



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Mr Daithí McKay MLA
Chairperson, Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont
Belfast BT4 3XX

05 September 2013

Dear Mr. McKay,

Re: Public Service Pensions Bill

The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(4) of the Northern Ireland Act 1998, advises the Assembly whether a Bill is compatible with human rights. In accordance with this function I am writing in relation to the Public Service Pensions Bill (the Bill).

The Commission draws to the attention of the Committee the right to social security, protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 12 of the European Social Charter (ESC). This may take the form of benefits, in cash or in kind, to secure protection from, inter alia, lack of work-related income caused by old age.¹ The right to social security is to be enjoyed without discrimination under Article 2(2) ICESCR, Article 12(1)(c) of the Convention on the Elimination of Discrimination Against Women (CEDAW) and Article 12 ESC.²

¹ UN Committee on Economic, Social and Cultural Rights, General Comment 19: Right to Social Security (2008) E/C.12/GC/19, at para 2

² Discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin is also prohibited in the preamble to the European Social Charter.

The Committee on Economic, Social and Cultural Rights states that measures to ensure the right to social security cannot be narrowly defined and may include contributory or insurance based schemes as well as contributory schemes.³ The Committee states that insurance based schemes “generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund”.⁴ Given these comments of the Committee, the horizontal effect of the ICESCR is relevant; applying between private actors to which the State may have responsibility for oversight.

As the entitlement to a pension is conferred by the State, it would then fall within the scope of ‘possessions’ for the purpose of Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). The engagement of Article 1 of Protocol 1 only applies to existing proprietary interests, not to the future acquisition of possessions,⁵ and may extend to claims where there is a legitimate expectation of obtaining effective enjoyment of a property right.⁶ Furthermore, it does not establish a right to a pension of a particular amount.⁷ The prohibition of discrimination provided for under Article 14 ECHR will also be engaged to ensure that this right is enjoyed without discrimination.

The European Court of Human Rights (ECtHR) has also recognised that economic and social matters will fall within the scope of the margin of appreciation, identifying that the State party is better placed to make an assessment in these areas and will respect their judgment unless it is “manifestly without reasonable foundation”.⁸ The ECtHR has commented that this wide margin of appreciation may lead to a State legitimately seeking to “adjust, cap or even reduce the amount of pensions normally payable to the qualifying population”.⁹

In respect of the present Bill, the Commission wishes to make the following observations.

The Commission notes that clause 3(3)(c) of the Bill permits scheme regulations which make retrospective provision. Such would

³ UN Committee on Economic, Social and Cultural Rights, General Comment 19: Right to Social Security (2008) E/C.12/GC/19, at para 4

⁴ *Ibid*, at para 4(a)

⁵ *Marckx v. Belgium* (1979) 2 EHRR 330, at 50

⁶ *Kopecky v. Slovakia* [2004] ECHR 446, at 35(c)

⁷ *Muller v. Austria* (1975) 3 DR 25, p.25

⁸ *James and Others v. the United Kingdom* [1986] ECHR 2, at 46

⁹ *Lakicevik and Others v. Serbia and Montenegro* (2011) app nos. 27458/06, 37205/06, 37207/06 and 33604/07, at 61

then be subject to the procedure under clause 23 which requires that the consent of those affected must be sought where retrospective provision will have a significant adverse effect. Notably, the Bill does not prescribe the circumstances in which retrospective regulations may be used, nor does it define what constitutes a 'significant adverse effect'.

Although the ECtHR has confirmed that retrospective legislation is not prohibited by the Convention in and of itself, the reasons for retrospective application, its impact upon an individual and whether it imposes an unreasonable burden are considerations in assessing whether such will be compatible with Article 1 of Protocol 1 ECHR.^{10&11}

Any interference with Article 1 of Protocol 1 ECHR must be in accordance with law, in the public interest and proportionate. Satisfaction of the first requirement of legality not only refers to the existence of a domestic law but also the quality of that law.¹² Therefore, in order to satisfy this element, the legislation must be accessible and drafted in a manner which is sufficiently clear to enable foresight of its consequences. **The Commission expresses concerns over the legal certainty of clause 23.**

The Commission recalls that the issue of legal certainty has also been raised by the Joint Committee on Human Rights of the UK Government (JCHR) in its scrutiny of the equivalent UK legislation. The JCHR questioned whether or not such a 'consent lock' provides sufficient legal certainty given that the circumstances in which retrospective provisions are to be used are undefined.¹³

As the clause does not make a retrospective change itself, only permitting regulations that do, it is not possible to comment on the specific human rights implications of regulations under this clause. **However, the Commission supports the provision of the safeguard that any scheme regulations which have retrospective provision are to be subject to the affirmative procedures, under clause 24, ensuring further scrutiny by the Assembly.**

The Commission further notes that, under clause 9, revaluation of pensionable earnings may be required by order of the Department

¹⁰ *M.A and Others v. Finland* (dec.) no. 27793/95

¹¹ The issue of the retrospective reduction in a pension is currently before the ECtHR in the case of *Gegia v. Georgia*, no. 6705/09.

¹² *James v. the United Kingdom* [1986] ECHR 2, at 143

¹³ Joint Committee on Human Rights (2013) *9th Report Legislative Scrutiny Update* (2012-13, HL 157 HC 107), at 69

for Finance and Personnel (DFP). Such may result in a percentage increase or decrease. Where a decrease is required, such an order will be subject to the affirmative procedures, whereas an increase will be subject to negative resolution.

The Commission supports the provision of the additional safeguard of the affirmative procedure in circumstances where an order of the DFP will result in a decrease in order that the matter be fully scrutinised by the Assembly.

However, the Commission identifies that, as an interference with Article 1 of Protocol 1, any reduction in pension benefits would require to be justified. The ECt.HR will consider whether an individual's right to derive a benefit from a scheme is infringed in a manner which impairs the essence of his pension rights.¹⁴ If there were to be a substantial decrease, the Commission would raise concerns as to the impact of this upon members of the scheme. Although the ECt.HR has accepted that a percentage loss of a pension benefit does not violate the essence of pension rights, it has found a violation where the reduction amounts to an "excessive and disproportionate burden which ... cannot be justified by the legitimate community interests".¹⁵

Clause 10 links pension age with the state pension age or 65 if that is higher. Future changes to the state pension age would apply to all benefits, including those already accrued under the scheme. This will not apply to fire fighters or members of the police service, whose normal pension age will be 60.

If a member of a pension scheme has a legitimate expectation of receiving his or her pension at a given age, changes to that may impact upon the enjoyment of a possession, thereby amounting to an interference with rights under Article 1 of Protocol 1 ECHR. Any such interference would require to be justified and not impose an excessive burden upon members. In relation to the distinction made for members of the fire service and police service, any difference in treatment which falls within the prohibited grounds of article 14, will not amount to unlawful discrimination if there is a legitimate aim and the action is proportionate.¹⁶ Once a difference in treatment has been established, the burden lies with the State to demonstrate justification.¹⁷

¹⁴ *Domalewski v. Poland* (dec) no. 34610/97, ECHR 1999-V

¹⁵ *Asmundsson v. Iceland* (2005) 41 EHRR 42, at 45

¹⁶ *Zdanoka v Latvia* (2006) 45 EHRR 17, at 112

¹⁷ *D.H and Others v. the Czech Republic* (2006) 43 EHRR 41, at 177; *Chassagnou v. France* (1999) 29 EHRR 615, at 91

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael O'Flaherty". The signature is written in a cursive style with a small mark at the end.

Professor Michael O'Flaherty
Chief Commissioner