



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Mr Peter McCallion
Clerk to the Committee for Finance

Room 373, Parliament Buildings
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Belfast
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By email to: Committee.Finance@niassembly.gov.uk

18 November 2021

Dear Mr McCallion

Committee for Finance Call to Evidence - Defamation Bill

The Northern Ireland Human Rights Commission (the Commission) welcomes the Committee for Finance Call to Evidence on the proposed Defamation Bill and the opportunity to submit evidence for consideration.

The Commission, pursuant to Section 69(4) of the Northern Ireland Act 1998, shall advise the Assembly whether a Bill is compatible with human rights—(a) as soon as reasonably practicable after receipt of a request for advice; and (b) on such other occasions as the Commission thinks appropriate. In addition, the Commission, pursuant to section 78A(6) of the Northern Ireland Act 1998, must advise the Assembly whether a Bill is compatible with Article 2(1) of the Ireland/Northern Ireland Protocol. In accordance with these functions, the following advice is submitted to the Committee for Finance to assist the Committee's scrutiny of the Defamation Bill.

The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by

the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.

The Commission highlights that defamation laws must be developed in line with international human rights law in order to strike an appropriate balance between the right to freedom of expression and the need to protect individual reputations under the right to private life. The right to freedom of expression is protected by the International Covenant on Civil and Political Rights (ICCPR), Article 19 and the European Convention on Human Rights (ECHR), Article 10. The right to respect for private life is protected by the ICCPR, Article 17 and the ECHR, Article 8.

In its 2008 concluding observations on the sixth periodic report of the United Kingdom on compliance with the ICCPR, the UN Human Rights Committee found that UK defamation laws were “unduly restrictive”, noting the potential chilling effect on freedom of expression regarding matters of public interest.¹ At the time of the UN Human Rights Committee’s recommendation the law governing defamation in NI and in England and Wales, whilst in separate legal instruments, was directly comparable. In England and Wales, the issues raised were, to some extent, addressed by the Defamation Act 2013. The 2013 Act largely corrected the imbalance identified by the UN Human Rights Committee, but that imbalance remains in NI.

The Commission therefore welcomes the intent of this Bill, to align NI with defamation law in England and Wales. The Commission is concerned that failure to amend the law in NI will continue to undermine the right to freedom of expression, not only in NI but throughout the UK. Freedom of expression, by its nature, cannot be properly regulated by different frameworks within the same jurisdiction.² The Commission also suggests that an added benefit of emulating the Defamation Act 2013 is that NI will be assisted by jurisprudence emerging from England and Wales. That jurisprudence, from a legal jurisdiction that sees many more defamation actions, can be very helpful.

In addition to the general advice above, the Commission offers the following on specific clauses 1 and 11.

Clause 1

The Commission welcomes the introduction of a statutory limit to only those claims involving serious harm to reputation. This clarity around the parameters of defamation is a crucial way of pre-empting the misuse or abuse of laws to the detriment of freedom of expression and public debate. This is also consistent with jurisprudence from the European Court of Human Rights regarding the relationship between free speech (Article 10) and the right to respect for private life (Article 8). The ECtHR has held that in balancing rights the law should limit claims to those that reach a certain level of seriousness, which causes prejudice

¹ CCPR/C/GBR/CO/6 ‘Concluding observations of the Human Rights Committee on sixth periodic report submitted by the United Kingdom’ 30 July 2008

² NIHRC ‘Submission to Committee for Finance: Defamation’ (2013) available at: [submission-by-human-rights-commission.pdf](https://www.niassembly.gov.uk/submission-by-human-rights-commission.pdf) ([niassembly.gov.uk](https://www.niassembly.gov.uk))

to the personal enjoyment of Article 8 rights or which undermines personal integrity.³

The introduction of such a statutory threshold would not, it seems to the Commission, add undue complexity or act as an unreasonable barrier to defamation proceedings. Courts routinely manage issues of evidence and the alleged extent of harm, which are best dealt with by Court hearing. It is worth noting that the UK Supreme Court observed how reputational harm can be proven by inferences from the circumstances and context of the defamatory publication.⁴ Lastly, on clause 1, the Commission observes the potential for this to result in more prompt correction and retraction of defamatory statements.

Clause 11

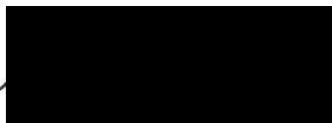
The Commission welcomes clause 11 for its intention to replace the current presumption that defamation trials will be heard before juries. The better approach, as set out in this clause, is to permit the Court to exercise its discretion to adopt the inquiry best suited to the circumstances of each case. This is likely to also protect against unnecessary delay in the court process by facilitating the early resolution by a Judge of complex legal issues. In effect, this would be an important procedural safeguard to protect against expensive and time-consuming legal actions from being abused by more powerful litigants to dampen free speech.

Clauses 2-10, 12-15

The remainder of the substantive clauses together provide an appropriate framework for balancing the competing rights and are welcomed by the Commission.

I hope this is of assistance. If I can be of any further assistance, please do not hesitate to get in touch.

Yours sincerely,

A solid black rectangular box redacting the signature of Alyson Kilpatrick.

Alyson Kilpatrick BL
Chief Commissioner

³ Axel Springer AG v. Germany [GC], § No. 39954/08, 7 February 2012. § 83 and 84; see also Karakó v. Hungary, No. 39311/05, 28 April 2009, § 23

⁴ Lachaux v Independent Print Ltd & Anor [2019] UKSC 27