

# **Online Safety and Media Regulation Bill 2022**

## **Submission on behalf of the RTÉ Election Steering Group**

**March 2022**

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## 1. Introduction

The RTÉ Election Steering Group comprises senior editorial management across RTÉ output under the Chair of the Director General.

This Group oversees and manages RTÉ coverage plans at elections to ensure compliance with our statutory and regulatory obligations.

There is also a sub-group which maintains contact with political parties and engages with them, outside of elections, on issues like coverage of political party Ard Fheiseanna/Conferences.

The Election Steering Group has been examining Section 46 M (4) of the OSMR Bill, specifically the wording “party political programmes” which replaces the current wording “party political broadcasts” in the Broadcasting Act 2009.

While we understand the OSMR Bill is intended to reflect and capture ‘on demand’ providers, we believe that as worded, it will have an unintended consequence in respect of key aspects of RTÉ’s coverage of Ard Fheiseanna/Conferences and Party-Political Broadcasts (PPBs).

Additionally, there are further issues concerning the provision of PPBs for future elections and RTÉ believes these issues can be addressed within the context of the OSMR Bill by way of updating the regulatory framework.

## **2. Online Safety & Media Regulation Bill 2022**

Section 46 M (4) of the Bill replaces Section 41 (5) in the existing Broadcasting Act 2009 in relation to Party Political Broadcasts.

Put simply, the wording “party political broadcast” is replaced with new wording – “party political programmes.”

The effect of this is twofold –

- i) It removes a statutory reference to offering Party Political Broadcasts, and
- ii) The new wording - “Party Political Programmes” - has a significantly wider reach if applied to a broadcaster

A PPB is offered in the context of a national election (or referendum) and is a short broadcast of not more than 3 minutes duration and is uncontested airtime. In contrast, a Party-Political Programme can be broadcast at any time.

To put this in context: RTÉ provides party conference coverage each year (subject to objective qualifying criteria) and two key elements of this are live coverage of a Party Leader Address and live coverage of proceedings from the conference floor. Currently, 7 parties qualify for this coverage.

These broadcasts, ranging from 30 minutes (Leader Address) to 1 hour (conference debate) are uncontested airtime, that is, RTÉ does not exercise editorial control.

In RTÉ’s view the proposed wording of Section 46 M (4) would apply to a Leader Address and conference coverage and these broadcasts would be considered “party political programmes” in that they are scheduled programmes with uncontested airtime, offered outside of an election cycle.

RTÉ believes the inevitable classification of these broadcasts as “party political programmes” in the proposed wording in the OSMR Bill would provide a strong legal basis for any party on the Dáil Register of Political Parties to compel RTÉ to provide such coverage, once offered to one or a limited number of parties. There are 25 parties on the Register.

It would not be feasible technically, financially or from a scheduling perspective for any broadcaster to provide such a range of party leader addresses or live coverage of conference debates.

It is RTÉ’s understanding that the use of the wording “party political programmes” is intended to facilitate the inclusion of party-political content (that is programmes) within an on-demand service by other media service providers. RTÉ recognises that the thrust of the OSMR Bill is to place broadcasters and media service providers on an analogous regulatory



footing. However, this aim can still be achieved by drawing the necessary and important distinction within Section 46 M (4) as outlined further below. In the absence of such distinction, the current wording of this section potentially removes the ability to offer PPBs and live coverage of a Leaders' Address and conference proceedings. This could not have been the legislative intent.

### 3. Background Re PPBs

RTÉ, like all broadcasters, is subject to the provisions of the **Broadcasting Act, 2009** and **Section 39** of that Act states that broadcasters must ensure that its news broadcasts are reported and presented in “*an objective and impartial manner*” (**Section 39(1)(a)**) and that the broadcast treatment of current affairs and current public debates is “*fair to all interests concerned*” and, “*presented in an impartial and objective manner*” (**Section 39(1)(b)**).

Over many decades RTÉ has offered Party Political Broadcasts during national elections such as, European, and General elections.

In the absence of any legislative or regulatory guidance, it has been left to the broadcaster to determine which parties qualify, the allocation of time and the rotation of PPBs over a campaign, in a manner that is fair.

To ensure RTÉ complies with its obligations it applies objective metrics to guide its election and conference coverage, such as past electoral performance and a threshold of representation, such as a minimum number of TDs. We have referenced the minimum number of TDs required under Dáil Eireann Standing Orders to form a group in the House. RTÉ has applied this metric when offering PPBs.

Prior to the 2020 General Election the minimum number of TDs required to form a group under Dáil Standing Orders was 7. On this basis PPBs were offered to any party in the General Election 2020 which was on the Dáil Register of Political Parties, and which was standing 7 or more candidates.

The allocation of time for each PPB was based on past electoral support, namely, a party’s share of the First Preference Vote in the previous General Election. New parties were offered a PPB of a minimum duration. Using this formula, a total of 19 PPBs were offered to 11 parties over 17 days.

Fine Gael and Fianna Fáil had 4 PPBs each and Sinn Féin had 3. That accounted for 11 days. The remaining 8 parties had 1 PPB each. In the past, each party had an allocated day(s) for their respective PPB.

The 2020 General Election created a situation where the number of PPBs exceeded the number of available days in the election cycle. To overcome this, 3 of the smaller parties agreed to have their PPBs run ‘back-to-back’ on the same day.

However, such agreement may not be forthcoming in a future election.

RTÉ has applied criteria based on past electoral performance on a consistent basis across election coverage, including the offer of PPBs.

The current Dáil has determined that the minimum number of TDs required to form a group is now 5.

If RTÉ is to apply this metric to a future national election the number of parties that potentially qualify for PPBs is likely to increase quite significantly, to the point where it may not be feasible to offer PPBs in a manner that complies with the obligations of fairness.

From a practical perspective, at the outset of any national election, several parties – those already with elected representatives – can reasonably expect they will be offered PPBs and can commence preparatory work on their broadcasts, pending confirmation from RTÉ of the time allocations.

But for absolute certainty on the final number of qualifying parties (particularly in respect of smaller and/or less well-known parties) RTÉ must await the close of nominations to confirm definitively those standing 5 candidates or more.

The potential difficulty is evident: in a future election RTÉ could offer of PPBs initially to parties who it is known will qualify under existing criteria only to find on the close of nominations that the total number of qualifying parties creates a situation where the total number of PPBs significantly exceeds the available days in the election cycle.

The only viable option would be multiple PPBs on the same days giving rise to issues of fairness between parties which could only be resolved by voluntary agreement between parties, in circumstances where they are already competing in an election campaign. There would be a real risk of litigation and potential disruption of coverage at the commencement of an election campaign.



#### 4. The lack of Statutory and/or Regulatory clarity

RTÉ has successfully dealt with legal and regulatory challenges in the past regarding the criteria used for its coverage of elections and referenda. While generally, these cases related to inclusion in leader and candidate debates, a core feature addressed by the courts and the BAI has been RTÉ's reliance on the principle of past electoral support as a key metric that is fair, objective, and impartial.

Judges in the superior courts and the BAI Compliance Committee have acknowledged the validity of using past electoral performance. The most recent cases arose in the context of the 2019 European elections.

In 2019 in the High Court, Mr Justice Senan Allen when dismissing an application by one candidate, who sought to challenge his non-inclusion in a television debate in the European elections, noted:

*"It seems to me that the selection of participants in the debate by reference to performance in previous elections is sensible and is likely to be some measure of audience interest in the participants."*

A complaint over non-inclusion by one candidate in a 2019 European election debate was also considered by the BAI Compliance Committee which upheld the approach adopted by RTÉ stating:

*The principle of fairness requires that the approach adopted by broadcasters should be transparent. The Committee noted that the broadcaster clearly outlined the mechanisms it developed to ensure that the programmes in question were fair, objective, and impartial. The criteria drawn up by the broadcaster was based on past electoral performance and the Committee noted that the broadcaster provided clear rationale for the approach. The Committee was of the view that the criteria adopted when choosing participants in the programmes was carefully considered and applied in a manner which was equitable and fair." [BAI decisions (C5192 /C5253) Delivered February 19th, 2020]*

[Underlined is RTÉ emphasis]

Reliance on past electoral performance was also endorsed in **Kivlehan Vs RTÉ [2016] 2 IR 539** when RTÉ applied such criteria to determine which candidates would qualify for inclusion in a leader's debate. Ms Justice Baker noted:

*"I consider that the threshold criterion that a party have some representation in the outgoing Dáil reflects an objective means of ascertaining the current support that a political party has, and that such a criterion is capable of being objectively ascertained and is intrinsically fair."*



The decisions above highlight the principle of using past electoral performance.

The validity of reviewing such criteria in the context of the prevailing circumstances was also noted in **Kivlehan Vs RTÉ**. Ms Justice Baker observed-

*“the process by which the (RTÉ) Steering Group decides the criteria emerges from a consideration of the current political landscape.”*

In relation to PPBs specifically, RTÉ relies on a measure of past electoral performance, namely, share of the First Preference Vote at the last comparable election. It is worth noting that while the existing Broadcasting Act 2009 allows a broadcaster to offer PPBs, there is no obligation on a broadcaster to do so. Indeed, this aspect has been considered by the Supreme Court in two cases – **State (Lynch) Vs Cooney** and **Coughlan Vs Broadcasting Complaints Commission**.

In Lynch, Walsh J expressly noted that RTÉ was under “no statutory or other obligation to transmit (PPBs) but is entitled to do so.”

In Coughlan, all the Judges who addressed the issue of whether PPBs were mandatory agreed they were not. Hamilton CJ observed that political parties have no right to be afforded the opportunity to make PPBs and Keane J confirmed that there was no obligation to allow PPBs even during a General Election campaign.

It is also noteworthy that Denham J pointed out the decision whether to offer PPBs must be arrived at in the context of equality and fairness and expressly observed –

*“It might be necessary to decide to hold no party-political broadcasts in a referendum campaign.”*

Although this comment was made in the context of PPBs in a referendum, in the light of Keane J’s observations that there is no obligation to broadcast PPBs even in a general election, there is a strong case that if a broadcaster could not be reasonably certain that it could ensure fairness in the offer of PPBs, its obligations of impartiality and objectivity may require it not to offer them.

The fundamental issue is that even though judges of the High Court, the Supreme Court and the BAI Compliance Committee have repeatedly upheld the principle of past electoral performance applied by RTÉ, there is currently no statutory or explicit regulatory framework that reflects these principles as a fair and objective basis for editorial decision-making during elections.

It is RTÉ’s view that in the absence of such regulatory clarity it will be increasingly difficult and legally fraught for a broadcaster to fulfil the obligations of fairness with PPBs in future elections.

In contrast, prior to the recent UK General Election, the regulator, Ofcom, set out extensive Guidelines stating past electoral performance must be used by broadcasters in guiding election coverage. Ofcom placed a requirement “on broadcasters to take election-related editorial decisions and decisions about allocations of PEBS (Party Election Broadcasts) and PPBs by reference to evidence of past electoral support and/or current support.”

In the context of the political landscape today compared to that at the enactment of the current Broadcasting Act 2009, there is a clear and compelling public interest justification to provide a coherent regulatory framework that will ensure a robust and durable basis for editorial decision making, particularly regarding the offering of PPBs and election coverage generally.



## 5. Suggested Approach

RTÉ believes the issues above can and should be addressed within the parameters of the OSMR Bill.

Firstly, the concerns regarding the wording “party political programmes” can be resolved by making a clear distinction between a party-political broadcast offered by a broadcaster and a party-political programme offered by a media service provider.

The current wording of Section 41 (5) of the Broadcasting Act 2009 states -

*5) Nothing in subsection (3) is to be read as preventing the broadcasting of a party-political broadcast provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party.*

The draft wording of Section 46 M (4) of the OSMR Bill states –

*Nothing in subsection (2)(a) prevents a broadcaster from broadcasting, or a relevant media service provider from making available, party-political programmes, provided that an unfair preference is not given to any political party— (a) by a broadcaster, in the allocation of time for such programmes, or (b) by a relevant media service provider, in the positioning of such programmes in a catalogue of the relevant service.*

**RTÉ suggests the following for consideration:**

Section 46 M (4) of the OSMR Bill to state –

*Nothing in subsection (2)(a) prevents a broadcaster from broadcasting a Party-Political Broadcast, or a relevant media service provider from making available, party-political programmes provided that an unfair preference is not given to any political party— (a) by a broadcaster, in the allocation of time for such party-political broadcasts or (b) by a relevant media service provider, in the positioning of such programmes in a catalogue of the relevant service.*

This has the effect of retaining the existing provision that allows a broadcaster to offer PPBs while also ensuring the conference coverage outlined earlier is not classified as “party political programmes.”

Secondly, RTÉ strongly urges the inclusion of an enabling provision in the OSMR Bill allowing the new Media Commission to set out revised Rule 27 Guidelines which confirm that a broadcaster should give due weight to past electoral performance, amongst other factors in determining election coverage, including the offer of PPBs, and that a broadcaster may review such criteria taking account of the prevailing political landscape within the context of their obligations under the Act and Codes.



This would have the effect of providing a regulatory basis for principles endorsed by the courts and the BAI Compliance Committee and in doing so will provide a secure basis for standards that are widely accepted as fair and in the public interest.

## 6. Summary

RTÉ believes the above proposals are reasonable, sensible, and proportionate.

At a time when it has rarely been more imperative for democratic societies to ensure their electoral processes, including the media's role, are transparent and robust, this opportunity should be used to provide a coherent regulatory framework.

This is particularly so with the next European Elections set for May 2024 and the next General Election thereafter. RTÉ is willing to engage further on these issues.

The RTÉ Election Steering Group will follow the progress of the OSMR Bill and will, in the light of prevailing statutory and regulatory provisions review our approach to future elections a year prior to the European Elections. This is important, particularly in respect of Party-Political Broadcasts, so that RTÉ can provide parties with clear guidance well in advance of those elections.

## March 2022