

Submission by
The Irish Times Group
to the
Future of the Media Commission

January 2021

“Before they died.....they lived. The people who died of Covid-19 in Ireland and among the diaspora in recent weeks led full, cherished lives. Here are some of their stories....”

So began the Lives Lost series in The Irish Times last May, looking beyond the cold statistics of daily coronavirus-related deaths to the heartbreak of individual families due to the loss of a loved one. In grouping the stories of ordinary lives – the everyday, the unsung, those largely unknown beyond their immediate circle - it revealed how the people hardest hit by the pandemic were a generation who had witnessed some of the defining moments of the 20th century and whose fortunes reflected those of the young Irish state in which they came of age.

It was a deeply moving glimpse of social history, recounted in real time, for which the team involved was named Journalist of the Year in the Newsbrands Ireland journalism awards last November.

But imagine a future where ‘Lives Lost’ would never have been written because The Irish Times could not afford to fund such a labour intensive project or, worse, it no longer existed as a publisher. A future where award winners Fintan O’Toole (columnist of the year) and Miriam Lord (political journalist of the year) were without their primary platform and place of employment; where Conor Lally (feature writer of the year) never told the story of a garda dismissed from the force because he was gay, or Johnny Watterson (sports journalist of the year) had no opportunity to alert readers to the impact of concussion in rugby.

Imagine a future where what is now encapsulated simply in one word – ‘Golfgate’ – remained hidden because the Irish Examiner had ceased to publish and its journalists could no longer investigate it; where the Echo in Cork, the Roscommon Herald, the Western People, the Waterford News & Star, and The Nationalist group in Carlow, Kildare and Laois – all part of the wider Irish Times family – had ceased to function, no longer reporting on life in their respective areas of circulation, championing the interests of their readers and helping to cement the bonds that unite communities.

Of course this is not necessarily the future. Such an outcome is not pre-determined and it can be avoided. It must be. Not because news publishers, or indeed newspapers, have a right to exist or are entitled to survive. But because the journalism we produce – from national through to local, now delivered across a range of media and digital platforms that would have

been unimaginable a decade or two ago – is part of a vital and inter-connected ecosystem, imparting trustworthy and accurate information which underpins society, citizenship and democracy.

Admittedly, we are not perfect and, as traditional news organisations, we do not have a monopoly on high standards or public-minded journalistic service. In a pressurised, deadline-driven environment, we make mistakes. But we invest heavily in trying to ensure we get it right. Every day we put our work before our audience, and make ourselves accountable to them. When we get something wrong, they are not slow to let us know, and it is our policy to make corrections and clarifications where appropriate. We support the right of anyone who feels we have breached the code of the Press Ombudsman/Council to make complaints, and to publish any rulings against us.

Were we no longer to exist, the shape of what might replace us is already evident: a digital world where the liberties and freedoms associated with the internet are often offset by a Wild West-style free-for-all, open to abuse by the irresponsible and malevolent, dominated by the loudest and the most base, sowing division and fomenting unrest. Where original and professional reporting – local, national and international – is replaced by opinion, much of it ill-informed, and by alternative facts, outrage and extremes, with little tolerance of different points of view or opportunity for reasoned and responsible discussion.

Ireland – and the world beyond – is at a turning point. Fortunately, the Future of Media Commission is beginning its work at a point when there is still time, however limited, to make good choices and for the Government to act on them in accordance with its stated commitments.

Executive summary

The media business, specifically newsgathering, is at a crucial economic and technological crossroads where survival is at issue. The newspaper business model was traditionally based on two main sources of revenue: one the cover price of newspapers and the other income from advertising.

As readers have switched to digital platforms, newspaper sales have declined. However, news publishers are starting to make progress in replacing this lost revenue with income from digital subscriptions. The Irish Times has led the way in this respect in the Irish market. Others have experimented with a voluntary contribution model where readers are invited to make donations towards the cost of funding journalism.

However, the switch of advertisers to digital platforms has resulted in a major decline in the income of news publishers, compounded by the advent of Big Tech companies which have been rapacious in seizing the bulk of advertising revenue. Arguably, this poses the greatest threat to the future of news publishing.

In addition, distinctions between media platforms have disappeared with each competing directly and aggressively for scarce resources. Newspapers now broadcast journalism and broadcasters write long-form articles. All work across the range of digital platforms. It is

appropriate as a result that our future be considered as one industry, holistically. The Irish Times Group, for whom this submission is made, welcomes this timely opportunity.

To overcome existential challenges, the news industry, a vital pillar supporting the smooth functioning of democracy, needs supportive state engagement to help it survive the current transition, but in a manner that is structured to protect continued editorial autonomy and independence of a free press.

The case for exceptional public support at a time of such radical change and extreme financial vulnerability rests on our core function as an essential forum for democratic exchange, as a public watchdog on behalf of our readerships and wider society, and on the public service imperatives which, in the case of The Irish Times Group in particular, are embedded in our ethos. These include scrutinising the institutions of State, at local and national level, to ensure they function effectively and transparently and ensuring, at the same time, that precious cultural priorities and minority perspectives continue to find broad outlets and to prosper.

The Irish Times is an independent voice, distinctive from state-owned media and uniquely Irish. Indeed we are owned by a Trust whose sole purpose is to ensure our continued existence.

This submission will argue that state support can best be provided by assistance in creating a level, fair playing field in a transformed media economy dominated and distorted by the power and near-monopoly positions of online platforms. We believe that this support should encompass direct financial assistance in recognition of the public service dimension of our journalism as well as aid to distribution, postage and publication technology costs, and tax relief.

Finally the submission highlights the issue of media regulation and, specifically, the onerous obligations of Ireland's oppressive defamation regime. The European Court of Human Rights has observed that the level of awards against Irish media outlets has "a chilling effect on freedom of expression", inhibiting the media's ability to hold power to account, and threatening the financial viability of titles.

Here too we find an uneven playing field between the obligations imposed on news publishers and the freedom accorded to Big Tech whose social media platforms often host the most egregious content. The promised reform of the Defamation Act, required under the legislation itself and now long overdue, must be honoured.

At this most critical juncture in the history of media in Ireland, the commission has an opportunity to recommend a framework of supports that can help sustain a vibrant, diverse and thriving media sector across the island. It can help to ensure that the reader, the audience, the consumer, and all citizens in all communities have access to the kind of high quality and trusted journalism that is integral to a fully-functioning democracy.

Summary of Recommendations

- A framework of financial assistance to support employment in journalism, including training/internship schemes, up-skilling, and continuing financial support to defray the cost of employment and investment in content
- Funding for specific public service oriented journalistic roles
- Transitional/adaptation funding to support investment in technology
- Support for newspaper distribution costs/postage.
- Reduction of VAT on newspaper sales from 9% to zero.
- Reform of the Defamation Act
- Passage of European Copyright Directive with requirement that online platforms pay copyright licensing fees for use of news publisher-generated material.

A timely review

The Future of Media Commission's brief was set out as part of the new Programme for Government to provide for a wider review of the future of print, broadcast and online media in "a platform- agnostic fashion". The Irish Times Group welcomes this review and its wider remit as timely and necessary. The task is to examine "best practice in other comparable jurisdictions, particularly across the European Economic Area in terms of providing future-proofed models" for meeting specified public services "in light of changing audience expectations, in particular the preferences and behaviours of younger audiences".

Taoiseach Micheál Martin, addressing the Dáil, has provided welcome acknowledgement both that the Government should financially underpin media in a way that ring-fences its editorial independence and that journalism should be "financially remunerative". It cannot survive otherwise.

His comments echoed those of the Cairncross Review into a sustainable future for journalism in the UK. It said that its goal was not related to special pleading or protecting news publishing companies themselves but "to advocate measures that will ensure the market in which they operate is efficient, and to defend their most democratically significant outputs".

It also warned that "Investigative journalism and democracy [sic] reporting are the areas of journalism most worthy and most under threat. Although news can be found on television and radio, written journalism (whether in print or online) supplies the largest quantity of original journalism and is most at risk".

Separately, then Minister for Communications Richard Bruton, embarking on an important initiative on media regulation last year, stated: "The situation at present where online and social media companies are not subject to any oversight or regulation by the State for the content which is shared on their platforms is no longer sustainable. I believe that the era of self-regulation in this area is over and a new Online Safety Act is necessary."

Public Service imperative

The heavy emphasis within the Commission’s terms of reference on the ‘public service’ role of the media accords with the ethos and community obligations which are at the heart of the mission of The Irish Times and the group of companies under its umbrella. The Commission’s terms of reference speak of delivery of “four important public services to Irish society” from “well-functioning media systems”:

- To inform, educate and entertain the Irish public with regard to matters of Irish culture, identity, sport, language and other matters inherent to Ireland and the Irish people;
- To ensure that the public has access to high quality, impartial, independent journalism, reporting on matters of local, regional, national, European and international importance in a balanced way and which contributes to democratic discourse;
- To bring the nation and diaspora together at moments of great national importance;
- To ensure that creative Irish talent gets the opportunity to have their work reach audiences in Ireland and, where possible, further afield.

The Irish Times is owned by The Irish Times Trust CLG. The latter is the sole shareholder in The Irish Times DAC, the publisher, which operates with a separate board of directors. The Trust cannot receive a dividend, sell or profit from the title and exists solely to ensure the continuing publication of The Irish Times.

Editorial policy is set out in the Memorandum and Articles of Association of The Irish Times.* The primary object describes it as an independent news publisher primarily concerned with serious issues for the benefit of the community throughout the whole of Ireland, free from any form of personal or party political, commercial, religious or other sectional control.

Although public service journalism is almost exclusively referenced in public discussion in the context of RTE as the national broadcaster, The Irish Times Trust oversees a similar public service ethos (though, it should be noted, without the benefit of funding via the licence fee). In the case of news, Irish Times journalism is required to be as accurate and as comprehensive as is practicable and to be presented fairly; comment and opinion shall be informed and responsible, and shall be identifiable from fact; special consideration shall be given to the reasonable representation of minority interests and divergent views.

These principles shape our extensive coverage of politics, of national and local government, and of public and social affairs and of the courts at all levels; enable a major emphasis on reporting developments outside Ireland through investment in an unrivalled network, relative to other Irish media, of international correspondents; foster important public debate through our opinion sections; and extend to distinctive coverage of arts and culture, sport and the Irish language.

The principles apply to our journalism across the many platforms and formats through which we engage with readers, listeners and viewers via the written word, audio and video. They are compatible too with the ethos and approach of the sister publications which now sit under

The Irish Times umbrella and which have their own proud record and history of service to their readers and communities.

In recent years Irish Times reporting has included breaking major stories that have had profound effects on the workings of our democracy – from revealing hidden payments to politicians to exposing details of the tragic death of Savita Halappanavar. Holding the powerful to account, investigating shady or illegal practices, campaigning for wrongs to be righted, sending journalists to the courts, the Oireachtas, city and county councils, to the Aviva Stadium and Croke Park, it's what we do every day.

But in common with most media and news publishers, the continuing contribution of Irish Times journalism to society is threatened by the market changes which the commission has been asked to examine.

** Extracts from the Objects of The Irish Times Trust CLG are set out in Appendix 1*

The digital challenges

The challenges to our industry are stark. For some titles, they may be terminal. A combination of the post-2008 recession and the technological revolution that led to the creation of Big Tech saw a radical readership shift to digital, with print newspaper sales declining dramatically in the past 10 years. In the case of the Irish Times, average daily print (only) sales have fallen from 117,000 in 2008 to close to 46,000 in 2020. Average daily print sales for the Irish Examiner in the same period have fallen from 53,000 to 18,500 copies.

But the picture is much brighter than those figures suggests. Readership of the titles last year was probably at its highest ever. Pageviews of irishtimes.com reached a record of 20 million on a single day during the peak of the Covid 19 crisis, reflecting our continuing relevance to readers, all the more so as they sought factual and trustworthy information in the midst of a global pandemic. Digital subscriptions – essential to replacing the revenue from declining newspaper sales – exceeded all expectations. The Irish Examiner too has recorded a big rise in traffic during the Covid 19 crisis.

But there is no escaping the reality that the shift to digital has undermined a previously successful business model. Paid newspaper sales have fallen sharply and the advertising sales that traditionally provided more than 65% of revenue have also migrated online where they have been captured overwhelmingly by digital platforms. In 2019, we estimate that 85% of the total digital spend on advertising in Ireland of €673m went to international platforms, publishers and networks.

Spending on digital advertising in Ireland soared from €263m in 2014 to €673m in 2019 (IAB Adspend report 2019). In the latter year it rose 17%, but with 97% of the growth going to digital giants – €96m of €99m. Online advertising represents 48 per cent of all ad spend while news publishers pick up some 8 per cent of it.

Revenues from print advertising for national titles have declined by up to 60% year on year from a high of €367m in 2007 to €87m in 2019. For local papers, the decline for the same

period was €103m, down to €42m last year. Classified advertising (e.g. used car sales, offers from local businesses), particularly important to the finances of the local papers, has largely migrated to online sites, especially Google Search.

Critically for the survival prospects of The Irish Times Group, however, more than 50% of our revenue is now coming from paid content – either newspaper sales or income from digital subscriptions. We are therefore less dependent on advertising although it remains a critically important revenue stream. While paid content is now the higher revenue source, it continues to be over-dependent on newspaper sales and it will take significant time and investment to strengthen digital subscriber revenue and to grow other income models.

In common with other titles, The Irish Times is successfully adapting to new market realities and changing consumer demand and reinventing ourselves. We have undergone major internal restructuring, capital investment, diversification and expanded/consolidated through the purchase of the former TCH group of newspapers and radio interests. We have refocused on a “digital first” strategy that has seen a huge expansion of offerings on digital platforms and the launch of a digital subscription model providing paid access to our journalism on electronic devices and broadening how we deliver content to include podcasts, video and liveblogs.

This emerging business model, however, has yet to prove its sustainability and, importantly in the context of the terms of reference of the commission, it remains uncertain whether it will be able to fund the full range of public service-type journalism which we regard as fundamental to what we do and our readers rightly expect.

Others, like the Irish Examiner, are starting on that transition with some optimism. But for regional publications, the change necessary to address the digital challenge is at an early stage, and the long-term viability of a sector so important to local community life remains unclear, all the more so when digital success tends to be linked to audience scale.

No doubt the future of regional publications will be a matter of specific concern to the commission in the context of the broader need for balanced regional and rural development and the role of essential service provision (including media) in achieving that goal. In something of a vicious circle, regional titles have been negatively impacted by the closure of retail outlets such as shops and post offices.

More broadly, the publishing industry is deeply concerned at the near monopoly position of BigTech in the advertising market and a potential for abuse of such dominance to leverage its business interests which, internationally, has prompted more than 100 official inquiries into or legal cases – and substantial fines – against the top four global digital platforms.

In the United Kingdom, the Cairncross Review into a sustainable future for journalism found that the “opacity of the market for online advertising and the market shares of Facebook and Google are justification for regulators ... to ensure that the unbalanced relationship between publishers and online platforms does not threaten the viability of publishers’ businesses”.

The dependence of news publishers on Big Tech platforms to help reach audiences and the parallel capacity of those platforms to mine user data, and to predict and to influence user behaviour, has transformed and effectively monopolised the world of advertising.

Copyright

The platforms not only take a large share of the market for advertising, they also provide the routes that many people use to find news online – in the case of young people, a huge majority reads news entirely or mostly online. And most online news is available for free, much of it carried by aggregators such as Google News or Apple News, or posted on Facebook’s news feed.

But this “free” content, published by the platforms, is hugely costly for news publishers to generate. And it is difficult for publishers credibly to threaten to remove their content from the online platforms as they depend on them to reach increasingly important numbers of readers. Without that threat, of course, they cannot easily demand or negotiate fairer terms for the distribution of that content.

That “free” content is central to the offering, brand and business model of Google in particular. The US News Media Alliance, representing 200 news organisations, published a study in 2019 analysing that reality and quantifying how Google benefits from it. Google Search has become a dominant search engine tool worldwide with a global market share of approximately 93% as of January 2019. News is a key source on which it has increasingly relied to drive consumer engagement with its products. The amount of news in its search results, the study found, ranges from 16 to 40 per cent.

And, according to the report, in the year from January 2017, traffic from Google Search to news publisher sites rose by more than 25% to approximately 1.6 billion visits per week. The platform, it says, received an estimated \$4.7 billion in revenue in 2018 from crawling and scraping news publishers’ content without paying the publishers for that use.

The alliance concedes that the exact value of news content to Google is difficult to quantify precisely because of the various ways the company uses news content to drive traffic, develop its products and entrench its dominant position. Estimates in Ireland for such value created for online platforms by news content producers are not available.

In its crucial role of facilitating the efficient and fair operation of markets, a central public policy objective of the State must be to ensure the right of the original creator of added value to benefit from it. That is the essential logic of the patent laws which reward inventors and protect their products from theft by others, or of copyright on music now protected much more effectively online. News deserves similar protection or it will die.

In this regard the European Union directive on copyright and neighbouring rights, which must be enacted by each member state by the end of 2021, is a potential game-changer. It requires the platforms to negotiate bilaterally with publishers or groups of publishers licensing agreements for the use of their content.

Still reluctant to pay for use of copyright material, and specifically the short summaries which accompany headlines and link to newspaper sites, Google threatened to circumvent the new directive’s “neighbouring rights” in Europe by not running the snippets at all, just headlines .

In France, however, where the transposition of the European directive is more advanced, there is evidence of progress. A number of major publishers have been engaged in talks with Google about a form of licence payments, reported tentatively to total some €50 million a year, or about 4% of the annual revenue of the press.

Google continues to insist that this is not a licence fee but payment for a new type of news packaging product to which publishers may contribute. The company has pledged to pay \$1 billion globally in what it calls such “investment in partnerships with news publishers”. Facebook and Apple are also developing new vehicles as an alternative to content licensing fees.

The willingness of digital giants to consider such payments is an implicit acknowledgment that change is coming. But not quickly enough and not yet of the principle that news content producers should receive a return on their products. And the prospects for balanced bilateral negotiations on that principle are hobbled by the reality that the news industry is dependent on them to provide the channels of access by readers to our sites. All the negotiating leverage is on one side.

However, recent developments in Australia are worthy of examination by the commission. In December, the government there introduced legislation which provides for a “news media and digital platforms mandatory bargaining code”. It appears likely to generate bigger licence payments from digital platforms to news publishers than other types of negotiations are achieving. Central to the arrangement is a process of forced arbitration if no agreement can be reached.

Crucially, the Australian approach, argues Robert Whitehead, head of a local publisher group, addresses the negotiating power imbalance between the two parties and the monopoly issues raised in the ad market: “The Australian precedent will not lie in the intellectual property or copyright space but rather within competition law. It is, if you like, a pre-settlement negotiation of an anti-trust case over the monies that have been lost through a power imbalance. Hence a much bigger value is expected than an exchange based on copyright fees.”

In transposing into Irish law the requirements of the European copyright directive, we believe the Government should look to the framework being established by the Australian code and specifically its model of mandatory arbitration.

As always, timing is important. The commission is beginning its work at a key point. Although it has been suggested the power and influence of digital platforms has passed the point of no return – that they have grown “too big to care” – the French and Australian examples indicate otherwise. Ireland must adopt a similarly robust approach if it is to protect its own media sector.

Direct support to news publishers

The future of a diverse media sector depends in the first instance on the financial performance of news publishers and the creation of a more stable operating/trading environment in which they can continue to employ journalists and invest in journalism.

The state can positively influence that environment and the bottom line of news publishers. The challenge is to do so in a manner that does not trespass on journalistic independence. Specific measures include:

- Direct support for journalism
- Support for internships, training and technological investment
- Support to defray distribution costs
- VAT reduction

The state has a history of active participation in funding for industries that are in transition and for in-service training and further education in many sectors. Applied to news publishers, this could see the state supporting training schemes/internships for young journalists at regional and national level. Similarly, funding could be provided to up-skill those already involved in journalism with a special emphasis on digital and multi-media competency while transitional funding could facilitate investment in technology.

However, such measures must be a means to an end: training and transition should lead to positive future career prospects for those involved in sustainable and stable indigenous media sector. This is likely to require continued state support to sustain journalistic employment.

In this regard, there are some important journalistic roles which may be more suitable for direct support than others. The state funds the operation of the courts service, for instance, and a relatively modest additional outlay would assist in covering the cost of court reporting, an integral part of principle of justice functioning in public. The Child Law Reporting Project, funded by the Department of Justice, would be an example worthy of exploration.

A similar approach could arise in the case of journalistic coverage of local government where decisions taken affect all communities and where public scrutiny is critically important.

Similar funding examples exist in other jurisdictions. Without subsidies for travel and accommodation costs by the European Parliament, its monthly meetings in Strasbourg would receive little coverage. The Austrian government assists publications with the costs of foreign correspondents while the Department of Foreign Affairs makes reporting of international development issues financially viable through the Simon Cumbers Fund.

We note that Local Ireland, the representative organisation of regional publishers, in its submission to the commission, is suggesting the creation of a Community Journalism Fund, based on the BAI Sound & Vision Fund. Such an approach could offer a useful test model of structures that potentially allow state funding to be dispersed in a neutral manner.

France too implements other imaginative policies that directly assist news publishers. One is a tax break for early-career journalists, modelled on a French tax deduction, first introduced in the 1930s, that applies to all working journalists. Another is a once-off tax credit of up to €50 to households subscribing for the first time, and for at least 12 months, to a newspaper, magazine or online news service “providing news of a general or political character”. It was introduced last year.

In many European countries, distribution networks – including the postal system – are subsidised to support the availability of newspapers in the home. In Ireland, with modest investment and with the support of An Post, a similar scheme could assist in making local,

regional and national newspapers available to the widest audience. As noted earlier, a distribution and supply challenge is emerging, especially in more rural areas, is emerging as the local retail sector contracts.

Home delivery has been a successful initiative for The Irish Times in the greater Dublin area and has been extended to Cork. But it is expensive to provide and is another area of potential state assistance. Within the EEA, member states which provide support for distribution costs and/or postal rates for newspapers include Belgium, Estonia, Finland, Germany, Greece, Italy, Luxembourg, Norway, Sweden and Switzerland. In France, subsidies worth around €500m a year go to reduced postal tariffs and transport costs of news publishers.

News publishers have lobbied for years for a reduction in VAT from the current special rate of 9% to zero. The impact on exchequer finances of such a move is minimal but the immediate gain to the sector would be significant. It would also bring Ireland into line with the majority of European countries. In a similar vein, rate rebates could also directly benefit the bottom line.

Vat rates on news publications throughout European Economic Area
(% print/ % digital):

Ireland (9/ 9); Austria: (10/10); Belgium: (0/6); Bulgaria: (20/20); Croatia (5/5); Cyprus:(5/19); Czech Republic: {10/10}; Denmark (0/25); Estonia (9/20); Finland (10 for subscriptions/ 24 for single copies/ 10 digital); France: (2.1/2.1); Germany (7/7); Greece: (6/24); Hungary (5/5); Iceland: {11/11}; Italy: (4/4); Latvia: (12/21); Lithuania (9/21); Luxembourg: (3/3); Malta: (5/5); Netherlands: (6/9); Norway: (0/0); Poland: (8/5); Portugal: (6/6); Romania: (5/24); Slovakia: (20/20); Slovenia: (9.5/5); Spain: (4/24); Sweden: (6/6); Switzerland: (2.5/2.5).

What the Commission should avoid above all is any suggestion that public support or subsidies should selectively target individual publications for support or punishment. The worrying experience of recent developments in Bulgaria, Poland, Romania, and Malta, with government abuse of its considerable advertising spend to favour politically friendly outlets and financially penalise critics, is a salutary reminder of the need for an arms-length and even-handed approach.

Regulating the media

Any 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. And to do so, as the commission is charged, in a “platform agnostic fashion”, which we understand to 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.

The publication in December of the provisions of the Online Safety and Media Regulation Bill marks an important and welcome attempt to bridge a regulatory void inhabited by the online platforms. Most importantly it establishes a form of “parity of esteem” – the principle that digital platforms are not merely hosts to all comers but responsible morally and legally for the content that is uploaded on their sites, just as news publishers are held liable for harmful content that they may host.

But there is more to be done. Monitoring by the EU Commission of the “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 legislation. 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. Questions remain, however, about the degree of ministerial control of the membership of the commission and its potential implications for the real autonomy of newsgathering.

Reforming the defamation regime

The continuing failure to proceed with the promised reform of the Defamation Act is simply unacceptable and we urge the commission to recommend immediate action in this regard. The Irish defamation regime remains one of the most oppressive and punitive in Europe and a constant threat to the financial survival of individual titles and to the future of a vibrant news industry.

We would reiterate the arguments made in our submission in 2016 on the review of the Defamation Act which, at that point, was already well beyond its statute- expired review date. “The defamation regime serves neither plaintiff nor defendant. It is hugely expensive and cumbersome to seek redress. It is prone to imposing prohibitive damages on an industry that can ill-afford it. As such it represents a real erosion of freedom of speech and the press,” we wrote. Nothing has changed since then.

In 2019, the cash cost of libel cases settled in The Irish Times Group was €1.5m. Settlements and damages accounted for €0.6m or 40% of that figure with the balance of €0.9m or 60% incurred in legal costs. That takes no account of the time spent by editors and managers in administering these cases.

In all cases, settlement was reached out of court. The risks associated with running an action greatly outweighs the more pragmatic option of settlement (though where the circumstances demand it, The Irish Times is committed to defending its journalism in court). The risks to us as the publisher are enormous in contrast to that faced by litigants and their legal representatives.

The Irish Times group reported an operating profit before exceptional items for 2019 of €3.8m. Thus the cost of libel accounted for almost 40% of profitability. As a publisher we fully accept that we make mistakes and that individuals are entitled to their good name. Nonetheless, the current system is unbalanced, unfair and unnecessarily expensive. It is indefensible that defamation awards bear no comparison to the sums payable in respect of the worst personal injuries. The result is a “chilling effect” on the right to freedom of speech which is only of benefit to those who would prefer to see the media silenced.

We argue for the introduction of a “serious harm” threshold before a defamation action can be brought. Lesser complaints should be dealt with by the Press Ombudsman/Council. Such a test, introduced in the UK Defamation Act 2013, is reported to be contributing significantly to preventing lesser libel actions from reaching the courts.

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”. The introduction of such a limitation would significantly benefit the Irish system. It would not be onerous for plaintiffs with a legitimate grievance and would provide an important filter.

The abolition of juries in defamation cases or, at a minimum, in the determination of quantum, would also contribute to both the reduction of awards and the legal costs arising from longer trials. No longer a feature of the vast majority of civil trials, including personal injury actions, jury trials feed further unpredictability and uncertainty into the defamation legal culture.

The reform should also set a ceiling on awards in defamation cases. Two states in the EU, Austria and Malta, set caps on damage awards for defamation (€20,000 in most circumstances in the case of Austria and €11,646.87 in Malta). We believe there is a strong case to follow suit. Judge-made case law in the UK has set an effective cap of £240,000 on awards.

We also support the view of the Law Reform Commission (1991) that the presumption of falsity should be abolished, and that to be defamatory, a matter should be required to be untrue.

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This submission to the Future of the Media Commission is made on behalf of the Irish Times Group of newspapers and digital sites: The Irish Times; Irish Examiner; The Echo (Cork); Roscommon Herald; Western People; Waterford News & Star; The Nationalist (Carlow, Kildare and Laois)

Appendix 1: Extracts from the Objects of The Irish Times Trust CLG

The objects for which the Company is established are:-

- (1) to publish The Irish Times as an independent newspaper primarily concerned with serious issues for the benefit of the community throughout the whole of Ireland free from any form of personal or of party political, commercial, religious, or other sectional control;
- (2) to follow, in the publication of The Irish Times, an editorial policy with the following as its principal objectives:-
 - A. the support of constitutional democracy expressed through governments freely elected;
 - B. the progressive achievement of social justice between people and the discouragement of discrimination of all kinds;
 - C. the promotion of a society where the quality of life is enriched by the standards of its education, its art, its culture, and its recreational facilities and where the quality of spirit is instinct with Christian values but free from all religious bias and discrimination;
 - D. the promotion of peace and tolerance and opposition to all forms of violence and hatred so that each man may live in harmony with his neighbour considerate for his cultural, material and spiritual needs;
 - E. the promotion of understanding of other nations and peoples and a sympathetic concern for their well being;
- (3) in pursuance of the foregoing and to enable the readers of The Irish Times to reach informed and independent judgments and to contribute more effectively to the life of the community to ensure that the following principles govern the publication of The Irish Times:
 - (i) that news shall be as accurate and as comprehensive as is practicable and be presented fairly;
 - (ii) that comment and opinion shall be informed and responsible and shall be identifiable from fact;
 - (iii) that special consideration shall be given to the reasonable representation of minority interests and divergent views.