

# PART I

## 1 Introduction

### 1.1 Purpose and overarching considerations

The Ministry of Culture hereby issues for public consultation a draft new act relating to editorial independence and liability of editor controlled journalistic media<sup>1</sup> (hereafter referred to as the Media Liability Act). The bill updates and gathers currently applicable special rules on liability in the media field, and introduces a number of new legislative provisions. Proposals entailing amendment of the Penal Code and the Compensation Act have been drafted in consultation with the Ministry of Justice and Public Security.

The bill implements the Jeløya Platform, which states that the Government will “[p]ropose a new act relating to media liability that addresses the protection of sources and editorial liability”.

This consultation memorandum also follows up on the report of the Media Liability Commission Official Norwegian Report (NOU) 2011:12 *On freedom of expression and liability in a new media reality*, as well as the Storting’s petition resolution of 17 January 2017 in which the Government was asked to report on a new media liability act.

The Ministry’s primary purpose in publishing the bill is to support the role of editor controlled journalistic mass media as guarantors of open, enlightened public discourse; see the infrastructure requirement in Article 100, sixth paragraph, of the Constitution and the Government’s media policy objectives. To achieve this purpose, the Ministry has adopted the following overarching considerations in the report:

- 1) *First*, liability rules should be adapted to the development in the media sector, in that they should be as technology neutral as possible. The choice of media technology should not, in principle, affect the imposition of liability for unlawful content published by editor controlled journalistic media.
- 2) *Second*, the bill should, insofar as possible, eliminate legal uncertainty and clarify applicable rules by establishing a more uniform system for the imposition of liability for the content of editor controlled journalistic media.
- 3) *Third*, any bill must secure a proper balance between freedom of expression and effective, proper enforcement of other rights that may provide grounds for restricting freedom of expression. On the one hand, the rules must provide practical opportunities for identifying one or several liable parties when the limitations on freedom of expression are breached. On the other hand, the rules must respect the fact that freedom of expression is a fundamental democratic principle, and not restrict it more than strictly necessary.

### 1.2 The main content of the report

This consultation memorandum is divided into five parts. Part I (sections 1, 2 and 3) describes the background to the bill. Part II (sections 4 and 5) provides an account of relevant current law in Norway and the other Nordic countries. In Part III (sections 6 and 7), the Ministry examines developments indicating the need for a review of this policy area, and defines the framework for the Ministry’s assessment. Based on the identified developments and the review of current law, the Ministry then

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<sup>1</sup> See section 7.1.4 on use of the term “editor controlled journalistic media” in this memorandum.

delineates the subject matter of the report and lays down some guiding principles for the subsequent discussion. In Part IV (sections 8 to 16), the Ministry discusses various legal provisions related to media liability, editorial independence, etc. In Part V (sections 17 to 20), the Ministry takes a closer look at the need to gather relevant provisions in a new, separate act, and discusses consequences of the proposal.

In *section 2*, the Ministry provides a brief description of the immediate background to the bill, including the Storting's petition resolution of 17 January 2017 in which the Government was asked to report on a new media liability act.

*Section 3* contains a review of earlier reports and statutory processes that are relevant to the subject matter of the report. The review shows that the question of modernising and coordinating the liability system in a separate media act has been raised several times in recent decades. This chapter also provides an overview of the Media Liability Commission's report and the public consultation on it.

In *section 4*, the Ministry reviews current Norwegian legal provisions applicable to statements, including overarching requirements following from Article 100 of the Constitution and obligations under Article 10 of the European Convention on Human Rights. The general review provides context for an account, in sections 4.6 to 4.12, of the special rules currently applicable to editor controlled journalistic mass media. The review shows that these special rules are not adapted to technological developments in the media field. For example, the editor's liability under criminal law (section 269 of the Penal Code<sup>2</sup>) currently only applies to the traditional printed press and broadcast media, not equivalent digital distribution channels. Moreover, the provisions are located in different pieces of legislation with different areas of application, and there are considerable differences in both drafting and terminology. These differences reflect the fact that the rules have been drafted at different times, under different media technology regimes and in differing legal contexts.

*Section 5* contains a review of foreign law in the area. The primary focus is on Sweden, which several press organisations have identified as their desired model. The section also reviews the media liability systems of the other Nordic countries: Denmark, Finland and Iceland. The review shows that there are relatively substantial differences in how liability for media content is regulated, and that there is currently no commonly preferred regulatory model for the Nordic region.

In *section 6*, the Ministry reviews media technology developments and examines current challenges related to freedom of expression, including topics such as surveillance, the spread of propaganda, disinformation and hate speech online. The review shows that changes in media technology and media habits, combined with general political and social trends in society, are challenging freedom of expression and other fundamental rights. This may affect the appropriate design of the media liability system.

In *section 7*, the Ministry describes the framework for its assessment of the various material legal issues discussed in subsequent chapters. The report is based on the assumption that there is a fundamental difference between editor controlled journalistic mass media and other media and services. When anyone can be a publisher, there will not, generally speaking, be a lack of information and expressions of opinion. What will be scarce is content (journalism) that possesses the credibility, consumer confidence and quality necessary for the content to constitute a basis for free formation of opinions and open, enlightened democratic discourse. This makes it particularly important to support the editorial function and public role of mass media. The Ministry considers that a new media liability act will make a contribution in this regard.

The need for liability rules that deviate from the general legislative system is linked to the democratic function of editor controlled journalistic mass media and, more specifically, to the role of editors as

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<sup>2</sup> Act of 20 May 2005 No 28 relating to criminal penalties.

independent leaders of editorial staff. The fact that editors have an especially independent position and bear expanded liability for content, ensures that editor controlled journalistic media can function as open and independent channels for the exchange of information and debate, administered in accordance with commonly accepted professional standards and ethics. Other media and platforms, such as social media, blogs, private websites, etc., do not raise the same questions concerning *who* can or should be held legally liable for content. In this context, questions more often relate to the design and enforcement of *general* limitations on freedom of expression. Such questions are beyond the scope of media policy and the mandate issued by the Storting for the present report.

In *section 8*, the Ministry discusses in more detail how the editorial function should be defined and regulated by law. The Ministry proposes the inclusion of a provision in the Media Liability Act establishing a duty to appoint an editor and a duty to publish the name of the appointed editor and provide necessary contact information. The duty to specify the name of the editor would replace the corresponding provision in section 270, second paragraph, of the Penal Code, which only applies to periodical publications.

In *section 9*, the Ministry reviews the legislation intended to ensure editorial independence in the media, primarily the Act relating to editorial independence in the media (the Editorial Independence Act).<sup>3</sup> Provisions on independence and liability are closely interlinked in terms of purpose and function. Expanded liability requires that editors have independent decision-making authority with respect to content, and vice versa. The Ministry proposes that the principle of editorial independence in the Editorial Independence Act be retained in a new media liability act, and that overlapping provisions in the Broadcasting Act<sup>4</sup> that are not of independent significance be repealed.

In *section 10*, the Ministry discusses liability of editors under criminal law. The Ministry proposes that the special rule on editor liability should be retained, but that the relevant provision should be transferred to a new media liability act and thus be rendered platform-neutral. The Ministry reviews various potential liability models, including exclusive liability as under Swedish law, but recommends retention of the current model, which imposes strict liability in negligence with a reversed burden of proof. The provision would replace the current section 269 of the Penal Code.

*Section 11* contains a review of editor liability under civil law, i.e. the strict liability in negligence that applies in the case of breaches of privacy under section 3-6, first paragraph, of the Compensation Act.<sup>5</sup> The Ministry proposes to retain liability for breaches of privacy, and to reintroduce the corresponding stricter civil-law liability for defamation that lapsed upon the entry into force of the new Penal Code in 2015. A further proposal is to include a provision on civil liability of editors in the Media Liability Act, a measure that would necessitate minor changes to section 3-6, first paragraph, of the Compensation Act.

In *section 12*, the Ministry reviews special “identification liability” in section 3-6, third paragraph, of the Compensation Act, i.e. civil liability for the owners and publishers of mass media. The Ministry proposes retention of the provision in a new media liability act. The proposal would replace the current section 3-6, third paragraph, of the Compensation Act. This section also discusses the use of corporate penalties against media undertakings. The Ministry proposes retention of the current law, and proposes no new legal provisions.

In *section 13*, the Ministry discusses current provisions on exemption from liability under criminal law and in damages for a person who has participated only through technical assistance or distribution. These provisions play an important role in preventing technical partners from engaging in “private

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<sup>3</sup> Act of 13 June 2008 No. 41 relating to editorial freedom in the media.

<sup>4</sup> Act of 4 December 1992 No. 127 relating to broadcasting and audiovisual on-demand services.

<sup>5</sup> Act of 13 June 1969 No. 26 relating to compensation.

“censorship” to avoid criminal and civil liability. The Ministry proposes to retain the exemption from criminal liability that presently applies to breaches of privacy, and to expand the exemption to include other unlawful statements published in editor controlled media, regardless of the distribution technology employed. A new provision in the Media Liability Act could replace the current section 267, second paragraph, of the Penal Code and section 3-6, second paragraph, of the Compensation Act. It is proposed that the corresponding exemption in section 236, second paragraph, of the Penal Code on unlawful dissemination of gross depictions of violence should also be retained.

In *section 14*, the Ministry examines whether, in light of international obligations in the area, editors should bear special liability, both under criminal law and in damages, for user-generated content published in relevant media. The Ministry proposes that editors should not be subject to stricter liability than follows from general liability rules, but that editors should have certain duties designed to help support applicable press ethics rules. Further, the Ministry invites input regarding a provision establishing exemption from liability along the lines of section 18 of the Electronic Commerce Act. The provision would establish a general duty of care but clarify that editors and other editorial staff acting on behalf of an editor are exempt from liability if they react quickly by removing unlawful content.

In *section 15*, the Ministry discusses whether media staff should be made subject to a statutory duty of confidentiality in respect of the identity of sources who have been promised anonymity and, alternatively, a right of anonymity for sources. The Ministry sees strong grounds in favour of introducing a statutory duty of confidentiality with regard to source identity in cases where the source and a media representative have agreed on anonymity. However, the Ministry of Culture does not make a specific proposal at this stage, and instead asks consultation respondents for their views on whether a duty of confidentiality should be made statutory, and on the various legal issues raised by such a provision.

*Section 16* contains a review of the right of reply, which currently applies to printed media under section 270, third paragraph, of the Penal Code and broadcast media under section 5-1 of the Broadcasting Act (rectification). The Ministry proposes to retain a statutory right of reply, but to make the provision platform-neutral by moving it into the proposed media liability act. The Ministry proposes to decriminalise breach of the right of reply. Such a provision could replace section 270, third paragraph, of the Penal Code and section 5-1 of the Broadcasting Act.

In *section 17*, the Ministry discusses in greater detail whether the conclusions reached in its review of the material issues (sections 8 to 16) provide grounds for gathering special provisions in a dedicated media liability act. The Ministry points out that the proposed statutory provisions have a corresponding purpose and function, and target the same types of media. The Ministry therefore proposes gathering the rules in a dedicated sectoral act applicable to editor controlled journalistic media. The Ministry also discusses the title and purpose provision of the act.

In *section 18*, the Ministry discusses more specifically desirable delimitation of the area of application of a new media liability act. The Ministry concludes that the act’s area of application should match the area of application of the current Editorial Independence Act, but proposes revised wording of the provision to make it more platform-neutral and robust in the face of technological and other changes in the sector. Finally, the Ministry reviews terminology usage and the detailed structure of the act.

In *section 19*, the Ministry assesses the financial and administrative consequences of the proposals, while the full draft law is contained in *section 20*.