



Future of Media Consultation
Irish Council for Civil Liberties (ICCL) Submission
8 January 2021

Overview

The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to make a submission to the Future of Media Commission as part of its consultation on public service media.

From our establishment in 1976, ICCL has consistently campaigned for Irish law to respect and protect the right to freedom of expression, including campaigns to repeal censorship of political speech, in defense of artistic expression and to remove the criminalization of blasphemy. Under the Constitution and Ireland's international human rights obligations, the Irish State has a clear duty to create an enabling environment for free expression and must not, through laws or other forms of regulation, disproportionately interfere with that right. The freedom to freely exchange ideas, views and experiences without disproportionate interference is fundamental for a flourishing democracy, the protection of human dignity and full participation in public life.

Two guiding principles for all questions around media regulation must be the protection and promotion of the rights to freedom of expression and the right to receive and impart information. These rights are protected in Ireland under the Irish Constitution in article 40.6.1.i (freedom of expression) and article 40.3.1 (right to communicate); article 10 of the European Convention on Human Rights, (ECHR); article 11 of the EU Charter on Fundamental Rights and Freedoms and article 19 of the UN International Covenant on Civil and Political Rights (ICCPR).

Outline of Submission

In addressing Question 1, ICCL highlights the importance of a free flow of accurate and timely information from government to the public service media to engender trust in the reliability of news from public service outlets. Participation from all sectors of the

community in public service programming, with a focus on including traditionally marginalised groups, is vital to ensure inclusion, diversity and equality. We highlight the importance of S.42 of the Irish Human Rights and Equality Commission Act 2014 in guiding considerations of equality, non-discrimination and human rights.

In responding to Question 2, ICCL draws to the Commission's attention the economic benefit to public broadcasters that comes from strong data protection. We share new economic evidence from ICCL and the Dutch national broadcaster, NPO, that strong data protection creates a level playing field on which publishers can finally compete with Google and Facebook and protect their businesses from other digital media market hazards. Strong data rights enforcement also removes conditions for disinformation.

In responding to Question 3, ICCL highlights urgent law reforms that are needed to protect the freedom of all media, including the public service media, from undue interference. This includes reforming the Defamation Act 2009; properly legislating for hate speech in a way that protects freedom of expression; and regulating social media content in a manner that protects but doesn't disproportionately interfere with the rights to free expression and information.

Question 1. Public Sector Broadcasting

How should Government develop and support the concept and role of public service media and what should its role in relation to public service content in the wider media be?

ICCL considers that public service media has a very important role to play in fulfilling the rights to freedom of expression, access to information and public participation in a democracy. As part of the right to information in a functioning democracy, the Government must provide clear, adequate and accessible information about how it is operating. Transparency in a democracy is crucial in both ensuring the public understand how the country is being run and in holding the government to account. International standards such as those developed by UNESCO¹ and the OECD require open, reliable and effective communication from government to public service media in order to fulfil this role.

¹For a range of sources on the issue of public service broadcasting developed by UNESCO see <http://www.unesco.org/new/en/communication-and-information/media-development/public-service-broadcasting/>

The OECD has emphasised the need for:

“A coordinated governmental communications policy linked from the beginning to the process of formulating, adopting and implementing a policy. [...] [G]overnment communications strategies which are well coordinated across the public administration, timely, proactive, and sensitive to the needs of journalists are more likely to be successful than those that are not.”²

Ensuring proper communication between government and the public service media can serve to combat fake news and sources that seek to disrupt democratic values and processes. Expert analysis and diverse representation in public service media can serve to engender trust in the reliability of public service media as a news source.

It is vital, however, that the Government does not interfere with analysis carried out by, and the editorial decisions of, media outlets. The European Court of Human Rights has made clear that the Article 10 right to freedom of expression includes “the right to hold opinions and receive and disseminate information and ideas without interference by public authorities”³. Proposed new hate speech laws will require robust defences for journalists and other laws that may disproportionately interfere with the right to free speech such as the Defamation Act 2009 must be reformed. The issue of law reform is addressed in more detail under question 3.

S.42 of the Irish Human Rights and Equality Commission Act 2014⁴

ICCL believes that public service media has an important role to play in proactively combating discrimination and integrating equality and human rights into the exercise of its functions. We consider that the s.42 public sector duty contained within the Irish Human Rights and Equality Commission Act 2014 should apply to public service media.

The Irish Human Rights and Equality Commission (IHREC) has issued a guidance note on the implementation of this duty, which can be accessed [here](#). This note states that the

² See further “The role of effective communication between the public service and the media”, Sigma Paper no.9, OECD, OCDE/GD(96)118, Paris 1996 available at <https://www.oecd-ilibrary.org/docserver/5kml6g6m8zjl-en.pdf?expires=1610032812&id=id&accname=guest&checksum=DE58CC22E5FD6552484351E1C470722E>

³ Guide on Article 10 of the European Convention on Human Rights, (European Court of Human Rights), page 10, available at https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf

⁴ <http://www.irishstatutebook.ie/eli/2014/act/25/section/42/enacted/en/html#sec42>

statutory duty requires public bodies to “eliminate discrimination, promote equality of opportunity and protect the human rights of those to whom they provide services and staff when carrying out their daily work.”

S.42 requires public bodies to place equality and non-discrimination at the heart of how they function. ICCL considers that this should influence how public service media engages with members of the public, as well as its own staff. In particular, we consider that the S.42 public sector duty requires public service media to substantively engage with issues of inclusion, diversity and participation. This means public service media should actively seek to include voices belonging to the diverse range of communities in modern Ireland. These voices should be represented among staff and efforts should be made to include a range of voices, in particular those that may represent marginalised communities, as guest analysts and participants on radio and television programmes and as guest contributors in other forms of media.

IHREC has recommended that all public bodies should undertake “an evidence-based assessment of equality and human rights issues relevant to its purpose and functions”. This can assist in considering how to eliminate discrimination and protect human rights, and can provide a basis for ensuring that equality of opportunity for diverse groups is considered in the provision of services and in the workplace. Once such an assessment is done, measures can be taken to address any issues that arise and the public body should then report publicly on the success or otherwise of measures taken to combat discrimination and promote equality and human rights.

In its briefing note, IHREC helpfully highlights that disadvantaged groups may need additional support, which in the media context may mean making an additional effort to ensure marginalised groups are represented in media outlets. IHREC says “equality does not always mean treating everyone the same. Certain people or groups of people may be more at risk than others of experiencing discrimination or human rights violations. Ensuring equality of opportunity may mean catering for the specific needs of people or groups of people who experience disadvantages in society.”

Institutions such as the Council of Europe and the European Court of Human Rights have emphasised the need for plurality of media and the inclusion of diverse voices.⁵ Pluralism of opinions must be actively promoted and facilitated. ICCL considers that public service media has a duty to reflect the broad makeup of the population it serves.

⁵ See for example the Council of Europe Report: ‘Guidelines on Safeguarding Privacy in the Media’, COE October 2018. <https://rm.coe.int/prems-guidelines-on-safeguarding-privacy-in-the-media-2018-/168090289b>

Sections of the population which have historically been discriminated against in Ireland, including the Traveller community, working class communities, people with disabilities and immigrant communities, should be able to see and hear themselves represented in national broadcasting. Not only should they be consulted on issues and news stories which are of particular concern to them, but potential barriers to their participation in the editorial and news-making process must be assessed and removed.

Question 2. How should public service media be financed sustainably?

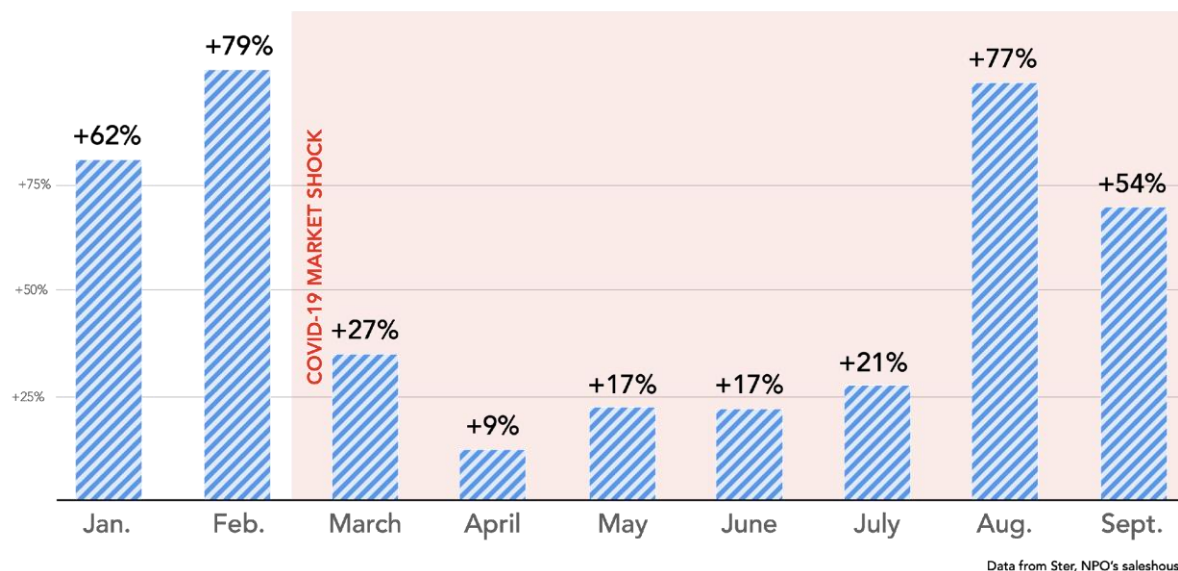
The ICCL draws to the Commission's attention new economic evidence from the ICCL on public broadcaster sustainability. The ICCL has worked with NPO, the Dutch national broadcaster, to examine the revenue impact of a new approach it has taken to grow revenue. Our analysis also shows that lax enforcement⁶ of data protection law in Ireland has severe consequences for public (and private) media sustainability, and weakens Irish media's resistance to disinformation. Data protection is therefore not only a legal obligation but also makes economic sense.

Dutch public broadcasting example: NPO

Breaking with convention, the Dutch national broadcaster NPO removed all "third party" tracking companies from its websites and mobile apps. This includes Google and Facebook. NPO also switched to selling advertising in a way that protects the privacy of its audience, and prevents Google, Facebook, and others from stealing data about its audience. This approach has yielded on unprecedented increases in revenue for this publisher. The chart below shows monthly revenue increase, year over year, from this shift to privacy-protecting advertising.

⁶See for example "New data on the RTB privacy crisis: people with AIDS profiled in Ireland, and Polish elections influenced", Irish Council for Civil Liberties, 21 September 2020 (URL: <https://www.iccl.ie/human-rights/info-privacy/rtb-data-breach-2-years-on/>); see also See also Irish Council for Civil Liberties to Minister Helen McEntee TD, 28 September 2020 (URL: <https://www.iccl.ie/wp-content/uploads/2020/09/Letter-regarding-DPC-inaction-on-RTB-from-ICCL-to-Minister-McEntee-28-September-2020.pdf>).

NPO (publisher) revenue increase, after removing all 3rd party ad tracking in 2020



In January 2020, NPO switched from advertising systems that track people. Its revenue that month increased 62% as a result. The following month, revenue increased 79% over the previous year.

In the following month the Netherlands experienced an economic shock from the Covid-19 pandemic, and Dutch economists predicted a recession.⁷ Even so, despite the Covid shock to the advertising market, this publisher's revenue increased by 27% in March over the previous year, 9% in April, and 17% in May and in June, and 21% in July. The months of August and September show 77% and 54% year over year increases.

This revenue growth is unique among public or private publishers in any digital media. It appears to be directly attributable to four factors that also have an impact on disinformation, too.

Data leakage and disinformation

Disinformation is possible because of what happens almost every time you load an ad-supported website (or app). When a webpage loads, data about your interests is

⁷ Economic Quarterly Report, RaboBank, 23 March 2020 (URL: <https://economics.rabobank.com/publications/2020/march/the-netherlands-coronavirus-pushes-economy-in-a-recession/>).

broadcast to tens or hundreds of companies.⁸ This lets technology companies representing advertisers compete for the opportunity to show you an ad.

The following can be included in these broadcasts: your inferred sexual orientation, political views, religion, health conditions, etc.;⁹ what you are reading, watching, and listening to¹⁰ and where you are at that moment. These data are accompanied by unique ID codes that are as specific to you as is your social security number, so that all of this data can be added to dossiers about you.

This process is known in the online advertising industry as “real-time bidding” (RTB). The data broadcast widely by the RTB system is perfect fuel for micro-targeted disinformation, and there is no control over what companies do with it. It is by far the largest data breach ever recorded, which means that any entity that wishes to profile the electorate can do so by simply collecting RTB data, or buying profiles from a company that is already doing so.

The data leakage and profiling made possible by RTB harms democracy in a second way: it undermines the online advertising model of legitimate media, and enables a business model for the bottom of the web.

NPO: three factors that radically grew revenue, and reinforce the media market against disinformation

NPO’s shift to privacy-focussed advertising both dramatically increased its revenues and reduced the Dutch media market’s vulnerability to disinformation.

Factor 1. “Audience arbitrage”

If you read about a luxury car on RTE, and then later visit a less reputable website, you may see luxury car ads there. Companies that know you are a high value RTE reader – thanks to the RTB system – show ads to you on the less reputable website at an

8 See ICCL’s Dr Johnny Ryan in testimony at the International Grand Committee on Disinformation and “Fake News”, 7 November 2019 (URL: <https://vimeo.com/371652420>).

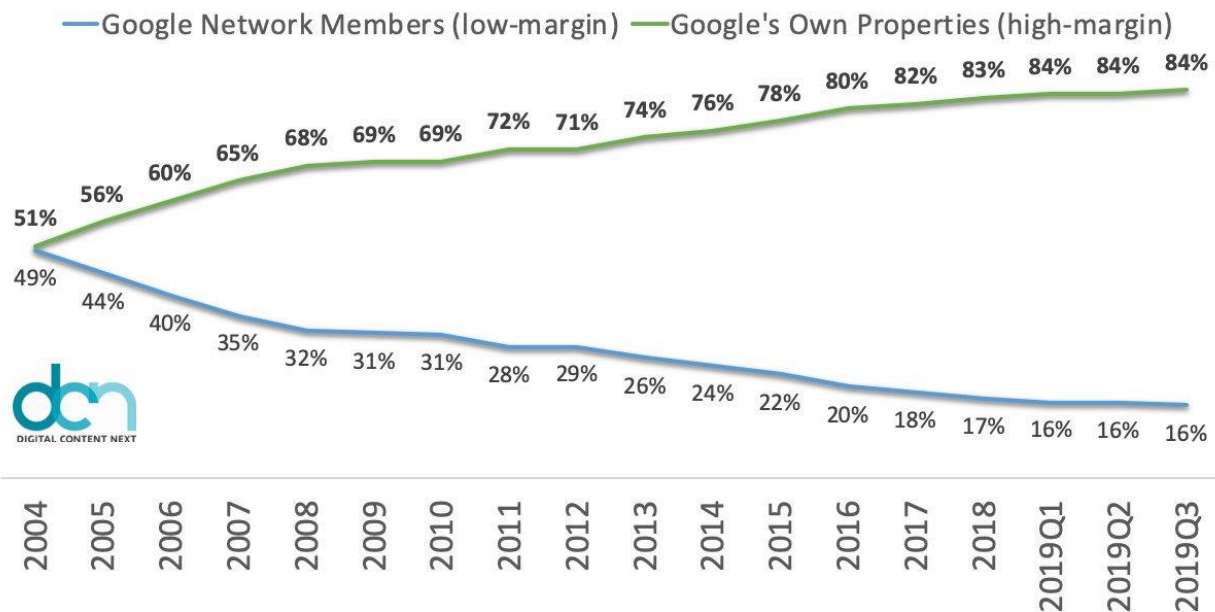
9 See IAB OpenRTB “content taxonomies” list, which is referred to in several contexts in the IAB OpenRTB AdCOM API (https://www.iab.com/wp-content/uploads/2017/11/IAB_Tech_Lab_Content_Taxonomy_V2_Final_2017-11.xlsx).

10 See “Examples of data in a bid request from IAB OpenRTB and Google Authorized Buyers’ specification documents” (URL: <http://fixad.tech/wp-content/uploads/2019/02/3-bid-request-examples.pdf>), evidence submitted to the Irish Data Protection Commission, and UK Information Commissioner’s Office, 12 September 2018 and 20 February 2019; see also “Object: user” in AdCOM Specification v1.0, Beta Draft”, IAB TechLab, 24 July 2018 (URL: <https://github.com/InteractiveAdvertisingBureau/AdCOM/blob/master/AdCOM%20v1.0%20FINAL.md>); “hosted_match_data”, “google_user_id”, and “UserList object” in Authorized Buyers Real-Time Bidding Proto”, Google, 23 April 2019 (URL: <https://developers.google.com/authorized-buyers/rtb/realtime-bidding-guide>).

enormous discount. They want you because you are a RTE reader, but RTE does not benefit. The industry calls this “audience arbitrage”.

By exposing their readers to “third-party” technology companies that can identify them when they appear on other websites and apps, publishers surrender their ability to exclusively sell their own audience’s attention to advertisers on their own properties. This enables the “bottom of the web” to commodify that audience, driving prices down and creating a business model for disinformation.

It also explains Google and Facebook’s enormous growth at the apparent expense of traditional publishers. This chart below, from the international publisher trade group Digital Content Next, appears to show that Google has used its access to publisher’s websites and apps to (shown here as Google’s “network members”) that use Google advertising systems to advantage its own advertising sales on its own properties, where it can charge a higher margin.¹¹ Chronically lax data protection enforcement allows Google to do this.



¹¹ In 2004, 51% of Google revenue was earned on its own sites, by 2019 this had risen to 84%. Ads sold on their own properties are higher in margin. See https://twitter.com/jason_kint/status/1189219705451679745

NPO's move to privacy-protecting advertising prevents tracking companies (including Google and Facebook) from selling people identified as NPO's high value audience anywhere else.

Factor 2. "Adtech tax"

The conventional, tracking-based advertising system, disadvantages publishers because they receive only 30-45 cents of every Euro. Intermediaries siphon off the spend through notoriously opaque charges - commonly referred to as the "ad tech tax". Estimates range between 70-55%, but price opacity and variations in vendors make it impossible to pin down these charges with certainty. In a widely cited experiment, *The Guardian* newspaper bought twenty thousand pounds of ads on its own site and only 30% of their spend returned to them in revenue¹². The NPO has avoided this "adtech tax" by removing the bulk of intermediary tracking companies from the equation. This protects its audience's privacy, and protects its business, too.

Factor 3. "Ad Fraud"

RTB also enables fraudulent activity that further harms legitimate publishers. "Ad bots" masquerading as humans pretend to view and click on ads. Real advertisers are then charged real money, even though nobody really saw any ads.

The estimates of the cost of this "ad fraud" range from 5.8 to 42 Billion US\$, diverted from legitimate publishers to the bottom of the web.¹³ By protecting people's privacy, NPO prevents this form of "bot fraud".

Better outcomes for advertisers

NPO's results are good news for advertisers, too. NPO and its sales house "Ster" tested the effectiveness of private versus tracking based ad targeting with several advertisers and concluded that "non-personalized is just as effective".¹⁴ More so, on occasion. For example, a travel brand's click through rate increased by 70% when using context as

12 See "Where did the money go? Guardian buys its own ad inventory", Mediatel Newslines, 4 October 2016 (URL: <https://mediatel.co.uk/newsline/2016/10/04/where-did-the-money-go-guardian-buysits-own-ad-inventory/>).

13 At least \$5.8 billion of their spend is stolen by "ad fraud" or "bot fraud" criminals, see "2018-2019 Bot baseline: fraud in digital advertising", Association of National Advertisers (URL: <https://www.whiteops.com/botbaseline2019>). Other estimates are higher: \$50 billion by 2025. See "Compendium of Ad Fraud Knowledge for Media Investors", World Federation of Advertisers, 2016 (URL: https://www.wfanet.org/app/uploads/2017/04/WFA_Compendium_Of_Ad_Fraud_Knowledge.pdf).

14 "Een toekomst zonder advertentiecookies?", Ster, 2020 (URL: <https://www.ster.nl/onderzoek/een-toekomst-zonder-advertentiecookies-het-kan/>), p. 12; See results at "Een toekomst zonder advertentiecookies?", Ster, 2020 (URL: <https://www.ster.nl/onderzoek/een-toekomst-zonder-advertentiecookies-het-kan/>), pp. 8-19.

opposed to tracking.¹⁵ Extensive testing with advertisers has proven that the ads are effective, and advertisers are spending more with NPO than before.¹⁶

Better outcomes for other private broadcasters & publishers, too

As a public broadcaster, NPO enjoys a strong position in the Dutch news market. However, its example indicates that smaller publishers may benefit from engaging with reputable sales houses that can aggregate the supply of eyeballs to advertisers, and do so without leaking any personal data, as Ster does for NPO's various properties.

The table below shows NPO properties ranked by the size of their audience reach. NPO's move to privacy brought huge sales increases across all NPO properties, irrespective of how strong their positions or what size their audiences are. The properties with the smallest audience reach are highlighted. As the table shows, their growth has been remarkable. This indicates that a shift to privacy, and to data protection enforcement, would benefit not only large public broadcasters, but private publishers of all sizes, too.

¹⁵ "Online advertising", Ster presentation at CPDP 2020, p. 19.

¹⁶ "Een toekomst zonder advertentiecookies?", Ster, 2020 (URL: <https://www.ster.nl/onderzoek/een-toekomst-zonder-advertentiecookies-het-kan/>), p. 12; See results at pp. 8-19.

First half of 2020: sales per NPO site



NPO property	Impressions sold ¹	Reach rank in category ²	Reach ³
nos.nl	186%	3rd (News)	4,390,000
blauwbloed.eo.nl	171%	1st (Royals)	793,000
nporadio1.nl	198%	3rd (Music)	1,127,000
kro-ncrv.nl	183%	1st (Dating)	593,000
avrotros.nl	112%	8th (Entertainment)	1,119,000
funx.nl	180%	4th (Music)	790,000
vpro.nl	192%	19th (Music)	769,000
nporadio2.nl	196%	5th (Music)	699,000
home.bnnvara.nl	192%	18th (Entertainment)	288,000
wnl.nl	189%	38th (News)	365,000
nporadio4.nl	199%	12th (News)	269,000
3fm.nl	194%	13th (Music)	247,000
bvn.nl	197%	20th (Entertainment)	153,000
powned.tv	188%	48th (News)	62,000
omroepmax.nl	192%	8th (Opinion)	54,000

¹ Sales data from Ster, NPO's saleshouse.

² Category rank from NOBO. Highest category shown where a property is in more than one category.

³ Reach externally audited by NOBO.

Remedy

RTB both enables voter profiling and manipulation, and undermines legitimate media. Two organisations alone decide what data about people can and cannot be in an RTB broadcast. One is the "IAB", the industry's standards body, whose biggest members are Google and Facebook. The other is Google. Clearly, they should not have designed the system to operate as it currently does.

The NPO example suggests that strict data protection is a practical measure to establish a level playing field from which publishers can finally compete with Google, Facebook, and the other big (and small) tech companies. In addition, the ICCL suggests that enforcement¹⁷ against the IAB and Google to end the broadcast of any personal

¹⁷ ICCL is leading proceedings in Belgium, before the Belgian Data Protection Authority, and ICCL staff have submitted evidence to the Irish Data Protection Authority, on against both Google and the IAB. Regrettably, after more than two years, we still wait for any action of any substance from the Irish Data Protection Commission.

data in the RTB system would starve disinformation micro-targeters of data, and the bottom of the web of cash, at a single stroke. We urge the Commission to examine these matters.

Question 3. How should media be governed and regulated?

All forms of media regulation must take into account the rights to freedom of expression and information. As noted above, these rights are protected in Ireland under the Irish Constitution in article 40.6.1.i (freedom of expression) and article 40.3.1 (right to communicate); article 10 of the European Convention on Human Rights, (ECHR); article 11 of the EU Charter on Fundamental Rights and Freedom and article 19 of the UN International Covenant on Civil and Political Rights (ICCPR). These rights can only be interfered with when provided for by law, necessary in a democratic society and proportionate to a legitimate aim. The freedom to freely exchange ideas, views and experiences without fear of disproportionate legal responses is fundamental for a flourishing democracy, the protection of human dignity and full participation in public life.

ICCL has previously commented on three areas of law that seek to limit free expression that are relevant to public service media and about which we have expressed some concern:

1. The need to reform the current law on defamation;
2. Proposed new laws on hate speech; and
3. Appropriate content moderation on social media.

We summarise our concerns below.

1. Defamation

ICCL considers that the Defamation Act 2009 has a number of flaws that together constitute a disproportionate impact on the right to freedom of expression and have a chilling effect on expression, public debate and the right to participate in public life, including for the media. For a full exposition of ICCL's concerns please see our submission to the Department of Justice on reform of the Defamation Act [here](https://www.iccl.ie/wp-content/uploads/2021/01/ICCL-Defamation-Act-Submission-3.4.20.pdf).¹⁸

In summary, ICCL's concerns include the following:

¹⁸ <https://www.iccl.ie/wp-content/uploads/2021/01/ICCL-Defamation-Act-Submission-3.4.20.pdf>

- a. **Legal Aid Exclusion**-The exclusion of defamatory legal actions from the civil legal aid scheme is a disincentive to defend defamatory actions. A person, including a journalist, is more likely to withdraw a statement than defend it, creating a chilling effect on free speech.
- b. **Defences** - The defences of honest opinion and fair and reasonable comment in the public interest are too limited and, therefore, have an overly restrictive impact on freedom of expression.
- c. **Burden of Proof** - The burden of proof on the defendant to prove an alleged defamatory statement is true should be shifted to the plaintiff to prove the statement is false.
- d. **Damages** - The uncertainty and unpredictability around the amount of damages that can be awarded is a disincentive to defend defamatory actions and permit disproportionate awards.

These issues together provide a disincentive to bring or, particularly, to defend a claim. This can create a chilling effect on speech by preventing media, citizen journalists and others from expressing views and disseminating ideas. Of particular relevance for the media is the need to provide more robust **defences** to a defamation action. Two key issues are as follow:

Remove requirement to prove ‘truth of the opinion’

The law needs to be amended to change the requirement in the Act for a defendant to a defamation action to prove that they believed in the “truth of the opinion”¹⁹. The Irish Constitution and the ECHR protect the right of individuals to hold and express an opinion, as part of the right to freedom of expression. The European Court of Human Rights has stated that a distinction needs to be made between “facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.”²⁰ While a belief in the underlying facts relating to the opinion may need to be proven, the truth of an opinion itself can’t be proven and therefore should not be required. This defence does not appear to conform to article 10 ECHR and should be amended to remove the requirement that the defendant prove the ‘truth’ of the opinion.

Remove requirement of “fair and reasonable” for comment in the public interest

¹⁹ S.20(2)(a) Defamation Act 2009

²⁰ Lingens v Austria Application no 9815/82, (1986) 8 EHRR 103, [1986] ECHR 7 (8 July 1986) [46]

The defence provided for in s.26 of the Defamation Act: “Fair and reasonable comment in the public interest” is overly complex, lacks clarity and provides too high a threshold for a defendant to meet. It also may not meet the standard required by article 10 of the ECHR. ICCL recommends that the public interest defence in Irish law is simplified along the lines of s.4 of the English Defamation Act 2013.²¹ This would mean providing for the defence of publication on a matter of public interest without having to prove that publication was “fair and reasonable in all of the circumstances”²²

2. Hate Speech

ICCL recently broadly welcomed a recent Department of Justice report signalling its intention to draft legislation against crimes motivated by hate and prejudice published in December 2020.²³ ICCL has been calling for such legislation for some years, after our 2017 research revealed that the hate crime element of crimes is often filtered out by the time it gets to court or sentencing. You can access our research here.

The Department proposes to use the same legislation to replace the *Prohibition of Incitement to Hatred Act of 1989*, which many stakeholders have deemed inadequate because of difficulties in securing successful prosecutions for extreme hate speech. While we agree that the Act is inadequate, we are cautious about the possible conflation of hate speech with hate crime. It is imperative that speech that is not extreme hate speech is not criminalised in order to protect the Article 10 ECHR freedom to “offend, shock or disturb.”²⁴

Under international law, there is a distinction between extreme hate speech which **must** be prohibited; hate speech which **may** be prohibited; and deeply offensive speech which is problematic but **should not** be prohibited. This is known as the hate speech pyramid.

ICCL does not support criminalising hate speech except in extreme circumstances such as incitement to genocide, a hateful violent action, or propaganda for war. We are encouraged that the Department has expressed its intention to undertake non-legislative steps to counter less extreme forms of hate speech, which nevertheless can

21 S.4(1) provides that: (1) It is a defence to an action for defamation for the defendant to show that -(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

22 S.26(1)c Defamation Act 2009.

23 http://www.justice.ie/en/JELR/Legisating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legisating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf

24 *Handyside v. the United Kingdom* judgment of 7 December 1976, § 49

cause harm and can itself infringe on the right to freedom of expression where people are forced out of public spaces.

These steps include robust public policies aimed at countering stereotypes, ending all forms of discrimination, and promoting equality. Education, monitoring, training, ethical codes and facilitating counter-speech should all form part of the government strategy in tackling deeply offensive speech and non-extreme hate speech.

The criminalisation of hate speech can cause particular problems for media, in particular where it is reporting on incidents or conducting analysis. It is important that the criminalisation of some forms of hate speech does not have a chilling effect on reporting, media analysis or debate.

We welcome the commitment in the Department's report to provide "robust safeguards for freedom of expression, such as protections for reasonable and genuine contributions to literary, artistic, political, scientific or academic discourse, and fair and accurate reporting."²⁵ Defining "fair and accurate reporting" in a way that does not hinder the free flow of information will be a key challenge. It will be vital that interested stakeholders, including the Commission, continue to contribute to the development of this legislation to ensure that the ultimate law does not disproportionately interfere with the rights to freedom of expression and information in a way that may unduly prevent free discussion and debate.

3. Social media regulation

Modern public service media will often engage in social media platforms to promote their content or interact with the public. These platforms offer unique challenges to the proper balancing of the right to freedom of expression with the right to privacy as well as the rights to non-discrimination and equality and the need to protect people from serious harm. A number of recent Acts and legislative proposals by the Government seek to regulate harmful content on social media. ICCL has made a number of submissions on these topics.

Of particular relevance to the moderation of media content online is our April 2019 [submission](#)²⁶ to the Department of Communications, Climate Action & Environment on

²⁵http://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf

²⁶ [ICCL submission to the public consultation on regulation of online content](#), April 2019. See also our Autumn 2018 joint submissions with CIVICUS to the Committee for Communications, Climate Action & Environment.

the regulation of harmful content on online platforms. In our submission, we briefly set out the issues and fundamental rights challenges facing state and corporate attempts to regulate content online and provided recommendations.

Our main points are summarised below.

i. Fundamental rights implicated by harmful content regulation online

It is clear that our fundamental rights are relevant to the regulation of harmful content online, including our rights to privacy²⁷ and freedom of expression²⁸. Our rights are not changed or reduced online²⁹, but rather apply to all forms of online communication³⁰. As noted above, legislation in Ireland is required to conform with Ireland's human rights obligations under the Irish Constitution, the European Convention on Human Rights, and the international human rights treaties that Ireland has ratified.

Egregious circumstances including the exploitation of children, terrorism, or, more broadly, harmful content, are frequently cited reasons by states and corporations for limiting fundamental rights online. Mechanisms used and proposed to limit content online have included a combination of monitoring, reporting, pausing, reducing, removing, filtering, blocking, or censorship.

All forms of online moderation must take into account rights principles. States may limit our rights only where such limitations conform with the principles of legality, necessity, and proportionality. Businesses too must take into account human rights principles.³¹

ii. Rights-compliant online content moderation: identified difficulties

Rights compliant online content moderation and regulation is difficult because of the nature of online communication. It consists of fast and often spontaneous

27 Our right to privacy is protected by Article 12 of the Universal Declaration of Human Rights (UDHR), Article 17 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the European Convention on Human Rights (ECHR), and Article 7 of the Charter of Fundamental Rights of the EU (EU Charter). In correlation, our personal data is also protected under Article 8 of the EU Charter. In the Irish Constitution, a right to privacy has also been identified as one of the unenumerated rights stemming from the wording of Article 40.3; see *Cullen v. Toibín* [1984] ILRM 577.

28 Similarly, our right to freedom of expression is protected by Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR, Article 11 of the EU Charter, and Article 40(6)(1)(i) of the Irish Constitution.

29 The United Nations Human Rights Council has stated that the same rights people have offline must also be protected online. This is particularly true for freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the UDHR and the ICCPR. See UN Doc A/HRC/32/L.20.t, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>

30 The right to freedom of expression for example applies to all forms of electronic and Internet-based modes of expression. See UN Human Rights Committee, General Comment No.34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, (2011), available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

31 See eg the Irish National Plan on Business and Human Rights, drafted pursuant to the UN Guiding Principles on Business and Human Rights. <https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>

communication; it spreads easily to vast numbers of recipients; and it is difficult to contain once it has been published. This means individual considered responses to particular content can be difficult. However, blanket monitoring, imprecise legal terms seeking to regulate harmful content online and obstacles to accurately identifying context mean the solution to online moderation while protecting rights is not straight forward.

A. Blanket monitoring is not rights compliant

Legislation or regulations permitting generalised monitoring of content based on the concern that it *might* be harmful could allow governments and corporate platforms to surveil people in Ireland in a manner that contravenes constitutional and human rights standards and the principles of legality, necessity and proportionality. Blanket monitoring should therefore never be introduced.

B. Imprecise legal terms

Imprecisely drafted laws or regulations that do not intend to but nonetheless increase the chances of blanket surveillance would also contravene these standards.

By way of example of an imprecisely drafted law, ICCL recently raised concerns with the Minister for Justice about the term “grossly offensive communication” as per Section 4.1(a)(i) and (ii) of the *Harassment, Harmful Communications and Related Offences Act 2020*. We believe the term is over broad and open to a level of interpretation that could disproportionately impact the right to freedom of expression. We have urged the government to amend the Act to introduce a clearer definition of “grossly offensive communication” to assist individuals, victims, gardaí and the DPP with interpreting the scope of this new crime. In particular, we believe there needs to be a higher threshold of harm caused by such communication to justify criminal liability.

C. Removal systems and accuracy

The major barrier to rights compliant standardised term definitions or removal systems thus far have been problems in accuracy. Experts point out that, apart from settling on agreed definitions, standardised content monitoring by either humans or algorithms are inevitably inaccurate - rights compliant material is often wrongfully removed and rights infringing material is often left up³².

³² See Daphne Keller, 'Problems with filters in the European Commission's platforms proposal' (Center for Internet and Society at Stanford Law School, 05 October 2017), available at: <http://cyberlaw.stanford.edu/blog/2017/10/problemsfilters-european-commissions-platforms-proposal>. Keller notes that 'errors include both false positives—removing lawful content—and false negatives—leaving infringing content up.'

It is important that legislative responses in Ireland take into account these challenges of monitoring and regulating online content, in particular in a way that does not resort to online surveillance that unduly impact the right to privacy.

D. Systems design and value-based solutions

Whether algorithmic design or predictive data can at some point effectively respond to the issue of content moderation is still being explored. There may be scope in the future for filters that are self-appointed and directed (as opposed to operated by an external authority including state regulators or corporate platform).³³ Self-appointed filtering would permit end users to decide what content we might see online. Such mechanisms might include what one design expert has called ‘repository invitations’, a method whereby an internet user can’t add another to a project without that user’s consent.³⁴

These designs are nascent and still exploratory but redirect the conversation to the importance of users deciding for ourselves what we want our internet and online platforms to look like.

Irish society as a whole needs to reflect on what values we want reflected in social media regulation: will we support online spaces that are heavily monitored and tightly regulated by mediators who, to date, have often applied rights balancing analysis incorrectly? Or will we support online spaces that are free, secure, and self-actualising emphasising the user’s own discretion to control what content we have exposure to?

E. Transparency

One solution to the moderation problem proposed by the United Nations Special Rapporteur on Freedom of Expression includes ‘radical transparency’ for corporate platforms, institutions and states.³⁵ The Special Rapporteur’s brand of transparency has also been promoted by a range of civil rights advocates.³⁶ It requires at a minimum full

33 Mike Masnick, ‘Platforms, Speech And Truth: Policy, Policing And Impossible Choices’ (techdirt, 9 August 2019), available at: <https://www.techdirt.com/articles/20180808/17090940397/platforms-speech-truth-policy-policing-impossiblechoices.shtml>

34 Bits of Freedom, ‘ENDitorial: Can design save us from content moderation?’ (ENDitorial, 16 May 2018), available at: <https://edri.org/enditorial-can-design-save-us-from-content-moderation/>

35 UN Doc A/HRC/38/35 (18 June–6 July 2018).

36 See in particular ‘The Santa Clara Principles On Transparency and Accountability in Content Moderation’, available at: <https://santaclaraprinciples.org>. The principles state that, at minimum, companies should (1) publish the numbers of posts removed and accounts permanently or temporarily suspended due to violations of their content guidelines; (2) provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension; and (3) provide a meaningful opportunity for timely appeal of any content removal or account suspension. It is the position of the ICCL that states should be held to an equally high transparency standard.

disclosure of the moderating entity of the rules used to moderate content and how those rules are applied, together with appeals processes and accountability for wrongful takedown.

Transparency to this level of disclosure would assist state, treaty body mechanisms and human rights advocates in better understanding the strengths and weaknesses of content moderation programs towards designing more effective and rights compliant programs.

iii. Recommendations on social media regulation

We make the following recommendations in our April 2019 [submission](#)³⁷ to the Department of Communications, Climate Action & Environment on the regulation of harmful content on online platforms:

1. Rights compliant moderation

As the Special Rapporteur on Freedom of Expression has made abundantly clear: ‘States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy.’³⁸ The ICCL supports this position while noting that the precise mechanisms for achieving this have not yet been identified. Given this lack of clarity, it is the position of the ICCL that content moderation should adhere absolutely to a rights-based approach which complies with constitutional and human rights standards. Legal ambiguities relating to moderating online content should be resolved in favour of respect for freedom of expression, privacy, and data protection principles.

2. Transparency

³⁷ [ICCL submission to the public consultation on regulation of online content](#), April 2019. See also our Autumn 2018 joint submissions with CIVICUS to the Committee for Communications, Climate Action & Environment.

³⁸ Freedex, ‘The Special Rapporteur’s 2018 report to the United Nations Human Rights Council is now online’ (A Human Rights Approach to Platform Content Regulation, 6 April 2019), available at: <https://freedex.org/a-human-rightsapproach-to-platform-content-regulation/>

ICCL supports the recommendations of the Special Rapporteur³⁹ and also the Santa Fe principles⁴⁰ for explicit transparency. We assert transparency is essential for both corporate platform and state content moderation. Transparency includes at minimum full disclosure of the rules used to moderate content and how those rules are applied together with functional appeals processes and accountability for wrongful takedown.

3. Harmful content definitions

States must clarify definitions of harmful content so that they may be subject to a rights balancing analysis. It is unlikely that states can define harmful content to a level of specificity that avoids the need for an independent and impartial judicial authority to evaluate individual circumstances when applying this definition.

4. Blanket monitoring

Blanket monitoring, particularly by cloud services and infrastructure, software and platform services, including those that may be used by public service media, should be prohibited in order to protect fundamental rights. This includes prohibiting automated monitoring tools including filters that are used to surveil content generally and indiscriminately online.

39 UN Doc A/HRC/38/35 (18 June–6 July 2018).

40 'The Santa Clara Principles On Transparency and Accountability in Content Moderation', available at: <https://santaclaraprinciples.org>. The principles state that, at minimum, companies should (1) publish the numbers of posts removed and accounts permanently or temporarily suspended due to violations of their content guidelines; (2) provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension; and (3) provide a meaningful opportunity for timely appeal of any content removal or account suspension. It is the position of the ICCL that states should be held to an equally high transparency standard.