NORTHERN IRELAND HUMAN RIGHTS COMMISSION

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Dear Jim,

Re: Functioning of Government (Miscellaneous Provisions) Bill

I am writing in response to your letter of 3 June 2020, which is seeking further information following oral evidence provided by the Northern Ireland Human Rights Commission (NIHRC) on 27 May 2020 regarding the Functioning for Government (Miscellaneous Provisions) Bill.

Decoupling the accountability over the behaviour of special advisers from ministers

As highlighted in our earlier advice to the Committee, legal certainty and due process are central to the European Convention on Human Rights (ECHR). Drawing from the Preamble to the ECHR, the European Court of Human Rights (ECtHR) has clarified that the rule of law is to be "part of the common heritage of the Contracting States" to the ECHR, including the UK.[1] The ECtHR has further clarified that the principle of legal certainty is "implied in the ECHR" and

[1] *Nejdet Şahin v Turkey* (2011) ECHR 1787, at para 57.

"constitutes one of the basic elements of the rule of law".[2] The Bill proposes independent accountability through ensuring special advisers are subject to the disciplinary codes of the NI Civil Service. As a matter of best practice, any disciplinary procedures should be bound by the principles of legal certainty and due process.

According to the Code of Conduct for Special Advisers, their role is to provide a "political dimension to the advice and assistance available to Ministers while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support".[3] The function of a Special Adviser is different to that of a Civil Servant. The Minister is directly responsible for her/his Special Adviser and their adherence to the Code of Conduct and is politically responsible for their discipline under the Ministerial Code.[4] In the event that the accountability structures between the Minister and the special adviser are separated out, this could create a mechanism where political accountability for special advisers by Ministers is replaced by administrative accountability by the civil service disciplinary mechanisms.

One potential option is to utilise the Northern Ireland Civil Service Commissioners. The Northern Ireland Civil Service Commissioners have a statutory function in hearing appeals from NI civil servants relating to the NI Civil Service Code of Ethics.[5] Civil servants must uphold the core values of integrity, honesty, objectivity and impartiality.[6] The Code of Ethics relates to the outward-facing roles of civil servants rather than their internal relations, therefore the NI Civil Service Commissioners is not to regulate the human resource management or employment law claims of civil servants.[7] Under the current system, there are limited circumstances where the Civil Service Commissioners can hear an appeal without having to go through internal processes, for example, "where the Permanent Secretary or Chief Executive are involved" and where the issue of concern is "time-limited, urgent and serious".[8] In terms of ensuring the appropriate safeguards of legal certainty and due process are upheld, it may be beneficial to consider placing the disciplinary process for special advisers outside of the relevant department and of the civil service.

The right to a fair hearing

[2] *Baranowski v Poland* (2000) ECHR 120, at para 56.
[3] Department of Finance, 'Code of Conduct for Special Advisers', Department of Finance, 20 January 2020.
[4] Department of Finance, 'Ministerial Code of Conduct', Department of Finance, 16 March 2020.
[5] Article 5, Civil Service Commissioners (Northern Ireland) Order 1999.
[6] Department of Finance, 'Northern Ireland Civil Service Code of Ethics' (DoF, 2019).
[7] Northern Ireland Civil Service Commissioners, NI Civil Service Code of Ethics: Guidance for Appellants (NICSC, 2013), at 5-6.
[8] Ibid, at 16.

The ECtHR has clarified that:

> for Article 6(1) in its 'civil' limb to be applicable, there must be a 'dispute' regarding a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the ECHR. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play.[9]

The ECtHR recognises that access to a court is an "inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the ECHR".[10] The ECtHR further recognises that:

> in many Member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6(1) is applicable, conferring powers in this manner does not in itself infringe the ECHR. Nonetheless, in such circumstances the ECHR calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).[11]

As advised in the Commission's earlier evidence, it is established in ECtHR case law "that disciplinary proceedings in which… the right to continue to practise a profession is at stake give rise to 'contestations (disputes) over civil rights' within the meaning of Article 6(1)" and, consequently, Article 6 ECHR applies.[12] Moreover, disputes between public servants fall in principle within the scope of Article 6(1). The guarantees of Article 6 can only be excluded where the State sets this out in national law and in such circumstances the exclusion must be justified on objective grounds in the national interest. It is not enough for the State to establish that there exists a special bond of trust and loyalty between

[9] *Denisov v Ukraine* (2018) ECHR 1061, at para 44.
[10] *Lupeni Greek Catholic Parish v Romania* (2016) ECHR 487, at para 84.
[11] *Albert and Le Compte v Belgium* (1983) ECHR 1, at para 29. See also *Ortenberg v Austria* (1994) ECHR 42, at para 31; *Gautrin v France* (1998) ECHR 39, at para 33.
[12] *Philis v Greece* (No 2) (1997) ECHR 34 at para 45; *Gautrin v France* (1998) ECHR 39, at para 33.

the civil servant and the state as an employer.[13] The guarantees of Article 6 also therefore cannot be excluded from ordinary labour disputes.

In addition, the ECtHR has confirmed that:

> the fact that an act which can lead to a disciplinary sanction under administrative law also constitutes a criminal offence is not sufficient reason to consider that a person presented as responsible before the local authority and the administrative court is 'charged with a crime' in so far as it is neither the purpose nor the effect of the provisions of Article 6(2) [ECHR] to prevent the authorities vested with disciplinary power from sanctioning misconduct in a civil servant where such misconduct has been duly established.[14]

Thus, three criteria are taken into account when deciding whether a dispute is criminal for the purposes of Article 6: 1) the classification of the proceedings under national law; 2) their essential nature; and 3) the type and severity of the penalty that the applicant risked incurring.[15]

In circumstances where there is an overlap between internal disciplinary matters and potential liability in criminal law, consideration should be given to recognising that anyone who is accused of a criminal offence has the right to remain silent and right not to contribute to incriminating her or himself.[16] These rights are particularly relevant in the context of introducing new offences in areas that have previously been dealt with as disciplinary matters within the work place.

These rights are closely linked to the presumption of innocence contained in Article 6(2) ECHR.[17] They are "generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6" and "by providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6".[18] However, these rights are not absolute and

[13] *Vilho Eskelinen and Others v Finland* [2007] ECHR 314, at para 50-62.
[14] *Moullet v France* (2007) ECHR 5557, at Section 2.
[15] Ibid, at Section 1; *Y v Norway* (2003) ECHR 80, at para 39.
[16] *Saunders v UK* (1996) ECHR 65, at para 68.
[17] Ibid, at para 68.
[18] *John Murray v UK* (1996) ECHR 3, at para 47.

> whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.[19]

In addition:

> the general requirements of fairness contained in Article 6 [ECHR] apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the ECHR.[20]

When a dispute does not meet the threshold for the enhanced safeguards of the criminal limb of Article 6, this does not mean that the protections fall away completely. The ECHR "must be interpreted in such a way as to protect rights that are not theoretical or illusory but practical and effective". Therefore, "with the result that if the national administrative decision were to contain a statement imputing criminal liability to the applicant for the misconduct alleged against him in the administrative proceedings, it would raise an issue under Article 6(2) [ECHR]".[21]

In this context, the rights and obligations in Article 6 ECHR and the guiding case law of the ECtHR, set the minimum level of protection that is required to ensure adherence to the ECHR. However, it is within the discretion of the legislature to decide whether it wishes to provide such protections within a code of conduct or through legislation, subject to any provisions complying with the ECHR.

If the Committee requires any further information, please do not hesitate to get

[19] Ibid, at para 47.
[20] *Jallot v Germany* (2006) ECHR 721, at para 97.
[21] *Moullet v France* (2007) ECHR 5557, at Section 2.

in touch.

Yours sincerely,

Les Allamby
Chief Commissioner