



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Briefing Paper for the Northern Ireland Assembly on the Sunbeds Bill

Summary

This is a Briefing Paper on a proposed new law to regulate sunbeds, which is currently being discussed by the Northern Ireland Assembly.

The Commission examines whether a proposal to prohibit sunbed operators from giving out their own information on the health effects of sunbeds is acceptable under human rights law protecting freedom of expression.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ providing legal advice and representation in human rights proceedings,² and advising on whether a Bill is compatible with human rights.³ In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies. In accordance with its mandate, the

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.70.

³ *Ibid*, s.69(4).

Commission also delivered advice to government on the content of a Bill of Rights for Northern Ireland on 10 December 2008.⁴

2. This response is provided further to the request for scrutiny of the Bill from the Office of the Presiding Officer (Speaker) in accordance with Section 13(4)(a) of the Northern Ireland Act 1998. The Sunbeds Bill was introduced in the Assembly on Monday 11 May 2010.

Overall

3. In human rights terms, effective measures taken to protect the health of the population, as is the intention of the Sunbeds Bill, are regarded as positive steps in fulfilling the right to health. The UK is party to a number of human rights treaties acknowledging the right to health including the UN International Covenant on Economic, Social and Cultural Rights (Article 12).

Clause 7 prohibition on provision or display of other information relating to the health effects of sunbeds

4. The Commission will focus its submission on clause 7 of the Bill. Taken with the duty in clause 6 of the bill to display an information notice this 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.
5. During the policy development process the Commission responded to a request for advice on compatibility of clause 7 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 Commission responded by setting out the legal test for compatibility, further elaborated on in this submission.
6. 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

⁴ *Ibid*, s.69(7).

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]

7. 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]

8. For the Bill to proceed the legislature 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.
9. First, the restriction needs to pursue one of the *legitimate aims* set out in the latter half of Article 10(2). The DHSSPS informed the Commission that the aim of this measure 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 prescribed by the DHSSPS under clause 6(4). 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 the DHSSPS indicating the health risks (or in theory any beneficial effects) of sunbed usage, and that sunbed users are not exposed to other claims of health effects related to usage.
10. So long as there is a reliable evidence base the legislature 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 legislature 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).

11. The requirement that the restriction is **prescribed by law** can be satisfied as the measure will be set out in the Act once the Bill becomes law. Notably, if the Bill had gone for a lesser restriction, for example, only prohibiting alternative information which made 'unfounded or unproven' claims, the onus would be on the DHSSPS, 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.
12. 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.
13. In reference to a *pressing social need*, the requirement is to demonstrate the damage actually or potentially caused to health by unregulated and unreliable claims being made in information provided by sunbed operators. If this is the evidence base which has prompted the policy in the first place, the Department could place this on the record during scrutiny of the Bill.
14. There is then a requirement 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 case for this 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).
15. 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.

16. 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, the domestic case of *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 the European Court of Human Rights, see, *Hachette Filipacchi Presse Automobile and Dupuy v France* (application no 13353/05) and *Société de Conception de Presse et d'Édition et Ponson v France* (application no 26935/05) of 5 March 2009. In both the French cases the applicants unsuccessfully tried to argue that their convictions and fines for unlawful tobacco advertising had violated their rights to freedom of expression. The Court disagreed, concluding in both cases the interference in question could be regarded as "necessary in a democratic society" in pursuit of the legitimate aim of protecting health; accordingly there had been no violation of Article 10.⁵
17. It is the view of the Commission that, providing the above evidence base can be provided, the legal test for restricting expression under Article 10 should be met.

June 2010

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⁵ Paragraphs 19-22 48-50;