



Response to Northern Ireland Court Service Consultation on the Provision of In-Court Interpretation Services

April 2010

Introduction

1. The Equality Commission for Northern Ireland ('The Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. In addition, the Equality Commission, along with the Northern Ireland Human Rights Commission, has been designated under the U.N. Convention on the Rights of Persons with Disabilities ('CRPD') as the independent mechanism tasked with promoting, protecting and monitoring implementation of the CRPD in Northern Ireland.
3. The Equality Commission welcomes the opportunity to respond to the Northern Ireland Court Service ('NICS') consultation on the provision of in-court interpretation services. In responding to this consultation, the Commission draws on its unique experience on advising and assisting complainants (including disabled claimants

and those claimants for whom English is not their first language) in relation to proceedings under the anti-discrimination legislation.

4. The Equality Commission has concentrated on those questions relevant to its remit and expertise. Its detailed responses to the specific questions that it has addressed are outlined below.

Comments

5. In general, the Equality Commission welcomes the NICS's commitment to providing an efficient and effective interpretation service to meet the needs of non-English speakers and deaf and hearing impaired court users.
6. It is essential that in delivering this service, the NICS complies with its obligations under the Disability Discrimination Act 1995, the Race Relations Order (NI) 1997 and Section 75 of the Northern Ireland Act 1998.

Interpretation services in criminal courts

Draft Council Directive

7. The Commission notes that there is a proposal for a European Directive on the right to interpretation and translation in criminal proceedings¹, which aims to set common minimum standards as regards to the right to interpretation and translation in criminal proceedings throughout the European Union. The proposal seeks to improve the rights of suspects who do not understand or speak the language of the proceedings and builds on the European Convention on Human Rights ('ECHR') and the case law of the European Court of Human Rights.

¹ COM (2010) 82, 9 March 2010

8. The draft Directive makes it clear that interpretation should be provided during the judicial phases of the proceedings; including at trial and at any interim hearings or appeals.
9. The Commission recommends that the standards applied by the NICS in relation to the provision of interpretation and translation services in criminal proceedings comply with the requirements outlined in the draft Directive which sets out the proposed *minimum requirements* for Member States in this area.

- **people with speech impediments**

10. The Equality Commission notes that in the preamble to the draft Directive, the European Commission states that the duty of care towards suspects or accused persons who are in a potentially weak position, in particular, because of physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice.
11. It states that competent authorities should therefore ensure that these persons are able effectively to exercise the rights provided for under this Directive by being aware of any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, by taking appropriate steps to safeguard these rights.
12. In addition, the right to interpretation and translation in criminal proceedings in the draft Directive includes assistance of persons with hearing **or speech impediments**.
13. We note that there are no proposals in the consultation document in relation to the right to in-court interpretation services for persons with speech impediments. The document only refers to arrangements for deaf and hearing impaired persons.
14. In-line with the provisions of the draft Directive, the Commission recommends that provision is made in criminal proceedings for interpreting services for people with speech impediments or other physical impairments which affect their ability to communicate effectively.

- **appeal procedures**

15. The draft Directive stipulates that Member States must ensure that a system is in place for the person to challenge a decision that an interpreter is not needed or to challenge the quality of the interpretation.
16. We note from the consultation document that complaints or concerns regarding the standard and behaviour of an interpreter engaged by the NICS can be raised with the NICS. However, there is no indication in the consultation document as to whether or not there are procedures in place to enable a non-English speaking defendant or a disabled applicant to challenge a decision that an interpreter is not needed.
17. It is vital that the decision-making process is subject to independent scrutiny. Such appeal systems should be widely published and accessible and any appeals handled effectively and efficiently.
19. The Commission therefore recommends that appeal procedures are put in place to ensure that a disabled or non-English speaking applicant/defendant can challenge a decision that an interpreter is not needed. Such procedures should exist both in relation in-court interpretation service in criminal proceedings **and** civil (including tribunal) proceedings.

- **assessment of needs**

19. The draft Directive stipulates that Member States must ensure that a procedure is in place to ascertain whether the person understands and speaks the language of the criminal proceedings.
20. The Equality Commission recommends, as regards both criminal proceedings and civil proceedings, that the NICS ensures that the assessment as to whether or not a person requires an interpreter or translator is carried out by a person with the necessary skills and knowledge required to make an accurate assessment of the person's needs.

21. Such an assessment should take into consideration the views of the disabled person/ foreign national on what adjustments should be made. Such an approach is consistent with the Commission's good practice recommendations on the provision of auxiliary aids for disabled users by service providers.²

- **translation of essential documents**

22. The draft Directive states that Member States are under an obligation to provide written translations of all essential documents of a quality sufficient to safeguard the fairness of the proceedings.

23. The Equality Commission recommends that the NICS makes clear its policy on the translation of essential documents in criminal proceedings; in particular, the nature of the documents it will translate and the degree to which they will be translated.

- **training of judges, etc**

24. It is of note that the draft Directive states that Member States must offer training to judges, lawyers, prosecutors, police officers and other relevant court personnel in order to ensure the suspect's ability to understand proceedings and to better comprehend the role of interpreters and translators.

25. The Equality Commission therefore recommends the provision of effective training for judges, police and other relevant tribunal/ court staff in order to ensure that they are aware of the needs of those requiring and providing interpretation, both in criminal and civil proceedings.

- **quality of interpretation**

26. The draft Directive makes it clear that the interpretation must be of a 'quality sufficient to safeguard the fairness of the criminal proceedings'. It is therefore essential that interpreters used in

² *Code of Practice, Rights of access, goods, facilities, services and premises*, 2003, ECNI, www.equalityni.org

criminal proceedings are competent and in-line with requirements in the ECHR, the interpretation must enable the defendant to understand the case against him or her and defend him or herself.

- **integrated approach**

27. Finally, the Commission notes that the European Commission in formulating the draft Directive has taken an integrated approach to the issues of interpretation and translation services; applying common standards and requirements in relation to those who 'do not understand or speak the language of the proceedings'. In recognition of the fact that sign language is a 'language', the Commission recommends that the NICS adopt a similar approach in relation to its policy, rather than treating sign language interpretation as a separate issue.

Interpreters for defence witnesses

28. The NICS has sought views on whether it is more effective for the prosecution and defence to be responsible for the provision of interpreters for their own witnesses.

29. The consultation document indicates that the defence is responsible for making arrangements for the interpreting needs of all defence witnesses, both during the preparation of the case and while giving evidence and that the defence is also responsible for the payment of those interpreter's fees.

30. We note that in Great Britain (GB) that the current arrangements for interpreters in criminal investigations or proceedings are set out in a revised agreed protocol between the Crown Prosecution Service (CPS) and other agencies in the criminal justice system.³ This agreement states that in GB the defence is responsible for the payment of interpreters' fees incurred during pre-trial case preparation, but that the Court is responsible for the payment of interpreting for defence witnesses at court. It appears, therefore,

³ *The National Agreement on the Arrangements for the Use of Interpreters, Translators and Language Service Professionals in Investigations and Proceedings within in the Criminal Justice System*, August 2008, www.hmcourts-service.gov.uk

from the consultation document that a similar situation does not apply to Northern Ireland.

31. In line with the position in GB, the Commission recommends that, in criminal proceedings, the Court is responsible for the payment of interpreting for non-English speaking defence witnesses **at court** (as opposed to pre-trial case preparation). Similar provisions should apply in relation to provision of interpreters for deaf or hearing/speech impaired defendants as regards interpretation of defence witnesses at court.
32. In addition, the Equality Commission is of the view that placing responsibility on the defendant for the payment of interpretation/translation services for defence witnesses in court is likely to constitute a significant barrier for defendants who do not financial resources to meet these costs.

Interpretation services in tribunal and civil courts

- **criteria for funding**

33. We note that the NICS has indicated that it will arrange for an interpreter for deaf and hearing impaired persons and non-English speaking applicants in tribunal hearings provided certain criteria are met; in particular:-
 - the party cannot speak or understand the language of the Tribunal well enough to take part in the hearing, and the party cannot get public funding and cannot afford to fund an interpreter privately,
 - or the judge, adjudicator or legal chairman directs that an interpreter be arranged by the tribunal.
34. We note that one criterion which the NICS proposes to apply is that the party 'cannot get public funding'. The NICS will be aware that in accordance with its strategic enforcement policy, the Commission can provide assistance to a disabled applicant who is

deaf or has a hearing impairment to bring discrimination proceedings in a tribunal or county court under the Disability Discrimination Act 1995, or to the Special Educational Needs and Disability Tribunal (SENDIST) under the Special Educational Needs and Disability (NI) Order 2005. It can also provide assistance to a non-English speaking applicant to bring discrimination proceedings in a tribunal or county court under the Race Relations (NI) Order 1997.

35. The Commission, however, is not a legal aid body and can only assist the most strategic cases in order to clarify the law or change practices. It is therefore likely that there will be a number of disability or race discrimination cases where the applicant requires interpreters/translators, which will not receive funding from the Equality Commission.
36. In addition, in line with its responsibilities as a service provider under the equality legislation, the Commission arranges and pays for the provision of interpretation/translation services for applicants (or witnesses) in discrimination cases, in relation to the services that the Commission provides. For example, it provides for interpretation/translation services as regards the provision of advice, during consultations with barristers, or taking instructions in relation to a tribunal/court case.⁴
37. In the Commission's view, the arrangement and payment of interpretation/translation services for applicants (or witnesses) whilst giving evidence at tribunal/court proceedings (including case management discussions) should remain the responsibility of the NICS. This is consistent, for example, with the tribunal's duty under its rules of procedure to give effect to the overriding objective to deal with cases justly when exercising its powers.
38. In addition, the NICS will be aware that there is only limited funding available towards obtaining legal advice and assistance in connection with a claim to a tribunal and the preparation of a case from the Legal Services Commission.

⁴ For example, the Commission's expenditure on interpretation/ translation services in relation to the provision of its legal services during the period 09/10 was £5,631.

39. We note that the NICS has indicated that where a litigant cannot get public funding, the court service will arrange and meet the cost of supplying an interpreter, where the litigant 'cannot afford to fund an interpreter privately'. The NICS has not indicated what criteria will be used in order to assess whether or not an applicant can afford to fund an interpreter privately. It has not, for example, indicated whether it will use similar financial criteria as those applied by the Legal Services Commission for civil legal aid.
40. It is essential that there are clear guidelines as to what criteria are used by the NICS in deciding in what circumstances it will be deemed that a disabled person or non-English speaking person 'cannot afford to fund an interpreter privately'.
41. We welcome the fact that the NICS will arrange and meet the costs of supplying an interpreter in tribunal and civil courts where the judge (or adjudicator or legal chairman) directs that an interpreter be arranged by the court or tribunal.
42. This allows the judge or tribunal chair person a discretion to direct that a disabled (or non-English speaking) litigant is provided with an interpreter and the costs of interpretation are borne by the NICS.
43. We recommend that guidelines and training are provided to judges and tribunal chairpersons in order to ensure that their power of discretion is exercised in a coherent and consistent manner. As regards disabled applicants, as set out below, such a discretion must be exercised in a manner consistent with the Tribunal's obligations under the DDA 1995.

- **Provision for disabled applicants**

43. The NICS has sought views on whether the arrangements for the provision of interpreters for deaf and hearing impaired persons should be the same as the proposed arrangements for foreign language interpreters, in relation to both criminal and civil proceedings.

44. Under the Disability Discrimination Act 1995 (DDA 1995), service providers are under a duty to make reasonable adjustments in relation to disabled people. A service provider discriminates against a disabled person if he or she fails to comply with that duty and cannot show that failure to be justified.
45. Under the DDA 1995, a service provider is under a duty to take reasonable steps in all the circumstances of the case to provide an auxiliary aid or service where it would enable a disabled person to make use of the service or facilitate the use of such a service. One example specifically cited in the DDA 1995 as an auxiliary aid or service, is the provision of a sign language interpreter.
46. Public authorities are also under a duty not to discriminate against disabled people when exercising a public function. This duty includes the duty to take reasonable steps to provide an auxiliary aid or service, as described above.
47. In deciding what is 'reasonable', a number of relevant factors need to be considered; including the type of service that is being provided, the nature of the service provider and its size and resources and the effects of the disability on the individual disabled person.
48. Although the financial and other costs of making the adjustment, and the availability of financial or other assistance may be factors which might be taken into account when deciding what is reasonable, other factors, such as the extent of the service provider's financial and other resources, may also be relevant. It will ultimately be up to a court to decide whether the provision of interpreting services for a disabled applicant (or defendant in criminal proceedings) is reasonable in light of the facts of the case.
49. We note that the Council on Tribunals in GB (now the Administrative Justice and Tribunals Council) makes it clear in its guidance entitled *Making Tribunals Accessible to Disabled People*⁵ that when considering if services are unreasonably difficult for

⁵ *Making Tribunals Accessible to Disabled People, Guidance on applying the Disability Discrimination Act, 2002*, www.council-on-tribunals.gov.uk

disabled people to use, tribunals should take account of whether the time, inconvenience, effort, discomfort or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties.

50. As stressed in the guidance for tribunals, 'the DDA does not permit the additional costs of making adjustments to be passed on to disabled users of the tribunal. Such costs are part of the tribunal's general expenses.' In addition, it states that 'tribunals must consider whether an adjustment is 'reasonable' and, if so, the adjustment should be made at no additional cost to the disabled user of the tribunal.'
51. It is important to note that it may be reasonable for the NICS to provide more than one type of auxiliary aid or services, as different people have different communication requirements; such as the provision of speech to text or an induction loop.
52. The NICS should also take account of people with multiple communication disabilities, such as deaf-blindness or combined speech and hearing disabilities; as well as applicants who have both hearing impairments and are unable to communicate in English.⁶
53. In addition, under the U.N. Convention on the Rights of Persons with Disabilities (CRPD) which entered into force in the U.K. on the 8 July 2009 (and the Optional Protocol on 7 September 2009), there is an obligation on State Parties to ensure 'effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses in all legal proceedings, including at investigative and other preliminary stages.'⁷
54. It is also clear from the CRPD, that State Parties must take all appropriate measures to ensure that disabled people can exercise

⁶ For example, a Polish applicant who could not communicate in English who had a hearing impairment; case number CDLA/36/2009

⁷ Article 13

the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.⁸

55. The Convention states that this includes ‘accepting and facilitating the use of sign languages, Braille, augmentative and alternative communications, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.’

56. In summary, the Commission recommends that the NICS adopts the test set out in the DDA 1995 as regards the criteria to be adopted in relation to the provision of interpreters for deaf and hearing impaired litigants (as well as litigants with other communication difficulties); namely that it will take **all reasonable steps** to meet their needs.

- **training for tribunal chairpersons, etc.**

57. The NICS will note that under the U.N. Convention on the Rights of Persons with Disabilities (CRPD), in order to help to ensure effective access to justice for disabled people, there is an obligation on State Parties to ‘promote appropriate training for those working in the field of administration of justice ...’⁹

58. The Commission therefore recommends that effective training is provided to tribunal chairmen, panel members and tribunal staff in order to raise awareness of the needs of a disabled party to the proceedings. It further recommends that, where appropriate, interpreters have access to relevant background information about the case and tribunal procedures and processes.

Additional recommendations

59. We note that the Ministry of Justice in GB plans to commission a research project examining the provision of interpretation services

⁸ Article 21

⁹ Article 13

in courts and tribunals in England and Wales. This project will consider interpreting services for people who use English as an additional language, as well as interpreting for people whose first language is British Sign Language. The Commission recommends, in-line with the proposed objectives of the research in GB, that the NICS considers the current extent of demand for court interpreting and any areas of unmet need, explores the experiences of case participants who have used interpreting and of court staff and legal professionals who have worked with interpreters, to gain an independent assessment of the quality of court interpreting and to identify good practice in this area.¹⁰

¹⁰ www.homeoffice.gov.uk