

**Written evidence from Prof Onora O'Neill, FBA, FRS, FMedSci
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1. I'm an academic and work on a wide range of questions in political philosophy and ethics. I have been Professor of Philosophy at the Universities of Essex and Cambridge, was Principal of Newnham College, Cambridge from 1992-2006, President of the British Academy from 2005-9, chaired the Nuffield Foundation from 1998-2010, and am a crossbench member of the House of Lords (Baroness O'Neill of Bengarve). I have worked and continue to work with many universities, academies and other organisations in and beyond the UK (including in last year the US, the Netherlands, Germany, Norway, Singapore, New Zealand and the Republic of Ireland). I regularly lecture and publish for academic and public policy audiences, and broadcast and write for newspapers occasionally.

For about a decade, beginning with my 2002 Reith Lectures, I have published extensively both on conceptions of media freedom and on many other aspects of the ethics of communication. In answering the questions posed I shall focus primarily on available arguments for media freedoms, their limitations, and some of their implications for press regulation. In my opinion, most public discussion of press freedom and regulation during the last year has made little useful progress because contributors assume some favoured configuration of media freedoms *without argument*, then infer that certain types of media regulation are –or are not—acceptable. Consequently those with differing views of the right or best configuration of media freedoms have talked past one another. It is not possible to reach a realistic or defensible view of media freedoms and regulation without distinguishing and evaluating the underlying arguments for conceptions of media freedom. The conclusions that I shall reach apply to new as well as to traditional media, although their specific implementation will vary.

2. In responding to this question I shall comment on a number of conceptions of media freedoms, on the arguments that support them, and on some of their central practical implications.

a) *Freedom of expression* became the conventional *generic* term to designate the speech rights both of individuals and of the media in the

post war era. The term is used both in UDHR and in ECHR. Appeals to generic freedom of expression have two limitations.

i. In the nature of the case, Declarations of Rights do not justify: they promulgate. Justifications require more than an appeal to the authority of Declarations and Conventions.

ii Even if we set concerns about justification aside, appeals to the authority of the Declarations and Conventions that declare rights to generic freedom of expression are inconclusive. The human rights Declarations do not view freedom of expression as an unconditional right, do not claim that it has a unique acceptable configuration, and do not take a detailed view of the acceptability of specific forms of media regulation.

b) Contemporary claims about *freedom of expression* are quite often confused with J.S. Mill's much more specific claims about *individual rights of self expression*. This simple error often leads to confusion, and claims about media freedom based on this error have no value. Mill argued that individuals should enjoy *rights of self expression* because these are needed to protect individuality, and that individual self expression should be curtailed only where likely to harm others. His argument for rights of self expression still has great cultural resonance, but shows little, if anything, about the speech rights of organisations, including the media, as opposed to those of individuals. Several considerations are relevant:

- i. An argument for free speech for the powerless will not make a case for free speech for powerful organisations. If (unlike other powerful organisations) the media are to enjoy extensive freedom of speech, other arguments are needed.
- ii. Mill's argument from the need to protect individuality applies only to beings that *can* express themselves. Organisations, including media organisations, are not in the business of self-expression: they are not *selves* in the relevant sense.
- iii. Mill's argument for limiting freedom of self expression only when likely to harm others has unclear implications.

The public interest in *media freedom of expression* is therefore not the same as the public interest in *individuals' rights of self expression*. The

former is a public interest, through and through; the latter is primarily a private good, and only indirectly a public good.

c) A quite different argument for freedom of speech and of the press appeals to the importance of seeking and establishing truth. Although this argument first emerged in theological debates in the Reformation, it is now particularly important for speech that comments on or reports on public affairs, science, and other areas in which truth and accuracy are important. .

However, the public interest in a free press is not confined to the public interest in a press that reports matters of fact accurately and observes the disciplines of truth seeking needed for various sorts of inquiry. It also includes an interest in having a press that communicates other sorts of content —e.g. music and art, puzzles and stories—that do not make truth claims. Nevertheless, where truth claims are made, there is a particularly strong public interest in standards of media communication that meet the relevant requirements for truth seeking—accuracy about evidence and its limitations; distinctions between different sorts of evidence; the inclusion of necessary qualifications, and many others.

d) Any adequate justification of freedom of expression must therefore do *more* than provide reasons for protecting individual self expression, and for protecting speech that aims to establish truth. In my view the public interest in freedom of expression, and specifically in a free press, is best construed as an interest in adequate (or better than adequate) standards of public communication, that allow readers, listeners and viewers to gain information and form judgements, and so to participate in social, cultural and democratic life. A free press is a public good because it is needed for civic and common life.

This justification of media freedoms is deeper, more serviceable and more plausible than justifications that go no further than generic claims about freedom of expression, or that appeal to individual rights to self expression, or that ignore the importance of communication that does not aim at truth. A focus on the necessary conditions for communication requires attention both to speech content and to speech acts. Readers, listeners and viewers need to be able to grasp and assess not only speech content—*what is said*—but speech acts—*what is done in saying it*. They must be able to tell reporting from invention, parody from fantasy, advertisements from independent reviews, and so on.

4. This listing of the public interests that might have to be 'balanced' with freedom of the press omits certain types of public interest. Some public interests are neither interests in 'good political governance' nor interests in the protection of a private sphere. Examples might include freedom of association (including aspects of freedom of worship) and freedom of inquiry. Each of these indeed requires freedom for individuals to undertake the relevant activities, but the public interest runs broader than protecting rights for individuals to participate. There is a public interest in people *actually* associating, combining and collaborating with others, not just in their being free to do so; there is a public interest in inquiry and research *actually* taking place, not just in freedom for individuals to inquire and research. Public interests in these activities are neither a matter of 'public life and governance', nor a matter of 'self determination and protection and enforcement of private interests'.
5. The current balance between the 'public interest in freedom of the press and free expression' and other matters of public interest appears to me out of kilter. It is evidently a matter of widespread and intense public concern.

To some extent this reflects confusions between generic *freedom of expression* and individual *rights of self expression* (see 2a, 2b, 2d above), which has supported an unwarranted extension of media freedom at the expense of other matters of public interest. Readers, listeners and viewers don't need media that 'express themselves': they need media that meet at least minimal standards for adequate communication with intended audiences. These standards include (but are not confined to) *accessibility, intelligibility and assessability*.

The UK media generally meet the first two standards well: media content is widely accessible (a lot of it free at the point of consumption), and generally intelligible to intended audiences. In these matters, media interests are aligned with those of readers, listeners and viewers.

Assessability is another matter. At present it can be hard, sometimes impossible, for readers, listeners and viewers to assess what they read, hear or see. At worst they may be deceived or misled, and often they will be unsure how to assess the truth or falsity, the importance or triviality, of media claims.

These deficiencies can be seen across the spectrum of media claims from 'humble' journalism on consumer affairs and local concerns, to politically

significant investigative journalism. It is all too often hard for members of the public to judge the credibility or importance of media claims: are they true or false, report or rumour, evidenced or invented, balanced or tendentious, important or trivial?

While it is important to protect *genuine* investigative journalism into matters of public interest (see 9 c, 9 b ii, below), it is also important to distinguish the genuine article from purported investigative journalism that ignores or flouts the relevant disciplines of truth seeking, or is not directed at any matters of public interest. *Pseudo* public interest journalism discredits the genuine article, is not assessable by its audiences and damages the reputation of the media.

A great deal could be done to make it easier for the public to assess media claims without detriment to press freedom. This will require the establishment of a regulator of *media process*, working to an improved Press Code, with a mandate that explicitly prohibits regulation of *media content*.

An effective framework for remedying these effects could take a number of forms. However, in my view, no remedies can be secured without an a regulator of *media process* that has

- a) *a statutory basis*: otherwise the regulator will be unable to investigate or sanction.
- b) *independence from government and from corporate interests*.
- c) A duty to regulate only in accordance with an agreed and considerably revised Press Code,
- d) No power to require the publication or non publication of content, hence no power to censor.

The question whether regulation should be voluntary or obligatory is not easy. Some will argue that it should be voluntary because a Press Code cannot be enforced on organisations that are outwith the jurisdiction, or on anonymous communication.

In my view, a revised Press Code should at least be obligatory for media organisations that reach audiences above some threshold, or have a turnover above some threshold. I recognise that this leaves issues of enforceability in some cases unresolved.

Press Ethics

6. In my view media organisations are ethical if they genuinely try to communicate in ways that enable intended audiences to understand and to assess what they publish, while respecting the legitimate claims of those on whom they comment and of those affected by their reporting.

These are demanding aims. To meet them the media need not only to refrain from unlawful speech acts (threatening, bribing, defaming, breaches of data protection, breaches of confidentiality—and many others) but to meet adequate ethical and epistemic standards in journalistic, editorial and business practice. There is no single or optimal way of doing this, but in contemporary circumstances it is likely to require *both* a regulator of media process that meets the conditions set out in 5 above, and the adoption of more specific ethical codes that are suited to particular parts of the media.

7. Ethical duties are owed to all of those listed, but are highly differentiated. However, I have a few comments on the headings:
- a) ‘Readers and consumers of the media’. This way of phrasing matters fails to recognise the extent to which exposure to media content is unchosen—particularly by children, those in institutional settings, and those in public places. Regulation should have regard to the realities of media penetration rather than assuming that it always reflects consumer choices.
 - b) Again the phrasing is unsettling. Are those about whom misleading or false information is published the ‘subject matter’ of stories? Arguably not always. Perhaps the focus should be on ‘the ostensible subjects of media coverage, whether true or false’. There may also be duties to persons who are not the ostensible subjects of media coverage, if they are adversely affected by that coverage.
 - c) ‘The wider public’: the phrase covers the case, but may seem too demanding. Not every newspaper or broadcaster, let alone every article or programme, is aimed at ‘the wider public’. There are many more limited publics for who content of specific sorts matters. What matters is that the media take account of *their* public, the *relevant* public, the *intended* public. Nothing has gone wrong if a sports magazine does not review concerts.
 - d) Within this group –‘employees, journalists, and other producers of the media’— there are many distinctions to be drawn. The differing

positions of those who produce media content may have to be recognised both in a regulatory Press Code and in any specific ethical codes adopted by parts of media.

- e) Again, there are many distinctions among agents with a commercial interest in the media, which a regulatory Press Code may need to address.

There is no formula for resolving conflicts between duties to individuals or organisations in these various groups. As in other domains of life, it is often feasible to respect a plurality of duties to a range of others, provided these duties have not been inflated to make conflict inevitable or highly likely. This applies both to any future regulatory Press Code, and to specific ethical codes adopted for particular parts of the media. It should be clear whether the provisions are matters of duty (which must not make incoherent or impossible demands); matters of good professional practice which are (highly) recommended; ideals or aspirations.

8. Ethical codes exist in most professions, and many industries. The UK media have both a 'professional' code (the NUJ code for journalists) and an industry code (the PCC Code for participating newspapers, which is not a regulatory code). Broadcasting has statutory regulation in the form OFCOM, with additional requirements on the BBC. The professional and industry Codes of the UK media contain useful requirements, although some are poorly specified, but they have not proved effective in maintaining media standards.

In my view, professional ethical codes *on their own* have limited efficacy, particularly where 'professions' lack powers or willingness to discipline their errant members. Even in the era of reduced professional self regulation, some regulated professions (medicine, law, dentistry) continue to control entry, certification and revalidation. This secures a degree of professional control of standards. Journalism, however, controls neither entry nor exit, and many would view any 'licence to practice' as a threat to press freedom. There are good reasons, including media freedom reasons, for journalism *not* to become a regulated profession or to seek powers to determine who may work as a journalist. This sets limits to the effectiveness of any ethical codes adopted by parts of the media, and means that ethical codes, while important are not enough.

Equally it is hard to see that a *voluntary industry code* can achieve enough. The PCC has provided a complaints procedure for some of those who think they have been ill used by the media: a useful but limited achievement. It has not secured adequate standards of media communication, adequate respect for those whom the media 'cover', or adequate respect for the legitimate claims of those affected by media reporting. Its processes have not managed to detect, let alone deal with, widespread criminal activity by the media.

These failures are not reasons against having both a regulatory Press Code and appropriate ethical codes. Where Codes have been widely ignored and flouted, steps can be taken to make them more effective.

Traditionally ethical codes worked because they were embedded in cultural and social norms that were widely respected and adhered to, making shame and exclusion the principal sanctions for violation. Adherence to these ethical norms standards cannot be achieved in a scattered workforce, without entry requirements, agreed standards of practice, benchmarks of progression or ways of barring inadequate practitioners,

So any ethical code adopted in parts of the media will need to be able rely on a Press Code with statutory backing that does not threaten media freedom and sets out requirements that are needed to secure communication that is adequate for social, cultural and political life.

9. However, the current PCC code is not merely ineffective but defective. It contains various omissions, exaggerations and weaknesses. It does not focus on the basic requirements for adequate (let alone good) communication; it makes rhetorical gestures towards unachievable aims such as 'rights to know' (rights to receive information are feasible; 'rights to know' are not); it hedges many of its principles. The Code needs extensive redrafting, and in my opinion it would be better to start again. Among my reasons for taking this view are:

- a) Gaps. The Code takes an unsystematic view of duties to communicate effectively, for example by providing evidence and disclosing its limitations. It takes an unsystematic view of the importance of disclosing payments by individuals or commercial organisations in order to secure or prevent media coverage. It takes a piecemeal view of disclosing whether

payments have been made to obtain 'stories'. It says very little about disclosure of interests by journalists, editors, programme makers or proprietors (confined to disclosure of some financial interests *to editors*). It takes a naïf, if convenient, view of 'identifying' persons that (I suspect) reduces to naming them: but identification is often achieved by inference, not by naming. (Newspapers that publish photographs of a child with an identifiable adult do not prevent identification by pixillating the child's face, since the child's identity is readily inferred: consider the publication of such a photograph during media pursuit of David Blunkett). These points are set out more in slightly more detail below, b) i-v.

- b) Remedies. The framework for any more adequate code needs to be based on a systematic of view standards and norms required for adequate communication that enables readers, listeners and viewers to assess media claims. Some of the necessary changes require the media to be more open about their own communication and relevant activities. The following six types of openness should be required in any future Press Code. They would provide a more effective framework for adequately assessable media communication:
- i. **Openness about Payments from Others.** At present readers, listeners and viewers often cannot tell whether money has been paid by a media organisation to obtain content. If they are to assess what the media 'report', they need to be able to distinguish paid for and non-paid for content: who paid for what? Did the 'celebrities' and their agents pay for the publication or suppression of certain stories? Who paid for the lovely clothes, holidays, hotels and meals that are 'reviewed'? What benefits in kind were provided by and for whom? Which parts of the content were actually written by other organisations, whose press releases are substituted for genuine reporting, without any indication that this is being done? What is the point of requiring a distinction between advertisements and other content if a lot of supposedly 'other' content is in fact covert advertisement? Why should not advertising standards apply to all paid for content, including that paid or provided in kind?

- ii. Openness about Payments to Others** At present readers, listeners and viewers cannot tell whether money has been paid, or favours have been provided, either by or on behalf of a media organisation, in order to obtain certain content. Who paid whom to provide private information about others, for example about public figures, ‘celebrities’, their friends, families or employees? Who paid whom to cover certain matters, or not to cover them? A requirement to indicate where payments are made would provide a considerable incentive not to buy content.

A limited exemption from requirements to disclose payments, or perhaps only an exemption from requirements to disclose *who* supplied information, may be needed for genuine investigative journalism. Even there, readers, listeners and viewers might be informed *that* payments had been made, or even *how much* had been paid, even if names of informants had to be withheld.

- iii. Openness about Interests.** Owners, editors, programme makers and journalists have interests, like others in positions of influence, but remain curiously exempt from requirements to disclose them. While the media often demand transparency about the interests of those working for or controlling other powerful organisations, indeed castigate and expose those who fail to meet these standards, they have not shown much interest in comparable transparency for those working in or controlling the media. But audiences may not be able to assess media claims, without knowing the interests of those who make them. It is cheap and easy to list interests on a website and to update the list regularly; it is simple to indicate actual conflicts of interests within an article or feature.

If this were done routinely it would help readers, listeners and viewers to tell what interests financial, commercial and property journalists have in the matters on which they ‘report’ (at present there some progress has been achieved in financial reporting—but there is a long way to go). They could tell whether those writing on taxation pay the taxes on which they opine, or whether they are non-doms. They could tell which political and other causes owners and editors, journalists and programme makers support and fund.

Openness about producers' interests helps others to assess their product.

- iv. **Openness about Errors.** Parts of the media have already found systematic ways of correcting errors promptly. Other parts have not, or correct only trivial errors. The practice is useful not only to those who are misrepresented, but more widely because it helps all readers, listeners and viewers to assess the reliability of media communication.
- v. **Openness about (most) Sources.** The most useful way of enabling others to assess claims is to provide evidence and cite sources. Most good writing and reporting does so, and while a small proportion of media speech may (as suggested) need special treatment, that is not true of a great deal of media communication. An adequately *drawn public interest* exemption would allow *some* sources to be kept confidential for *specific* reasons in *particular* situations, provided appropriate processes were followed. But there is no *general* case for hiding sources —as good journalists have long recognised. Where hiding sources becomes a habit, journalism can become lazy, even corrupt, and will not be open to the assessment or comments of readers, listeners and viewers. Without a default assumption that, *in the absence of a public interest to the contrary*, the media will provide readers listeners and viewers with evidence for their claims, and indications of their sources, communication is impeded and impaired.
- vi. **Openness about Comments from Members of the Public.** Where the media publish comments or letters from members of the public, readers, listeners and viewers should be able to tell whether and how comments are selected for publication.

c) Normativity

A regulatory Press Code should concentrate on defining principles, and in particular on principles that specify requirements. Even this limited aim is not simple, because a range of ethical and epistemic norms must be respected if communication is to be adequately assessable. In addition, some important aims that are not easily specified as

requirements but are 'necessarily the subject of good practice' may also be useful parts of a Press Code.

Matters that are not required, and are not necessary parts of good practice, may be generally *desirable*, or *indicative of excellence*, or *best in class*. They are important, but are probably best left to the ethical codes adopted by specific parts of the media, to editors and programme makers, to schools of journalism and to those who recognise excellence in journalism, for example the Orwell Prize jury. If a Press Code were cluttered with fine aspirations or generally desirable aims it might sound lofty, but would probably be less effective than a more limited code that sets out what is required and prohibited.

- d) For reasons given above, I do not think the spirit of the Press Code is clear, and it may be useful to make it clearer.
- e) Neither the effects nor the effectiveness of the current Press Code are clear. Cynics might say that it is all too clear that non-compliance with the current Press Code, even outright lying and criminal activity, will not be sanctioned. However, these failings may be due not to the Code making the wrong provisions, but to the PCC's lack of means of investigation or enforcement. In my view, however, the current Press Code both has substantive defects and lacks adequate means of enforcement.

10. I think that the process of improving the Code and its use will be long and complex. The first task might be to secure Parliamentary approval for having a statutory code, and the appointment of a body (including, but not dominated by, media representatives) to undertake the subsequent tasks. These would include rewriting the provisions of the Press Code to focus on required principles; pruning gestures towards good practice and aspirations that go beyond what is required; drafting a focused public interest defence to which journalists and media organisations could appeal in defence or mitigation of activity that breaches the Code; defining sanctions that breaches of the Code might incur; addressing specific problems arising from the emergence of new media.

11. A clearer and more focused Press Code, with appropriate statutory backing and appropriate limitations on the regulation of content could

do much to improve and encourage better media standards. A revised Press Code would meet its purpose even if it dealt effectively only with violations of standards for adequate communication, failure of respect for those on whom the media report, and damage to the interests of others, leaving more specific matters to ethical codes. Both a Press Code and subsidiary ethical codes should regulate what is required, and their implementation should aim to detect and prevent media activity that falls below required standards. They should not aim to impose or to recommend more exacting of standards. Even mediocre publications should be able to meet the requirements of the Press Code, and no determinate ideal of media standards should be enforced by regulation.