

Leveson Inquiry: Witness Statement

Mr. Dáithí O'Ceallaigh, Chairman, Press Council of Ireland

and

Professor John Horgan, Press Ombudsman, Ireland.

The creation of the Press Council of Ireland and the Office of the Press Ombudsman arose out of a protracted debate in Ireland over the past 25 years about defamation and related matters.

A government Commission on the Newspaper Industry (1995-6), set up in the aftermath of the collapse of a major newspaper group, recommended the establishment of a Press Ombudsman, on the grounds that Ireland was too small for a fully-fledged Press Council. No initiatives were taken on this score either by government or by the industry, but an expert advisory group set up by, and reporting to, the Minister for Justice recommended in 2003 that statutory regulation should be created for the press, as well as the introduction of privacy legislation. The 2003 *Report of the Legal Advisory Group on Defamation* is available at

<http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>

Material from a follow-up Conference organised by the Department in 2003 is available at:

http://www.justice.ie/en/JELR/Pages/Consultation_conference_on_defamation

At this point all the main print media associations. i.e. National Newspapers of Ireland (NNI), the Regional Newspapers Association of Ireland (RNPAI), Magazines Ireland (MI), and the National Union of Journalists (NUJ), came together and established a Steering Committee under the chairmanship of Professor Tom Mitchell, former Provost of Trinity College Dublin, and including a number of public interest members, to create a model of Press Council that would be independent of government and, in its operation, independent of the industry.

The model of a Press Council and a Press Ombudsman, which was devised after considerable research, leaned to some degree on the experience of the Swedish Press Ombudsman and on that

of the Press Complaints Commission in the UK (as well as on other European models), but has significant differences from any of these exemplars. The Council has been established as a company limited by guarantee, with its own Articles of Association. The Members of the Council are *ex officio* the board of directors of the company. There are seven independent members of the Council, and six members nominated by the founder organizations. The Chairman is chosen by the Council. Members of the Council may hold office for a maximum of two three-year terms. The present public interest members of the Council include the CEO of an NGO, a former university vice-President, a senior civil servant, two university lecturers and a solicitor. The Chairman is a former Irish ambassador. The Press Ombudsman is a former journalist, former member of the Irish legislature, and an academic.

The Council appoints the Press Ombudsman following a process of public advertisement, short-listing and interview. The Press Ombudsman reports to the Council, but is otherwise independent in the performance of his functions. S/he is appointed for a period of three years, and may be re-appointed for a maximum of three terms.

Under the Press Council of Ireland's Articles of Association, there is a Code Committee, composed of nominees from the various sectors of the industry (national and regional titles, magazines, the NUJ): these may include editors but rarely do. The NUJ also nominates a representative, and the Press Ombudsman is an *ex-officio* member. The Code of Practice contains a definition of the public interest, a declaration of the freedom of the press, and a statement that this freedom has concomitant responsibilities, which are set out in ten Principles (<http://www.pressombudsman.ie/code-of-practice.10.html>).

The Press Council of Ireland's Articles of Association provide for the creation of an Administrative Committee. This Committee, which is chaired by a public interest member of the Council, and whose membership is effectively nominated by the founder organizations, has the responsibility of providing adequate financial support for the Council and the Office of the Press Ombudsman. To this end, the Committee and the Council agree a budget in November each year for the following calendar year.

Some of the principal similarities and differences between the Press Council of Ireland and similar structures elsewhere are as follows:

In the Swedish system, the Press Ombudsman may not make a decision that involves criticism of a publication. Instead, s/he recommends such a decision to the Swedish Press Council, and the recommendations of the Press Ombudsman are adopted by the Council in approximately 70% of cases. In Ireland, the Press Ombudsman makes all the primary decisions about complaints where conciliation between the publication and the complainant has failed (he has the discretion, rarely exercised except in cases of possible conflicts of interest, to refer complaints directly to the Council). All these primary decisions can be appealed to the Council, which has allowed such appeals in a small number of cases: in 2010, only one appeal was allowed out of 30 submitted to the Council (see statistics in Annual Report). In deciding on appeals (many of which are decided by consensus), the Council has never divided along public interest/industry lines: when there are divisions of opinion, representatives of both sectors of the Council membership are generally to be found on each side of the argument.

In the Swedish system, a publication which is found to have breached the Code of Practice may be required to pay an administrative fine, which is used to offset the Council's costs. In Ireland, no monetary awards may be made. Small monetary offers are sometimes made and accepted as part of the outcome of successfully conciliated cases, but such offers do not form part of any adjudication by the Press Ombudsman or by the Council.

In the PCC system, as we understand it, the Chairman of the PCC is effectively appointed by the industry (PressBoF). In the Irish system, the Chairman of the Council is appointed by the Council following public advertisement, short-listing and interview. On the retirement of the first Chairman in 2007, the Council made its choice between two applicants, one internal and the other external. The external candidate was appointed. In the Irish system, independent public interest members of the Council are appointed by a four-member Appointments Committee, of which the Chairman of the Council is ex-officio Chair, and which has three other members of standing within Irish society, none of whom has any connection with the press industry. This Committee also has the function of ratifying the proposals for membership made by the founder organisations (NNI, RNPAI, MI, and NUJ). The membership of this Committee has no fixed tenure and is renewed by co-option.

As this model took shape, the Committee began a series of consultations with the then Minister for Justice, Michael McDowell, who effectively accepted that such developments in accountability by the industry would obviate the need for the type of statutory regulation originally envisaged. He also agreed that the Defamation Bill, which incorporated some of the changes to the civil law on defamation that had long been sought by the industry, would also contain a provision to give legal recognition to the Press Council if certain conditions were met, and to afford, following such recognition, certain protections both to the Council and to member publications. The Bill became the Defamation Act 2009, and came into force in 2010 (<http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf>). The protections for member publications are set out in Section 26 (2) (f) of the Act. The protections which allocate legal privilege to statements and documents of the Council and the Ombudsman are set out in the first schedule to the Act (Statements Privileged Without Explanation or Contradiction: Schedule 1, sections 14-18 inclusive). The conditions for recognition of the Press Council and the Press Ombudsman, which are set out in Schedule II of the Act (Minimum Requirements in Relation to Press Council), and were compatible with the Steering Committee's own proposals. The Oireachtas (the Irish Dáil and Senate) recognised the Press Council under the provisions of the Act by separate resolutions early in 2010.

Recognition under the statute has been specifically designed to incentivise membership of the Press Council of Ireland. This resolution gives our new regulatory structures a status which, although not unique, is accorded to few other non-governmental bodies in Irish law, in that it is a body that is recognized under statute rather than a body created by statute.

The privileges of membership, broadly speaking, are that statements by the Council or the Press Ombudsman, and documentation associated with their activities, enjoy legal privilege as set out in the Act. All national newspapers that are members of the NNI are full member publications of the Council. This comprises all major national titles (including The Irish Daily Star, which is 50% owned by Express Newspapers, the Irish Daily Mirror, Irish Sunday Mirror, and Irish Sun), but does not include a number of UK newspaper titles that have small or marginal circulations in Ireland, e.g. the Guardian, the Observer, the Daily Telegraph and Sunday Telegraph, and the Financial Times. All major paid-for regional newspapers are also members, either through their

membership of RNPAI or because they are subsidiaries of Independent Newspapers, whose regional titles are not members of RNPAI. Most substantial Irish periodicals are also members. Some substantial regional free-sheets are not members (very few free-sheets have in fact joined), and neither are some UK magazines that have reasonably large circulations in the Republic. One web-based news site is a member; consideration is being given at the moment to establishing criteria and procedures by which other web-based publication might be considered for membership.

The main aspect of the work of the Press Ombudsman and the Press Council relates to complaint-handling and accountability. Its regulatory function is, by contrast, necessarily secondary to the primary regulatory functions exercised in relation to the press by existing criminal and civil law, notably the laws on defamation, on official secrets, and on contempt of court.

Investigations and the conciliation process are carried out on the basis of documentation alone, although there is also provision for face-to-face mediation. All decisions, whether by the Press Ombudsman or, on appeal, by the Press Council, are circulated to the interested parties and published on our website: decisions upholding complaints have to be published by the publications concerned in accordance with the Council's "Publication Guidelines" (<http://presscouncil.ie/cases-and-appeals/publication-guidelines-for-newspapers-and-periodicals.1162.html>). There is an Annual Report, of which copies are attached, giving details of our activities. The volume of complaints has been running at a rate of around 350 annually (disregarding multiple complaints about individual articles) and the statistical breakdown of the outcome of these complaints is detailed in the Reports.

The provision of a formal appeal system, while it can delay the finalization of decisions, can also be seen as a safeguard for the interests both of complainants and publications, and as an aid to greater public and industry acceptance of these decisions.

The involvement of legal practitioners is actively discouraged. This is not of course only because of the patent desire of the newspaper industry for a low-cost (free to complainants) mechanism for conflict resolution. Structured conciliation, such as our staff can engage in, can help to resolve up to a quarter of all cases without the necessity for a formal decision.

What is unclear, as yet, is how and where the procedures, actions and decisions will fit into the new defamation law landscape. Complainants cannot, for legal and Constitutional reasons, be required to give an undertaking not to engage in legal action based on the article or articles that are the cause of complaint. However, if formal legal proceedings have been initiated before a complaint is made, the complaint will not be processed until these legal proceedings are withdrawn or concluded. If formal legal proceedings are initiated during the course of the consideration of a complaint, consideration of that complaint will be suspended until those proceedings, also, have been withdrawn or concluded.

However, the new legislation does give the Press Council and the Press Ombudsman a significance - albeit an indirect one - in legal proceedings for defamation in two important respects.

One of the most radical changes in the law under the new Act is the provision that a published apology may be considered by the court, not as an admission of liability exposing the publication to considerable legal hazards, but as something that can be taken into account, at the discretion of the Court, in mitigating any financial sanction applicable. Insofar as the conciliation service of the Office of the Press Ombudsman may, on occasion, secure such publication, this provision of the Act obviously enhances the role of the new institution.

Secondly, any publication that is a member publication of the Press Council may, in its pleadings in a defamation case, provide evidence that it is a member publication in good standing of the Council, that it observes the Code of Practice for Newspapers and Magazines, and that it publishes decisions of the Press Ombudsman and/or the Press Council upholding complaints about it in full accordance with the Code and the Council's procedures. The Court is empowered

to take such evidence by a newspaper or magazine into consideration, at its discretion, when deciding on whether the publication of the material complained about was fair and reasonable.

Both these aspects of the recognition under statute provide substantial incentives for publications to remain in, or to join, the Press Council.

An issue arises, in this connection, as to whether member publications of the Press Council are, in this respect, more privileged than non-member publications: if this were the case, it would raise constitutional issues. Equally, and also for constitutional reasons, no publication can be required to join the Press Council against its will. This problem is addressed indirectly in Section 26 (2) (f) of the Act, which requires publications that are not members of the Press Council and wishing to avail of a similar defence, to provide satisfactory evidence to the Court that they abide by standards equivalent to those of the body recognized as the Press Council. Those familiar with the Press Council's Code of Practice and its procedures will be aware that the bar, in this matter, is set fairly high.

There is, as yet, no case-law under the new Act in which membership of, and adherence to the standards of, the Press Council has been advanced as part of the defence of fair and reasonable publication. Any decisions on cases involving such evidence would, of course, be entirely within the competence of the courts.

I should also refer briefly to the question of internet or web-based publications. The definition of a publication in the Act includes any electronic version of a publication circulating in the State, but not internet-based publication as such. There is nothing in the Articles of Association of the Press Council of Ireland that would preclude membership of the Council by web-based publications, and in recent times one such publication has already applied for, and has been accepted into, membership of the Council. This is a wholly positive development with substantial potential implications for the future.

Finally, the experience of the Press Council of Ireland, together with that of the PCC and of sister organizations elsewhere in the countries of central and eastern Europe, and sometimes further afield, is called on from time to time in countries anxious to create structures that can resolve or at least ameliorate the inevitable tensions between government and media, and enhance press freedom, in ways that can command both public and political support and respect.

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