



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

3 March 2010

Health Protection Branch  
Department of Health, Social Services & Public Safety  
Castle Buildings, Stormont  
Belfast BT4 3SQ

Dear

### **Bill to Regulate Sunbed Industry in Northern Ireland**

Thank you for your correspondence to the Chief Commissioner dated 25 February 2010 which has been passed to me for response.

You advise that the proposed Sunbeds Bill would require sunbed operators to provide and display prescribed information relating to the health risks associated with using sunbeds, and would prohibit the provision or display of any other information relating to the health effects of sunbeds. You request the Commission's advice as to whether that prohibition is compatible with Article 10 (freedom of expression) of the European Convention on Human Rights, which is given further effect in domestic law by the Human Rights Act 1998. The full text of Article 10(1) is:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and **impart information** and ideas **without interference by public authority** and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. [emphasis added]

The first question to be addressed is whether the restriction falls within the ambit of Article 10. As the proposed provision involves restriction by a public authority on imparting information, it is clear that the measure will engage Article 10. However, Article 10 is not absolute and limitations on its exercise are permitted provided they are under the terms of Article 10(2), which states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, **restrictions or penalties** as are **prescribed by law** and are **necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, **for the protection of health** or morals, for the protection of the reputation or **rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [emphasis added]

The DHSSPS must therefore ensure that the restriction can be justified under the provisions of Article 10(2). The following outlines the main elements of the legal test in this regard.

Firstly, the restriction needs to pursue one of the *legitimate aims* set out in the latter half of Article 10(2). You state that the aim of the policy is to prevent sunbed providers from making unfounded or unproven claims which attribute health benefits to sunbed use. The restriction is complemented by compulsory provision of information on the health risks of sunbeds: while your letter does not say so, we take this to mean information provided or approved by DHSSPS. Taking both together, it would appear that the overall aim is to ensure that sunbed users receive information that accurately reflects the evidence accepted by DHSSPS indicating the risks of sunbed usage, and are not exposed to *any* claims of health benefits (this is our reading of the general effect of clause 7, although it could in principle allow for information on supposed health benefits if it is approved by the Department). So long as there is a reliable evidence base the Department can be confident that the restriction pursues the legitimate aim of *the protection of health*. Moreover, should this evidence base indicate dangers of sunbed usage that include association with conditions that are life-threatening or lead to serious illness or injury, the Department can also cite the legitimate aim of protecting the *rights of others*, specifically the right to life (Article 2) and the right to freedom from inhuman and degrading treatment (Article 3).

The Department can satisfy the requirement that the restriction is **prescribed by law**, as the measure will be set out in the legislation. Notably, if the Department had gone for a lesser restriction, for example, only prohibiting alternative information which made 'unfounded or unproven' claims, the onus would be on the Department, perhaps through the vehicle of guidance, to provide clarity as to the types of information captured under this definition. The approach taken is stricter, in that only approved information can be given, so no guidance is necessary.

Finally, turning to the question of whether the restriction is *necessary in a democratic society*, the test is whether the limitations on the right relate to a *pressing social need* and are *proportionate* to the *legitimate aim* pursued.

In reference to a *pressing social need*, the Department has to be able to demonstrate the damage actually or potentially caused to health by unregulated and unreliable claims being made in information provided by sunbed operators. I presume that this is the evidence base which has prompted the policy in the first place.

The Department then has to be able to justify the proposed restriction and penalty as being *proportionate* to the aim pursued of protecting health, in that the goal could not be achieved by a lesser restriction or penalty. The Department will be assisted in resisting any challenge based on proportionality if it can demonstrate that the legislation reflects a substantial level of scientific medical consensus, based on reliable data, relating to the risks (and any benefits) of usage, so that the restriction is not limiting legitimate scientific debate but only commercial misrepresentation (the restriction does not restrict the issue of alternative information per se, but rather that directly given by commercial providers to customers). The European Court of Human Rights, and domestic courts applying the Human Rights Act, have afforded greater discretion ('margin of appreciation') to restrictions on commercial expression vis-à-vis other forms of expression, such as political expression: see for example *R (on the Application of British American Tobacco UK Ltd) v Secretary of State for Health* in the England and Wales High Court (judgment of 5 November 2004).

In addition, it is unlikely that a court would find that the proposed penalty is disproportionate, given that the level of fine (presently set at a maximum of £200) is relatively small for a commercial provider. The Bill also sets out a statutory defence of reasonable precautions to prevent prosecution for inadvertent actions.

I hope this information is sufficient to assist the Department's considerations in relation to the proposed measure, and am happy to discuss further if this would be of assistance.

Yours sincerely

**Daniel Holder**  
**Policy Worker**