

COUNSEL'S OPINION

Primary legislation i.e. Acts of the Oireachtas is how the elected representatives of the Irish people give legal force to principles and policies which they want implemented (see *Laurentiu v. The Minister for Justice* [1999] 4 I.R. 26). Such Acts often have provision for a monitoring agency to ensure implementation and/or for annual reports as to progress. Both are found in the Official Languages Act 2003 for example.

Experience has shown that where constitution rights are left without a legislative mechanism for their vindication, that they only appear on the radar of Government Departments and public bodies in the context of litigation. This is not problematic for those right which relate to the prosecution of offences, for example, as the courts are necessarily involved in that aspect of life. However where the rights relate to other matter such as education and language rights, experience has shown that these rights persist but you need to go to the High Court in order to enjoy them.

Even then because of the nature of constitutional rights, they need to be balanced against competing rights and the result can be a very watered-down version of what one would expect to be entitled to. Worse still, one can win the case and get a declaration that the State has failed to uphold the constitutional right in question and the State then neglects to change its ways.

A classic example of this is *Ó Murchú v. An Taoiseach* [2010] 4 I.R. 484 where the Supreme Court held that the State was obliged to issue an Irish language version/translation of Acts of the Oireachtas as soon as possible after they were passed. The State has largely ignored this judgment – long delays and large arrears remain.

There is an undisputed constitutional right to an Irish version of an official form which is available in English (see *Ó Murchú v. Cláráitheoir na gCuideachtaí* (1988) T.É.T.S. 42) yet they remain the exception. Few people are able to afford the wait or risk the expense of a High Court action to vindicate this right.

There is no constitution right to see or hear an advertisement from a public body in Irish yet pursuant to section 10A of the Official Languages Act 2003 as inserted by the Official Languages (Amendment) Act 2021 each public body must ensure that (a) at least 20 per cent of any advertising placed by the body in any year shall be in the Irish language, and (b) at least 5 per cent of any money expended by the body on advertising in any year shall be used to place advertising in the Irish language through Irish language media. This statutory duty enforced and the results are tangible in everyday life.

A decision of an Coimisinéir Teanga that a Government Department or public body has failed in a statutory duty in relation to the Irish language can have a positive effect as

happened in the case of RTÉ's failure to provide a comprehensive Irish language service pursuant to sections 114(3) of the Broadcasting Act 2009. However that was only on the context of a clear duty set out in an Act of the Oireachtas. (See Coimisinéir Teanga Annual Report 2018).

There is no Act underpinning of the Department of Education's practice of it deciding where new schools will go and in reality refusing other applications. That might appear to provide rich pickings for parental groups seeking to litigate their way to a new Gaelscoil or Gaelcholáiste but litigation is an uncertain business and the courts are reluctant to get into the weeds and take decisions better taken by departments and ministers.

What is need is a cultural change in the Department of Education driven from the top down and underpinned by an Act mandating for example that 20% of school be Irish medium within 20 years and that 4, 5, or 6-year plans be drawn up to identify locations for such 'new' schools based on unmet local demand.

Clear targets and dedicated personnel mandated to achieve certain results within fixed periods subject to annual reports and external oversight can achieve results. An *ad hoc* effort will soon run out of steam as the personnel involved will lose heart at the first set back and return to their core functions.

Also such an Act with clear targets and a reporting mechanism will be subject to the oversight of an Coimisinéir Teanga further ensuring compliance.

A draft Act is attached to this opinion.

Nothing further occurs.

Dáithí Mac Cárthaigh