



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Public Procurement and Human Rights:
Northern Ireland Human Rights Commission

14 May 2014

NORTHERN IRELAND ASSEMBLY

Committee for Finance and Personnel

Public Procurement and Human Rights: Northern Ireland Human Rights Commission

14 May 2014

Members present for all or part of the proceedings:

Mr Daithí McKay (Chairperson)
Ms Michaela Boyle
Mrs Judith Cochrane
Mr Leslie Cree
Mr Paul Girvan
Mr John McCallister
Mr Ian McCrea
Mr Mitchel McLaughlin
Mr Peter Weir

Witnesses:

Mr John Corey	Northern Ireland Human Rights Commission
Ms Kellie Turtle	Northern Ireland Human Rights Commission

The Chairperson: I welcome to the meeting Mr John Corey, the interim chairperson of the Human Rights Commission (HRC); and Miss Kellie Turtle, education worker with the commission. John, do you want to open up with some comments, after which we will go to questions?

Mr John Corey (Northern Ireland Human Rights Commission): Yes, Chairman. Thank you very much. First, I wish to record the Human Rights Commission's appreciation to the Committee for the opportunity to provide evidence on the report. Before I say anything more, I have to state formally for the record that the Northern Ireland Human Rights Commission provides its advice to the Committee pursuant to its role under section 69(4) of the Northern Ireland Act 1998 and, further, that it grounds its advice on the full range of 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 the United Nations system. I am told that I have to say that. *[Laughter.]*

Mr Weir: It is a bit like at the end of movies, when it says that any resemblance to any person living or dead is purely coincidental.

Mr Corey: Yes, absolutely. Moving on to our submission, as I said, the commission welcomes the positive, I hope, early engagement by you in considering the report. The commission believes that the Committee has an important role in the report's objective to embed human rights considerations in the public procurement processes. Indeed, the commission recognises that the Committee has undertaken extensive work on public procurement, not least the inquiry that you conducted and reported on into public procurement in 2010, which we consider to have been instrumental in the Northern Ireland Executive's decision to include social clauses in public procurement policy, which is

relevant to this consideration. We think that the commission's report complements and adds to the work that you have already undertaken on that.

I intend to comment very briefly on four aspects. First is the background on why the commission undertook that work as part of our overall work on business and human rights. Secondly, I will comment very briefly on the findings. Thirdly, I will comment on the recommendations. Fourthly, and finally, I will comment on how we might move forward on the issue as the commission sees it.

First, I want to set out the background. The starting point was the decision of the Human Rights Council in 2011 to adopt the United Nations Guiding Principles on Business and Human Rights — UNGPs as they are known in the trade. The standards in those guiding principles are structured according to the framework of the following three pillars: first, the state duty to protect against business-related abuses of human rights; secondly, the corporate responsibility to respect human rights; and, thirdly, access to remedy for victims of business-related abuses. That, if you like, was the starting point with the UN developing, publishing and agreeing those guiding principles.

Next, the European Union committed fully to the implementation of those UN guiding principles. That was emphasised in the commission's strategy on corporate social responsibility (CSR). Again, people may be familiar with that. That European Union strategy included an invitation to all UN member states to produce a national action plan for the implementation of the UN guiding principles by the end of 2012.

In fact, the UK was the first country to publish a national action plan. It was published in September last year, and I have it here. Unfortunately, it has remained somewhat below the radar. If you said to people that the UK Government have published an action plan on the UN 'Guiding Principles on Business and Human Rights', they might be surprised. However, the UK was the first country to publish a national action plan. We combined those developments with the fact that public procurement plays such an important role in the life and economy of Northern Ireland and with the Human Rights Commission's duty to protect and promote everyone's human rights. As a commission, we considered that we had a responsibility to address, first, the impact of procurement actions on human rights and, secondly, where and how procurement decisions could assist in improving the protection and fulfilment of human rights. That is what led us to produce this particular report.

I will just turn to the report. It provides an analysis of the human rights and procurement legal frameworks. It details the interactions between those two things and how human rights exist at their interface. That is what it sets out to do. I know that that sounds like complicated language, but it is really trying to address how public procurement interacts with human rights issues and how it could then help to improve the fulfilment of human rights. That is our objective.

For those who may have spotted it, I will just point out that there is an error in the report. It refers to expenditure for public procurement in Northern Ireland being £11.5 billion. It is actually public expenditure in Northern Ireland that is circa £11.5 billion. The most recent estimate that I saw for the amount of expenditure that is involved in public procurement was £3 billion.

We have identified in the report, and it is recorded there, that there are three dimensions to the human rights interface with the legal framework and the business side of public procurement. First, it is the state's general responsibility to ensure that the business sector and the third sector, which would also be involved in public procurement, do not violate any person's human rights. Secondly, where a private or third sector body is contracted to provide a public service, the public authority must ensure that the contract is compliant with all human rights laws and standards, and it must also ensure that the subsequent delivery of that contract is human rights compliant. So, that responsibility falls on the state. Thirdly, the private sector organisations that are engaged in public procurement are culpable under human rights law. So, they need to be fully aware of that when entering into any public procurement activity. The report builds on those key principles and seeks to carry them through.

The research and work on the report was undertaken with the assistance of the Danish Institute of Human Rights, which has been a leader in the field of business and human rights, and public procurement and human rights. It continues to do that.

I will comment briefly on the report's findings and recommendations. If members have access to the report, they will see that those key findings and recommendations are summarised at pages 4 and 5. I do not intend to work my way through those in the presentation, but two examples emerge. First, the finding is that the current legal and policy frameworks do not make it clear, explicit and visible how the state's duties to protect human rights should be operationalised in procurement activities. Secondly,

there is a further finding that the current guidance for public authorities on public procurement does not contain specific references to human rights, as such.

The report goes on to summarise a number of recommendations arising from those findings. Those recommendations relate to legal and policy frameworks and to guidance and support for implementation; actions that the Northern Ireland Executive should take. There is also recognition of the position of councils, which are not major players in public procurement at this time. However, with the change in councils, local government reorganisation and the greater powers of councils, that will change. The recommendations also relate to excepted and reserved matters.

Finally, in opening the evidence session on this and on the way forward, the commission acknowledges that it is a relatively thin report. It may not be the easiest report to read, but it is relatively thin. It is not claiming to represent a comprehensive examination of all the issues. We were seeking to initiate consideration and discussion of the actions that could be taken. The report also seeks to outline why Departments and other public authorities should be integrating human rights standards into their public procurement processes.

I note that you referred to the response that was received from the Department. I think that you also have in your papers a response that the commission submitted to the Department. I was a little surprised that the Department's letter appeared to be defensive. I do not think that that is necessary or how we view the position. There are two reasons for that, and I think that it is important that I state them. First, I emphasise that it was not the purpose of the Human Rights Commission or of this report to attack or criticise the Northern Ireland Executive or Departments. The commission recognises fully that this is a developing area of human rights work. We are not arguing that there has been failure to comply; we are recognising that this is a developing area of human rights work. We are trying to break new ground in human rights and this sector of public service activity.

Secondly, let me say absolutely for the record that the commission has had the fullest support and engagement in this work from the Department's public procurement directorate and in the consideration of the issues, and it has given commitments to continue to work with us. The commission recognises that this has set the scene. We have to move forward and to progress this, and that will require the development of guidance and processes. The commission is fully committed to working with the Central Procurement Directorate and others who are involved in public procurement to try to do that. We will engage with Departments and public authorities to try to embed human rights compliance in public procurement policy and activity. That is what this is about.

That is all that I wish to say, Chairman. Kellie and I are happy to try to answer any questions that members have.

The Chairperson: Thank you, John. Obviously, you are flagging up that there is a degree of risk in not having these provisions and guidance etc in place. What does that leave us open to? Can you give us some concrete examples of what could be involved, such as migrant workers or zero-hour contracts? What are you most concerned about this lack of guidance leading to?

Mr Corey: Kellie may wish to pick up on some of those points. At a general level, as we see it, the state, in the sense of the Northern Ireland Executive and public authorities, has duties under the human rights laws and standards, particularly the Human Rights Act, to ensure that all its activity is compliant with human rights requirements and that it has done everything possible to avoid any breach or violation of human rights. Given those absolute requirements, given that public procurement is such a significant element of public activity and given that it then engages non-state actors, namely private companies, third sector bodies and so on, we are trying to establish and to be clear that there must be clarity about the human rights obligations that flow from those procurement arrangements. There are obligations on the state body that has undertaken the procurement to ensure that the body that it is procuring the service from is fully compliant with human rights and that those who are receiving the service have their human rights fully respected. That is the overarching principle.

Within that, what are the risks, and from where can problems arise? Problems can arise if the private sector company or body that the state is procuring from has been found guilty of abuses of human rights and if that is not properly established in the procurement process. Furthermore, the state retains responsibility for the service provided where there is a violation of human rights. We are not saying that that has happened, but it will vary according to sector. For example, if the state or a public authority contracts for the provision of residential care for a person and the human rights of the person

who is in residential care are abused, the state has and retains a responsibility for that. That is one example, and the responsibility will vary according to the sector in which the procurement takes place.

There are a wide range of areas of public procurement and a wide range of circumstances in which human rights abuses could arise. I am not sure whether Kellie wishes to add to that.

Ms Kellie Turtle (Northern Ireland Human Rights Commission): One of our recommendations is that purchasing activity is segregated by risk. That is a recognition that there will be some purchasing activity that carries very little human rights risk. The most obvious one, as John mentioned, is in the commissioning of services, where you have vulnerable people in particular. That is an area where you can see quite clearly that human rights could be engaged for dignity and the treatment of people. However, there is a range of practices that businesses and voluntary sector organisations could employ when procuring services or goods from them that would connect with employment practices, including some of the issues on forced labour that you raised.

Work in that area has also looked at supply chain management. So, in the catering industry, for example, there could be supply chain issues with the ethical purchase of goods. Some of the work on human rights in procurement also touches on work that is already carried out, such as compliance issues in health and safety. Human rights are engaged when considering health and safety, as well as data protection. It is something that has quite a broad reach, but we take a realistic approach to it. That is why we made the recommendation about disaggregating low-, medium- and high-risk areas.

The Chairperson: Are any other jurisdictions leading with that? Have they covered the bases, or are we lagging behind? That is what I am trying to establish.

Mr Corey: The positive answer to that is that, no, Northern Ireland is not lagging behind general practice. As I indicated in my opening remarks, we have been assisted in the production of the report by the Danish Institute of Human Rights, which has been leading in building human rights mechanisms and processes to link human rights with public procurement. It is a developing area of work. At this point in time, we cannot just lift a country as an example and say that that is how it should be done. We recognise that. We are developing new ground with this. I have ambitions that Northern Ireland should be a leader in things. Public procurement is such a significant part of our economy and our public service activity that I think that it is right that Northern Ireland should try to be ahead of others in the application of human rights to that procurement process.

Ms Turtle: We presented the paper in December at the UN Forum on Business and Human Rights, where we sat on a panel alongside the Norwegian public procurement agency, which has recently published a kind of how-to guide. So, it is at the stage of looking at how you do it and providing the kind of guidance that we recommended in any guidance note that CPD could produce.

One thing that we need to be conscious of is that, given that the UK national action plan specifically references a commitment to public procurement, we have a unique opportunity to push this forward in Northern Ireland. We also have to be aware that we have not had the same rate of commissioning of services to private providers, for example, as you would see in GB. For that reason, although we are not behind in the agenda, we may not be aware of issues that could arise further down the line, because we do not have case law here, for example, whereas challenges may have been raised in England, Wales and Scotland on those issues.

Mr Mitchel McLaughlin: The letter from the Department is interesting. You described it as "defensive". However, I agree with you, in that there has been good progress and a good collaboration across the board between the key stakeholders, the Department and CPD. In its letter, the Department refers to discrimination. I wonder whether there is a problem with the language or the communication between us, because, obviously, there has to be a very significant range of examples in which human rights could be engaged; it happens not necessarily just in instances of discrimination. In the bad old days, we used to be told that there was no discrimination, because it was illegal here. That did not necessarily mean that it did not exist. I am just wondering about that response and whether, in fact, the Department got the point.

Mr Corey: There is, of course, separate guidance, which was drawn up by working with the Equality Commission, that addresses issues of equality and public procurement. Of course, equality is part of human rights as well. When I made that comment on the Department's letter, I was thinking more of the penultimate substantive paragraph, which says:

"There is no evidence to date that human rights are not being respected within the public procurement process in Northern Ireland or that procurement practitioners do not understand their obligations".

We are not arguing the opposite. We are not arguing that there is evidence or that they do not understand. We are saying that there is scope to improve our public procurement processes to make them fully human rights compliant. When I say "make them fully human rights compliant", I mean that that should be the case from the beginning to the end of the public procurement process. It is not just a question of putting a clause in a contract document; it is a question of the whole process being human rights compliant. There should be clarity in the assessment of those who are seeking contracts so that they have no record of human rights abuses. First, if a supply chain is involved, for example, there should be no record of human rights abuses in that supply chain. Secondly, in the contract itself, there should be clear provision for the public authority to have a continuous process of monitoring for human rights compliance in the delivery of that service. Thirdly, there should be clarity for the person delivering the procured service so that they understand, and are practising, human rights compliance in the service that they are providing. That is what we are trying to develop in this process. I accept that it is not easy to visualise at this point in time, because it is still an area of development in human rights terms. Indeed, the UK's response document and the UN guiding principles themselves recognise that we still have to develop the precise mechanisms to ensure that those compliance processes are there.

Mr Mitchel McLaughlin: Yes. However, I do not think that there are people out there who are actively victimising people or abusing human rights. It could be bad practice or a whole range of influences. Some of the cultural dynamics that we have in our society at present have led to some very unfortunate circumstances today in the case of ethnic minority groupings. What we have in the broad public procurement process is pressure to deliver value for money and to ensure that there is probity and effective protection for the public interest in that regard, rather than an overriding awareness that there could be inbuilt opportunities or potential for human rights abuses. So, I am not sure that the practitioners have any bad intent whatsoever, but they may not be equipped to recognise the problems or the emergence of potential problems. How do we deal with that? The conversation that we are having is almost esoteric, as then people will go off to do their very busy jobs. Really, it must be hard to keep a focus on the possibility of some kind of problem down the line, even though you are spelling out in stark terms that there is a legal implication if such problems emerge.

Mr Corey: There are unquestionably legal obligations in human rights, both in human rights that are in the Human Rights Act 1998, which enacts the European Convention, but in all the human rights laws and standards that the UK Government have signed and ratified. They all bring human rights obligations on the Executive, Departments and public authorities herein the report, we are trying to present that clear mechanisms and processes should be in place in public procurement processes to ensure that the whole process is human rights-compliant and that there should be processes within that to prevent, as far as is possible, any risk of human rights abuses or violations.

Mr Mitchel McLaughlin: Do you ever fail to vindicate issues that are referred to the commission? By that, I mean issues that you adjudge represent an abuse. Are those then drawn to the attention of the relevant authorities? It is a bit like gender blindness. People are not waking up in the morning trying to figure out how they are going to annoy women in society, but they are doing it.

Mr Weir: Speak for yourself.

Mr Mitchel McLaughlin: I was not thinking about —

Mr Corey: We accept that we are not coming here and presenting this approach: "Here is an example of where human rights have been abused through the public procurement process in Northern Ireland". We are not presenting that case. For example, two years ago, the Human Rights Commission undertook an investigation into residential home care in Northern Ireland. In that investigation, examples were identified of instances in which it could have been considered that residents' human right to dignity and respect was not being met. You can extrapolate that to say that the engagement of that residential home was done through public procurement, so clear mechanisms should have been in place to ensure that that type of human rights abuse or violation could not have taken place. That is what we are trying to build. We are not suggesting that we have come with a blueprint that the public bodies are not complying with and that something must be done about that. We are saying that we see this as an area in which positive action could be taken to ensure human

rights compliance and greater fulfilment of human rights. We wish to be part of developing the blueprint to do that, through contributing along with the public bodies responsible.

Kellie might be able to speak more knowledgeably about this than me, but the UN has talked about trying to produce due diligence mechanisms in processes. I am not sure what stage that has reached.

Ms Turtle: If you look at this in the context of the business and the broader human rights framework, you will see that a lot of work has already been done with the business side of that partnership. Ideas around human rights due diligence for businesses are very well developed, especially for big multinationals. As you can imagine, the reach of their activities is much broader, and they have high reputational risk.

More recently, it has focused on small and medium-sized enterprises (SMEs). I have with me a guide to human rights for SMEs, which the European Commission has very recently published. It is very practical. You raised issues around how people know and whether it is simply a case of not being aware. The guide includes a list of questions that businesses can ask themselves about their practices, be that employment practice, advertising, stress in the workplace, whom they sell to or whom they buy from. Therefore, a lot of practical work has been done on that side. With this report, we are trying, as John said, to review the adequacy of policy and practice here, when it comes to purchasing from businesses, to ensure that the reasonable actions that the purchasing authority is required to take to protect human rights are being met.

Mr Corey: I will add a point. I referred earlier to the fact that, last September, the UK Government produced an action plan, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights'. The action plan states that the UK will:

"Review the degree to which the activities of UK State-owned, controlled or supported enterprises, and of State contracting and purchasing of goods and services, are executed with respect for human rights, and make recommendations to ensure compliance with the UNGPs."

As we see it in the commission, that action plan is binding on the Northern Ireland Executive as well. It is a UK commitment to the UN that that is what the UK will do.

This is part of the process of carrying through the UK's action plan. We have used this report, in which we have made recommendations, but we recognise that we wish to continue the work with the public procurement bodies responsible and try to develop it further.

The Chairperson: How long has the training that the commission offers been under way?

Ms Turtle: The introduction to human rights, which the commission has been delivering with the Centre for Applied Learning, has been up and running for six months now. In that time, we have trained just over 150 civil servants from various Departments.

The Chairperson: How many have you trained in procurement?

Ms Turtle: Procurement personnel have come through that training. I do not have the exact figures, but the course that we are offering is an introductory course covering human rights in all different contexts. One of the things that the report recognises is that procurement personnel would require specific training in how human rights is engaged in the very complex area of procurement. It is not something that is covered in detail in the introductory course.

The Chairperson: What are the most immediate steps and actions that the Central Procurement Directorate should take now to address some of the concerns?

Mr Corey: As I said in my opening remarks, the Central Procurement Directorate has engaged very positively with the Human Rights Commission in the process of the launch and at subsequent events. One of the steps in the recommendations is:

"Requirements for public authorities and businesses to respect human rights should be fully integrated into general guidance materials".

We envisage the commission supporting and working jointly with Central Procurement Directorate on trying to develop appropriate guidance that meets that recommendation. As you know, Central Procurement Directorate operates a number of groups that are involved in procurement across each of the sectors. We would see CPD as being the appropriate place to develop that work. That would then feed in to other sectors.

Ms Boyle: Thank you, John, for your presentation, which I listened very carefully to. I have to welcome the work that the commission is doing with CPD and am delighted to hear that CPD is very compliant in moving forward with the work that you are doing.

I do not have a particular question, but sometimes I take issue with the word "guidance", because it lets a lot of Departments off the hook, based on their definition of "guidance". I see a lot of that in the work that I do on the Public Accounts Committee (PAC). How do you apply guidance so that it is mandatory? That is the difficulty, and it needs to be looked at.

John, I appreciate that you say that we are trying to be world leaders in this kind of thing. I would like to see that as an outcome, but if you dig deep, you will find that there are perceptions that human rights have been overlooked in all areas. At times, perception of the work that we all do gives way to evidence of human rights having been overlooked in many cases. That is why I have difficulty with the word "guidance". It is guidance at times, albeit not ethically mandatory. That is just an observation.

Mr Corey: I will make three quick points. Although I have focused on the development of guidance with CPD as a practical step forward, the recommendations also include propositions relating to legal and policy frameworks. For example, a clear recommendation is:

"The Northern Ireland Executive should legislate to make it clear that both human rights legal obligations and domestic equality laws apply to public procurement and to establish sanctions for companies responsible for breaches."

Therefore, we see a case for setting out a clear legal obligation so that there is no ambiguity. We can interpolate that there is a clear legal obligation by dint of the requirement to comply with the Human Rights Act. That does not in any way prevent the Northern Ireland Executive from enacting a law that makes clear provision in a particular area for human rights requirements to be met. That is the point that we make.

The second point is a general one that goes back to your point, Chairperson, about the training that there has been for civil servants. The commission strongly supports and welcomes that, as it does the positive engagement that there has been from the Civil Service.

Although the commission's task is to hold public authorities, the Northern Ireland Executive and their Departments to account for compliance with human rights, and we do not resile from that task and seek to carry it out without fear or favour, we believe that it is better to work cooperatively and jointly with Departments and the Executive to create processes and structures that will guard against any violation of human rights. It is better to put a high proportion of our resources into ensuring that what is done in Northern Ireland is human rights-compliant in the first instance rather than following abuses and acting on them. That is why we put a lot of effort into things such as the Civil Service training and have extensive engagement with many public bodies in trying to develop human rights-compliant activity in what they are doing. That is what we are doing here.

Ms Turtle: On the recommendation that John highlighted around legislation, our basis for that was paragraph 23 of the Northern Ireland public procurement policy, in which a commitment is made to legislate to remove any ambiguity around, as John mentioned, the domestic equality duty. We have not brought this to the table without having that firm basis. That commitment has been made, the commissioner is saying that that should be followed through on, and the human rights duty should also be legislated for on an equal basis.

Ms Boyle: I value the work that you do on that.

The Chairperson: Thank you very much.

Mr Corey: Thank you.