

News Media Association Response to the Law Commission Consultation on Harmful Online Communications: The Criminal Offences (the “[Consultation Paper](#)”)

The News Media Association (“**NMA**”) is the voice of UK national, regional and local newspapers in all their print and digital forms - a £4 billion sector read by 49.2 million adults every month in print and online. Our members publish over 900 news media titles - from The Times, The Guardian, the Daily Mail and the Daily Mirror to the Yorkshire Post, Kent Messenger, and the Monmouthshire Beacon. Our membership spans the industry - from the largest groups to small, independent, family-owned companies publishing one or two local titles.

Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK. The Government and DCMS have expressed a wish to sustain such high-quality journalism, particularly in the local and regional press. That investment in journalism is largely financed by advertising revenues from their print and online news publications and services.

1. Summary of the proposals

Commissioned by the Government as part of the online harms work, the Law Commission recommends reform to the law to protect victims from harmful online behaviour. The Law Commission is consulting on its “*proposals to improve the protection afforded to victims by the criminal law, while at the same time provide better safeguards for freedom of expression*”. To do so, the Law Commission proposes the creation of the following new offences: (i) sending or posting a communication with the intention to harm; (ii) the malicious sharing of information known to be false; (iii) inciting or encouraging group harassment and participation in uncoordinated group (“*pile-on*”) harassment; (iv) cyber-flashing; (v) glorification of violence or violent crime; and (vi) a specific offence of glorification or encouragement of self-harm. These proposals mark a move away from categories of speech to harm caused online.

The Law Commission expressly aims to accommodate Article 10 freedom of expression concerns through: (i) a news media carve out applicable only to the first of those proposed offences (sending or posting a communication with the intention to harm) and then only to the newspaper article itself and not to the customary comments posted below online newspaper articles; and (ii) defences of reasonable excuse and contribution to matters of public interest.

2. Background

NMA has argued strongly for a news publishers’ exemption from the proposed statutory online harms regime. In particular, the NMA opposed the Government’s [Online Harms White Paper](#) proposals, which pose profound dangers to press freedom. We refer you to the [NMA’s Response](#). The NMA has consistently stressed that there must be a robust, comprehensive exemption for all elements of the proposed new offence, including all content on: (i) news sites; *and* (ii) all such content on third party sites including social media platforms. We therefore welcome the Government’s commitment to defend freedom of expression and the invaluable role of a free press

with safeguards for their protection online in its 'Online Harms White Paper: Full government response to the consultation' published this week (the "[Full Government Response](#)"):

"Content and articles produced and published by news websites on their own sites, and below-the-line comments published on these sites, will not be in scope of legislation. In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government is committed to defending the invaluable role of a free media and is clear that online safety measures must do this. The government will continue to engage with a range of stakeholders to develop these proposals."

Successive Secretaries of State and Ministers appear to have accepted the industry's arguments that there is no need for further regulation of an already well-regulated industry and so publishers – and their independent systems of press regulation - ought not be subject to the new regime and its regulator. The Government has rightly recognised that online journalism from news publishers' websites will be exempt, as will reader comments on such sites. It has promised that specific measures will be included in the legislation to make sure journalistic content is still protected when it is reshared on social media platforms.

"Alongside tackling harmful content this legislation will protect freedom of expression and uphold media freedom." (Joint Ministerial forward to the Fully Government Response)

We trust, therefore, that the Government will exempt news publishers such as NMA members and their content wherever it appears. A clear, comprehensive, robust exemption to achieve this must be made on the face of any upcoming Online Safety Bill and any other relevant primary and secondary legislation and regulatory material, a principle we are pleased to see the Government is committed to:

"In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government is committed to defending the invaluable role of a free media and is clear that online safety measures must do this. The government will continue to engage with a range of stakeholders to develop our proposals." (Paragraph 23 of the Full Government Response)

The imposition of the new regime upon news publishers is simply unnecessary, disproportionate and an unjustified incursion into press freedom. Further, publishers already have systems in place to address user generated content concerns, backed up by transparent industry wide standards and enforced by a well-established industry wide regulator, commended by Government. There will be no risk of harm or detriment to individuals, the public or society.

The NMA is opposed to press being subject to an overarching statutory regulator and platforms' own algorithms and compliance systems blocking news content. In the absence of an effective exemption, the Government's proposals would undermine trusted media, not support it. Indeed, it is wholly unnecessary to inaugurate a competing system to govern media which is already well regulated. News media has a long established civil and criminal legal liability, independent regulatory system (such as the Editors' Code upheld by IPSO) and media organisations' own proactive policies. NMA members, local and national, have well established systems relating to user generated content, subject to the operation of the law and independent oversight of IPSO, as practically all NMA members and their titles, local and national are in membership. These include policies on user generated content, users, systems for moderating content where appropriate, reader alerts, complaints, review, take down or re-instatement.

In principle, the NMA supports the Law Commission’s inclusion of an exemption for news media. However, NMA members are extremely concerned that, as drafted, the Law Commission’s proposed exemption would fail to achieve its purpose of preventing undue incursions into Article 10 press freedoms. Any exemption must accord with NMA proposals for an online harm regime and be wider and include all material wherever published including on social media and third-party platforms.

3. Scope of the proposed carveout

The Law Commission proposes *“the offence should cover the sending or posting of any letter, electronic communication, or article (of any description). It should not cover the news media, broadcast media, or cinema”*.

NMA members foresee three significant practical problems with the scope of the proposed carveout, the first of which shall be addressed in the section following this one to avoid duplication: (i) it applies only to sending or posting a communication with the intention to harm; (ii) it applies only to editorial material not to content, especially concerning is the express inclusion of comments to news pieces within the purview of the offence; and (iii) a failure to delineate what is meant by *“news media”*. [**Consultation Question 2**]

a. Exclusion of all published content

The Consultation Paper’s carve out only extends to editorial material not to content. It is imperative for any exemption to encompass both. Most concerning is the express inclusion of comments to a newspaper article on a news publishers’ website being caught within the offence as set out at paragraph 5.66 of the Consultation Paper:

“We do not, however, intend for the proposed offence to cover regulated media such as the news media, broadcast media, and cinema. Our intention is that the publisher of an online newspaper article would not be caught by the proposed offence, but an individual who posts an abusive comment in response to the article would be caught. This could be achieved by way of a carve out, if necessary.”

Comment and its generation, like opinion, is at the heart of free speech and forms an important part of news publication and creating meaningful public debate on topical issues. A principle we are pleased to see has been recognised in the Full Government Response: *“Regulation will safeguard pluralism and ensure internet users can continue to engage in robust debate online.”* As it stands, NMA members remove content that contravenes legal and regulatory parameters from their websites once they become aware, in order to maintain a safe online environment conducive to public debate of its publications. The threat of criminalisation for comments on news publisher’s website will likely have a chilling effect on public discussion in relation to a reputable and researched news publication in a safe and moderated space (via IPSO and industry regulators). Consequently, user generated comments, as recognised in the Full Government Response, must be protected by any exemption for the same reasons that editorial content has been carved out from criminalisation.

“The government will put in place safeguards to ensure that media freedom is upheld. Content and articles produced and published by news services on their own sites do not constitute user-generated content and therefore fall outside the scope of legislation. Below-the-line comments on articles on news publishers’ sites will be explicitly exempted from scope. In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services.” (Part I, Full Government Response)

“Stakeholders raised concerns during the consultation about how the legislation will impact journalistic content online and the importance of upholding media freedom. Content published by a news publisher on its own site (e.g. on a newspaper or broadcaster’s website) will not be in scope of the regulatory framework and user comments on that content will be exempted.” (Paragraph 22 of the Full Government Response)

“Freedom of expression is at the heart of the regulatory framework and there will be strong safeguards to ensure that media freedom is upheld. Content and articles produced and published by news services on their own sites do not constitute user-generated content and so are out of scope. The government recognises the importance of below-the-line comments for enabling reader engagement with the news. User comments below articles on news publishers’ sites will be explicitly exempted from scope.” (Paragraph 1.10, Part I, of the Full Government Response)

Furthermore, as drafted, the Law Commission’s proposed carveout fails to cover the following legitimate scenarios that form part of day-to-day news reporting:

- (i) Journalists routinely post reference to the content their articles on a social media site which would, counter-intuitively, circumvent the proposed press exemption.
- (ii) Similarly, journalists' requests for responses which could include content which might be considered distressing, as is customary with, for example, public enquiries or investigative journalism would fail to be covered and, therefore, stymie public engagement and public discourse.

The NMA appreciates that the Law Commission may not have intended to catch the press in this way, but this demonstrates why a clear and comprehensive exemption is required. We are pleased to see the Government is also keen to address these potential practical impediments via its forthcoming Online Safety Bill.

“Journalistic content is shared across the internet, on social media, forums and other websites. Journalists use social media services to report directly to their audiences. This content is subject to in-scope services’ existing content moderation processes. This can result in journalistic content being removed for vague reasons, with limited opportunities for appeal. Media stakeholders have raised concerns that regulation may result in increased takedowns of journalistic content.”

In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government will continue to engage with a wide range of stakeholders to develop proposals that protect the invaluable role of a free media and ensure that the UK is the safest place in the world to be online.” (Paragraphs 1.11 and 1.12, Part I, of the Full Government Response)

b. Definition of “news media”

For any carve out to be effective, the scope of “news media” must be defined sufficiently broadly to prevent over-criminalisation. If it is restricted to the regulated press, it leaves vulnerable freelance journalists who are not associated with the recognised publication, thus limiting press plurality.

The NMA is confident that there is an industry solution to ensure that the scope of “*news media*” is appropriately delineated. Indeed, there are already working models that could be adopted, including:

- (i) No definition, instead protecting journalistic purposes whereby each case is decided on its facts, which has been in statutory usage for nearly 40 years, from PACE to the most recent legislation on investigatory powers, terrorism without creating difficulties for enforcement authorities, courts or news media organisations;
- (ii) Referring to the notion of UK Press Card Authority press card, an established test for journalistic access to courts and court documentation recognised by the MoJ, HMCTS, the police and for exemption from quarantine cross border;
- (iii) A requirement to be a member of an industry regulator or have an internal complaints procedure, this may need to be one aspect of the definition supplemented by broader criteria to protect, for example, freelance journalism; and
- (iv) Australia’s News Media Bargaining Code which sets out when platforms must pay a fair price for news content and, in doing so, setting out the parameters of news publication for the code to apply.

In line with Government [assurances to the industry](#), the NMA would be happy to work closely with the Government and the Law Commission on drafting the total exemptions necessary, for news publishers and their content, however disseminated and discovered, which must be clear, comprehensive and robust and on the face of any Online Safety Bill and other relevant primary and secondary legislation. We will keep the Government informed on industry measures that will enable their practicable operation, as the proposals in the Consultation Paper are developed.

4. Express exemption required for all proposed offences

Incongruently, the news media exemption has only been proposed in relation to the offence of sending or posting a communication with the intention to harm. Though the structure and language of the remaining offences proposed in the Consultation Paper do not ostensibly seem applicable to news publishers, it is nonetheless very likely that the offence will capture online news articles communicated to an online audience unless there is an express carveout in each case. It is, therefore, imperative to expressly extend any news media carveout to all other proposed offences otherwise news publishers could inadvertently be caught within the ambit of the criminal law.

The problem lies in the consequential practical effects of these proposed offences on news media. Online news dissemination has naturally led to wider readership of news, which has resulted in an increase in complaints regarding online news reporting. Without an express carveout to rely upon, news publishers will be unduly subject to challenges to news content not intended to be caught within the purview of regulation.

The suggested ‘freedom of expression’ requirements and appeals processes fail to meet the industry’s objections of principle and practice. Direct and indirect censorship may not be detectable in practice, they will be subject to the judgement and oversight of the statutory regulator (presumably itself subject to judicial review or further legal action) and may involve lengthy and costly processes which publishers would be unlikely to invoke. Even if this becomes clear at the point of prosecution that the Law Commission did not intend for news media to be caught within the remit of its proposed offences, time and resources would have been unnecessarily expended without a clear

basis for news media exclusion from liability. News is of course a perishable commodity. A clear, comprehensive exemption for news media in relation to all proposed offences is, therefore, necessary to head off the threat of criminalisation, particularly in the following instances:

- (i) Inciting or encouraging group harassment and participation in uncoordinated group (“*pile-on*”) harassment: We note the potential defences of reasonable excuse by virtue of a contribution to a matter of public interest. However, without stronger safeguards such as an express exemption, routine news publication activity could be unduly criminalised, for example: repeated publication of the same or similar stories on several platforms controlled by the same news publisher; and journalists’ requests may be mischaracterised as harassment as could routine questions from multiple journalists from different organisations, thus leading to a chilling effect on investigative journalism. The NMA and other media organisations pointed out at the time of the passage of the protection from harassment act that it would be exploited for use against the media. It is vital that this is avoided by comprehensive, strong exemptions and safeguards. **[Consultation Questions 22 and 23].**
- (ii) Glorification of violent crime and self-harm: The NMA opposes the creation of offences of glorification of violent crime because of its potential impact upon news media. The NMA, broadcasters and other media held detailed discussions on the current Terrorism Offences to avoid restrictions on reporting and glorification of violent crime would pose an even greater threat to freedom of expression. Without an express exemption, news stories reporting on terrorism, violent crime or merely public order matters (such as a demonstration that escalates, police killings, unlawful killings by the military, coverage of recent Black Lives Matter issues) and suicide could be stifled by the threat of criminal action, which the proposed the potential defence of reasonable excuse by virtue of a contribution to a matter of public interest would be insufficient address. **[Consultation Questions 27 and 28].**
- (iii) The sharing of information known to be false: This could provide a helpful tool to those trying to shut down investigative reporting and to suppress widespread reports of, indeed, any matter. As it is, news media faces complaints under the banner of ‘fake news’, despite the high standards of journalistic integrity to which it is held by IPSO, Ofcom, civil and criminal legal liability, and self-regulatory systems. To criminalise dissemination of knowingly false information without an exemption for news media makes it difficult to protect its sources in the face of criminal sanctions. **[Consultation Questions 18 and 19].**

5. Going forward

It is imperative that news publishers, all NMA members, and their content are wholly exempt from the proposed regime. Exemption must be both robust and comprehensive. Exemption must not only apply to the news publishers – corporately and individually to all their workforce and contributors and in respect of all their online publications, services, website content – but must also cover all news publishers’ content that is disseminated online, broadcast, print or any other means, including by third parties, especially the tech companies through social media and searches. Such exemptions must be all encompassing and enduring, without any potential loophole that could be exploited to induce regulatory action, or legal claim, or state repression, or over cautious censorship by third party distributors.

Thus, robust, comprehensive, clear, complete exemption from all elements of any proposed new offences is vital and the only option that would actually safeguard press freedom. This must therefore be framed in any legislation, on face of any Online Safety Bill, in all relevant primary and secondary legislation and all other regulatory material. This would wholly accord with the Government's welcome assurances to the industry, that:

"we are seeking to build sufficient safeguards into our proposals to protect these freedoms. We are consulting the scope of our regulations, and I am keen that we work closely with you and the press industry to ensure our proposals are effective, proportionate and do not have unintended consequences".

The NMA and our member news publishers who are engaged in their own initiatives continue to participate in Government discussions. We would also welcome the opportunity to discuss these matters in more detail with the Law Commission.

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