

*Contribution by Professor Thomas Mitchell,  
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The Defamation Act and the Press Council

I am very pleased to participate in this seminar on a topic of major interest, and we owe thanks to Andrew O’Rorke and Hayes Solicitors for organising it. I have been asked to speak about the place of the Press Council in the evolution of the Defamation Act, and I would like to review the genesis of the Council, its mission and structures, and its relationship to the Act.

The Press Council arose out of the protracted debate in Ireland over the past 25 years about defamation and related matters. The length and intensity of the debate show that there are still many issues surrounding freedom of the press and its regulation that remain contentious and difficult to resolve.

Some things are agreed. It is broadly accepted among modern liberal democracies that a strong free press is not only compatible with democratic values and ideals, but is essential for the effective working of any democratic system. The news media are the means, and the only effective means, of ensuring that the public is sufficiently well-informed to carry out the duties of citizens. They are also the best means of ensuring that public officials and those who govern are held accountable, that there is transparency in the working of government and of all bodies, public and private, that impinge on the public good, and that there is opportunity for public debate and input into political decision-making.

The principle of freedom of the press is now well entrenched in the legal fabric of modern democracies through inclusion in written constitutions and in internationally agreed documents, such as the UN Universal Declaration on Human Rights and the European Convention on Human Rights. It has been further reinforced by judgments of the courts.

Where the controversy remains is in the limit of press freedom and how these limits should be defined and enforced. The debate has also extended beyond what the press cannot do to what the press is obliged to do, what responsibilities it carries by virtue of its protected position, and what accountability there should be in relation to these responsibilities. This comes from the recognition that the justification for freedom of the press does not rest merely on what are personal rights of freedom of expression and the right to inform and be informed. It rests much more powerfully on the value of the services the press provides to the public and the public good.

The limits of press freedom have been fleshed out to some extent in constitutional provisions and in case law and in legislation. The focus has been largely on areas such as defamation, privacy, the right to fair trial and what is sometimes called group libel, which is concerned with malicious attacks and incitement to hatred against groups on grounds such as religion or race or ethnic origin.

But these have been seen for some time as incomplete and to some extent unsatisfactory modes of press regulation. There is a large body of opinion, and it includes many lawyers and experts in jurisprudence, that legislation in particular is a blunt instrument as a means of defining private rights versus press rights. It also carries risks in that legislative bodies will forever have a vested interest in reining in their chief watchdog. Case law and decisions of other forms of regulatory agency are seen as safer ways of achieving an acceptable balance and proportionality between the need to safeguard private rights and the need to safeguard the capacity of the media to fulfil their public responsibilities.

Changing trends in the media over the past half-century have also exposed a need for new forms of press regulation. Greater commercialisation, most visible in the emergence of global media conglomerates, and greater competition for readers and advertisers throughout the industry, have brought an alarming degree of mission creep. There has been a shift in focus in some elements

of the media from informing to entertaining. The sensational and the trivial and preoccupation with the lives and foibles of the famous are often given great prominence than hard news.

Some of these changes are acceptable. Diversity in the press is a good thing. There are different readerships out there, and the more people who read newspapers the better. But no newspaper that claims privilege for its work can ignore its responsibility to report the news and to do so with careful regard for truth and accuracy.

But whatever the causes, there can be no doubt that there has been a sharp drop in public confidence in the press, and a belief that standards have fallen, and with them respect for private rights. A succession of international surveys provides the evidence. There is a clear demand for higher ethical and professional standards and for effective ways to enforce them.

This is clearly not a task for the courts. It is about ethics and professionalism, not law. A large number of the complaints that people have about newspapers are not actionable in any event, nor should they be, but they reflect a deep sense of injury, and deserve some form of redress. Even where complaints are actionable, many people would prefer to seek satisfaction through a simpler, less intimidating process than the courts can offer.

For all these reasons, many countries have, in some cases long ago, established new forms of non-legal press regulation, commonly called Press Councils. Some are statutory, with their membership and terms of reference controlled by the state. There are also statutory Press Councils with higher levels of independence. Other Press Councils have been set up by the press industry itself as a form of self-regulation. But the primary objective of all of them is to provide a remedy for grievances other than the courts, and in the process to promote the ethical and professional standards appropriate to the mission of the press.

Ireland was slow in going down this route, the issue of a Press Council becoming entangled in the ongoing debate about defamation. But when the government made clear its intention to introduce a Privacy Bill and a statutory Press Council alongside a new Defamation Bill, all of the main print media associations, national and regional, along with the Periodical Association of Ireland and the National Union of Journalists, came together and established a Steering Committee to create a model of Press Council that would be independent of government and, in its operation, independent of the industry. I was asked to act as independent chairman of that Committee in January 2004.

The Committee identified five requirements that the new Press Council should have to meet in order to achieve its purposes.

To be credible and effective it would have to be genuinely independent. This was the toughest challenge. Since the Press Council would have to be funded by the industry, many believed that, to some extent at least, it would be subject to control by the industry. The Committee went to extraordinary lengths to counter any such suspicion. It decided that the Press Council would be established as a separate company with the members of the Council as its Board of Directors. There would be a Press Ombudsman, who would be the first port of call for complainants, would be chosen by the Press Council, would report only to the Press Council and would be free of any dependence or control by the industry. The Press Council itself would have an independent majority consisting of an independent Chairman and six other members representative of civil society and chosen by an independent Appointments Committee. There would be five additional members nominated by the industry associations, and one representative from the National Union of Journalists. All would be subject to ratification by the independent Appointments Committee. The model is unique among all Press Councils around the world that the Committee reviewed, and represents an innovative third way that keeps the Press Council and the Press Ombudsman at arm's length from both the state and the industry.

The second requirement was to create a complaints procedure that would be simple, quick, fair and free, devoid of legalism and, to the greatest extent possible, devoid of lawyers. The record of the past two years shows this was achieved. Resolution of complaints typically take about six to eight weeks, considerably less if conciliated. There is a right of appeal to the Press Council, which can extend the process by a month.

The third requirement was to create a Code of Practice to which the industry would unreservedly commit itself and which would identify the ethical and professional standards that should govern good journalism, and that would make the press fully accountable both in regard to its obligations to respect private rights and inform the public with truth and accuracy and without fear or favour.

The fourth requirement was that the Press Council and Press Ombudsman should adopt an approach to their work that was cooperative and consensual rather than adversarial, and that put a high value on resolving complaints through conciliation.

The fifth and final requirement was that the Press Council would not seek to draw its authority from any form of quasi-judicial power to impose penalties such as fines. Its authority should come from its independence, from the standing and integrity of the Press Council and Press Ombudsman, and from the commitment of all its members to abide by the Code of Practice and to accept all decisions of the Press Council. Those who violated the Code or failed to accept decisions against them would stand exposed before colleagues and the public.

As the model developed, the Committee began a series of consultations with the then Minister for Justice, Michael McDowell, who at that time was preparing the new Defamation Bill. The

Minister contributed very valuable input, which deserves to be acknowledged, and he agreed that the Defamation Bill would make provision to give legal recognition to the Press Council if it met certain conditions. The conditions, which are now set out in Schedule II of the Defamation Act, were entirely compatible with the Steering Committee's own proposals.

The Defamation Act has now been implemented and the Press Council has applied for recognition as specified in the Act. It is very confident that the recognition will be soon forthcoming. That will represent the final stage in the consolidation of the position of the Press Council of Ireland as the new regulatory agency for the print media.

Recognition under the Act will greatly strengthen the Press Council and will, I hope, allay the worries of those who have insisted that the Press Council has no teeth. The Irish public will know that the Press Council now has the sanction of statute law. The act will also expedite the Press Council's procedures. It will give qualified privilege to all decisions of the Press Ombudsman and of the Press Council, and to all communications associated with the investigation and hearing of complaints. It will enable newspapers to offer an apology without risk that this could be taken as an admission of liability. This should increase the number of complaints that can be conciliated.

But perhaps the most significant benefit of the Act to the Press Council will be that, in the case of member publications who are using the defence of fair and reasonable publication, the court

will be able to take into account their membership of the Press Council and the extent to which they have complied with the Code of Practice. This will be a strong incentive to publications both to become members of the Press Council and to abide by the Code.

I would like to conclude by giving a brief assessment of the work of the Press Council over the past two years and the extent to which it has achieved its objectives. I believe it has been an auspicious beginning and that the Press Council can continue to provide substantial benefits to both the public and the press.

I will briefly mention four benefits. Ireland now has a model of press regulation that greatly extends the accountability of the print media and that gives the public easy access to a quick and simple mode of redress for a wide variety of grievances. It is a facility they never had before and they are making good use of it. Over the past two years about 700 complaints have been submitted to the Press Ombudsman.

There is now, for the first time, a carefully constructed, fully agreed Code of Practice, there for all to see, which spells out clearly the ethical standards by which the press must operate. This will raise awareness of the high standards that responsible journalism requires and will make everyone who works in the profession a bit more conscious of the ethical constraints that surround everything they do.

Conciliation has become a major part of the complaints procedure and the number of conciliated cases keeps growing. This has many benefits. It saves time and energy. It satisfies the complainant and helps newspapers understand the concerns of their readers. It generates goodwill and can help build confidence in the press and dispel some of the negative thinking.

There is one further benefit that the Press Council is offering the press and the public. There are still big questions surrounding press freedom and responsibility. They need to be brought into the open and thoroughly aired. The Press Council is well placed to facilitate such debate, and it has already begun to do so with encouraging results. It has already organised seminars in various parts of the country on subjects of high public interest such as the reporting of crime and of suicide, and last weekend it hosted a seminar in Cork on privacy, with the emphasis on the internet and the rather frightening implications for private rights of the uncontrolled flood of private information that is now circulating in cyber space. We look forward to continuing and extending this programme of public engagement with the challenges that surround the world of the media.

It is my hope that the establishment of the Press Council of Ireland and the enactment of the Defamation Bill will both be seen in the future as positive and progressive steps in the history of Irish journalism.