



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Submission on the Civil Service (Special Advisers) Bill 2012**

### **SUMMARY**

- A. In this submission the Commission advises on the provisions of the Civil Service (Special Advisers) Bill which provides that no person shall hold the post of special adviser if they have been convicted of a criminal offence for which they received a custodial sentence of five years or more.
- B. The European Court of Human Rights affords member states a wide margin of appreciation with respect to access to the civil service. The Commission advises, however, that the Committee considers the absolute nature of the proposed prohibition in light of the current arrangements for the appointment of special advisers operational from September 2011.
- C. The Commission advises that the Committee considers whether, or not, the restriction on employment as a special adviser constitutes a penalty that was not applicable at the time the criminal offence was committed and any potential breach of Article 15 of the ICCPR and Article 7 of the ECHR.
- D. Relevant international standards relating to lustration are referred to.
- E. The Commission refers the Committee to the UN Standard Minimum Rules for the Treatment of Prisoners which emphasise the importance of ensuring the social rehabilitation of prisoners.

F. The Commission refers to initiatives undertaken by the Executive to assist in the reintegration of those involved in the conflict and recalls the UN Standards regarding disarmament, demobilization, and re-integration of ex-combatants. The Commission considers that the Bill may be inconsistent with these standards and with the developments in this area taken by the NI Executive.

## **SUBMISSION OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION**

1. 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.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Committee for Finance and Personnel on the Civil Service (Special Advisers) Bill 2012.
  
2. The Commission bases its views on the internationally accepted human rights standards, including the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998* and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties in this context include:
  - *The European Convention on Human Rights, 1950* ('ECHR') [UK ratification 1951] and
  - *The International Covenant on Civil and Political Rights, 1966* ('ICCPR')[UK ratification 1976].
  
3. The Northern Ireland Executive and Assembly are subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. The Commission, therefore, advises that the Committee scrutinises the proposed Private Members Bill for full compliance with international human rights standards.
  
4. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the United Nations. These declarations and principles are non-binding in themselves but they are considered to constitute explications of the treaty provisions and they provide further guidance in respect of specific topic areas. The relevant standards in this context are:
  - the UN Standards for Disarmament, Demobilization, Re-integration of ex-combatants

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<sup>1</sup> *Northern Ireland Act 1998*, s.69 (4)

- the UN Standard Minimum Rules for the Treatment of Prisoners
  - the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.
5. This advice relates to clauses 1, 2, 3 and 9 of the Civil Service (Special Advisers) Bill. The effect of these clauses is summarised in the Explanatory Memorandum which states that they:

*"provide that no person shall hold the post of special adviser if they have been convicted of a criminal offence for which they received a custodial sentence of five years or more (a "serious criminal conviction")."*

6. The Bill will have implications for those convicted of a criminal offence and consequentially victims of crime. The Commission notes the potential impact upon those convicted of a conflict related offence, who may be designated as an ex-combatants under the relevant international standards.<sup>2</sup> The Bill, therefore, has implications for victims and survivors of the conflict.

### **Vetting Arrangements**

7. The Bill introduces a prohibition on the appointment to the post of special adviser, which is a civil service appointment, made by the relevant Minister. The Commission recalls the case of *Sidabras v Lithuania* in which the European Court stated, *"that access to the civil service as such cannot be basis for a complaint under the Convention..."*<sup>3</sup> It should be noted that the European Court has afforded member states a wide margin of appreciation in respect of access to the civil service.<sup>4</sup>
8. The Commission notes that under the Civil Service (NI) Order 1999, the Department of Finance and Personnel may make regulations or give directions prescribing the requirements for

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<sup>2</sup> Disarmament, demobilization and reintegration of ex-combatants in a peacekeeping environment, Principles and Guidance Principles and Guidelines

<sup>3</sup> *SIDABRAS AND DŽIAUTAS v. LITHUANIA* (Applications nos. 55480/00 and 59330/00) See for discussion Virginia Mantouvalou 'Work and private life: *Sidabras and Dziautas v Lithuania*' *European Law Review* [30, 2005]

<sup>4</sup> *Glasenapp and Kosiek v. Germany* judgments of 28 August 1986 (Series A nos. 104, § 49, and 105, § 35)

appointment to the Northern Ireland Civil Service. At present every position in the NICS carries a security vetting level which is determined by the individual Departmental Security Officer, under the terms of which:

*"A person must not be appointed to the NICS where there is a significant risk that he or she would represent a threat to the people, assets or information which the Service has a duty to protect.*

*To enable this assessment to be made, as a minimum, candidates who are liable to be appointed must complete an application for a criminal application for a criminal record check at the appropriate level which meets the requirements of the post."*<sup>5</sup>

9. Following a review of arrangements for the appointment of special advisers a new vetting process was introduced which provides for Corporate Human Resources to make a recommendation to the appointing Minister with respect to the appropriateness of a proposed appointment (hereinafter 'the 2011 Review').<sup>6</sup> This arrangement has been operational since September 2011.
10. The Commission recalls that in general the European Court has found blanket prohibitions to be disproportionate interferences with the relevant rights engaged. For instance in Hirst v United Kingdom the Court found that an automatic blanket prohibition on convicted prisoners exercising the right to vote was arbitrary in its effects and no longer served its stated aim of punishing offenders.<sup>7</sup> Similarly in the case of S and Marper v UK the Court ruled that the indiscriminate approach towards the retention of DNA profiles "*fail to strike a fair balance between the competing public and private interests*".<sup>8</sup>

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<sup>5</sup> See DFP Risk Assessment Matrix

<sup>6</sup> 'Special Advisors - Review of arrangements for the appointment of Ministers special advisers' DFP 6 September 2011 available at:

<http://www.dfpni.gov.uk/special-advisers-review-of-arrangements-for-the-appointment-of-ministers>

<sup>7</sup> (No 2) [2005] ECHR 6

<sup>8</sup> S and Marper v United Kingdom, applications nos 30562/04 and 30566/04, Council of Europe: European Court of Human Rights, 4 Dec 2008

11. The European Court has recognised that in certain circumstances restrictions on employment may engage the right to private life.<sup>9</sup> Whilst the circumstances provided for by the proposed Bill do not appear to engage the right to private life, the jurisprudence of the European Court is evolving and the Commission advises the Committee to consider the possibility of a potential future challenge. If such a challenge were brought the relevant court would assess whether the interference with an applicant's right to private life was a proportionate means of achieving a legitimate aim.
12. The Bill proposes an indefinite prohibition on those convicted of a serious offence being appointed as a special adviser. The Commission advises that the Supreme Court of the United Kingdom has previously found that the imposition of indefinite restrictions, which represent an interference with the right to private life, may be found to be disproportionate where there is no provision for an independent review into the circumstances of an individual.<sup>10</sup>
13. The availability of an independent review mechanism is a relevant consideration in assessing the proportionality of an interference or restriction. The Commission notes that whilst the mechanisms put in place by virtue of the 2011 Review makes provision for individual assessment, the restriction proposed by the current Bill does not make provision for individual assessment or review. The Commission advises that the imposition of a blanket restriction without provision for individual review may be considered disproportionate.

### **Retroactive Penalty**

14. The ICCPR (Article 15) and the ECHR (Article 7) prohibit the imposition of a heavier penalty than the one that was applicable at the time a criminal offence was committed. It is noted that the relevance of Article 7 ECHR has been raised with the Committee. Articles 15 (ICCPR) and 7 (ECHR) would only be relevant if the prohibition on recruitment could be considered a

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<sup>9</sup> The European Court has ruled that the right to private life may include the right to seek employment *Niemitz v Germany* (1992) 16 E.H.R.R. 97, s.29.

<sup>10</sup> 'R (on the application of F and Angus Aubrey Thompson) v Secretary of State for the Home Department' [2010] UKSC 17

heavier penalty than the one applicable at the time a criminal offence was committed. The Commission advises that the Committee assures itself that the proposed restriction does not amount to the imposition of an additional and retroactive penalty.

15. The issue of penalties has been considered by the European Court on a number of occasions. In the Welch case, the European Court ruled:

*"the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure and its severity."*<sup>11</sup>

16. The UN Human Rights Committee which is responsible for ensuring compliance with ICCPR, in its General Comment 29, stated that Article 15 includes a requirement *that 'criminal liability and punishment [be] limited to clear and precise provisions in the law that were in place and applicable at the time the act or omission took place'*.
17. The Commission notes that the Bill makes provision for transitional measures and importantly provides compensation for any person who may be removed from post as a consequence of a serious conviction. The Explanatory Memorandum states that these measures have been put in place to ensure compliance with Article 1 of the First Protocol to the ECHR, on the right to property.

### **Lustration**

18. International human rights standards recognise the importance of ensuring that public institutions are structured in such a manner as to ensure respect for the rule of law and human rights. The Updated Set of Principles for the Protection and

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<sup>11</sup> Welsch v UK, (App. 17440/90), 9 February 1993, Series A No 307-A

Promotion of Human Rights through Action to Combat Impunity ('Updated Principles')<sup>12</sup> state:

*"Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination."*

19. The Updated Principles are intended to address impunity and primarily to address individuals who have committed gross violations, including extra-legal, arbitrary or summary executions in order to prevent further violations.<sup>13</sup> The removal of certain individuals from public office (referred to as lustration) is, therefore, recognised in international human rights standards and good practice under certain circumstances.

20. The European Court has ruled that to ensure human rights compliance lustration measures must meet certain criteria which are summarised below:

- Lustration law should be accessible to the subject and foreseeable as to effects
- Lustration should not exclusively serve the purpose of retribution or revenge
- If domestic law allows restrictions on ECHR rights, it must be precise enough to allow for the individualisation of the responsibility of each person affected thereby and contain adequate procedural safeguards
- National authorities must keep in mind that lustration measures are temporary, and therefore their necessity diminishes with time.<sup>14</sup>

21. The Commission advises that the Committee assure itself that the imposition of lustration for those already in office and who

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<sup>12</sup> E/CN.4/2005/102/Add.1

<sup>13</sup> E/CN.4/2005/102/Add.1, Updated Set of principles for the protection and promotion of human rights through action to combat impunity Principle 26 refers to 'gross violations of human rights, such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution.'

<sup>14</sup> Adamsons v Latvia (no. 3669/03, 24 June 2008) Para 116



have been convicted of a serious offence is compliant with these criteria and with the Updated Principles.

## **Transitional Justice and Rehabilitation – Reintegration**

22. The Commission recalls that international human rights standards require state authorities to assist in the rehabilitation and reintegration of prisoners. The UN Standard Minimum Rules for the Treatment of Prisoners state:

*"The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation."*

23. In addition the Commission notes that in May 2007, the Office of the First Minister and deputy First Minister (OFMdfM) issued guidance for employers on the recruitment of people with conflict-related convictions.<sup>15</sup>

24. This guidance is intended to assist in the reintegration of those involved in the conflict and its stated aim is *"to ensure that .. a [conflict related] conviction is not taken into account, unless it is materially relevant to the post or service in question"*.

25. A Review Panel established to assess the effectiveness of the guidance reported its findings in March 2012.<sup>16</sup> The Panel recommended that legislative changes be introduced to underpin the effectiveness of the guidance, namely amendments to the Fair Employment and Treatment (Northern Ireland) Order 1998 to ensure those with conflict related offences are protected from discrimination.

26. The Commission advises that the United Nations has issued relevant guidance on transitional justice and treatment of former combatants, including the 'Standards for Disarmament, Demobilization, and Re-integration of ex-combatants' (DDR).

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<sup>15</sup> OFMdfM 'Guidance for Employers on the Recruitment of People with Conflict Related Convictions' May 2007

These Standards emphasise the importance of ensuring that those involved in conflict are able to re-integrate into society. The Standards state:

*"DDR supports and encourages peace-building and prevents future conflicts by reducing violence and improving security conditions, demobilizing members of armed forces and groups, and providing other ways of making a living to encourage the long-term reintegration of ex-combatants into civilian life."*

27. The Commission advises the Committee that the OFMdfM guidance and the current arrangements for the appointment of special advisers are broadly consistent with human rights standards. The prohibition contained within the Bill may be inconsistent with the UN Standards.