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24 April 2020

Dear Jim,

Re: Functioning of Government (Miscellaneous Provisions) Bill

I am writing in response to your letter of 27 March 2020 in relation to the draft Functioning of Government (Miscellaneous Provisions) Bill in exercise of our functions pursuant to Section 69(4) of the Northern Ireland Act 1998, to advise the Assembly whether a Bill is compatible with human rights.

This Private Member Bill is designed to clarify and codify the position of special advisers within the Northern Ireland Executive and the overall ethos of the Bill to increase accountability and transparency is to be welcomed.

All public officials, including special advisers are required to act within the purview of the laws and codes of practice which apply in Northern Ireland, including good governance, information management and data protection laws. The Bill is designed to codify a number of measures into law which ensure that Special Advisers are accountable to their Ministers, subject to the disciplinary codes of the civil services and link the salaries of special advisers to specific grades within the civil service.

These provisions largely duplicate the recently adopted Code of Conduct for Special Advisers and place a practice guide into a codified legal form. However, some clauses in the Bill go further and create new disciplinary processes and create two new offences. While this codification brings the advantages of legal certainty, the rigidity of codification could have unintended consequences for the operation of good governance and flexibility within the executive.

Special Advisers are political appointees by a Minister and currently Ministers are directly responsible for ensuring that their Special Advisers adhere to the code of conduct. This mechanism creates a clear link whereby Ministers are directly accountable for the actions of their Special Advisers.

Clause 1

Clause 1 of the Bill is designed to change the procedures whereby special advisers are disciplined and brings them into line with the "disciplinary code operative in the Northern Ireland Civil Service". This change would create a clear avenue of independent accountability over the behaviour of Special Advisers and ensure that it is decoupled from the Minister. This provides for more impartial and structured disciplinary proceedings, but could have the inadvertent effect that a Minister is no longer directly responsible for any action or inaction of their Special Adviser.

Article 6 ECHR protects the right to a fair hearing and must be read in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of all State Parties.[1] The principle of legal certainty is one of the core elements of the rule of law and arbitrariness undermines this principle.[2] The requirements inherent in the concept of a 'fair hearing' differ on the basis of whether it relates to criminal or civil matter, with greater latitude when dealing with civil cases.[3] Persons accused of or charged with a criminal offence required greater protection.[4]

Disciplinary proceedings where a person's right to continue to exercise a profession is at stake constitute a dispute over civil rights, which invokes Article 6(1) ECHR.[5] In cases where the facts which gave rise to the disciplinary proceedings also constitute a criminal offence, and the allegations brought against the individual in the disciplinary proceedings related solely to

[1] *Nejdet Şahin v Turkey* (2011) ECHR 1787, at para 57.
[2] *Lupeni Greek Catholic Parish v Romania* (2016) ECHR 487, at para 116.
[3] *Dombo Beheer BV v The Netherlands* (1993) ECHR 49, at para 32.
[4] *Moreira Ferreira v Portugal* (No 2) (2017) ECHR 658, at para 67.
[5] *Müller-Hartburg v Austria* (2013) ECHR 155.

professional misconduct, then this does not meet the criteria for the enhanced protections under Article 6 ECHR required for a criminal dispute.[6] Disciplinary proceedings that do not directly interfere with the right to continue to practise a profession do not automatically invoke the protections of Article 6.[7]

In addition to the ECHR, the UN International Covenant on Civil and Political Rights (UN ICCPR) protects the right to "take part in the conduct of public affairs, directly or through freely chosen representatives" and "to have access … to public service in his country" in Article 25. It also recognises the right to equality before the law and a right to fair trial in Article 14 UN ICCPR. However, the disciplinary proceedings are unlikely to meet the criteria for a "tribunal" in Article 14 UN ICCPR. According to the Human Rights Committee in General Comment 32, it must be established by law, be independent of the executive and legislative branches of government or enjoy in specific cases judicial independence in deciding legal matter.[8] In addition, the UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR) also protects the "right of everyone to just and favourable conditions of work" in Article 7. General Comment 18 of the UN ICESCR Committee elaborates what this means in practice, including "the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal".[9]

The ECtHR jurisprudence is clear that when disciplinary proceedings will result in someone no longer being able to exercise their profession, then Article 6 ECHR is engaged and any proceedings must ensure the appropriate safeguards are in place. However, when disciplinary proceedings fall short of this threshold, then Article 6 ECHR protections are not automatically invoked. The international human rights standards do not mandate specific forms of disciplinary proceedings.

The NIHRC advises that there is considerable discretion in the international human right law on the specific form that disciplinary procedures should take and Clause 1 appears to be compliant with the due process guarantees in Article 6 ECHR.

Clause 9

Clause 9 creates a new offence for any minister, civil servant or special adviser to use personal accounts when communicating on government business and to use anything other than departmental systems and email addresses. It is a

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[6] *Moullet v France* (2007) ECHR 5557.
[7] *Marušić v Croatia* , Application No 79821/12, Admissibility Decision, 15 June 2017, at paras 74 and 75.
[8] CCPR/C/GC/32, 'UN Human Rights Committee General Comment 32: Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007.
[9] E/C.12/GC/18, 'UN ICESCR Committee General Comment No 18: Right to Work', 24 November 2005.

defence to invoke a reasonable excuse.

Under the principle of subsidiarity, the ECtHR does not usually take a view on the length of the prison sentence or whether the type of penalty is suited to any given offence.[10] Where a penalty is "clearly disproportionate", it may fall foul of Article 3 ECHR, but this is a high threshold and "it will only be on rare and unique occasions that this test will be met".[11]

The UN ICCPR protects the right to liberty and security of the person in Article 9, which provides that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Further guidance is available in General Comment 35, which recognises that the right is not absolute and that arbitrariness must be broadly interpreted to include "inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[12] This does not mean that penalties imposed by criminal offences will fall foul of human rights law.

As the ECtHR has made clear, a professional working in an area where a high degree of caution is common can be required to take special care in assessing the risks that such activity entails.[13] International human rights law requires that the law is not applied arbitrarily, which includes an assessment of reasonableness, necessity and proportionality.

The creation of this offence goes further than the recommendations from the RHI inquiry which suggests that "expectations and rules for SpAds when handling and emailing official information" and "guidance about use of personal email addresses and personal mobiles for official business" should be addressed in a revised Special Adviser Code of Conduct.[14]

The NIHRC recommends that consideration is given to including this as a specific disciplinary offence which falls short of criminal liability within Ministerial, Civil Service and Special Adviser codes of practice.

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[10] *Vinter v UK* (2013) ECHR 61, at para 105.
[11] *Vinter v UK* (2013) ECHR 61, at para 102.
[12] CCPR/C/GC/35, 'UN Human Rights Committee General Comment No 35: Liberty and Security of Person, 16 December 2014.
[13] *Kononov v Latvia* (2008) ECHR 695, at para 235.
[14] Renewable Heat Incentive Inquiry, 'The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive Scheme: Volume 3' (RHI, 2020), at 209.

Clause 11

Clause 11 makes it an offence for "any Minister, special adviser or civil servant to communicate, directly or indirectly, confidential and/or commercially sensitive information to any natural person or legal entity for the financial or other potential benefit of any natural person, legal entity, minister, special adviser or civil servant". This clearly creates a direct interference with the right to freedom of expression in Article 10 ECHR.

The right to freedom of expression in Article 10(1) ECHR provides that "everyone has the right to freedom of expression". Any constraint on freedom of expression must be a proportionate interference with the right and must be based on the principle of non-discrimination.[15] Such limitations must be no more than is "necessary in a democratic society", be prescribed by law and meet one of the legitimate aims in Article 10(2) ECHR, including "the interests of national security " and "for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence".

The ECtHR has confirmed that Article 10 ECHR applies within the workplace. While civil servants in a democratic society have a particular duty to assist the government in discharging its functions, this does not preclude someone from the protection of Article 10 ECHR if they divulge or publish information, even secret information, if there is a strong public interest in disclosure.[16]

The right to freedom of expression is also recognised in Article 19 UN ICCPR and further guidance on protecting the rights of whistle blowers is available from the UN Special Rapporteur Special Rapporteur on the right to freedom of expression.[17]

Particular care should be taken to ensure that this clause does not inadvertently capture someone for example a whistle blower who would otherwise come within the scope of the Public Interest Disclosure (Northern Ireland) Order 1998.

This offence is more far reaching than the recommendation of the Report on the RHI inquiry, which states that "SpAds' duty of confidentiality, cross-referencing to their employment terms under the Civil Service code", is addressed in the Special Adviser Code of Conduct.[18]

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[15] *Sunday Times v UK* (1979) 2 EHRR 245; *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 50; *Handyside v UK* (1979) 1 EHRR 737.

[16] *Guja v Moldova* (2008) ECHR 144, at paras 69-71.

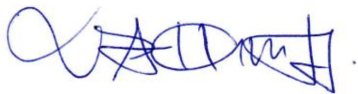
[17] A/70/361, 'UN Special Rapporteur on the Right to Freedom of Expression, David Kaye, Report on the Protection of Sources of Information and Whistle-blowers', 8 September 2015.

[18] Renewable Heat Incentive Inquiry, 'The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive Scheme: Volume 3' (RHI, 2020), at 209.

The NIHRC recommends that the creation of a criminal offence in Clause 11 should be more focused and specifically drawn to address the particular harm it is seeking to remedy, for example by the inclusion of the word "improper" preceding "benefit" at line 20 and includes appropriate safeguards in line with international human rights standards including whistle blowing.

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

Yours sincerely,



Les Allamby
Chief Commissioner