



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Peter McCallion
Clerk
Education Committee
Room 430, Parliament Buildings,
Ballymiscaw,
Stormont,
Belfast, BT4 3XX

27 January 2016

Peter,
Dear Mr McCallion

Re: Addressing Bullying in Schools Bill

The Commission welcomes the opportunity to respond to correspondence arising from the Committee's evidence session on 20 January 2016.

The Commission was asked for its views on the constraints on school authorities on obtaining electronic information from personal communication devices owned by school pupils, in order to record or address incidents of cyber-bullying.

The Commission advises that the issue engages Article 8 of the European Convention on Human Rights, which provides for the right to respect for private life, family, home and correspondence. A similar provision is contained within Article 16 of the UN Convention on the Rights of the Child (UNCRC).¹ It should be noted that Article

¹ Article 16 of the UN Convention on the Rights of the Child (UNCRC) also provides for child's right not to be subject to arbitrary or unlawful interference with privacy, family and correspondence.

16 of the UNCRC can be circumscribed by the best interests of the child principle in Article 3 of the UNCRC.

Article 8 of the ECHR is not an absolute right, as Article 8(2) of the ECHR sets out the conditions on which public authorities may interfere with the right to privacy i.e. when it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Commission advises that the European Court of Human Rights (ECtHR) does not appear to have considered the specific issue of interest to the Education Committee in its consideration on the bill, but advises that the ECtHR has recently considered the question of whether the monitoring of an employee's internet use and his resulting dismissal was justified.

In the case of *Barbulescu v Romania*², the court held that the fact that an employer accessed the applicant's professional internet account and that record was used in domestic litigation was sufficient to engage the applicant's right to private life and correspondence. The ECtHR found that it was not unreasonable that an employer would want to verify that employees were completing professional tasks during working hours. The ECtHR also noted that monitoring had been limited in scope and proportionate as the communications had been monitored, but not other data and documents. The ECtHR concluded that the domestic courts struck a balance between the applicant's Article 8 rights and the interests of the employer, thus there was no violation of Article 8.

While the facts of the case are different to the issues being considered by the Education Committee, the principles applied by the ECtHR may be applicable. **Therefore, schools may not be in violation of Article 8 if accessing a pupil's school account or monitoring use of school facilities and equipment, including devices in certain circumstances. However the Commission advises that any such monitoring is required to respect Convention principles: it must be transparent to pupils and parents that communications would be monitored (to comply with the 'in accordance with law requirement'); the monitoring must be for a legitimate purpose (in this case presumably to protect the rights of others) and must be proportionate.**

² *Barbaulescu v Romania*, Application Number 61496/08

The Commission draws attention to the Education Act 2011 in England and Wales, which gives teachers stronger search powers to tackle cyber-bullying by providing a specific search power to search and if necessary, delete inappropriate images or files.³ The UK Department of Education provided the Joint Committee on Human Rights (JCHR) with a Human Rights Memorandum during legislative scrutiny of the Education Act 2011. The memorandum stated that the intention of the provision is to allow the searcher to see whether there are, for example, any images of bullying or threatening messages that show that the device is being used for cyber-bullying. The Department of Education went on to acknowledge that the power to examine and erase data engages Article 8 and is justifiable to meet the legitimate aim of preventing and detecting crime and the protection of the rights of others.⁴ The Memorandum committed the Secretary of State to issue guidance in connection with the exercise of this power to meet concerns about the possible misuse.⁵ The Department also considered that the arguments in support of the conclusion that the provisions of this clause were compatible with Article 8 ECHR applied equally in respect of Article 16 UNCRC.⁶

The JCHR welcomed the inclusion in the Bill of measures to improve discipline and behaviour in schools. The JCHR report on the provision stated 'As the Government's Human Rights Memorandum correctly points out, such measures are, in principle, human rights enhancing measures, insofar as they enable all children better to exercise their right to education which is guaranteed by Article 2 Protocol 1 ECHR and Article 28 of the UN Convention on the Rights of the Child.'⁷

In respect of searching electronic devices, the JCHR stated:⁸

³ Section 2 of the Education Act 2011. See Department of Education 'Preventing and tackling bullying; advice for headteachers, staff and governing bodies' para p 6
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444862/Preventing_and_tackling_bullying_advice.pdf

⁴ HR Memorandum 1 February 2011, Ev 19-53. Human Rights Memorandum available at
<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/154/15410.htm>

⁵ *ibid*, para 85

⁶ *ibid*, para 53

⁷ Joint Committee on Human Rights 'Legislative Scrutiny; Education Bill and other Bills', available at

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/154/15404.htm#a5>

⁸ *ibid*, para 1.25

'We accept the necessity for a properly circumscribed power to examine and erase data on a pupil's electronic device and we welcome the Government's intention to give guidance about the exercise of the power. We have concerns, however, about the width of the power as currently defined in the Bill. Given the potentially serious interference with a pupil's right to respect for private life, we recommend that the power to examine and erase "if the person thinks there is a good reason to do so" be replaced by a more tightly defined power which is exercisable "if the person has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or contrary to the school rules."

The Commission therefore advises that should consideration be given to introducing a clause to the Bill that allows for schools to examine pupils electronic devices, that cognisance is taken of the JCHR's recommendations in legislative scrutiny of the Education Act 2011, i.e. that any such power must be tightly defined and accompanied by guidance to prevent misuse of such a power.

I hope this is helpful in your deliberations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Les Allamby', with a horizontal line drawn through the middle of the signature.

**Les Allamby
Chief Commissioner**



Northern Ireland
Assembly

Committee for Education

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22 January 2016

Our Ref:2489

Dear Mr Allamby

Addressing Bullying in Schools Bill – Committee Stage

Please pass on the Committee for Education's thanks to your colleagues David Russell and Fiona O'Connell for the very useful and informative briefing on 20 January 2016 as part of the Committee Stage of the Addressing Bullying in Schools Bill.

Following the briefing, the Committee agreed to write to the Northern Ireland Human Rights Commission seeking your views on the constraints on school authorities in obtaining electronic information from the personal communication devices owned by pupils, in order to record or address cyberbullying incidents.

As the Committee Stage is about to conclude, a response at your earliest convenience would be greatly appreciated.

The Committee expects to publish its report on the Bill in February 2016.

Committee for Education

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Further information on the Bill can be found at the following link:

<http://www.niassembly.gov.uk/assembly-business/committees/education/legislation---committee-stage-of-bills/addressing-bullying-in-schools-bill/>

Yours sincerely

Signed Peter McCallion

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Clerk
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