The Chartered Institute of Journalists—written evidence (FEO0074)

House of Lords Communications and Digital Committee inquiry into Freedom of Expression Online

The Chartered Institute of Journalists is the world's longest established professional association for journalists, and only such body with a Royal Charter. We represent staff and freelance journalists across all sectors of the media including local and national newspapers, periodicals, broadcasting and electronic publishing.

The Institute prides itself in being non-party political and expresses opinions only on matters that relate directly to our profession and industry, or to our members.

The Committee's questions represent the titles for what would be a very large monograph book or thesis running to hundreds of thousands of words, and this may well be the extent of the eventually published report and evidence.

We propose to confine our responses to the perspective of professional journalists and concentrate on those questions that are more relevant to our members.

Online Freedom of Expression

Freedom of Expression in the UK is under threat online and this cannot be separated from threats and problems affecting traditional 'legacy' media such as print, radio and television broadcasting.

The UK does not have a written constitution. The Inquiry's background introduction refers to 'Freedom of expression as a fundamental right protected by Article 10 of the European Convention on Human Rights. It is also protected under common law and in the International Covenant on Civil and Political Rights.'

These protections are limited in scope and based only on statute, case law and international legal treaty. The latter regarded by the jurist H.L.A Hart in *The Concept of the Law* as soft, problematic and lacking the legitimacy of a sovereign jurisdictional system of recognition, change, and adjudication.

The Institute has advocated for many years for a statutory declaration of media freedom equivalent to that afforded to the Judiciary in our constitution. The independence of the judiciary is guaranteed by the Constitutional Reform Act 2005. No such statutory provision protects media freedom and independence.

Article 10 of the Human Rights Act is heavily qualified and equally balances freedom of expression with other rights. It could be seen as that which is left to say and publish after every other right has been respected, subtracted from freedom of expression, and even worse- anticipated. This is 'a chilling effect' not necessarily a liberating or freedom affirming constitutional provision.

The UK needs a pragmatic priority for freedom of expression equivalent to that of media freedom which is inherent in the US First Amendment and its interpretation by the US Supreme Court in modern times- primarily from New York Times v Sullivan 1964.

Sir Brian Leveson advocated a statutory declaration of media freedom in his inquiry report of 2011. It has not been acted upon.

At page 1,780 he proposed in a section headed 'Protection of Freedom of the Press':

'GUARANTEE OF MEDIA FREEDOM

(1) The Secretary of State for Culture, Media and Sport and other Ministers of the Crown and all with responsibility for matters relating to the media must uphold the freedom of the press and its independence from the executive.

(2) The Secretary of State for Culture, Media and Sport must have regard to:

i) the importance of the freedom and integrity of the media;

ii) the right of the media and the public to receive and impart information without interference by public authorities;

iii) the need to defend the independence of the media.

(3) Interference with the activities of the media shall be lawful only insofar as it is for a legitimate purpose and is necessary in a democratic society, having full regard to the importance of media freedom in a democracy.'

We would argue that this proposal merits renewed consideration provided it is coupled with a wide provision of 'public interest' defences for all crimes and civil wrongs relating to media conduct and publication.

An across-the-board public interest defence in professional media cases is an essential pathway to providing the necessary protection for the social watchdog role of journalists and journalism that sustains democracy and basic liberty in a fair and stable society.

It is highly problematic that public interest is not adequately protected in a number of laws, including the Official Secrets Act, Investigatory Powers Act, Bribery Act, various Terrorism Acts, Communications Act, and the Computer Misuse Act.

The lack of a clear law on public interest has contributed to poor decision making by police forces and the Crown Prosecution Service and their equivalents in Scotland and Northern Ireland in respect of journalists.

We have in mind the case of journalists Trevor Birney and Barry McCaffrey wrongly arrested on suspicion of stealing confidential documents after working on a documentary about the unsolved killings at Loughinisland in 1994 and the police investigation of journalist Darren Grimes over his controversial YouTube interview with the historian David Starkey on the subject of slavery and genocide. Another example of an effort to chill freedom of expression can be shown in the case of Scottish journalist Mark Hirst who was eventually acquitted with 'no case to answer' at Jedburgh Sheriff Court over a YouTube commentary following the end of the trial of former SNP leader Alex Salmond.

A failure to recognise the public interest imperative in journalistic purpose resulted in unnecessary prosecutions and trials of journalists during the Metropolitan Police 'Operation Elveden' which relied on the common law offence of misconduct in public office.

The Court of Appeal, Criminal Division would eventually recognise that the offence required that the 'necessary conduct was not simply a breach of duty or a breach of trust' but 'one where the conduct was calculated to injure the public interest.' But this happened after the lives of many professional journalists had been disrupted, damaged and their liberty and freedom put in serious jeopardy by criminal trial and wrongful conviction.

It could be argued that there is more professional journalism conducted and produced now for online publication alongside, and compared to, the world of print and broadcasting media.

There is, therefore, a greater need for journalists working in the public interest to have protection from arrest for criminal offences applying to their spheres of research, news gathering and communication with an accompanying defence in civil proceedings.

This would provide vital and important support and furtherance of free and independent professional media publication.

The Institute is deeply concerned that state interception of online and digital communications by up to 50 government investigative bodies and agencies is conducted secretly under the Investigatory Powers Act 2016.

The legislation enables access to up to one year of mobile and Internet communications data retained by the private digital communications corporations. The oversight infrastructure of the Investigatory Powers Commissioners' Office (IPCO) and Office for Communications Data Authorisations (OCDA) is not adequate for protecting the public interest freedom of information rights of professional journalists and their sources.

IPCO's 2019 report states that communications data requests affecting journalists are 'subject to an independent decision by the Office for Communications Data Authorisations (OCDA) and are not subject to Judicial Commissioner review.'

The report also confirms that confidential journalist material is not protected from access 'if the journalist was using professional communications for the furtherance of serious crime.'

The problem here is that serious crime is defined as any criminal offence with a maximum jail sentence of more than one year and this means there is no protection in relation to any leak enquiry of any form of government body information.

Misconduct in public office is a common law offence which in theory carries a maximum sentence of life imprisonment and has been deployed as a substitute for the notorious and repealed Section 2 of the 1911 Official Secrets Act that made it a crime to communicate any official information to a journalist.

In the digital and online sphere we fear that protection of journalists' sources is practically non-existent and it is extremely difficult for journalists to carry out news gathering confidentially and communicate with their sources freely and securely without the fear and suspicion of snooping, later reprisals and consequences for people providing information to them in the public interest.

The Institute has identified further problems with the lack of Open Justice and clarity in oversight:

1. Failure to provide the identity of the law enforcement and public authorities applying for communications data relating to journalists and their sources and the journalists and publications affected;

2. No clarity on difference between 'requests' and 'authorisations' so that some kind of quantitative measurement can be made of the nature of oversight;

3. While the system engages some independent judicial oversight, it does not facilitate Open Justice equivalence. It does not match the extent of disclosure when applications are made for production orders and access to confidential journalistic material under the Police and Criminal Evidence Act 1984;

4. In practice the oversight process is secret justice that guarantees mystery and suspicion. The Institute believes there is a need for much more information about the justification for warrants and communications data interceptions. It should be possible at the very least to provide summary accounts.

5. There is a significant natural and open justice problem in that journalists and sources affected are excluded from any knowledge and awareness of the interception while it is being carried out and remain barred from any knowledge after the event.

The Investigatory Powers Act highlights the philosophical, sociological and indeed policy confusion about the ownership and integrity of digital online information. Mobile and Internet communications by journalists are not deemed to be owned by them. The legislation determines that power and control resides

in the private corporations providing the services and the UK state thereby exercises its power of interception and surveillance with the digital host and 'proprietor' of the communication and not the **journalist** authors.

Confusion over public and private sphere.

An overriding concern about freedom of expression online must be the censoring powers exercised by private corporate 'Internet Service Providers' or 'Online platforms' that some commentators are calling 'Big Tech.' It is arguable whether Twitter or Facebook should have the power to determine what opinions are acceptable online.

As private companies, currently, they have the means to impose their own rules on what is acceptable. However, since that ventures into the territory of censorship, Big Tech must be claiming editorial rights, which makes them publishers, not platforms. You don't have to like the outgoing President Donald Trump to be alarmed that a commercial entity operating in 'the public space' or at least what has come to be seen as a public space, can silence those with whom it disagrees.

The decision by YouTube to halt the streaming of TalkRadio over allegedly problematic COVID-19 health discussion is a most recent example of the exercise of private corporate power and censorship in online communications. It silenced and closed down what is regarded as a mainstream radio broadcaster in the UK regulated by Ofcom.

YouTube's ban on the output of TalkRadio for about 12 hours was justified on the grounds that its internal 'moderation' and regulatory infrastructure had decided there were breaches of its 'community guidelines' in relation to discussion of COVID-19 health information.

The implications of this incident are serious. The digital Radio station had been given no warning and there was considerable delay over their learning what had been responsible for the alleged breach. The removal of this transmission was an exercise of much more draconian and peremptory disciplining than could be applied if the complaint had been made to the national broadcast regulator Ofcom. The position of TalkRadio is that it is Ofcom-licensed and a properly regulated broadcaster with robust editorial controls in place, which always take very great professional care to balance debate.

Ofcom could have only investigated this post-broadcast with a considerable amount of more 'due process' in terms of communicating the complaint and content problem, giving an opportunity to TalkRadio to make their representations, and publicly publish an adjudication in a Broadcast Bulletin with accountability, transparency and public scrutiny of the process.

The examples above make clear that the 'BigTech' platforms are operating as publishers, and as such, should be subject to whatever disciplines, statutory regulation and laws other publishers have to accept within traditional media parameters of publication in certain jurisdictions. The Institute believes there is a clear change now in the centre of gravity of interpreting the position and status of digital oligopolies.

Online and digital geography- sovereign territory or private enterprise?

This comes back to the issue of whether to legally and constitutionally treat the digital online oligopolies as digital data processors or publishers.

The European Court of Justice ruling of the Gonzales case, Google v Spain from 2016 highlights the dilemma in jurisprudence and legislative policy.

The court ruled European citizens have a right to request that commercial search firms, such as Google, that gather personal information for profit, should remove links to private information when asked, provided the information is no longer relevant.

The ruling supported the judgment of the Spanish Data Protection Agency which upheld press freedoms and rejected a request to have the original article concerning personal bankruptcy removed from the website of the press organization.

The judges rejected the advice of the court's Advocate-General that Google should be regarded as a publisher and not a digital data processor. Consequently, the freedom of expression value in original publication by the news publisher did not transfer to Google. The Court decided that the fundamental right to privacy is greater than the economic interest of the commercial data processor and, in some circumstances, the public interest interests in accessing the information.

The development of this 'right to be forgotten' has had serious implications for public accessibility to public interest archive articles maintained by journalistic news publishers. Google had to introduce within its private corporate realm a behind closed doors of receiving applications to severe its search engine from previously published journalism.

Recent English High Court cases involving Google have further developed the law of privacy in this country on 'right to be forgotten.'

What had been the right to be rehabilitated for some crimes has now been extended to the right for the information about previously rehabilitated offences and reports of mere association with news events and criminal investigations to be concealed and withheld from what is the effective digital online public record.

Even the identity of the parties challenging a refusal by Google to remove the links has now been privileged with reporting bans and confidentiality.

These trends are of grave concern to the Institute because they represent an alarming direction of travel in the censorship of truthful journalistic information that had been previously in the public interest to publish.

It becomes a retrospective control and effective rewriting of history operating in the digital public sphere when the analogue world of print and document libraries are becoming redundant and anachronistic facilities and inevitably not repositories of the same information circulated in the digital Information Age.

This is a 21st century manifestation of the phenomenon so worryingly symbolised by George Orwell in his novel *Nineteen Eighty Four* where Winston Smith works in a special archives manipulation department and incinerates past newspaper articles into 'memory holes.'

The Institute will not repeat the submissions it made to the Committee's previous enquiry on the future of journalism suffice to say our belief that the digital oligopolies should be much more fairly rewarding news publishers via the concept of copyright and intellectual property is much more effectively supported by the idea that they are publishers of the news publishers' material.

If they are broadcasting, should they not be subject to Ofcom regulation in terms of the Broadcasting Code?

If they are publishers of print newspaper and magazine content, should they not be subject to regulation by IPSO? If they are regulated by the Advertising Standards Authority (ASA) there can surely be no reason why regulation for hosting franchised published content should not make them liable to other forms of content regulation and indeed Intellectual Property and copyright distribution duties and obligations.

If Parliament were to decide that this would be the most efficient and effective way to regulate and balance the rights of audience and media communicators/publishers, key values of freedom of expression and the avoidance of peremptory and unjustifiable censorship and discrimination of communicators could be protected and addressed.

There should surely be a legal obligation on all manner of oligopoly online platform 'publishers' to protect freedom of expression *within the law.* When 'platforms' make value judgements about expression of opinions, we enter a dangerous area where 'minority' views are frozen out of debates if they do not accord with the views of a majority. That is a very slippery slope.

The Institute invokes the philosophy here of John Stuart Mill from *On Liberty* where the benchmarks of protection must be to prevent the tyranny of the majority and apply the brakes on communication only up until the evidence of clear and present danger of physical harm. The modern understanding of emotional harm needs very careful attenuation in terms of a manifestation and understanding that is as close to the nature of physical harm as possible.

Other Issues.

The Committee's inquiry raises further questions that would significantly extend the Institute's submission beyond the length that is being invited.

We would like to add briefly the following points raised by our members to your inquiry.

Education.

We recommend full and comprehensive education about digital communications, computer science, digital online technology and the role and function of robotic artificial intelligence from Primary School level with a graduated introduction and scaling up in digital citizenship education beyond that which would include the ethics, laws and regulation of social and multimedia communication. It is clearly needed in terms of Continuing Professional Development courses in the profession of journalism and public relations/communications.

'Lawful but harmful.'

When you start applying 'lawful but harmful' judgements to opinions you enter a minefield. Who determines what is harmful? The Institute believes online content should be overseen in the same way as printed publications and broadcasting - within the law of the land, and without arbitrary limits imposed by so-called 'platforms', which deny being publishers but behave as if that is their role.

Advantages of UK statutory regulation of online platform oligopolies.

Statutory regulation by Ofcom or an equivalent for the Digital online public sphere defined as UK digital sovereign territory is that this could deliver and ensure:

platform transparency; regulated content moderation, the promotion and maintenance of standards of the reliability of information, and this can include smartphone and mobile phone messaging apps when the scale and speed of their use goes beyond the bounds of mere private communications between private individuals one-to-one.

Such regulation can also ensure the application of machine-readable standards and ethics so that search engine algorithms can give preference to media that support the journalistic standards and ethics expressed in Ofcom's Broadcasting Code, IPSO's Editors' Code.

Effective models of online freedom of expression and regulatory regimes

The Institute's research in this area suggests that the Committee would find it difficult to identify any other country in the world that has successfully resolved the problems and issues that it is investigating.

The comparative media law, regulation and ethics is vast and complicated. There might be some merit in visiting and investigating (whether physically or virtually) one of the most literate countries and societies in the world- Iceland.

It is among the top countries in the world in terms of Internet deployment and use, and has had to negotiate the fact that censorship is prohibited by the Icelandic Constitution and there is a strong tradition of protecting freedom of expression which fully extends to the use of the Internet and indeed the content of online media. But it is no different from Britain in having to find the best ways of protecting children, combatting terrorism, protecting the rights of copyright

holders and maintaining the rule of law in terms of libel and other perceptions of harm by communication whether civil or criminal.

Iceland is also the home of the International Modern Media Institute (IMMI) set up to promote the exchange of ideas on law that support and protect freedom of information, speech, and expression. IMMI initiated the 'Icelandic Modern Media Initiative', which was unanimously adopted by the Icelandic Parliament in June 2010.

This was not a piece of final legislation but the beginning of a process of editing 13 separate laws according to the proposal's specifications. The Initiative aimed to make Iceland a journalistic safe haven, protecting both freedom of expression as well as freedom of information.

However, the journey to confirming the proposal as legislation was not achieved until 2020 when the Icelandic Parliament encoded the protection of whistle-blowers in the public and private sphere alike into fully applied law and enacted legislation.

The Institute invites the Committee to seek more information about Iceland's experience with freedom of expression online in the context of its social, cultural and political developments during the onset of the digital information age.

15 January 2021