitivities mean? In Northern Ireland, unionists have been subjected to a decade-long cultural war, with the right to fly the national flag challenged, and the Orange and marching band tradition, and traditional well-maintained bonfires, all under constant attack by contrived nationalist residents' groups and lobbying organisations. The cultural warfare follows a familiar pattern, with contrived grievances and sensitivities that are deliberately weaponised in an effort to target unionist culture and every vestige of British identity. From a legal point of view, this would seem to be a different test from that which applies to public bodies under Section 6 of the Human Rights Act. I know that the Bill says that it has been passed as being okay with the Human Rights Act, but that Section 6 requires public bodies to act compatibly with convention rights, which includes freedom of expression and of assembly, as set out in Articles 10 and 11 of the European convention."](#)

⁷ [HL Hansard Volume 823: debated on Wednesday 22 June 2022, Amendment 1.](#)

‘sensitivities’ in NDNA.⁸ This does not provide any further clarification as to how ‘sensitivities’ is intended to be interpreted and

MPs may wish to ask how the qualification on cultural expression on the basis of the ‘sensitivities’ of others on the face of the bill is to be interpreted in practice, and how it can be ensured such interpretations are compatible with ECHR rights.

19. The substantive amendment introduced by Government to the Bill on the Office of Cultural Identity and Expression relates to the insertion of a new provision in the Bill regarding the establishment of the Castlereagh Foundation.
20. The provision in the Bill will allow the Office of Identity and Cultural Expression to establish the ‘Castlereagh Foundation’, or finance and delegate its establishment to another organisation or person. The principal objective of the Castlereagh Foundation set out in the bill is *‘the funding and support of academic research into identity, including national and cultural identity and shifting patterns of identity, in Northern Ireland.’*⁹
21. The UK committed to funding to establish ‘the Castlereagh Foundation’ in the annex of UK commitments in NDNA, it was not part of the draft NDNA legislation.
22. No documentation at all has been made available before or since about the proposed Castlereagh Foundation, the background to it or its intended objectives. NIO officials in a briefing on the bill pointed only to the revised explanatory notes as the only available documentation that are limited to setting out the provisions of the bill.
23. The then NI Secretary of State announced in May 2021 an advisory committee would be established for the establishment of the Castlereagh Foundation.¹⁰ There was no public process and a Parliamentary Question answered in October 2022 queried why the names of the appointees to the had not been publicised. The response set out that the appointees, which included the chair Arlene Foster, had been tasked to report to the Secretary of State within six months.¹¹ Written advice was accordingly submitted in January 2022.¹² In March the official opposition asked the Minister if the next steps would be published in light of the advice. Government responded the matter was still under consideration.¹³ Neither the advice nor other documentation have therefore been published.

⁸ Lord Caine [“Although I understand the intent behind this amendment, I believe that this would not correctly reflect the national and cultural identity principles that were a matter of careful negotiation between those parties that agreed to New Decade, New Approach, and which are set out in paragraph 25 of that document. They were also set out in the same terms in the accompanying draft legislation that went with New Decade, New Approach. The provision in this Bill therefore reflects the terms under which the parties agreed New Decade, New Approach and re-entered the Executive in January 2020. It has been our approach throughout to reflect in good faith that agreement from January 2020, and I believe that it would be inconsistent with that approach if we were unilaterally to deviate from those principles today.”](#)

⁹ Clause 1(1) inserting 78I.

¹⁰ <https://www.gov.uk/government/news/secretary-of-state-to-appoint-advisory-committee-for-the-establishment-of-the-castlereagh-foundation>

¹¹ <https://questions-statements.parliament.uk/written-questions/detail/2021-09-22/53372/>

¹² <https://www.theyworkforyou.com/wrans/?id=2022-01-07.99414.h>

¹³ <https://www.theyworkforyou.com/wrans/?id=2022-03-24.146690.h>

24. In the House of Lords debate on amendments some further limited light was shone on the potential role of the Castlereagh Foundation, which it was stated is named after Viscount Castlereagh, later the second Marquess of Londonderry. Following the Government amendment the promoter of the original amendment Lord Lexden expressed hope that the work of the foundation would *'enrich and enlarge understanding, of the unionist tradition in particular, and help to increase support for unionism in all parts of the community in Northern Ireland.'*¹⁴ There will clearly be different views in relation to the historical the role of Viscount Castlereagh in relation to the Acts of Union and the United Irishmen rebellion which proceeded it.
25. The British-Irish Agreement Treaty which forms part of the Belfast/Good Friday Agreement said that *"power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions."*¹⁵ The role of the Office of Cultural Identity and Expression is also expressly provided for in the bill as involving the promotion of 'cultural pluralism and respect for diversity in Northern Ireland.'¹⁶
26. The establishment of a state-sponsored organisation to promote the union and unionism and hence a particular tradition and identity endangers compliance with the 'rigorous impartiality' provisions of the Belfast Agreement. Placing the establishment and funding of the Foundation under the Office of Cultural Identity and Expression also engages its pluralism and diversity remit.

MPs may wish to ask whether the advice provided to the Secretary of State on the establishment of the Castlereagh Foundation or other documentation will be published prior to the Committee stage consideration of this provision in the bill; and raise the question of British-Irish Agreement and functions of the Office of Cultural Identity and Expression of the current proposals.

Commissioner for the Ulster Scots and Ulster British Traditions

27. The main amendment made to the legislation in the House of Lords relates to the name of the Commissioner. The name now makes express reference to 'the Ulster Scots' as a people, and separately to the Ulster British Traditions.¹⁷
28. The Minister, Lord Caine, set out this change was made in light of the Governments' new recognition at the time of the introduction of the Bill of Ulster Scots as an ethnic group (specifically in his words a 'distinct people').¹⁸
29. This recognition was tied to a UK commitment in NDNA, separate to the draft legislation, to recognise Ulster Scots as a national minority under the Framework Convention for National Minorities. This could be understandably read as a recognition of Ulster Scots *speakers* as a linguistic minority, given this has been long established. Instead, however, Government has moved away from language towards recognition of Ulster Scots as an ethnic minority group.

¹⁴ [HL Hansard](#) Volume 823: debated on Wednesday 6 July 2022

¹⁵ Article 1(v)

¹⁶ Clause 1(1) inserting 78H

¹⁷ Clause 3(1) inserting part 7C

¹⁸ [HL Hansard Volume 823: debated on Wednesday 6 July 2022](#)

30. This has followed an irregular process. No documentation existed on the background to the commitment in NDNA. No documentation has been made public since, with the decision being taken behind closed doors, without consultation. The NIO statement also makes reference to deferring to the courts as to whether the Ulster Scots will be protected as a racial group under the Equality Act 2010 – legislation that does not apply in Northern Ireland.¹⁹
31. There are a number of issues with this, including the risk this could lead to discontinuation of focus on much needed initiatives to safeguard the Ulster variant of Scots linguistically. One safeguard is that the remit of the Commissioner does, however, continue to focus on language, arts and literature, ensuring a linguistic focus. Ulster Scots Services remain defined in the bill as including those provided through the medium of Ulster Scots, and the provisions on complaints to the Commissioner relate specifically to guidance on facilitating the use of Ulster Scots in the provision of services. There remains no clarification in the bill as to whether the Commissioner and staff will actually be required to be a speaker of Scots, leaving open the scenario that a Commissioner for Ulster Scots would actually not be able to speak Scots.
32. There are also definitional issues in that no consultation has taken place as to whether Ulster Scots speakers wish to self-identify as an ethnic group. There are also questions as to the extent Ulster Scots in this context will be used as a proxy for the tradition of political unionism. The Ulster Scots Agency, for example, in the context of the above NDNA commitment has sought to openly tie Ulster Scots identity to affinity to the Ulster Banner (the flag of the former unionist government at Stormont). A detailed narrative on this issue of the NDNA recognition of Ulster Scots is found in a recent CAJ report to the Framework Convention Committee.²⁰ The concerns in this context are similar to the issues raised by the NI Human Rights Commission regarding the risks of the bill linking Ulster Scots to the ‘distinct political identity’ of Ulster British.²¹
33. There is therefore a question as to whether moving away language with the political recognition of Ulster Scots by the Government ‘as a distinct people’ has implications for the provisions of the bill. This includes whether the duty on facilitating the ‘understanding’ of Ulster Scots in the education system will in practice be re-interpreted as facilitating and encouraging teaching of particular political perspectives on Ulster Scots as a people rather than be limited to language (and the attendant culture of language).

MPs may wish to clarify: whether the Commissioner will be required to be a speaker of Scots, and whether the proposed education duty will still relate to language.

¹⁹ <https://questions-statements.parliament.uk/written-statements/detail/2022-05-25/hcws56>

²⁰ <https://caj.org.uk/2022/04/17/submission-uk-fifth-state-report-fncm/>

²¹ “...‘Ulster British’ is not a term or a linguistic/national minority group presently recognised by human rights treaty bodies. It appears that Ulster Scots culture is at risk of being conflated with a distinct political identity. This may have unintended consequences” NIHRC ‘Ulster Scots/Ulster British Provisions of the Northern Ireland Act 1998 (Amendment No 3), May 2020, paragraph 2.14.

Irish language Commissioner

34. The Irish language elements of the bill take forward the UK's international obligations entered into both in St Andrews and Council of Europe treaties. Irish language legislation has been subject to public consultation and the bill follows the Welsh model of a language Commissioner issuing language standards to public authorities. The provisions represent significant progress, albeit Council of Europe experts have assessed them as falling below the UK's treaty-based requirements.²²
35. There are weaknesses in the bill, derived from NDNA, that could lead to frustration of the purpose of the Irish Language Commissioner. This includes the provision whereby each Irish language standard will be subject to ministerial approval by both the First and deputy First Ministers, who are also to appoint the Commissioner.²³
36. There is recognition of this problem in the Bill including the vesting of concurrent powers in the Secretary of State. This is presumably included in the context where the DUP, having blocked the passage of the Irish language bill to date, could continue to block the implementation of the Act once it is passed.
37. The concurrent powers of the Secretary of State could prevent such a scenario by being make or direct appointments, approve standards etc. However, it is notable that the powers are drafted very broadly and are permanent, requiring long term political will to intervene over each Irish language standard. A better solution would have been to vest appointments in alternative office holders, and to remove provisions such as the requirement that the Commissioners' Irish language standards must be approved by Ministers. There is no apparent legal reason why the First and deputy First Minister need to approve the Commissioners' standards as they are not secondary legislation (as in Wales).²⁴

MPs may wish to probe in particular whether Ministers would consider amending the act to remove the requirement for ministerial approval of each Irish language Standard to prevent frustration of the purpose of the Commissioner.

October 2022

Committee on the Administration of Justice (CAJ)
1st Floor, Community House, Citylink Business Park
6A Albert Street, Belfast, BT12 4HQ

Tel: (028) 9031 6000

Email: info@caj.org.uk

Website: www.caj.org.uk

²² MIN-LANG (2021)3, '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 ISLE OF MAN', Paragraphs 24-26.

²³ Clause 2(1), inserting section 78M(2).

²⁴ <https://www.legislation.gov.uk/mwa/2011/1/part/4/enacted>