



Northern Ireland
Assembly

Assembly and Executive Review Committee

OFFICIAL REPORT (Hansard)

Review of Petitions of Concern: Briefing from
Research and Information Service

11 February 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Seán Rogers
Ms Gairíona Ruane

Witnesses:

Mr Tim Moore Research and Information Service, Northern Ireland Assembly

The Chairperson: I welcome Tim Moore, who is a senior research officer. Tim, whenever you are ready, you can go ahead.

Mr Tim Moore (Research and Information Service, Northern Ireland Assembly): Thank you, Chair. The Committee asked the Research and Information Service (RaISe) to identify the human rights and equality proofing mechanisms for legislation or public Bills going through the Assembly. I should point out at the start that this is a paper from the Research and Information Service; it is not a paper from Legal Services. Nothing in it constitutes legal advice. So, if the Committee requires legal advice, Legal Services will be more than happy to provide it.

The Committee previously had a briefing from one of my RaISe colleagues that looked at the operation of human rights committees in other legislatures. The point was made that the Oireachtas and Westminster can both legislate in ways that are incompatible with the European Convention on Human Rights. That is not the case for the Assembly, so that is the starting point of our paper. We look at the Assembly's legislative competence, because that undermines the human rights and equality proofing that goes on with public Bills.

Section 6 of the Northern Ireland Act 1998 establishes that the Assembly cannot legislate in ways that are outside its legislative competence. The relevance of that to considerations of equality and human rights is that section 6 states that an Act of the Assembly will be outside its competence if:

"it is incompatible with any of the Convention rights"

or if:

"it discriminates against any person or class of person on the ground of religious belief or political opinion".

Those are two fundamental grounds by which anything that the Assembly legislates on that is incompatible with them could be struck down in a court.

There is a reference to incompatibility with EU law, which brings up one of the difficulties. We were asked to look at equality-proofing processes in the context of equality and human rights requirements. When you look at the provisions, you see that it is difficult to separate them out. The discrimination element of section 6 would overlap with some of the human rights elements in section 6(2)(c), and EU law is a primary source of anti-discrimination law, which would also overlap with section 6(2)(c). So, it is difficult to separate equality processes and human rights processes, as they overlap in their competence. They also intermingle in the Assembly's Standing Orders, where you will find reference to human rights and equality. Those matters emerge later in the paper.

Another point about the paper that I should make at the outset is that we have not sought to identify every way in which you could challenge legislation made by the Assembly on human rights and equality. There may be innovative ways in which lawyers could question some of the legislation. We have looked for the primary mechanisms set out in legislation and in Standing Orders to ensure equality and human rights proofing of the legislation.

The remainder of the paper looks at the process, from pre-legislative scrutiny through to Royal Assent. Probably the best way to go through the paper is to look at the table, which is at appendix 1. The process of equality and human rights proofing of Assembly legislation starts at the pre-legislative stage, which is the policy development stage in the Departments. Members will be well aware that section 75 places duties on Departments to take account of equality. The Human Rights Act 1998 places responsibilities on Departments, which, for the purposes of the Act, are public authorities. As such, they cannot act in a way that is incompatible with the convention.

At the outset, the Department will be working within a framework that is designed to ensure equality and human rights proofing of any policy that will eventually become a Bill and be introduced into the Assembly. Once the Department has worked up the policy into a draft Bill, there are opportunities for the Assembly to use Standing Orders 34 and 35, which are the special mechanisms for addressing human rights and equality issues. They have not been used at that stage. I will touch on them later, because they can be used throughout the legislative process.

Setting those aside, the Minister in charge of a Bill must, before he introduces it in the Assembly, make a statement saying that the Bill is compatible with convention rights. The explanatory memorandum that accompanies the Bill usually contains that statement. It also usually contains statements on human rights issues and section 75 statutory duties. It is interesting that it is not a requirement in the Assembly's Standing Orders to include those statements, but they are generally included. In fact, of the 11 Executive Bills that are in front of the Assembly at the moment, all have statements on human rights issues and on the statutory equality duties.

The point that could be made about the explanatory memoranda is the extent to which the statements in them are meaningful. It has been suggested with regard to human rights statements that, if you have a statement in which the Minister says that the Bill is compatible with convention rights, the additional statement on human rights issues should say something different. Essentially, it should address the issues that have emerged in the policy development process and the development of the Bill that relate to human rights. The Minister would not have introduced the Bill if he had thought that it was incompatible, but there still might be issues that are of concern to the Assembly. The argument has been made that it might provide for a better Second Stage debate if you had more information on those issues.

To be fair to the Departments, of the 11 Bills that we have in front of the Assembly, two address human rights issues and look at the right to possession. I am not sure of the exact wording, but they refer to the rightful use of your possessions, which is article 1 of protocol 1. There are issues around those that were identified in the Reservoirs Bill and the Public Service Pensions Bill. So, there is some discussion in the explanatory memoranda, but one of the arguments could be that that discussion could be fuller. Where the section 75 duties are concerned, the statements tend to be little more than saying that section 75 has been adhered to. There is no real discussion of what the section 75 issues were. The Welfare Reform Bill directs you to the equality impact assessment statement but does not address those in the explanatory memoranda. That is the pre-legislative phase.

The Bill will go to the Speaker, as members will know. The Speaker then has seven days to assess whether, in his opinion, the Bill is within the Assembly's legislative competence. That engages the elements of compatibility with the convention and discrimination, which we mentioned. If the Speaker decides that the Bill is within the Assembly's legislative competence, it has a First Stage. Following that, it will be sent to the Human Rights Commission for its opinion. There is no obligation on the commission to come back with an opinion, but, when it has an opinion, it tends to use the Committee Stage to bring it to the Assembly.

Standing Orders 34 and 35 are the special mechanisms. I mentioned that they could be used in the pre-legislative phase, but they can be used in the other phases of legislation through the Assembly. Standing Order 34 allows any Member to table a motion to seek advice from the Human Rights Commission on compatibility with human rights. Standing Order 35 allows the establishment of an Ad Hoc Committee on Conformity with Equality Requirements, which is one of the areas that this Committee has been looking at.

Standing Order 34 was used once, and that was for the Welfare Reform Bill. The motion did not pass, so the Bill was not referred to the Human Rights Commission for advice. Standing Order 35 was used once, which led to the establishment of the Ad Hoc Committee on Conformity with Equality Requirements, again on the Welfare Reform Bill. Those were the only times that the Assembly has used the special Standing Orders that are provided for human rights and equality issues.

Outside those special procedures, the Committee Stage is when Committees engage in equality and human rights issues. It is standard practice to take evidence from statutory bodies, such as the Equality Commission, the Human Rights Commission and the Children's Commissioner. The paper contains examples of when that has happened. The Committee Stage provides that mechanism, but, as I said, the two other Standing Orders allow for special provisions.

One feature of the Assembly is that a Committee cannot amend legislation; it can only make recommendations for amendments, so amendments have to be made at further stages. Amendments can be made at Consideration Stage and Further Consideration Stage. These amendments can work in two ways for human rights and equality issues. They can introduce human rights or equality concerns or resolve human rights and equality concerns that have been addressed in earlier proceedings.

Amendments are not checked for competence. The Department will look at them, and there is a responsibility on anyone tabling an amendment. However, there is no requirement for an amendment to be competent, as I understand it. If the Committee needs advice on that, I am sure that Legal Services would be happy to provide it. As the Bill progresses to Final Stage, the Speaker has to make a statement or introduction and has to address the Bill, and the Minister will have to make a statement, but, at Final Stage, there is no final statement from the Speaker or final consideration or decision on the Bill. Once the Bill has been passed and is at its Final Stage, the legislation provides an opportunity for the Attorney General to examine it for competence issues. Those will address human rights compliance with the convention, as well as equality.

Where the Attorney General feels that there is a competence issue, he will make a reference to the Supreme Court to have it examined. That happened once with the Damages (Asbestos-related Conditions) Bill, and the Attorney General eventually withdrew the reference. Again, it was to the rights of possession under article 1 of protocol 1. Similar legislation went through the Scottish Parliament. There was a reference from the Scottish Parliament, and, on the back of that being considered, the Attorney General withdrew his reference. So, we have had a reference, but we have never had a decision on the Attorney General for Northern Ireland's reference to the Supreme Court.

The Advocate General, who is the UK Attorney General, can also make such a reference but has not done so. In what is referred to as Reconsideration Stage, Assembly Standing Orders provide for situations where the Supreme Court makes a decision. It allows the Assembly to revisit the Bill so that it does not lose it, and it allows the Assembly to make amendments to make it compatible with the court decision. Again, that has not happened, because we have never had a case go to the Supreme Court.

The final stage in the legislative process is Royal Assent. The Secretary of State can decide not to send the Bill for Royal Assent, because, among other things, he feels that it does not meet the UK's international obligations. It could well be argued that those obligations include references to international treaties, such as the UN Convention on the Rights of the Child and the UN Convention on

the Rights of Persons with Disabilities. At that stage, the Secretary of State could introduce human rights and equality issues into the consideration of the legislative process.

That is a run-through of the equality and human rights proofing of Bills as they go through the legislative process. The paper makes the point that none of this is a guarantee that a Bill that is coming through the Assembly and achieving Royal Assent is actually compliant or does not have human rights or equality issues. For that reason, the courts can hear cases that challenge our legislation, and, in an extreme case, the legislation can be struck down because it is incompatible.

One of the questions that arise is this: are the human rights and equality checks sufficient, or is there a gap? I am not the person to answer that question, but the Procedures Committee looked at this in 2002. It came to the conclusion that the lack of use of the special provision in Standing Orders 34 and 35 would lead you to believe that the mechanisms were sufficient and that, if they were not, you would have had much more use of them. I am in no position to judge whether that is the right conclusion to draw. There are probably other conclusions, but that was the only time that the legislative process and equality proofing has been considered, and that was the conclusion drawn in 2002. With that, I end the briefing, and I am happy to take questions.

The Chairperson: OK, Tim. Thank you very much for that. Are there any questions?

Ms Ruane: How many Bills were referred to the Human Rights Commission in the North?

Mr Moore: All Bills are sent to the Human Rights Commission as soon as possible after introduction. There is no requirement on the Human Rights Commission to respond.

Ms Ruane: Does it generally respond at Committee Stage?

Mr Moore: It generally responds at Committee Stage, because that is the first stage in the process that it can.

Ms Ruane: Has it responded formally?

Mr Moore: It has responded formally at Committee Stage.

Ms Ruane: I have one comment to make. This is very clear, and I appreciate the work that you have done. However, I just think that we should use "he/she" and not "Chairman/Chairperson". I know that you use it in one instance, but in some of the others it is just "Chairman" and "he" and "Secretary of State" and "he", especially given that we are talking about equality and human rights.

Mr Moore: Absolutely, I take your point.

Mr Campbell: The appendix in particular is very useful. Sometimes we get briefing papers that you have to go through four or five times to find out what exactly is being said, but that is not the case with this one. It appears to crystallise the current position. I just want to check that I have got this right. The paper quite usefully crystallises down the various stages, and I think that I am 99% sure, but I want to be 100% sure.

I will go through briefly the stages that you outlined. At the pre-legislative stage, an impact statement on human rights and equality is included, and the Minister in charge must publish a written statement to the effect that the Bill will be within the legislative competence. At the next stage, it is scrutinised by the Assembly legal office, and the Speaker decides whether it is within the legislative competence. The Speaker then sends a copy to the Human Rights Commission. There is then the lack of use that you referred to of Standing Orders 34 and 35, where any member can table a motion that the Human Rights Commission should be asked to advise. A member of the Executive Committee or a Chairman of the relevant Committee may table a motion to refer a Bill to an Ad Hoc Committee. I want to make sure that I am 100% clear on this multiplicity of sieves, if you like. At Committee Stage, the Human Rights Commission again may be asked to give a written submission. Then, under Standing Order 39, prior to the Final Stage, the Speaker considers the Bill again in accordance with section 10 of the Northern Ireland Act 1998. At that point, the Attorney General and the Advocate General may, within four weeks, refer it to the Supreme Court for a decision. After that, if the Secretary of State considers that the Bill contains a provision that is incompatible, he or she may decide not to submit it for Royal

Assent, and then, at Reconsideration Stage, the Supreme Court may decide. Have I got that series of sieves right?

Mr Moore: The only point that I would make about that series of sieves is that the Speaker does not make a final assessment of competence, but, yes, that is the process.

Mr Campbell: Do you mean the one about him passing it on?

Mr Moore: At the Final Stage, the Speaker will address a number of issues, but he does not address the competence of the Bill as detailed in section 6.

Mr Campbell: However, that series of sieves that —

Mr Moore: Absolutely.

Mr Campbell: That is fair enough.

Ms Ruane: With your indulgence, may I ask one more question? Your paper refers to the fact that the Human Rights Commission:

"raised the notion of establishing a human rights committee".

You could make all sorts of interpretations of whether Standing Orders 34 and 35 were used. When they were used, the Assembly was only up and running, it was very early stages, and there were probably not that many Bills going through. What are the pros and cons of the notion of the establishment of a human rights Committee? Was any work ever done on that?

Mr Moore: I am not aware of the arguments that were put around 2002. There may have been the feeling that, although you had the OFMDFM Committee, which has a clear cross-cutting remit on human rights, you did not have a Committee with that focus. The same could be said about a European Committee. You needed one with that focus. My colleague, Ray, presented a paper that looked at human rights committees and at how they operate to see whether there is scope for a remit that would add to this process. However, that is not a decision for the Research and Information Service to make. One of the benefits, I suppose, would be the expertise that you build up in a Committee. In the human rights Committee at Westminster, you have a group of members who are very focused solely on human rights issues, as it is a complicated area. So, that would be one of the arguments for it.

Ms Ruane: Trevor raised that point the previous time.

The Chairperson: Thank you, Tim.