Submission to Future of Media Commission

Michael Foley, Patrick Smyth – January, 2021

A discussion of the future of the news media cannot confine itself to the economics of the industry but must also address the regulation of media content.

We are aware that the Commission might view much of this submission as pertaining to the Department of Justice and not within the terms of the Commission. However, we would maintain that it is difficult, if not impossible, to separate any consideration of the health of journalism and the media that supports it from the legal and regulatory systems. We are also of the view that it is important that journalism, on whatever platform, be treated separately from other media activity because of its unique role in the democratic life of the country. Ideally we would like to see all journalism coming under the same voluntary regulatory regime as a recognition of how demarcations have been blurred and mostly disappeared.

We do not propose to deal with the need for public financial support for the news industry but would emphasise our strong support for the urgent case being made by others in this respect.

With the development of online media and explosion of social media the media landscape has been transformed, and the old distinctions between its various platforms has become impossible to maintain.

While newspapers are becoming broadcasters, producing videos and podcasts, broadcasters are using text-based journalism increasingly online in blogs and other formats. In between there is the growing number of online-only publications that are neither newspapers nor broadcasters.

Furthermore it is impossible to maintain the insistence, still proclaimed by social media organisations, that they are not "publishers" with the same ethical, and legal obligations to consumers as print publishers.

To address these and related new realities this Commission is charged to come up with proposals on the future of newsgathering in a **"**platform agnostic fashion" – that must mean an approach that does not privilege one type of media over another, and which applies common standards to necessary restrictions on freedom of speech and frameworks for regulation.

We are concerned here with the institutional/legal challenge to both delivering and policing regulation, and to redress for, individuals maltreated by the press where appropriate - whether through the courts , a new media council, and through the existing Press Council or by the BAI's Compliance Committee .

The publication in December of the provisions of the Online Safety and Media Regulation Bill mark an important and welcome attempt to bridge a regulatory void inhabited by the online platforms. Importantly it establishes a form of "parity of esteem" - the principle that platforms are not merely hosts to all comers but responsible morally and legally for the

content that is uploaded to their sites, just as newspapers are held liable for harmful content they may host.

The prospect of legislation has already led to platforms hiring significant numbers of content moderators and showing a greater willingness to enforce "community standards" by taking down many millions of pieces of harmful content. There is more to be done – the EU Commission monitoring of "takedown" of notified harmful content has led it to the view that relying on voluntary codes of conduct is inadequate, and its new Digital Services Act proposal goes some way down the compulsory enforcement route of the Irish Act. The latter, importantly, provides for fines at a sufficiently dissuasive level on those who fail to act promptly on such material.

The proposed transformation of the Broadcasting Authority into a Media Commission with responsibility for extending its remit to online platforms should bring a welcome consistency to the regulatory field. But journalists remain wary of the degree of ministerial control of the membership of the commission and its implications for the real autonomy of newsgathering.

We also welcome the restraint manifest in the legislation when it comes to defining proscribed "harmful content".

Beyond prohibited illegal content, such as child abuse material, material promoting violence or terrorism or content containing incitement to hatred, the Commission will confine itself additionally to policing cyberbullying and material encouraging or promoting eating disorders, self-harm or suicide.

While it might be politically popular to prohibit some or all of the full list of possible bans also considered - promotion of nutritional deprivation or eating disorders, homophobia, promotion of anti-scientific views , alcohol marketing, defamatory comments, disinformation, intimidation, extremism, violent content, promotion of female genital mutilation – to have done so could have involved serious erosion of free speech.

That right implies the uncomfortable right to publish reprehensible or offensive material. And while some of these potentially ban-able acts, such as intimidation, may well already be covered by the proposed bans on incitement, subjectivity in defining offences makes more general and wider prohibitions either impossible or inevitably oppressive.

In this context we are opposed to suggestions made recently, for example, that proscriptions of genocide denial should be considered. And we view with unease attempts to broaden the definition of anti-Semitism to include statements of support for movements for boycott and divestment. Such "objectionable" views must remain publishable, although organisations may wish to make their expression unacceptable internally.

In the age of disinformation the challenge of confronting false news and lies in the online world, the best defence, does not lie with legislative bans, but with newspapers that uphold journalistic high standards – it is ultimately their USP, and will be their saving in a market awash with fake news.

The legislative framers of the Bill also make clear that they view certain categories of unacceptable speech as being dealt with elsewhere and beyond the practical remit of such a Media Commission – defamatory comments, protecting consumers from misleading ads, and breaches of data protection.

Beyond a passing reference to the promised reform of the Defamation Act , however, the failure to advert to how inadequately defamation is being dealt with, is disappointing.

In this context we would recall and reiterate the arguments made in many submissions in 2016 on the review of Defamation Act, even then well beyond its statute- expired review

date. This delay needs urgently to be remedied and we appeal to the Commission to urge the expediting of this work.

The Irish defamation regime remains one of the most oppressive and chilling to journalism in Europe, as acknowledged by the European Court of Human Rights in 2017 and the European Commission in 2019. It is a major threat to the economic survival of individual titles and to the future of a vibrant news industry. High damages for defamation pushed Ireland's press freedom ranking down to 13th out of 180 countries in the 2020 World Press Freedom Index, from 15th in 2019.

We support the submissions by Newsbrands, the Irish Times Group, and others for the introduction of a "serious harm" threshold for the bringing of a defamation action - the UK Act provides in section 1 that a "statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

We would like to see the setting of a ceiling on awards in defamation cases, so general damages in defamation could not exceed the highest allowable award in a personal injuries action - judge-made case law in the UK has set an effective cap of £240,000 on awards. And the abolition of the presumption of falsity so that to be defamatory, a matter should be required to be untrue.

In reforming the Defamation Act aspects of the provisions for the establishment of a Press Council/ Ombudsman need to be tackled.

The PC was established to provide a simple and cheap means of redress for readers for whom litigation was, and remains, a prohibitive lottery. It was set up following the 2003 report of the government's legal advisory group on defamation, which also recommended reform of the 1961 Defamation Act.

Newspapers, who have viewed the council as a cheap alternative to facing costly litigation in the courts, view its role with mixed feelings – unable to satisfy those wishing to get financial compensation for the wrong done to them by the press, the PC has failed to stem court litigation and the huge costs to newspapers associated with it.

But the PC has provided redress for many readers who simply want their story put right, and journalists regard the council's work, not as an alternative to legal remedies, but as an important expression of their ethical obligation to do right by readers.

The new Online Safety and Media Regulation Bill provides no alternative cheap or informal means of redress or relief for defamation complaints in online platforms. It explicitly rejects the idea of a role for the Media Council in defamation.

The Press Council, or a similar model, could provide that alternative for the online platforms. The incentivising of participation in the Council, by complainants and complained-of alike, through its system of voluntary self-regulation can be a means of bringing such forms of redress and correction to the currently unregulated online world.

As a first step that can be done by strengthening and making more explicit the Section 26 requirement that courts "shall … take into account" Press Council membership in determining "fair and reasonable" publication. And specifically in assessing and reducing awards against publications/platforms that can demonstrate compliance with and commitment to PC standards.

We would also urge the Commission to consider recommending that the PC should have the power to make moderate awards to plaintiffs through fines on offending publications/sites as an alternative to and precluding court action. Even a ceiling for awards set at the level of €2,000 would provide an incentive for many otherwise contemplating court action.

An unintentional ambiguity in the Act about whether all online news sites may join the PC, or only those that are offshoots of print publications, also needs to be addressed. This would safeguard the position of the online sites already affiliated and offer the online platforms the opportunity to join the PC system.
Currently the Act provides (Section 44 (4)) that "The owner of any periodical in circulation in the State or part of the State shall be entitled to be a member of the Press Council." And it defines "periodical" (Part 1 Section 2 – Definitions) as meaning "any newspaper, magazine, journal or other publication that is printed, published or issued, or that circulates, in the State at regular or substantially regular intervals and includes any version thereof published on the internet or by other electronic means ..."
The "any version thereof" definition does not appear to include in its scope the many stand-alone news websites such as The Journal.ie, social media news aggregating sites like Google, or perhaps even the majority of newspaper websites which now publish considerable unique, previously unpublished , content.
The Press Council, and the protections that it affords, should be open to all news publications or platforms in print or online and even television and other broadcast journalism. The extension of its remit to potential defamation in online platforms would contribute to building a **"**platform agnostic" framework of media regulation while providing a new simple and cheap means of redress for ordinary readers that obviated the need for litigation.

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