



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Defamation Act 2013: Northern Ireland
Human Rights Commission Briefing

3 July 2013

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Members present for all or part of the proceedings:

Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mrs Judith Cochrane
Mr Leslie Cree
Mr Paul Girvan
Mr Peter Weir

Witnesses:

Mr Colin Caughey	Northern Ireland Human Rights Commission
Mrs Virginia McVea	Northern Ireland Human Rights Commission
Ms Angela Stevens	Northern Ireland Human Rights Commission

The Chairperson: I welcome Virginia McVea, the new director; Angela Stevens, a case worker; and Colin Caughey, a policy worker with the commission. Virginia, do you want to open up the discussion on this?

Mrs Virginia McVea (Northern Ireland Human Rights Commission): Yes. Thank you for the opportunity to address the Committee this morning. The Committee's work is very timely. I heard the word "urgent" used this morning, and it really would not be out of place. This is because, in the first quarter of next year, the UK will be re-examined by the United Nations Human Rights Committee, which is looking at the treaty on civil and political rights that was ratified by the UK.

Freedom of speech is seen by the UN as an absolutely crucial component within civil and political rights. Interestingly, in the global village of our world today, with information being a commodity, we see increasingly that free speech and the issues under consideration today are equally applicable when we think of economic, social and cultural rights, particularly in relation to the internet.

Your deliberations here today will be relevant to that examination in the first part of 2014. The reason for our confidence in the, usually risky, business of future-gazing is that, in the last examination in 2008, that UN committee decided to single out the issue of defamation law for particular consideration. As mentioned very briefly this morning, it was not satisfied with the UK, and so the spotlight will definitely be on the new Defamation Act and, indeed, on what has happened in Northern Ireland.

I am further given to understand that in the draft submissions already prepared by the Government for that pending examination, responses have been provided referring to the new Defamation Act and the reasons for travelling in that direction. Northern Ireland will have to make submissions to that consideration.

So, what is the committee's approach likely to be? As I indicated, on past performance and past comments, I think that it is likely that the committee will find us wanting. It has called for a free, uncensored and unhindered press or other media, and it has stressed that the public has a corresponding right to receive that information, putting the state parties under an obligation to take what it calls:

"all necessary steps to foster...independence...and...ensure access of individuals".

We can provide details on all these concluding observations, general comments, reports and submissions to you following this session.

In its concluding observations, the committee stated that the UK law, as it stood prior to the Defamation Act 2013, had served to discourage critical media reporting and had an unduly restrictive impact on freedom of expression. What members should also note is that the draft submissions being prepared for 2014 will not be the first time that the UK Government have spoken to the UN directly and said that they accepted that the law on defamation was not as it should be and explained why they have changed it.

Last year, the UK came before the UN under a state-of-the-nation consideration called the universal periodic review. In that review, the UK Government proactively offered, on the subject of defamation law, that the Defamation Bill reflected the Government's view that the law needs to be rebalanced to secure more effective protection for freedom of speech and stop the threat of long, costly libel proceedings.

They said that the core aim of their legislation was to get the balance right so that free speech was not unjustifiably impeded. That is the evidence that the UK has already submitted to the UN. There were no submissions in last year's universal periodic review from Northern Ireland. That was noted at the UN. It also means that any distinguishing features that Northern Ireland may have wanted to suggest for this jurisdiction have never been raised before.

As you consider what, if anything, should be done in Northern Ireland, some guidance, beyond the comments of that committee, can be gleaned from the special rapporteur to the UN on freedom of expression — that is the world expert, as it were, appointed to the UN to advise it. In a 2011 report, the special rapporteur highlighted three things about freedom of expression that I will mention briefly to you. It was said that any restriction must be clearly provided by law, proven to be necessary, and was the least intrusive means.

Take the first point about legal certainty, which has been opened before you this morning. It is one of our own constitutional principles. The evidence by Dr Wilmshurst about the chilling effect was compelling. It is the chilling effect of individuals or organisations being inhibited in freedom of expression for fear of the unknown legal consequences that may occur. Evidence has been provided to you of the National Association of Citizens Advice Bureaux pouring vast amounts of money into the consideration of its reports on welfare reform legislation before feeling in any way safe to publish. You can see the difficulties. The Singh case has been opened before you this morning, and the difficulty in understanding the various defences — what is the difference between fair comment and verifiable fact?

We have had our own example in Northern Ireland of a case such as that; the Convery case in 2008. Much has been said this morning about crusaders. That was a case about a restaurant critic. I do not know whether restaurant critics have ever been referred to as moral crusaders, but, in that case, the same difficulty as Singh arose; it was about trying to distinguish which defence was applicable.

Secondly, the special rapporteur talked about necessity. The difficulty emerging already, with regard to the submissions made by Westminster, is how Northern Ireland will distinguish itself as requiring more restrictive legislation on free speech than England and Wales in order to satisfy that second hurdle of "necessary".

Thirdly, we come to the special rapporteur's comments on least restrictive means. That, in essence, is proportionality. When the European Court of Human Rights has decided on proportionality in relation to free speech, it has taken a very narrow interpretation of any restriction. We can open cases before you this morning, such as the Max Mosley case, the older 'Sunday Times' case that, I believe, was mentioned in the evidence, or the very odd German case combining rock star and talk show host: the Axel Springer case, which is one of the most recent cases. In all of those, it was a very narrow interpretation.

When you join the concentric circles of international human rights law, you should know that when the European Court of Human Rights looks at cases it will pay attention to the examination carried out by the various UN committees. It will pay attention to any general comments made or concluding observations, and so those worlds combine. The comment made this morning about the Derbyshire test was interesting. You can see that that, in essence, is a very narrow interpretation of what restriction is provided.

With England and Wales using the threshold of serious harm, Northern Ireland is clearly distinguished. In our Human Rights Act, article 10 on freedom of expression refers to that right being regardless of frontiers. The issue arose this morning. As Jo said, the special rapporteur regarded the internet as an enabler of human rights. You can see, even from the point of view of education, that that it is crucial. He recognised the unique characteristics of the internet, because it arguably provides a right of reply immediately, which may restore the harm caused in a way that previous print media may not have been able to do, and changes have been made to consider platform providers.

You mentioned libel tourism. We do not have any statistics or key evidence to provide you with this morning on what is likely to happen, but you can see that Northern Ireland, in being distinguished, has the opportunity to become a portal.

Mention was made first thing this morning about vexatious litigation; we would also refer to what is essentially speculative litigation. If you can close something down that might be difficult for you, and you have the money to do so, it is clearly in your interest. In a world where information is, more and more, an important commodity with human rights stating that freedom of expression must operate regardless of frontiers, we would be very concerned that in an examination by the UN, Northern Ireland would be seen as having become part of a final frontier.

The Chairperson: I have a couple of questions, Virginia. At point 9 of your presentation, you state:

"The State party should re-examine its technical doctrines of libel law, and consider the utility of a so-called "public figure" exception, requiring proof by the plaintiff of actual malice".

To what extent did the Westminster Act address that conclusion and confine the exception to public figures?

Mrs McVea: I do not know the detail of what was considered in that exception, but protecting reputations and certain privileges remain, and human rights law would not be prescriptive in prohibiting that.

The Chairperson: Also, at point 14 of your presentation, you state that there has been a:

"a worrying trend on the misuse of lawsuits against media professionals".

On what basis does that practice take place? Is that a reference to super-injunctions?

Mrs McVea: I would have to read it in its entirety to understand the full context, but that is essentially what the UN committee had said; that it was overly discouraging critical media reporting. The concluding observations can be made available to you.

Mr Weir: Thank you, Virginia. That was useful. To highlight the point made by the Chairperson, if I am picking that up right, your presentation states that it would require:

"proof by the plaintiff of actual malice in order to go forward".

That would essentially be in a case with a public official; am I reading that correctly?

Mrs McVea: That is my understanding, yes.

Mr Weir: If you are going after a public official, a politician, civil servant or whatever, they would have to show that there was some direct level of malice. Say, at one end of the scale, a newspaper said, "We were not quite sure if it was true or not, we have nothing against Mr Bloggs or Mrs Bloggs, but we reckoned that by printing this we would get a couple of hundred thousand extra sales". In many ways,

that is not malice; there is no direct indication that it is hostile to the person. The newspaper just saw it as a commercial opportunity. Surely if that is incorporated as a defence, it would open up a potential realm of defamation?

Mrs McVea: Issues of definitions are always difficult. Part of our challenge here this morning is that we have not seen the 2013 legislation in operation, but the other issue that has not been discussed here this morning is the issue of putting all your eggs in one basket. There has been so much public discourse around the media and ethics, what can and cannot be said, and what is in the public interest, that we must hold in mind at all times that the defamation legislation is only one angle in all of this. As regards regulation of the press, ethics, and so on, clearly that discussion is live and needs huge influence, I think. This is one corner, and the risk is that it becomes all things to all men, but actually is only this wee bit of defamation.

Mr Weir: That is a fair point. We are looking at the Defamation Bill, and there are much wider issues that are outside its parameters, but this is where our focus is today. From a UN point of view, everyone would accept that there need to be degrees of reform, particularly on access to justice. The Minister indicated that he wants to see how this works out in practice across the water. Let us remember that this is not a question of us shifting Northern Ireland laws in any direction. The law on 1 January 2014 will be exactly the same as it was 10 years ago and, largely speaking, 20 or 30 years ago.

Mention has been made of libel tourism, but the one lawyer who has given evidence to us sees very little evidence that that will come in our direction. Is there any concrete evidence that it could come here?

Mrs McVea: We are not aware of any in Northern Ireland. I am not aware of the full details of what has been put to the UN committee. There is an interesting aspect of your debate about influence at Westminster and cross-party support. The comfort that the Committee can take is that the UN committee is looking at this issue with a degree of neutrality. So, if you are concerned about any of those influences, that means that it does not come into play. If it, on a world stage with information as a global commodity, is concerned, then in this jurisdiction, we are obliged to take note, although I fully accept that at this moment it is a —

Mr Weir: The Minister's position, as he has outlined, is not that he is opposed to any degree of reform of this but that you have got something that is being put in place in England and that there is a desire to see whether it is fit for purpose before it is implemented here. I suspect it will be tailored to our needs. I have concerns about the abolition of jury trials, for example. Is there likely to be any UN view on that, or is it something that it is likely to be silent on?

Mrs McVea: We have not heard anything. It is not prescriptive and there is no obligation to provide it. In terms of thresholds, we are looking at, as you mentioned, access to justice and the right to a fair hearing; but human rights law is not, as you know, prescriptive about the format.

Mr Weir: If we are talking about freedom of speech and expression being paramount, is not the logical extension of that to say that we should not have any defamation laws at all and that there should be no libel? In that case, there would be no restriction on anything that anybody publishes.

Mrs McVea: No, part of the difficulty of human rights law comes from competing rights. It can be clearly seen how important to the rights of an individual the ability to protect their reputation is, not purely in an economic sense but when it comes to general well-being. That is the wrestling match that has been —

Mr Weir: I am not altogether sure that there has been a great deal done in the 2013 Act that improves access to justice. One of the dangers of libel is that it is still a very rich person's tool, and I am not altogether sure that there is anything in the 2013 Act that radically improves that situation. The principal differences, leaving aside that missed opportunity, are around striking the balances on what the burden of proof should be — as to whether it is action per se or the serious harm test, and the jury side.

There may be work to be done around the definition. To come back to something that was said earlier, whether somebody reasonably believes or could reasonably believe, strikes me as being a fairly moot point. It shifts the burden. Clearly, it would also leave the judge having to decide whether

the person reasonably believed. Similarly, the judge is still going to have to make a judgement call on that.

Mrs McVea: Those are issues, undoubtedly, of fine tuning. Whilst there is always interest in waiting to see how something pans out, that will not be terribly constructive for Northern Ireland before the United Nations, because we are looking at 1955 legislation and because the United Nations will be looking to see, given the detailed scrutiny in England and Wales, some evidence of how Northern Ireland is paying attention. That is why this Committee is invaluable. We would not want to see the issue put on the back-burner.

Mr Weir: Internet publication might be described as one of the new, or more recent, frontiers. The internet can ultimately be a mixed bag. Everyone acknowledges that there is the opportunity at times, if it is used correctly, for it to be a very good educational tool. I am tempted to say that, for example, I have learnt today, that simply by giving my bank account details, I can earn £1 million from a Nigerian general who wants to relocate in this country. That is something that I did not know when I woke up this morning.

Mrs McVea: You have been enriched.

Mr Weir: Enriched indeed. I could probably afford to take a libel action, if I is so desired.

There are two ends of the scale. There is the citizen, blogger or crusader who is trying to get out valuable public information. We must ensure that he is not restricted. On the flip side of the coin, we have, unfortunately, seen a lot of garbage and defamatory material pumped out against people. To use the defence of malice, a lot of it is quite often motivated by levels of malice. There may be racial hatred, and a whole range of very personal motives. Clearly, a balance must be struck to ensure that that level of defamation is not allowed. Quite often, it is one individual putting information out against another, with maybe a very limited readership. Therefore, the amount of serious harm that a person suffers, objectively, may be limited, but to that person it could be extremely hurtful because it is something that is defamatory and untrue. So, do you agree that there is the need to strike a balance with respect to that?

Mrs McVea: Absolutely. It is crucial that we pay attention to what the UN refers to as "new media". Part of the difficulty is that that is not currently evident in Northern Ireland, in that there has been that detailed consideration in the build-up to the legislation.

Mr Weir: I appreciate that it may not be the UN's particular remit. Clearly, it has highlighted an issue of new media, or a new frontier. Does it suggest any solutions, other than offering broad principles?

Mrs McVea: No. Generally the UN will not be too prescriptive. Certainly, you can see the advantages of what has been created through the new legislation for England and Wales, in allowing this opportunity to take down and engage with the various platforms, whether they are internet service providers or community platforms. For Northern Ireland to be able to consider this and pay attention to it is vital. In broad terms, the view is that, on an international level, there is so much more to be gained than lost. So, it would be in the fine tuning of the protection. The special rapporteur, for example, is giving reports to the UN on how important the internet was to the Arab spring and how you can chart the wave of what happened there across the internet. So, there are vast winds, with respect to education and opportunities. These are seen as issues remaining to be tackled, however, at the margins; and the less are being given the gift of freedom of expression provided.

The Chairperson: There is reference to the UN Human Rights Committee and to article 17 and the right to protection of personal honour and reputation. Has there been much commentary about that, and how that is protected?

Mrs McVea: In his reports, the special rapporteur will refer to the balance between reputation, which is cited each time, and national security, public morals and economic well-being. So, it is referenced, and brought up. It is usually the first item mentioned, and you see, closer to home, in the European case law that that is the key issue that is usually being litigated.

The Chairperson: Are there any concerns about getting the balance right?

Mrs McVea: Absolutely. In the special rapporteurs' reports, you will see that that is exactly how they chart it. They constantly referred to the need for a balance. Ultimately, the conclusion that they have come to, thus far, in relation to defamation law in the UK, is that it does not get the balance right.

The Chairperson: Virginia, thank you very much.

Mrs McVea: Thank you very much.