

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 41-1991)

REPORT
ON
THE CRIME OF LIBEL

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-seven Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp 20-23.

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NOTE

This Report was submitted on 20th December 1991 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination of and research in relation to the law relating to The Crime of Libel which was carried out by the Commission at the request of the former Attorney General, Mr. John Murray, S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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CHAPTER 1: INTRODUCTION

In January 1989 the Attorney General pursuant to section 4(2)(c) of the Law Reform Commission Act 1975 requested the Commission to undertake an examination of, and conduct research and formulate and submit to him proposals for reform of, the law of Defamation and Contempt of Court.

The subject matter of this request can be divided into three parts: Civil Defamation, Criminal Defamation and Contempt of Court. The Commission decided to undertake in the first place an examination of Civil Defamation, the most extensive of these categories. Last March, the Commission published a Consultation Paper on the Civil Law of Defamation and their final proposals were presented to the Attorney General on the 19th December 1991.

The Commission published in July a Consultation Paper on Contempt of Court containing the results of their examinations together with provisional proposals and it is hoped to present final proposals to the Attorney General on the subject in the near future.

Last August, the Commission published a Consultation Paper containing the results of our examination of the second subject, i.e. Criminal Defamation or, to give it its more precise legal description, the Crime of Libel. (Unlike the civil wrong of defamation, which can be committed in either written or permanent form (libel) or spoken form (slander), criminal defamation can only take a written form).

The response to our Consultation Paper was very limited, in contrast to the wide range of views and discussion provoked by the Paper on the civil law. This was not particularly surprising, since the subject is of small practical importance today and would hardly have merited such extensive examination, had it not been included in the Attorney General's request. We are, however, grateful to The National Newspapers of Ireland, who were the only body to furnish us with written submissions on the Consultation Paper.

CHAPTER 2: DEFAMATORY LIBEL***General***

1. We provisionally recommended in the Consultation Paper that the common law offence of defamatory libel should be retained but in a more confined form. While we recognised that the crime was prosecuted very rarely today, we were of the view that its use in one recent case¹ demonstrated that its abolition would deprive the criminal law of a potentially valuable weapon. The fact that it need only be invoked in a restricted category of cases was, in our view, no reason for abolishing the offence.

The National Newspapers of Ireland disagreed with our conclusion that the offence should be retained. They argued that a reformed civil law of defamation would provide the citizen with all the protection he or she required against defamatory statements. They took the view that it was unnecessary and unduly restrictive to add to the burden of newspapers the prospect of criminal proceedings.

There were no other dissentients from our provisional recommendation. Having carefully considered the objections advanced by the NNI, and having weighed again the arguments for and against retention of the offence, we are still of the opinion that it should be retained. In view of the fact that there have been no prosecutions against Irish newspapers in this century, we doubt if it can be realistically urged that the retention of the crime can be regarded as unduly onerous in their case. We do not think that this is a sufficient ground for removing from the law a form of criminal procedure which may still have a useful, although limited, function.

2. We did suggest, however, that some features of the present crime should be modified. In order to ensure that relatively trivial cases were not brought before the courts, we provisionally recommended that prosecutions should be instituted only with the consent of the Director of Public Prosecutions and that the offence should be triable either summarily or on indictment at the option of the Director of Public Prosecutions. We also recommended that the relevant sections of the Defamation Act 1961 enabling the District Court to dismiss or dispose summarily of prosecutions for defamation against newspapers, should be repealed.

1 *DPP v Fleming*, unreported, the Irish Times, 23rd November 1989.

3. The provision that prosecutions should be instituted only with the consent of the DPP was intended by us to replace the existing procedure under s8 of the Defamation Act 1961. This provides that no criminal prosecution is to be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge or the High Court sitting in camera being first obtained. We considered this procedure to be a uniquely anomalous exception to the general principle, reflected in the Constitution, vesting the discretionary power to authorise a prosecution in the Attorney General or the Director of Public Prosecutions.

4. One commentator² took strong exception to two of these proposals, i.e. that the DPP should be allowed to elect for summary trial in the District Court and that the provision requiring the leave of the High Court to be obtained to a prosecution be replaced by a procedure under which the consent of the DPP would be necessary.

This critic described the first proposal as "inexplicable" and observed that:

"The suggestion that an accused might be charged with so trivial a criminal defamation that it would be wrong to bother a jury with it is laughable".

The Commission's provisional recommendation was not intended to deprive accused persons of the right to a trial by jury on a major charge of criminal defamation. The power which we recommended the DPP should have could not be exercised consistently with the Constitution in a manner which deprived an accused person of that right. Were the DPP to exercise his powers in such a manner, the District Court would be obliged to refuse jurisdiction and send the accused person forward for trial by jury in the Circuit Court. If the District Court wrongly assumed jurisdiction in such a case, its decision could be reviewed in the Superior Courts.

The suggestion underlying this criticism appears to be that the District Court should be confined in its criminal jurisdiction to "trivial" cases. We do not agree. The cases with which the District Court is concerned are not, of course, of the same gravity as those which entitle the accused person to a trial by jury. But many of them are of a serious nature for the persons concerned and the Commission cannot accept the suggestion that that court, composed as it is of professional judges who are independent in the discharge of their functions, is in some sense unfit to try any but "trivial" criminal cases. We are satisfied that, in the rare cases where proceedings for criminal defamation may be appropriate, the District Court should retain a power to deal with them summarily and that the election should properly be a matter for the prosecuting authorities rather than the accused, whose constitutional right to a trial by jury in the case of a major offence will remain unaffected.

As to the second proposal, this comment suggests that it is based on a "touching but unwarranted faith in State prosecution" and that it would "deprive an accused person of a valuable safeguard - the right he has to be heard by a High Court judge before a prosecution is commenced".

We confess to finding this criticism somewhat difficult to follow. The provision requiring the leave of a judge in chambers to be obtained first

2 Michael McDowell SC., *Controversial Proposals and Dubious Improvements*, The Irish Times, August 23rd 1991.

appeared in the Law of Libel Amendment Act 1888 and is confined to prosecutions against newspapers. Its enactment was prompted by the increasing number of such prosecutions against newspapers by the English DPP at the time.³

When the Defamation Act 1961 was being debated in the Oireachtas the necessity for this provision was questioned and it was made clear on behalf of the Government that it was being retained because Part II of the Bill was regarded as a consolidating rather than a reforming measure.⁴ (The Parliamentary Secretary to the Minister for Justice who was piloting the bill through the Oireachtas frankly conceded that he was not aware of the reason for the provision in the 1888 Act). In 1977 all the Law Lords in England indicated their view that the discretion as to whether a prosecution should be instituted should be vested in a prosecuting authority rather than the court.⁵

There appear to have been only two applications for leave under the section since the foundation of the State.⁶ In both cases, a private citizen, and not the prosecuting authority, sought to initiate the proceedings. The reasons underlying the original provision have, accordingly, long since ceased to apply in this country, if indeed they were ever relevant. Moreover, if such a procedure is indeed a "valuable safeguard" to an accused person, we know of no reason, and none is given, why it should be confined to newspapers accused of publishing criminal libel.

It is, in short, obvious that the provision in question is an anomalous and anachronistic survival in our law. As we have no doubt that the normal remedy for defamation should be by way of civil proceedings, and that criminal prosecutions should only be instituted in cases where such proceedings would not be an appropriate or effective remedy, it is essential that there should be a provision requiring the consent of an independent authority to the institution of criminal proceedings. Under our constitutional and statutory provisions dealing with the prosecution of offences, prosecutorial discretion is vested in the Director of Public Prosecutions. We have no doubt accordingly that the appropriate officer from whom leave should be obtained before a prosecution is instituted is the DPP.

5. We had recommended in the Consultation Paper that sections 8, 9 and 10 of the 1961 Act should be repealed and replaced by provisions giving effect to our provisional recommendations. In our *Report on Civil Defamation*, we have recommended the repeal in its entirety of the Defamation Act 1961 and its replacement by new legislation which should embody *inter alia* our proposals in relation to the crime of libel.

We recommend that the common law offence of defamatory libel should be retained but in a more confined form. We further recommend that any legislation giving effect to our recommendations on the civil law of defamation should also provide that:

- (1) *the offence of defamatory libel should be triable on indictment or summarily at the option of the Director of Public Prosecutions;*

³ For a detailed account of the historical background, see the Consultation Paper at p21.

⁴ *Dail Debates*, Vol 188, col. 1642-3.

⁵ *Gleaves v Deakin*, [1980] AC 477.

⁶ *Application of Gallagher*, unreported, Finlay P, judgment delivered 3rd July 1978, *Hilliard v Penfield Enterprise Ltd and Others*, (1990) 1 IR 138.

- (2) *the consent of the Director of Public Prosecutions should be obtained in all prosecutions for defamation.*

Sections 8,9 and 10 of the 1961 Act, requiring the leave of a High Court judge to be obtained to prosecutions for defamation against newspapers and enabling the District Court to dismiss or dispose summarily of such prosecutions should not be re-enacted.

Ingredients of the Crime

6. We were also of the view that there should be a clear statutory definition of the crime. We accordingly recommended that, for the purpose of consistency, the same definition of "defamatory" be adopted as that recommended in our Consultation paper on the Civil Law of Defamation. (We should point out that the definition has been somewhat modified in the Report). We also recommended that the prosecution should be required to show that the matter was actually false as well as defamatory.

In relation to the *mens rea*, we recommended at the outset that the burden should be on the prosecution to show the requisite *mens rea*. We were also of the view that the definition of *mens rea* should encompass the defendant's state of mind in regard to the two matters which can arise, i.e. (a) the fact that the matter is defamatory and (b) the fact that the matter is false.

In regard to the defendant's state of mind regarding the defamatory nature of the matter, we recommended that the prosecution should be required to prove that the defendant knew the matter was defamatory. We described the second aspect - the defendant's state of mind regarding falsity - as the more difficult aspect of the mental element. Having examined a number of possibilities, ranging from the strictest requirement of proof to the most lenient, we provisionally concluded that a person should not be convicted unless he knew the statement to be false or was recklessly indifferent to the question of truth or falsity.

There was no dissent from our provisional conclusions. *We accordingly recommend that:*

- (1) *The same definition of "defamatory" should be adopted for the criminal offence as is recommended for the civil wrong in our Report on the Civil Law of Defamation;*
- (2) *The prosecution should be required to show that the matter was false as well as defamatory;*
- (3) *The burden should also be on the prosecution to show the requisite mens rea;*
- (4) *The prosecution should be required to prove that the defendant knew that the matter was defamatory;*
- (5) *The prosecution should be required to prove that the person knew the statement to be false or was recklessly indifferent to the question of truth or falsity.*

Publication

7. We also expressed the view that the rationale which led to the rule that publication to the victim alone was sufficient is now obsolete.

Historically, a tendency to breach the peace was treated as an essential ingredient of the offence of defamatory libel. This has not been the case for some time and we accordingly recommended that the prosecution should now be required to show publication to a person other than victim. There was no dissent from our provisional view and we accordingly recommend that *the prosecution be required to show publication to a person other than the victim.*

Defences

8. We pointed out in the Consultation Paper that some of the principal common law defences to actions for civil defamation would not be relevant to the crime of defamation as redefined in the manner we have proposed. Since the prosecution will be required to show falsity beyond all reasonable doubt, there is no need for a defence of justification. As the offence will be confined to publication of false and defamatory statements of fact, there would also be no requirement for a defence of fair comment or comment based on fact.

As to defences of privilege, those instances of absolute privilege prescribed by the Constitution would remain. These are utterances by the President in the performance and exercise of his or her functions and powers, and by members of the Oireachtas in either House, official Oireachtas Reports, and utterances made in Parliamentary Committees. In our Report on the Civil Law, we have recommended that the law should be clarified by allowing absolute privilege in respect of judicial proceedings and fair and accurate reports thereof, but should not be retained in respect of communications between members of the executive, husband and wife and solicitor and client. We do not think that any distinction should be drawn between civil and criminal defamation in this context and, accordingly, recommend that the same categories of absolute privilege should apply.

As to common law qualified privilege, we pointed out in the Consultation Paper that this defence only arose where the defendant acted without malice. Our proposals, however, require the prosecution to establish that in every case the publication had been made with knowledge of, or reckless indifference as to, the truth or falsity or the publication. Accordingly, we do not recommend the introduction of a defence of qualified privilege similar to that existing in civil proceedings by virtue of the common law, as it would appear to be incompatible with the mental element in the offence proposed.

We also pointed out that the statutory instances of qualified privilege contained in s24 (read in conjunction with Schedule I) of the Defamation Act 1961 applied exclusively to civil proceedings and that, so long as criminal libel remains in its present form, this is a serious defect in the law. However, if the offence were redefined as we have proposed, this would no longer be the case. Statutory protection extends to reports of the proceedings of a list of bodies whose activities are of public interest. In the exceptional cases where the prosecution can prove that the reporter not only knew, or was recklessly indifferent as to whether, the matter was defamatory but also knew, or was recklessly indifferent as to whether it was false, there would be no grounds for relieving the reporter from liability. It would accordingly follow that neither the defence of fair report, on which we invited views in our Consultation Paper on civil defamation nor the existing defence under s24 of the 1961 Act should apply to cases of criminal defamation.

Since the publication of the Consultation Paper, we have recommended in our Report on Defamation that no defence of fair report should be created, but

that the existing defence under s24 should be revised and clarified.

There was no dissent from any of our provisional recommendations on these aspects of criminal defamation. We accordingly *recommend that*:

- (1) *There should be no defences of justification, comment or statutory or common law qualified privilege in proceedings for criminal defamation.*
- (2) *The defence of absolute privilege prescribed by the Constitution and recommended by us in respect of judicial proceedings and fair and accurate reports thereof in our Report on Civil Defamation should apply in cases of criminal defamation.*

Form of Communication

9. We said in the Consultation Paper that it would be indefensible if a defendant in an action for criminal libel could escape liability simply because he broadcast the matter, whereas he would have been liable if he had written it in a newspaper, but that this was the absurd result of the rule that written communication only comes within the ambit of defamatory libel. There was no dissent from our provisional recommendation in this matter and we therefore *recommend that publication be defined as "communication to a person other than the victim by any means whatsoever"*.

Distributors and Printers

10. Our provisional view was that there should be no special defence available to distributors and printers. It would in most cases be impossible to prove knowledge on their part and, while proof of recklessness might not be so difficult, there seems no reason why the printer and distributor should not be liable in such a case. Since the publication of the Consultation Paper, we have modified our original recommendation in relation to civil defamation that there should be a complete immunity for printers and distributors for actions in defamation. This if anything reinforces our view that there should be no special defence in this area. There was no dissent from our provisional recommendation and we accordingly *recommend that there should be no special defence available to distributors and printers.*

Vicarious Liability

11. We pointed out that the retention of vicarious liability alongside the new mental element we had proposed could produce an inconsistent and bizarre result. A master might continue to be liable for the publication of serious defamatory matter by his servant in circumstances where he was negligent in failing to detect and prevent the libel being published, whereas an independent person would be liable only if knowledge of, or recklessness as to, the character and falsity of the publication was shown. There was no dissent from our provisional recommendation that vicarious liability should, accordingly, not arise in this context. We *recommend that, for the purpose of clarity, the application of vicarious liability, however limited, to this crime should be abolished.*

Proof of Previous Convictions

12. Having noted the uncertainty as to whether proof of previous convictions may be admitted in criminal proceedings for libel where the subject matter of the libel was that a person had committed a crime, in a situation where that person was in fact previously convicted of that crime, and

that it was not clear what weight should be given to the evidence should it be held admissible, we recommended that the law be clarified in this area. There was no dissent from our recommendation.

We recommend that, in a prosecution for defamatory libel in which all or part of the subject matter of the alleged libel is an allegation that a person committed a criminal offence, evidence of a previous conviction in the State for that offence should be admissible and should be conclusive evidence that the crime was committed by that person. This recommendation is consistent with a similar recommendation in our Report on the *Civil Law of Defamation*.

Penalties

13. We provisionally recommended the revision of the penalties provided in the 1961 Act and encountered no opposition to our proposal, although, as we have noted, there was one objection to our proposal that the offence should be triable summarily at the option of the DPP.

We recommend that, where the offence is disposed of summarily, the accused should be liable to imprisonment for a term not exceeding 12 months or a fine not exceeding £2,000 or both and, where it is disposed of on indictment, to imprisonment for a term not exceeding five years or a fine not exceeding £10,000 or both.

Defamation of the Dead

14. We pointed out that, under present law, criminal liability in respect of defamation of the dead arises only where the contents of the libel can be said to bring living persons, such as the family of the deceased, into hatred, ridicule or contempt and the defamation of the living is sufficiently serious to require prosecution for a criminal offence.

Having pointed out that the proposal in the Consultation Paper on the Civil Law of Defamation that a remedy should be available for defamation of the dead had provoked strong criticism from the media and others, we invited views as to whether the definition of defamatory matter should include "statements concerning a living or deceased person" and as to whether there should be a time limit in respect of such proceedings.

We received no submissions in respect of this proposal. We assume, however, that it would meet with the same disapproval that our provisional recommendation as to the civil law of defamation encountered. In our *Report on Civil Defamation*, we have proposed that there should be a civil remedy, but that the only remedy should be a declaration and/or an injunction. We think that in this difficult and controversial area this is as far as alterations in the law should go at the present time.

Accordingly, we do not recommend that the definition of defamatory matter should include "statements concerning a deceased person".

Defamation of a Group

14. We commented that the rule concerning defamation of a group was more lenient in criminal proceedings than in civil proceedings. We thought it desirable that, in an appropriate case, it should be possible for a prosecution to take place where there was a group reference rather than an individual one. There was no dissent from this view.

We recommend that the definition of defamatory matter include "statements

made concerning a group of persons provided that the individuals are sufficiently identified for the matter to be understood to refer specifically to them".

15. We said that the damage caused by a libel on a company could be rectified in civil proceedings and that, in these circumstances, a libel upon a company should not be a crime. There was no dissent from this proposal.

We recommend that no criminal liability should attach in respect of a libel upon a corporate body.

CHAPTER 3: SEDITIOUS, BLASPHEMOUS AND OBSCENE LIBEL

Seditious Libel

1. We referred in the Consultation Paper to the fact that there appear to have been no reported cases of seditious libel since the foundation of the State. We conceded, however, that this did not necessarily mean that it had no function: seditious libel is not an offence which one would expect to occur very often in a relatively settled society. At the same time we were of the view that it was not necessary to have duplicated forms of machinery to deal with such activity when it occurs. We accordingly examined in detail certain existing statutory provisions in order to determine whether there are other methods of dealing with essentially the same activity.

2. We summarised in detail the most important piece of related legislation, the *Offences Against the State Act 1939*. We also referred to certain relevant sections of the *Broadcasting Authority Act 1960* as amended by subsequent acts in 1970 and 1976. We concluded that the matter which is the subject of the offence is now punishable in accordance with provisions of Irish legislation. While we accepted that the legislation leaves some definitional problems, and perhaps other difficulties which we had not addressed, it was preferable to the common law offence.

3. Our objections to the common law offence can be summarised as follows:

- (a) Its ambit is unsettled;
- (b) If it refers to matter which undermines the authority of the State, it is strongly arguable that it is inconsistent with Article 40.6.1.1 of the Constitution, which specifically refers to "rightful liberty of expression, including criticism of Government policy";
- (c) As an offence, it has an unsavoury history of suppression of Government criticism and has been used as a political muzzle.

We accordingly provisionally recommended the abolition without replacement of the common law offence of seditious libel. We remain convinced as to the desirability of abolishing the common law offence. We also remain of the view that the relevant provisions of the *Offences Against the State Act 1939* require re-examination in the light of the observations we made on them in the Consultation Paper. The submission by the NNI agreed with the

approach adopted by us in the Consultation Paper.

We recommend the abolition without replacement of the common law offence of seditious libel.

Blasphemous Libel

4. We pointed out in the Consultation Paper that, although the Constitution provided in article 40.6.1.i that the publication or utterance of blasphemous matter was an offence which should be punishable in accordance with law, and the Defamation Act 1961 prescribed penalties for the offence and also conferred unusual powers of search and seizure in respect of it, there was no certainty as to its precise scope and essential ingredients. We commented that, while in the absence of any modern Irish authority it was impossible to say what the *actus reus* of the offence consisted in, it was possible in theory that it continued to be that which it was from the earliest times until the 19th century, namely, any questioning of Christian doctrine. We suggested that, as an offence which originated in a period of religious intolerance and was governed by different conceptions of the role of the Church in State matters, it would be totally incompatible with modern conditions. It might also be unconstitutional in two respects, as being an unconstitutional restriction upon freedom of speech and being in breach of constitutional guarantees of religious equality.

On the other hand, if the *actus reus* of the offence could be deemed to be that which it is in England, i.e., an offensive and insulting attack upon the Christian religion, it would be open to constitutional objection on the ground that it discriminates against non-Christian religions contrary to article 44.

If, however, the *actus reus* of the offence was neither of the above, but merely what the jury deemed it to be in any particular case, the offence would be seriously lacking in an objective basis. It would, moreover, render legal advice as to what it is permissible to publish virtually impossible.

17. Having considered the various arguments for and against the retention of the offence, we concluded that there was no place for an offence of blasphemous libel in a society which respects freedom of speech. The argument in its favour that the publication of blasphemy causes injury to feelings appeared to us to be a tenuous basis on which to restrict freedom of speech. The argument that freedom to insult religion would threaten the stability of society by impairing the harmony between groups seemed highly questionable in the absence of any prosecutions.

We also noted the provisions of the *Prohibition of Incitement to Hatred Act* 1989 under which the publication of material designed to stir up "hatred" is made a criminal offence. Since "hatred" is defined in s1 as *inter alia* "hatred against a group of persons in the State or elsewhere on account of their religion...", we concluded that it might well be that any problems in the area which might exist were adequately covered by these provisions.

18. We also pointed out, however, that the abolition without replacement of the offence of blasphemy would be impossible under the existing constitutional provision and that a referendum which had as its sole object the removal without replacement of that provision would rightly be seen as a time wasting and expensive exercise. Our provisional recommendation was that, in any more extensive revision that might be undertaken of provisions of the Constitution which, for one reason or another, were generally considered to be anachronistic or anomalous, the opportunity should be taken

to delete the provision relating to blasphemy.

19. We also bore in mind, however, that it might be some time before any such revision took place and that, in any event, our provisional recommendation might not be accepted. Accordingly, we went on to consider what reforms should be introduced in the present law of blasphemous libel, assuming that it remains part of our law. We acknowledged, however, that providing for a new and reformed offence of blasphemy might be regarded as simply encouraging the retention of a law which is anachronistic and anomalous. We also observed that, having regard to the considerable difficulty that exists in reaching any acceptable definition of what constitutes a religion in the context of a modern law of blasphemy, any legislation we proposed might be arguably in contravention of those provisions of the European Convention on Human Rights, as interpreted by the court, which require a law restricting freedom of expression to be formulated with sufficient precision to enable a citizen to regulate his conduct.

20. We were of the view that, if the offence were to be redefined as we proposed, the *actus reus* should be redefined as "publication of matter the effect of which is likely to cause outrage to a substantial number of the adherents to a religion by reason of its insulting content concerning matters held sacred by that religion". We also recommended that "religion" for the purposes of the definition should include Christian and non-Christian religions. As to the *mens rea*, we considered that the prosecution should be required to show (a) that the defendant knew that the matter was likely to outrage and (b) that the defendant intended to outrage the feelings of the adherents of any religion. We also recommended that, for the purposes of clarity, it should be provided that the doctrine of vicarious liability, even in the restricted form set out in s7 of the Defamation Act 1961 should be abolished in relation to the crime. Finally, we recommended that publication should encompass communication by any means, including broadcast by wireless telegraphy.

21. The NNI submission agreed with our view that the offence of blasphemy should be abolished. Such press comment as was evoked by the proposals also appeared to be in favour of the abolition without replacement of the offence or, at the least, its extension to non-Christian religions. For our part, we see no reason to depart from our provisional recommendations.

We recommend:

- (1) *that in any revision which may be undertaken by referendum of the Constitution, so much of Article 40.6.1.i which renders the publication or utterance of blasphemous matter an offence should be deleted;*
- (2) *in the event of the foregoing recommendation not being accepted, the abolition of the common law offence of blasphemous libel and its replacement by a new offence entitled "publication of blasphemous matter";*
- (3) *the definition of "blasphemous matter" as matter the sole effect of which is likely to cause outrage to a substantial number of the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion;*
- (4) *the definition of "religion" as including Christian and non-Christian religions;*
- (5) *the definition of the phrase "matters held sacred" so as to exclude acts*

the commission of which is a criminal offence;

- (6) *the definition of "publication" for the purposes of the offence as publication by any means including, but not limited to, broadcasting by wireless telegraphy;*
- (7) *a requirement that the prosecution show:*
 - (a) *that the defendant knew the matter was likely to outrage the adherents of any religion and*
 - (b) *that its sole intent was to outrage the adherents of any religion;*
- (8) *the enactment of a provision stating that the doctrine of vicarious liability should not apply in any form to this offence;*
- (9) *the amendment of s7(2) of the Censorship of Films Act 1923 so as to define blasphemy in similar terms.*

Obscene Libel

22. Having examined in detail in the Consultation Paper the common law offence of obscene libel and also the various legislative constraints in our law on the publication of obscene matter, we concluded that the common law offence should be abolished.

We were influenced by a number of factors in arriving at that view. First, the offence has been very rarely prosecuted in modern times and this would suggest that it is virtually obsolete. Unlike seditious libel, the absence of prosecutions could not be accounted for by the relatively stable nature of our society. Secondly, there were a substantial number of legislative provisions for the regulation of obscene matter, most notably the *Censorship of Publications Acts*, the *Censorship of Films Acts* and the more recent *Video Recordings Act 1989*. We pointed out that these provisions did not simply involve the suppression of matter by an official before it reached the public, but also contained provisions for punishing the defendant *after* publication. Thirdly, we were concerned by the fact that the basis of the common law offence was uncertain and, to the extent that it can be ascertained, open to serious objection in that it allows the court to impose a particular moral view upon publications, is paternalistic and is also impractical. We also pointed out that it does not allow for the literary, academic, medical or other value of the publication.

There was no dissent from (and in the case of the NNI express agreement with) our recommendation that the common law offence should be abolished and that a re-examination should be undertaken of the existing legislation dealing with the publication of obscene matter. We remain of the view that the common law offence should be abolished for the reasons stated in the Consultation Paper.

We recommend the abolition without replacement of the common law offence of obscene libel. We further recommend that an examination should be undertaken of (a) legislation on obscene and indecent matter and (b) the various schemes of censorship in order to determine whether they are consistent with the requirements of the Constitution as to freedom of speech and are appropriate in modern conditions and to formulate, if necessary, changes to the existing law.

CHAPTER 4: SUMMARY OF RECOMMENDATIONS

Defamatory Libel

1. The common law offence of defamatory libel should be retained but in a more confined form. Any legislation giving effect to our recommendations on the civil law of defamation should also provide that:
 - (1) the offence of defamatory libel should be triable on indictment or summarily at the option of the Director of Public Prosecutions;
 - (2) the consent of the Director of Public Prosecutions should be obtained in all prosecutions for defamation.
2. Sections 8, 9 and 10 of the Defamation Act 1961, requiring the leave of a High Court judge to be obtained to prosecutions against newspapers and enabling the District Court to dismiss or dispose summarily of such prosecutions should not be re-enacted.
3. The same definition of "defamatory" should be adopted for the criminal offence as is recommended for the civil wrong in our Report on the Civil Law of Defamation.
4. The prosecution should be required to show that the matter was false as well as defamatory.
5. The burden should also be on the prosecution to show the requisite *mens rea*.
6. The prosecution should be required to prove that the defendant knew that the matter was defamatory.
7. The prosecution should be required to prove that the person knew the statement to be false or was recklessly indifferent to the question of truth or falsity.
8. The prosecution should be required to show publication to a person other than the victim.
9. (1) There should be no defence of justification, comment or

statutory or common law qualified privilege in proceedings for criminal defamation;

- (2) The defence of absolute privilege prescribed by the Constitution and recommended by us in respect of judicial proceedings and fair and accurate reports thereof in our Report on Civil Defamation should apply in cases of criminal defamation.
10. Publication should be defined as "communication to a person other than the victim by any means whatsoever".
 11. There should be no special defence available for distributors and printers.
 12. The application of vicarious liability, however limited, to the crime of defamatory libel should be abolished.
 13. In a prosecution for defamatory libel in which all or part of the subject matter of the alleged libel is an allegation that a person committed a criminal offence, evidence of a previous conviction in the State for that offence should be admissible and should be conclusive evidence that the crime was committed by that person.
 14. Where the offence is disposed of summarily, the accused should be liable to imprisonment for a term not exceeding 12 months or a fine not exceeding £2,000 or both and, where it is disposed of on indictment, to imprisonment for a term not exceeding five years or a fine not exceeding £10,000 or both.
 15. The definition of defamatory matter should not include "statements concerning a deceased person".
 16. The definition of defamatory matter should include statements made concerning a group of persons provided that the individuals are sufficiently identified for the matter to be understood to refer specifically to them.
 17. No criminal liability should attach in respect of a libel upon a corporate body.

Seditious Libel

18. The common law offence of seditious libel should be abolished.

Obscene Libel

19. The common law offence of obscene libel should be abolished.

Blasphemous Libel

20. In any revision which may be undertaken by Referendum of the Constitution, so much of Article 40.6.1 which renders the publication or utterance of blasphemous matter an offence should be deleted.
21. In the event of the foregoing recommendation not being accepted, the common law offence of blasphemous libel should be abolished and replaced by a new offence entitled "publication of blasphemous matter".

22. "Blasphemous matter" should be defined as matter the sole effect of which is likely to cause outrage to a substantial number of the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion.
23. "Religion" should be defined as including Christian and non-Christian religions.
24. "Matters held sacred" should be defined so as to exclude acts the commission of which is a criminal offence.
25. "Publication" should be defined for the purpose of the offence of blasphemous libel as publication by any means including, but not limited to, broadcasting by wireless telegraphy.
26. In a prosecution for blasphemous libel, the prosecution should be required to show:
 - (a) that the defendant knew the matter was likely to outrage the adherents of any religion and
 - (b) that its sole intent was to outrage the adherents of any religion.
27. There should be a provision stating that the doctrine of vicarious liability should not apply in any form to the offence of blasphemous libel.
28. Section 7(2) of the Censorship of Films Act 1923 should be amended so as to define blasphemy in the same terms as recommended above.

Obscene Libel

29. The common law offence of obscene libel should be abolished.

Miscellaneous

30. The following matters not within our terms of reference should in the future be examined:
 - (a) the scheme of censorship and the terms thereof maintained in respect of written publications, films and other methods of disseminating information;
 - (b) other provisions of the Censorship Acts which make it an offence to publish certain matters;
 - (c) the Offences Against the State Act 1939.