



# Regulation of the Press

Nine Key Questions for Civil Society



CHANGING MINDS • CHANGING LIVES

## ACKNOWLEDGEMENTS

This paper was written by Douglas White, with assistance from Jennifer Wallace. Invaluable comment, feedback and support was provided by Martyn Evans, Martine Miller, Blair Jenkins and Bill Livingstone.



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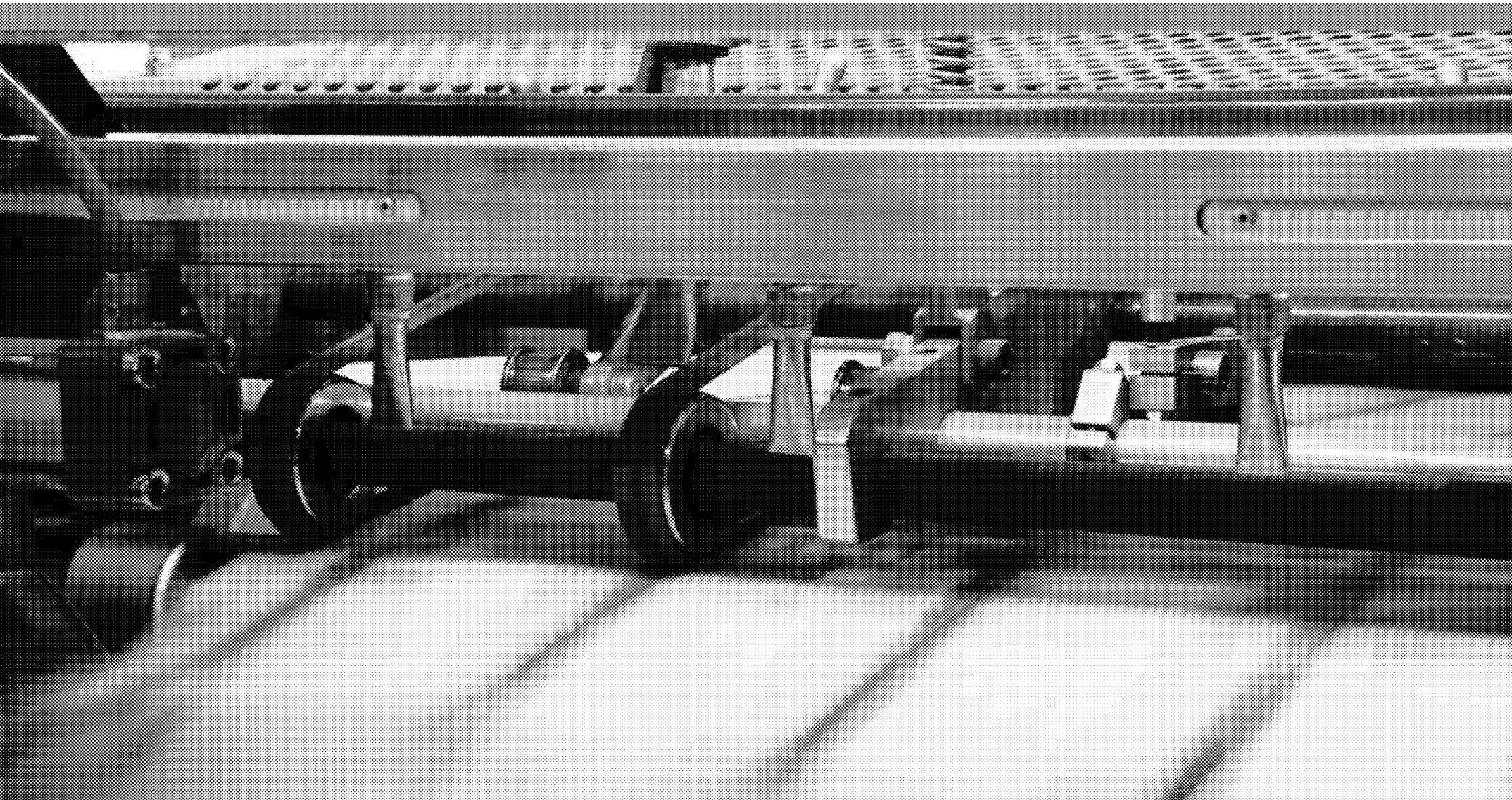
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# Foreword and summary



## Foreword

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This is a year in which many of the news headlines have been dominated by shocking stories about the very people who report the news. In the wake of the phone-hacking scandal in the UK, journalists who are used to scrutinising and questioning the actions of others have found the searchlight shining in their direction.

Some are likely to find it an uncomfortable experience. A public judicial inquiry under Lord Justice Leveson has been appointed to look into the culture, practices and ethics of the press and to make recommendations on “a new more effective policy and regulatory regime”.

The Carnegie UK Trust has a long-standing interest in the relationship between news media, civil society and healthy democracy. We firmly believe in the importance of robust and reliable news sources and that newspapers are an essential part of that landscape.

If an overhaul of press regulation is to be one outcome of public concern over the conduct of some newspapers, then it is a task which must be approached with great care. Strong high-quality journalism is vital for holding the powerful to account and it is not in society’s interest to place new obstacles in its way. Equally, it is clear that

there has been a loss of public confidence in the current regulatory arrangements and trust must now be restored.

It is our hope that there will be a wider and deeper engagement by citizens and civil society organisations in helping to secure a sustainable balance between a free press and a responsible press. This discussion paper is offered by the Carnegie UK Trust to support that process, by framing the key questions that we believe must be addressed if the right path is to be found.

The paper by the Trust is designed as a gateway to the debate and certainly not as any kind of a conclusion. In so far as any recommendations are made, these are largely on points of broad principle and should be regarded as indicative rather than definitive at this stage.

Finally, it should not be forgotten that providing the right regulatory framework is only part of the solution in securing better news media in the digital age. There are also important issues in journalism education, in new technology and innovative business models and in widening public access to high-quality news. We will address this broader debate in future publications.

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## Summary

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### Overview

Following the phone hacking crisis this summer, a wide-ranging public inquiry has been appointed to investigate the entire affair. As part of its remit, the inquiry, to be led by Lord Justice Leveson, has been asked to provide “*recommendations for a new more effective policy and regulatory regime*” for the press.

Given the critical role of the press in a democracy, this is an extremely complex and challenging task – and we believe that civil society must be at the heart of the debate about how this can be achieved. Civil society organisations are an essential complement to, and influence upon, the more formal institutions of democracy, and they have energy, expertise, knowledge, and breadth of opinions and perspectives to offer. We believe their input to the debate about press regulation is critical to finding a workable set of solutions that secures the correct balance between maximising press freedom while providing the level of scrutiny and protection that is required.

This discussion paper is therefore aimed at civil society organisations across the UK and is designed to support their engagement in this crucial debate. To support this process, we have identified and explored nine key questions that

we believe must be considered and addressed as part of these deliberations. In doing this, we hope to widen the parameters of the debate and increase the range of views and parties contributing to it – and therefore help those involved to achieve a set of outcomes which meets the needs of all concerned.

The Carnegie UK Trust has a long-standing interest and involvement in the relationship between media, civil society and democracy. In 2010, we argued that media ownership and content is a priority issue for civil society organisations and public policy-makers to consider and address.

Through our Commission on the Future of Civil Society, we argued that principles for media should be:

- freedom for civil society to engage with the media and shape content;
- pluralism to ensure the media is controlled by a wide range of different interests; and
- integrity to ensure that news media promotes essential values such as honesty and accuracy.

To build upon the work of the Commission, we appointed Blair Jenkins as a Carnegie Fellow in February 2011 to investigate how better news

services might be delivered in the UK in the digital age. A comprehensive report from this work will be published in late 2011, focusing on ethical standards in journalism, the increasing importance of new forms of local news, and how civic society can contribute to stronger media. This discussion paper on the regulation of the press is intended as a prelude to this forthcoming, broader report.

### 1. Why is press regulation a special case?

The press has a unique position and role in a democracy, which makes it unlike any other industry that may be the subject of regulation. It plays an essential role in investigating, scrutinising and monitoring decision-makers and those in positions of power. Indeed, the content of newspapers is covered by the right of freedom of expression, under Article 10 of the European Convention of Human Rights. We believe that the press must continue to have the freedom that it needs to carry out this vital role of holding individuals, organisations and governments to account on behalf of the public – and therefore the configuration of the new regulatory system will need careful consideration.

At the same time, it is important to recognise that our society already imposes regulations upon the press in a number of perfectly appropriate and legitimate ways – including through criminal law, competition law, and civil law. Meanwhile, Article 10 places restrictions on freedom of expression, and further restrictions are placed on the activities of the news media by Article 8 of the Convention, which covers the right to privacy. Much of the current debate about the future of press regulation focuses on the balance between the right to freedom of expression and the restrictions placed upon it by both Article 10 and Article 8.

The phone hacking crisis provides a perfect illustration of the nature of these tensions, as it showed that elements of the press had been engaging in intrusive activities that they should not have been – but at the same time it was investigative journalism carried out by other publications that was critical in bringing these practices to light.

## 2. Who are we trying to regulate?

The issue of who to regulate is not easily answered. The emergence and proliferation of new forms of digital and social media mean that it is now easier than ever for organisations and individuals to use online forums to comment, analyse and report on issues that are of interest to them. Attempts to include digital publication with a regulatory regime could undermine the Internet's capacity to provide a unique space for debate and discussion,

and could seriously impair freedom of expression. On the other hand, failure to address digital publication could undermine regulation of the press, as this increasingly becomes the medium of choice for consumers of news journalism.

A further issue in relation to who we are trying to regulate focuses on whether we aim to regulate individual journalists or editors and journalists. For example, would it make sense to have separate and specific regulatory requirements for newspaper proprietors, editors and journalists? And if so, does this simplify or complicate the question on regulating digital news?

## 3. What do we want to regulate?

Most of the public discourse and attention on the phone hacking crisis has centred on the *methods* by which the press have obtained – or sought to obtain – information. There appears to be a strong appetite to eradicate the most intrusive practices of news journalists.

What is less clear is the extent to which there is a need, or desire, to strengthen the regulations regarding the *content* of the press. Tightening the regulation of content would be complex and may be undesirable, given the press role in investigating issues in the public interest.

The issues of methods and content cannot be easily disentangled in press regulation. The press

has an unusual right to engage in otherwise prohibited activities in order to protect the public interest. They have a legitimate argument that the ends can justify the means. However, does there need to be a strengthening of the regulatory framework around the public interest test, including a greater role for civil society in determining the public interest?

## 4. Who should do the regulating?

We believe that the unique role of the press in holding decision-makers to account means that government's role in regulating the press should be minimised. However, parliament could potentially play an important role in developing a statutory basis for regulation by requiring proprietors, editors and/or journalists to be members of a compulsory scheme. This may provide legitimacy for the regulatory body without requiring government involvement in its day-to-day operations.

We believe that industry expertise and knowledge should be at the heart of any new system of press regulation. However, on its own, this is unlikely to satisfy critics who see self-regulation as inherently weak. The Trust believes that the answer lies with civil society. Civil society organisations could play a much greater role in the regulatory system, and engage with the regulatory body to ensure that regulations and interventions meet public expectations.

Options for increasing the citizen involvement in the regulatory system should also be considered. However, there are also ‘demand-side’ dynamics to this debate, and the press often argue that they are only providing what people wish to read. We believe that citizens themselves must consider what influence they can and might exert over the content of news reporting.

## 5. Who pays for the regulation of the press?

Any regulatory system has costs attached to it. There are significant competitive pressures on newspapers at the present time. Significant increases in costs to newspapers could impact on the sustainability of their businesses. On the other hand, it may not be desirable for the regulatory body to be funded wholly by government, and therefore not perceived as independent. We are clear, however, that it would **not** be desirable to cover the costs of additional regulation by imposing a fee upon citizens who wish to use the regulatory system.

## 6. What model of regulation should be used?

A critical question is how any regulatory system might work in practice. The Press Complaints Commission currently operates on a predominantly ex-post, rules-based model.

One approach would be to strengthen the rules underpinning the process. A new set of standards for regulating the press could be developed by engaging

citizens and civil society to help explore tensions between methods and content. Some commentators have suggested strengthening the rules to match broadcasting rules on impartiality. The Trust believes very strongly that such a restriction should not be placed on the press as it would fundamentally undermine the right to freedom of expression.

## 7. How do citizens access redress?

There is a perception that it is currently too difficult for people to get access to redress if they are unhappy about how the press has treated them. This is partly due to ‘inequalities of arms’ with few individuals able to match the legal expertise of newspaper owners. For this reason, it may be useful to explore the potential for an ombudsman arrangement with mediation options. These mechanisms are generally considered to be more accessible than courts and may be more investigative than the public perception of the current Press Complaints Commission. However, it is important that the positive features of the current system are retained within any new approach – and consideration would need to be given as to how any moves towards an ombudsman-style approach could be reconciled with a desire to increase citizen involvement in the new system.

## 8. How should regulations be enforced?

Whichever approach is chosen for achieving redress, it will only have an impact if it is able

to apply appropriate sanctions to punish any identified breach of regulations. Financial penalties may help to discourage editors from undertaking prohibited activities. In addition, the regulator could be given powers to require newspapers to ensure that corrections and apologies receive the same prominence and position in the newspaper as the original article. A further issue for consideration is whether there should be any personal sanctions applied to individuals responsible for the regulatory breaches. However, there are complexities and challenges associated with each of these options, and these will require thorough analysis and investigation to identify viable solutions.

## 9. What are the limits of regulation?

There are clearly limits to what any regulatory system can achieve. Some activities are clearly illegal, and dealing with behaviour of this nature ultimately – and correctly – falls within the remit of the police and the courts rather than the regulator. There are other ways, alongside regulation, that businesses in any given industry can be encouraged to play by the rules – and these approaches and opportunities should be considered in tandem with the debates about a new regulatory regime.

Our forthcoming report by Blair Jenkins, Carnegie Fellow, will examine the broader issues around the future of news, media and journalism.

# Background



## Background

### Context

The fallout from the recent phone hacking crisis will have a significant impact upon news media in the UK. There will be major changes across many different parts of the newspaper industry as a result of the crisis. The scale and nature of many of these changes are still to be determined, but it is already clear that one of the main adjustments will be a fundamental reform of the press regulation system.

Given the apparent scale of the phone hacking activities that are alleged to have taken place, the vulnerability of many of the alleged victims of this practice, and the unprecedented public and political anger about what has occurred, it is clear that in regulation terms, the status quo is not an option. Indeed, the Press Complaints Commission (PCC) itself has indicated that the current system needs to be overhauled<sup>1</sup>.

Consequently, one of the core objectives of the wide-ranging public inquiry into the affair, which is being led by Lord Justice Leveson, is to deliver:

*“Recommendations for a new more effective policy and regulatory regime which supports the*

*integrity and freedom of the press, the plurality of the media and its independence, including from Government, while encouraging the highest ethical and professional standards.”<sup>2</sup>*

Designing this new regime is arguably one of the most challenging and complex tasks facing the inquiry team.

### Why is the Carnegie UK Trust getting involved in the debate about press regulation?

The Carnegie UK Trust has a long-standing interest in the relationship between the media, civil society and democracy. In March 2010, the Carnegie UK Trust published *Making Good Society – the Final Report of the Commission of Inquiry into the Future of Civil Society in the UK and Ireland*. This report identified media ownership and content as priority areas for action for civil society organisations and policy-makers, and highlighted three overarching values as being of particular significance to this agenda. These were:

- Freedom – the freedom of all parts of civil society to shape media content, including maximum freedom on the Internet.

- Pluralism – news media controlled by a wide range of different interests, with civil society involved in the ownership of media organisations.
- Integrity – news media that promote essential values such as honesty and accuracy.

In order to strengthen the existence of these values within the media industry, our Commission of Inquiry called for action in the following areas:

- Improved transparency and accountability of news content.
- Protection of the free, open and democratic space offered by the Internet.
- Exploration of new funding models for different types of local media news service.
- Greater financial and policy commitments from local and national governments and philanthropic organisations to grow sustainable local and community news provision<sup>3</sup>.

Following these recommendations, the Carnegie UK Trust appointed Blair Jenkins as a Carnegie Fellow in February 2011 to build on the work

<sup>1</sup> Statement from the PCC on phone hacking; Press Complaints Commission; 6 July 2011

<sup>2</sup> Terms of Reference for Judge-Led Inquiry; House of Commons Library; 20 July 2011

<sup>3</sup> Making Good Society; Carnegie UK Trust; 2010

of the Commission, and investigate how better news services might be delivered in the UK in the digital age.

In carrying out this work, the Trust recognises that citizens can now access news content from a wider range of sources than ever before, and we believe this is extremely beneficial. However, we also know that this means that the traditional players in the media industry are facing huge competition and cost pressures. As a result, we believe there is a need to examine how news media can continue to fulfil its essential role in delivering objective, investigative reporting that holds national and local decision-makers to account within this new and changing context. Structural, ethical, training and regulatory systems all should be reviewed to identify a viable way forward – and we believe the role that civil society might play within these systems should be central to the debate. A Carnegie UK Trust report on these issues, written by Blair Jenkins, will be published in late 2011.

### What is the aim of this discussion paper?

This short discussion paper *Regulation of the press – nine key questions for civil society* is intended as a prelude to the broader report that we will publish later this year. The discussion paper focuses on the specific questions involved in the construction of any new press regulatory system and the particular role that civil society

might play in this system. The overall aim of the paper is to encourage a greater number of civil society organisations and groups to become involved in the debates about how the press might be regulated in the future.

Civil society has to date had a relatively limited input to the discussions about how any new press regulation system might be configured – and we believe that this limited involvement has contributed to the rather narrow, and at times polarised, nature of the current debate. A dichotomy appears to be emerging between those who favour tough new regulations to control press behaviour and those who argue that any tightening of the system will impinge upon the freedom of the press and its ability to monitor, investigate and scrutinise those who hold positions of power. We believe that civil society has a valuable role to play in widening the parameters of this debate.

The question of how the press should be regulated is a question of critical importance to democracy. Civil society is an essential complement to, and influence upon, the more formal institutions of democracy – and therefore we believe it should be at the heart of this debate. Furthermore, civil society organisations and groups have energy, expertise, knowledge, and breadth of opinions and perspectives to offer – and these attributes can play a vital role in helping to answer some of the complex and

challenging questions involved in designing a new system for press regulation.

This discussion paper therefore aims to explore some of the issues that we believe are likely to be of greatest interest and importance to civil society organisations wishing to engage with this important agenda. We hope that a broad spectrum of civil society organisations will consider these issues and seek to engage with the Leveson Inquiry and the various other processes and investigations that have been set up to examine these matters. At the same time, we hope that those involved in the public inquiry will take a proactive approach to engaging with civil society organisations and groups.

In publishing this discussion paper, we do not seek to provide an exhaustive and detailed review of all of the issues involved in press regulation or to deliver a comprehensive analysis of the previous work carried out on this topic. We also do not seek to provide definitive answers and responses to the complex and challenging questions involved – a wide range of stakeholders must play a role in agreeing how these issues should be resolved. Finally, in contributing to this debate, we recognise and understand that the issues involved are inherently complex and that there are no easy resolutions. Indeed, the challenging nature of the questions to be considered perhaps explains why a general consensus on a way forward has not yet begun to emerge.

## The theory of regulation

A valuable starting point for a discussion about regulation of the press is to consider why regulation is necessary, in any market, in the first place. The Office of Fair Trading states that there are essentially two main reasons why policy-makers might choose to intervene in any given market: to influence the outcomes that the market delivers, or to make the market work more effectively by promoting and protecting competition and choice<sup>4</sup>.

Regulation represents one particular type of public policy intervention in a market, and there are generally two broad types of regulation that can be established. ‘Lifeline’ regulations protect consumers from harm and guarantee access to essential services. ‘Market-making’ regulations frame how a market operates and ensure that customers are able to choose from a range of different providers, services and prices<sup>5</sup>. Given some of the complex issues involved in the debates about the regulation of the press, it is not clear whether this fits in neatly with either of these two categories. Nevertheless, we firmly believe that effective, necessary and proportionate regulation has a critical role to play in ensuring that any market works well for consumers, citizens, businesses and government.

But how do we define whether regulation is ‘effective’? In 1997, the UK Better Regulation Task Force set out the five principles of good regulation. These are still used by the Department of Business Innovation and Skills today, and they establish that regulation must be:

- Transparent – open, simple and easy for all to understand and use.
- Accountable – subject to scrutiny by the public.
- Consistent – fairly and accurately implemented.
- Targeted – focused on the nub of the problem.
- Proportionate – only implemented when necessary, appropriate to the nature and scale of harm that might be caused, and with costs clearly identified and minimised.

The Carnegie UK Trust is supportive of these principles and we believe that they should play an important role in helping to underpin the thinking about what any new regulatory regime for the press should look like.

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<sup>4</sup> Governments in Markets; Office of Fair Trading; 2009

<sup>5</sup> Regulating in the Consumer Interest; Consumer Focus; 2010

# Regulation of the press – nine key questions for civil society



## Regulation of the press – nine key questions for civil society

The theoretical discussion provides a useful framework for considering how any future regulatory system for the press might be configured. However, there are also a range of more specific questions that we believe should be considered in some detail before any new system can be established – and civil society must play a central role in this debate.

### 1. Why is press regulation a special case?

The first, absolutely critical point which must be taken into account, is that the press has a unique position and role in a democracy, which makes it unlike any other industry that may be the subject of a public policy intervention. It is the key channel through which politicians seek to provide information to citizens and build support for their policy positions and decisions. It also has an essential role to play in investigating, scrutinising and monitoring decision-makers and those in positions of power. It must hold these individuals to account on behalf of the public to ensure that power is not being abused and that the decisions made are in the public interest.

### Box 1: European Convention of Human Rights – Article 10: Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for the maintaining of the authority and impartiality of the judiciary.

Article 10 of the European Convention of Human Rights, set out in Box 1, provides the right of freedom of expression. It also establishes the restrictions that can legitimately be placed upon this right. The Article therefore enshrines the critical role that the press fulfils. We believe that Article 10 must act as the platform upon which any discussion about the future regulation of the press should be based. The aim of the discussion must be to maximise the freedoms outlined in part 1 of the Article, whilst at the same time identifying how the appropriate checks and balances can be used to ensure that the restrictions set out in part 2 are effectively and robustly upheld.

In order for this to be achieved we believe that government should not be the main player in any future regulatory system for the press. The campaigning organisation 'Reporters Without Borders' publishes a Press Freedom Index every year. In 2010, the UK had a very respectable ranking of 19th (just ahead of the USA) out of 178 countries for the freedom of its press<sup>6</sup>. It is important that the new regulatory system enables the UK to maintain its ranking both in objective terms but equally crucial in terms of the trust the public has in it. Minimising the presence of government in any new system is a critical component of this.

<sup>6</sup> Press Freedom Index 2010; Reporters Without Borders

There are of course comprehensive statutory regulatory mechanisms in place for the broadcasting industry in the UK<sup>7</sup>. That industry fulfils a similar function to the press in monitoring, questioning and scrutinising decision-makers. However, it is significant that whilst Article 10 of the European Convention specifically allows the licensing of broadcasting, it does not include the same provision in relation to the press. This suggests that there are some fundamental differences between the two. The Prime Minister David Cameron has argued that one of these differences is that there are a limited number of television channels, and therefore regulation of broadcasting is necessary to ensure that a small set of views does not crowd out other perspectives. In contrast, there are no restrictions on the number of newspapers and magazines that may be printed, and therefore there is no similar driver for regulating the press<sup>8</sup>.

Nevertheless, it is important to recognise that our society does already impose regulations upon the press in a number of perfectly appropriate and legitimate ways. It does this through criminal law, competition law, and civil law to name a few strands. For example, it is illegal for anyone, including the press, to publish information that is libellous or which may affect the outcome of a legal or judicial process – and the sanctions

for breaching these laws can be draconian. Furthermore there are also laws that prohibit the use of certain practices, which could potentially be used by the press or others, to gather information. Phone hacking is one very obvious example of this.

The debate, and this discussion paper, focuses upon how the behaviour of the press specifically – rather than society as a whole – might be regulated. This encompasses issues such as the standards and codes of conduct that those operating in the industry should have to comply with, the lines of accountability and responsibility within the industry, the sanctions for wrongdoing, and the options for redress should the industry cause harm to an individual or an organisation. In these matters, we believe that there would be real dangers and risks if government were to be heavily involved in the ongoing monitoring and enforcement of the new system. Nonetheless, there will be a number of extremely difficult questions to address in striking the right balance between maximising press freedom and strengthening the regulatory system so that the legitimate restrictions upon freedom of expression are robustly upheld.

## 2. Who are we trying to regulate?

The next crucial question, which must be approached in any debate about future regulation of the press, is to define exactly who it is who should be regulated. There are around

1,200 national, regional or local newspapers in the UK<sup>9</sup> and the PCC regulates the vast majority of these. As well as regulating the printed material that these titles produce, the PCC has also, since 1997, regulated the online versions of these publications<sup>10</sup>.

A critical question that must be considered is how journalistic conduct and behaviour can be regulated in the digital era. The emergence and proliferation of new forms of digital and social media means that it is now easier than ever for organisations and individuals to use online forums to comment, analyse and report on issues that are of interest to them. Approximately 30 million people in the UK can post content online via Facebook<sup>11</sup> and around 12 million can do so via Twitter<sup>12</sup>. Meanwhile, the PCC does not regulate readers' personal comments on online newspaper sites as these are not deemed to be the responsibility of the newspaper's editor<sup>13</sup>. Consideration is needed as to whether there should be an attempt to include some of these digital journalistic outputs within any new regulatory framework.

9 British Library figures; 2011

10 Self-Regulation of the Press; House of Commons Culture Media and Sport Committee; 2007

11 Speech by Joanna Shields, Vice President Facebook Europe; Financial Times Digital Media and Broadcasting Conference; 2011

12 UK Social Media Statistics; Xposure Creative Brand Marketing; 2011

13 Self-Regulation of the Press; House of Commons Culture Media and Sport Committee; 2007

7 For example the Ofcom Broadcasting Code provides a detailed set of requirements that all broadcast programmes must comply with

8 Prime Minister David Cameron; House of Commons; 13 July 2011

This is not an easy question to address. Serious thought will need to be given as to whether any moves in this direction would be in any way feasible or desirable. As the Commission of Inquiry into the Future of Civil Society in the UK and Ireland highlighted, one of the main attractions and benefits of the Internet is that it is completely free, open and unregulated<sup>14</sup>. Attempts to include it within a new, tougher press regulation system could undermine its capacity to provide a unique space for debate and discussion, and could seriously impair freedom of expression.

Meanwhile, defining the boundaries for where any regulation in this area might be set is extremely difficult. The PCC has highlighted previously that it might well be impossible to regulate the Internet in any meaningful way, even if this were desirable, given that the volume of content it provides is so vast, it changes so frequently and it transcends national borders<sup>15</sup>.

Furthermore, wherever a regulatory boundary is set in this field, it is likely that people will find a new way of approaching the issue in order to remain outside of it. In light of these arguments, it seems that seeking to broaden the definition of the 'press' to include a greater volume of digital content would be highly challenging and possibly deeply detrimental.

Despite these major concerns, it is clear that there are significant implications in failing to tackle this issue effectively. More and more news content and comment is now being delivered through online channels, often for free. These channels are growing in significance and are likely to become a much more important source of news and opinion for many citizens over the next decade. The recent furore over super-injunctions, and the breaching of these through the social networking site Twitter, provides a perfect illustration of the pertinence of these issues. Therefore, there are clearly significant risks in establishing a substantial – and expensive – new press regulatory system that fails to consider the relevance and impact of online content. If the regulatory proposals that emerge from the present debate don't address these issues in some way, then there is a danger that the new regulatory regime will become an anachronism almost before it has begun.

A second element to the question of who should be regulated is to consider exactly which individuals in the press should be included within this regulatory framework. At present, the Editors' Code of Practice states that:

"It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists."

In developing proposals for a new system, it may be useful to consider the different groups involved and whether different regulatory requirements should be devised for each. For example, would it make sense to have separate and specific regulatory requirements for newspaper proprietors, editors and journalists? This may help to give greater transparency and clarity about the roles and responsibilities of each of these different parties. However, there potentially is a risk that such differentiation could make the system cumbersome and possibly confusing, both for those involved in the industry and for the public.

'Fit and proper person' tests are applied in various industries, including broadcasting, to test whether people in positions of power and responsibility in a business should be holding such a position. Again, it may be useful to consider whether a similar mechanism could be applied in the newspaper industry – perhaps for proprietors, and/or for editors. Once again though, careful investigation and analysis would be required to assess what impact, if any, such a test might have upon the desire of providers to participate in the industry and upon the right to freedom of expression.

### 3. What do we want to regulate?

The next issue that must be considered is which aspects of press activity we actually want to regulate, and whether and how the system needs to be strengthened to enable this. Most of the public

<sup>14</sup> Making Good Society; Carnegie UK Trust; 2010

<sup>15</sup> Memorandum submitted to the House of Commons Culture Media and Sport Committee Inquiry into Self-Regulation of the Press; Press Complaints Commission; 2007

discourse and attention on the phone hacking crisis has centred on the *methods* by which the press have obtained – or sought to obtain – information for their stories. There appears to be a strong appetite amongst both the public and politicians to ensure that certain methods are eradicated from the industry. This is welcome and important.

What is far less clear is the extent to which there is a need, or desire, to strengthen regulations regarding the news *content* produced by the national printed press. There have been suggestions by some that any new regulatory framework should seek to take a tougher approach on issues of content, as well as on those of methods. Generally, however, this question has received less coverage and analysis in the furore around phone hacking than the debate about methods. This is significant as there is likely to be a much more diverse set of views about the need for additional regulation on content issues.

Indeed, this question is central to the debate about how to maximise freedom of expression whilst ensuring that the legitimate restrictions upon this right are properly upheld. For example, there has been a great deal of debate in recent years about whether particular news stories, such as those focusing on the private lives of individuals who are in the public eye, should be deemed to be in the public interest and therefore worthy of coverage by the press<sup>16</sup>. Concern has been

### Box 2: The Public Interest

1. The public interest includes, but is not confined to:
  - i) Detecting or exposing crime or serious impropriety.
  - ii) Protecting public health and safety.
  - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.
3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.
4. The PCC will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

expressed that at present, this tension between Article 10 of the European Convention of Human Rights (The Right to Freedom of Expression), and Article 8 (The Right to Privacy) is essentially being resolved through court judgements in a series of individual cases – and that this threatens to undermine the regulatory system, and arguably represents a threat to press freedom<sup>17</sup>. Many of those involved believe that it would be beneficial for a more systematic and consistent approach to be developed, and the Leveson Inquiry appears to offer an appropriate opportunity to resolve some

of these tensions and hopefully identify a way forward that is a little clearer for all concerned.

Despite the important distinction between content and methods, it is clearly impossible to completely separate the two debates. Unusually, the press has the right to engage in practices which would otherwise be prohibited, if the information that these practices uncovers is deemed to be in the public interest – as defined in the Editors' Code of Practice used by the PCC and set out in Box 2<sup>18</sup>.

<sup>16</sup> For example the report on 'Press Standards, Privacy and Libel' published by the House of Commons Culture Media and Sport Select Committee in 2010 examined these issues in some detail.

<sup>17</sup> A More Accountable Press; Media Standards Trust; 2009

<sup>18</sup> Editors' Code of Practice; Press Complaints Commission; 2011

In these carefully prescribed circumstances, the press can legitimately argue that the ends can justify the means. Given the critical role of the press in democracy, we believe it is vital that this unusual right that the press has to engage in otherwise prohibited activities in order to protect the public interest is maintained in any new regulatory system. However, this is a complex and sensitive issue, and it is one that needs serious and detailed consideration.

In particular, it is important to consider whether changes are needed to make the press more accountable when engaging in practices which are only permitted in certain circumstances. For example, might it be helpful to make the system more specific so that certain practices can only be used for *some* issues of public interest rather than all? Alternatively, could the regulator potentially play a role in ensuring that newspapers and magazines have sufficiently robust systems and procedures in place for using and approving those practices that are only permitted if the information they gather is deemed to be in the public interest? Each of these options, and the possible implications, could be explored – but careful analysis and consideration would be required in order to ensure that the correct balance was achieved, and that any new measure would not place prohibitive restrictions upon the ability of journalists to undertake legitimate subterfuge to expose criminal or corrupt activities.

#### 4. Who should do the regulating?

The next key issue that must be considered is the challenging question of who should actually do the regulating. This question is at the heart of much of the debate about whether and how the press should be regulated in the future. As we set out above, we believe that given the unique role and function of the press in a democracy, there are serious risks in government having a strong role in the implementation, monitoring and enforcement of any new regulatory system. However, the current regulatory model as deployed by the PCC, has clearly been damaged by the phone hacking crisis. A new approach therefore seems to be required.

In developing any new approach, it is critical that the benefits of having the input of industry experts into the regulatory system are not lost. The Office of Fair Trading is clear that any industry is likely to have a greater sense of ownership of the rules and regulations which it must adhere to, and is more likely to accept these rules, if providers have some direct involvement in determining these and ensuring they are upheld<sup>19</sup>. It is therefore vital to the success of any future press regulation system that the industry has a high degree of ownership and buy-in to it. Newspaper proprietors, editors and journalists all have a legitimate interest in the regulatory system and should be involved in some way. It is

certainly in the interests of good journalists and editors that everyone operating in the industry should adhere to the standards expected of them. Indeed, an independent review of the PCC's governance structures recommended in 2010 that the industry should become more engaged with the regulatory system<sup>20</sup>, and we believe that industry expertise and knowledge should be at the heart of the new system.

However, it is clear that the current arrangements need to be significantly strengthened and there are different ways in which this might be achieved. For example, one of the main differences between the PCC and regulators, such as Ofcom, Ofgem and the Financial Services Authority (FSA), is that membership of the PCC is voluntary. The PCC has no statutory basis; its existence and powers are determined by the newspapers it regulates. Newspapers are not obliged to join or adhere to its decisions – and indeed some major newspapers in the UK, such as the Daily Express, do not pay funds to the PCC and are not regulated by it. One option worthy of consideration going forward then may be to legally require all newspapers, magazines and other relevant publications to be part of the new regulatory regime. This would not involve government in the day-to-day running of the system, but it could give greater strength to an industry-led regulatory framework.

<sup>19</sup> Policy Statement – The Role of Self-Regulation in the OFT's Consumer Protection Work; Office of Fair Trading; 2009

<sup>20</sup> Governance of the Press Complaints Commission: An Independent Review; Governance Review Panel; 2010

Simply requiring the press to be part of the regulatory regime, however, may not be sufficient to satisfy the concerns of politicians and the public about how the behaviour and conduct of some elements of the press can be improved. If any new system is to be successful, then it may be that the powers available to the regulator allowing it to take action against companies who breach regulations also require strengthening – again potentially through giving these a stronger statutory footing. There is precedent of such an approach in other industries. For example, the Advertising Standards Authority is defined as a self-regulatory body. It is funded through a levy on advertising expenditure and has no legal powers itself – but it uses the Office of Fair Trading and Ofcom to provide a legal backstop, and these organisations *do* have statutory powers to take action against those in the industry who do not play by the rules<sup>21</sup>. It should be considered whether a similar approach might help strengthen the self-regulatory regime for the press.

Nevertheless, even if there were to be a new legal backstop, there would still be legitimate questions to be addressed about whether a regulatory regime run only by the industry would remain appropriate for the press in light of the phone hacking crisis – even although we are clear that the industry should be at the heart of any new system. This raises an important the

question: if it is not desirable for government to play a greater role in the regulatory regime (and we are clear that it is not), then what other parties may be able to work alongside the industry and provide the necessary independence, scrutiny, checks and balances?

We believe that the answer lies with civil society. Given the critical role of the press in a democracy and the importance of a strong civil society as an essential part of the fabric of any democratic society, there appears to be significant potential for enhancing the links and relationships between the two. Civil society organisations could potentially play a far greater role in helping to ensure that the conduct of the newspaper industry meets public expectations, and in involving the public in discussions and debates about how the industry operates. Serious consideration should therefore be given as to how civil society organisations can be involved in any new regulatory regime.

In addition, given the scale of the public outcry over the phone hacking issue, we believe that the potential for citizens to be more involved in the new regulatory regime should also be examined. The PCC states that it is independent because the majority of its commissioners are lay members. However, other options may exist for strengthening the citizen interest in the regulatory system in the future. There was widespread public anger when it became known that ordinary people in

extremely vulnerable situations had been the victims of phone hacking. This anger – which was expressed through digital media channels, print and broadcast media, and contact with elected representatives – was critical in changing the nature of the debate around phone hacking, and it played an important role in convincing political and industry leaders that they needed to take radical action to try to address the problem. Consideration should be given to how the energy and engagement that the public displayed in relation to phone hacking might be channelled into the new regulatory regime, so that the public as a whole plays a much greater role in helping to hold the press to account on an ongoing basis.

However, in seeking to involve the citizen-interest in the debate, it is also fair to ask what responsibilities citizens have in relation to the press and what is reported. There are ‘demand-side’ aspects to this debate as well as the ‘supply-side’ aspects – as the press would argue that it only reports on what people want to read. Therefore, citizens must consider what influence they can and might exert over the content of news reporting.

## 5. Who pays for the regulation of the press?

It is critical to recognise that all types of regulation have costs attached to them. For example, it may be that regulations require businesses to establish new processes and procedures, which usually incur costs. There

<sup>21</sup> Advertising Standards Authority  
<http://www.asa.org.uk/>

are also costs attached to the enforcement of regulation. Whilst businesses often have to pay these regulatory costs in the first instance, these costs are normally passed on to consumers through higher prices or to citizens through higher taxes<sup>22</sup>.

This is extremely relevant within any debate about the regulation of the press. The newspaper industry is facing significant financial pressures. Between 2004 and 2009 the circulation of the ten largest national daily newspapers fell by 13%, whilst advertisers are increasingly looking at online marketing opportunities rather than using the print media<sup>23</sup>. A major increase in regulatory costs could therefore have a significant impact upon the sustainability of many news outlets, which could then have serious implications for the plurality of news provision and consequently for democracy. Given this situation, it is critical that any proposals for a new regulatory regime for the press are fully measured and assessed, to examine how they would work in practice and ensure that there would be no unintended or detrimental consequences.

The PCC is currently funded through a levy on the newspaper and magazine industry at a cost

of just under £2 million per annum<sup>24</sup>. The PCC's funding model is similar to that of the FSA, which is funded by financial institutions, and Ofgem, which is funded by the energy companies. However, the budgets of these two large regulators dwarf those of the PCC. In 2011/12, Ofgem's budget is more than £40 million<sup>25</sup> whilst the FSA's is more than £500 million<sup>26</sup>. Ofcom has a slightly different funding model in that it receives funding from the UK Government as well as through fees from the broadcasting and communications industry. Although its budget has been cut substantially this year, it still has funding of £115 million for 2011/12<sup>27</sup>.

Even allowing for the size and complexity of the markets that the FSA, Ofgem and Ofcom have to regulate, it is clear that the resources which these regulators have available to them enable them to carry out a far more extensive set of regulatory activities than those which the PCC is able to undertake with its much smaller budget. Thus, it is critical that any revision of the press regulatory regime includes a thorough assessment of the resource requirements of the new system, and ensures that the regulator is provided with the resources it needs to do the job.

However, any increase in the scale and scope of press regulation would inevitably involve an increase in costs. As indicated above, such an increase could have a significant and negative effect upon the newspaper industry, and it may simply not be feasible to ask the industry to pay.

If the industry is not able to fund the cost of any additional regulations, then other resources would need to be found. It is imperative that these resources are **not** generated by the introduction of fees for individuals and organisations who submit complaints about the industry to the regulator. One of the underpinning principles of the PCC is that it provides free access to redress for those who need it, therefore helping to offset the disparity of resources that often exists between citizens and the businesses that they might wish to complain about. It is critical that this principle of free access to the system for citizens is retained within the new regulatory regime.

Government might be able to provide some of the additional resources that may be needed, but given the current pressures on the public finances, it is likely that there would be serious questions attached to any moves in this direction. Asking the taxpayer to pay for this new regulatory regime may not be seen as a priority in the current financial climate. Meanwhile, given the critical importance of protecting the freedom of expression – and by extension the freedom of the

22 Regulating in the Consumer Interest; Consumer Focus; 2010

23 Press Standards, Privacy and Libel; House of Commons Culture Media and Sport Select Committee; 2010

24 Annual Report; PCC; 2010

25 Corporate Strategy and Plan 2011-16; Ofgem; 2011

26 Business Plan 2011/12; FSA; 2011

27 Ofcom's Tariff Tables 2011/12; Ofcom; 2011

press – it is also reasonable to ask whether public funding would be an appropriate method of paying for press regulation, if this were to in any way create a perception that government was somehow involved in the industry, which would clearly not be desirable.

An alternative approach might be to consider how the regulatory model could be made self-financing in some way. This might be done perhaps by imposing financial penalties if regulations are breached, and then using these monies to fund regulatory activities. However, there would potentially be a significant conflict of interest if the regulator’s funding were dependent upon it taking tough enforcement action against the industry. Another option could be for the regulator to offer some services that it might charge a fee for – but again there would be serious questions to consider around conflicts of interest, and in any case such an approach might only deliver very limited additional funds.

**6. What model of regulation should be used?**

In its 2009 report *Themes and Trends in Regulatory Reform*, the House of Commons Regulatory Reform Select Committee identified a number of distinct regulatory models. Each of these models could be applied in any new regulatory framework for the press, but there are clearly advantages and disadvantages of each approach, as set out in Table 1.

Table 1 – Models of regulation<sup>28</sup>

Regulatory model	Approach	Advantages	Disadvantages
<b>Risk-based</b>	Focuses efforts and resources on avoiding the worst outcomes or practices.	Tackles the most harmful or problematic activities.	Would not tackle other practices, which may be seen as undesirable but which are deemed not to be as damaging or intrusive as others.
<b>Rules-based</b>	Provides a detailed set of rules about what is required and permitted – and what is not.	Very clear, transparent and easy to understand.	Can be inflexible with a tendency to be behind the curve – as providers may develop new approaches and tactics which are objectionable or which may have adverse impacts, but which cannot be immediately prevented or acted upon as they are not specifically accounted for within the regulations.
<b>Outcomes or principles-based</b>	High-level approach that does not regulate per se against any specific activities or methods but assesses the <i>effects</i> of these practices to test if these are harmful.	Broad, and therefore difficult for providers to circumvent.	Requires a clearly defined set of exceptions to be built in – otherwise the overarching principles can be difficult to interpret, apply and enforce.

28 Themes and Trends in Regulatory Reform; House of Commons Regulatory Reform Select Committee; 2009

The PCC generally takes a rules-based approach to regulation at present. However, it will be important to consider the pros and cons of the different models described above and identify which approach is most appropriate for any future regulatory model.

In addition to examining these different regulatory models, a further important issue for consideration is to assess whether these models should be applied reactively (ex-post) or proactively (ex-ante). The PCC is predominately based on an ex-post system, which aims to remedy problems after they have occurred. Ex-ante systems in contrast are more anticipatory and seek to prevent problems from developing in the first place. As with the different regulatory models described in Table 1, there are clearly advantages and disadvantages of both ex-post and ex-ante regulation – and those involved in designing a new regulatory system for the press will again have to weigh up these strengths and weaknesses in order to determine an appropriate way forward (see Table 2).

Table 2 – Ex-ante versus ex-post regulation<sup>29</sup>

	Advantages	Disadvantages
<b>Ex-post</b>	<p>Clearly sets out which types of behaviour are prohibited.</p> <p>Only seeks to take action against conduct that has been proven or deemed to be harmful to the public good.</p> <p>Requires relatively little ongoing monitoring and information-gathering processes, and therefore is low cost.</p> <p>Maintains a high degree of separation and clear boundaries between the regulator and the regulated as there is no need for regular contact on different regulatory issues.</p>	<p>Cannot prevent harm from occurring - it can only take action after the event has occurred to try and rectify harm.</p> <p>Can often find it difficult to obtain the information they need to enforce regulations from the companies being investigated – either because this information is no longer available, or because businesses are reluctant to provide information which could lead to them being punished.</p> <p>May have a limited impact in preventing businesses from becoming too powerful in any given market.</p>
<b>Ex-ante</b>	<p>Can avoid harm from occurring in the first place by establishing clear expectations of how businesses will behave, and then monitoring performance against these on an ongoing basis.</p> <p>Can take early action to help to prevent anti-competitive behaviour and the abuse of market power.</p> <p>Provides an effective process for the resolution of any complaint – as information relevant to any complaint is likely to have been collected by businesses, and possibly shared with the regulator, on an ongoing basis.</p>	<p>Tends to prevent all behaviour of a certain type, regardless of whether or not it would cause any harm.</p> <p>Requires businesses to have systems to monitor issues and gather information on an ongoing basis, which can result in significant costs being incurred.</p> <p>Usually requires regular, close contact between the regulator and the regulated to ensure that businesses are meeting their requirements at all times – therefore there is a danger of ‘regulatory capture’.</p>

29 The ICT Regulation Toolkit; infoDev and the International Telecommunication Union; 2011

One way of approaching this issue may be to try and determine the standards that the press should be required to adhere to, and then identify which regulatory system best supports these. The PCC currently regulates the industry according to the Editors' Code of Practice, which sets out the standards that the press is required to meet in the following areas:

- Accuracy
- Opportunity for reply
- Privacy
- Harassment
- Intrusion into grief or shock
- Children
- Children in sex cases
- Hospitals
- Reporting of crime
- Clandestine devices and subterfuge
- Victims of sexual assault
- Discrimination
- Financial journalism
- Confidential sources
- Witness payments in criminal trials
- Payment to criminals

Whilst these are undoubtedly a useful and important set of standards, it is interesting to note that the Ofcom Broadcasting Code, which all broadcast programmes must adhere to, provides a far more detailed and prescriptive set of requirements. This greater detail arguably offers the public a greater level of protection,

transparency and scrutiny than is available through the current PCC code. It may therefore be useful to consider whether the provisions set out in the Broadcasting Code could offer a suitable starting point for the creation of any new set of standards for regulating the press. However, a full and detailed review of the Broadcasting Code would clearly be required before this could be taken forward, to ensure that there would be no detrimental or unintended consequences – including any negative impact upon the freedom of expression.

For example, one key point of difference is that the Broadcasting Code requires broadcasters to take an impartial stance on political issues. In the wake of the phone hacking crisis, some politicians have suggested there could be a similar requirement for the press. We believe very strongly that such a restriction should **not** be placed upon the press. One of the key features of the press is the opinions that they express, and this is of great importance to their readers – while any restriction to the political freedom of the press would fatally undermine the right to freedom of expression, as outlined earlier in this paper. On a separate note, serious consideration would also need to be given as to whether the provisions in the Broadcasting Code would allow sufficient scope for the press to engage in activities that would otherwise be prohibited if these activities uncovered information that was in the public interest, as this is also clearly of critical importance.

## 7. How do citizens access redress?

Any regulatory system in any market is greatly undermined if there is not an effective mechanism that can assess whether the rules and requirements of the system have been breached, and deliver redress for those who have been affected<sup>30</sup>.

However, at present, there appears to be a perception amongst politicians and the public that it is currently too difficult to take enforcement action against the press. For example, the PCC has been criticised in the past for not doing enough to investigate cases proactively, or to investigate cases that have been referred to it by a third party<sup>31</sup>. An independent review of the PCC's governance arrangements concluded that there should be greater clarity about when and how the PCC could take action in different situations<sup>32</sup>, while a report by the Media Standards Trust recommended that the press regulator should be able receive complaints from any source, and should be able to investigate any potential breaches of the regulatory framework proactively, without the need for a complaint to be received<sup>33</sup>.

30 Mapping UK Consumer Redress; Office of Fair Trading; 2010

31 Press Standards, Privacy and Libel; House of Commons Culture Media and Sport Select Committee; 2010

32 Governance of the Press Complaints Commission: An Independent Review; Governance Review Panel; 2010

33 Can independent self-regulation keep standards high and preserve press freedom?; Media Standards Trust; 2010

Consideration should be given as to what further changes might be required in order to smooth the path to redress for citizens and consumers. For example, in recent years independent ombudsmen have been established in many industries, including the property and legal professions, to investigate complaints against businesses and impose sanctions. The success of the ombudsman approach relies on citizens and consumers knowing that it is there, its processes being easy to understand and use, and the sanctions it is able to apply being binding and sufficiently tough to act as a deterrent. It should be recognised, however, that there may be particular challenges in reconciling an ombudsman-style approach with the desire to increase citizen involvement in the new system. The two do not necessarily sit easily together, as in an ombudsman system decisions rest with one individual, rather than a panel which balances different interests. Nevertheless, it may be a model that is worthy of consideration, particularly as ombudsmen often have a high public profile, and this profile can help to generate wider public and civil society engagement with an industry.

In exploring this question about access to redress, it is of course vital that due consideration is given to what has worked well in the current system of regulation – as well as what has not – to ensure that these positive features, some of which are highlighted in Box 3 opposite, are retained in any new regime<sup>34</sup>.

**Box 3: Three positive features of the present regulatory system**

1. In 2010, the PCC’s mediation service successfully resolved more than 500 complaints.
2. The PCC has a system for distributing desist notices, which can help vulnerable individuals to avoid unwanted approaches from the media.
3. The PCC has a 24-hour emergency helpline for members of the public who are being harassed by a journalist or who need pre-publication advice.

Alongside taking action to resolve a problem that has already occurred, it should also be considered whether and how any new press regulatory regime could use the lessons and information garnered from the redress process to help prevent these problems from recurring in the future. This might involve training and professional development for journalists and editors. This would of course move the system towards a stronger ex-ante approach, and may require additional resources – something that would need careful thought.

**8. How should regulations be enforced?**

An effective mechanism for achieving redress only has an impact if it is able to apply the appropriate sanctions to punish any breach in the regulatory system. The sanctions that could be applied must be sufficient to act as a deterrent to breaking the rules. In practice, this usually means that there must be significant

financial or reputational risks attached to any failure to comply with the regulatory regime.

At present, however there is again a perception in some quarters that the sanctions which the press receives if it breaches the Editors’ Code of Conduct are not sufficient to deter particular types of behaviour<sup>35</sup>. A key issue for discussion must therefore be to consider the type and scale of sanctions that might be required in any new regulatory regime.

For example, if there were financial penalties for regulatory breaches, then this may well help to discourage newspapers from undertaking activities that were prohibited. There is precedent for this type of sanction in other markets, including broadcasting and financial services. However, it should be noted that the PCC has suggested in the past that statutory

<sup>34</sup> Annual Review; Press Complaints Commission; 2010

<sup>35</sup> Press Standards, Privacy and Libel; House of Commons Culture Media and Sport Select Committee; 2010

regulation would probably be required in order to implement any system of fines<sup>36</sup>. This would therefore need careful consideration.

Another potential option might be to require newspapers to ensure that corrections and apologies for erroneous articles received the same prominence and position in the newspaper as the original, incorrect article. This would create a significant reputational risk for a newspaper in printing an article that was then found to be erroneous. Given the increasing competition that newspapers are facing from online news providers, their reputation, and the trust that readers have in them, is one of their most valuable assets. Therefore any sanction such as this, which may undermine their reputation in some way, may be seen as a significant deterrent.

In addition, following on from the questions highlighted above about the role of different groups within the press, consideration could also be given to the type of personal sanctions that might be applied to individuals responsible for regulatory breaches. What sanctions might be applied to proprietors, editors and journalists? Might they be required to leave their publication, or suspended from working in the industry for a set period of time? Again there is precedent for such an approach in other professions, such as

the medical profession or teaching. However, as described previously, the growing provision of news content in the digital age means that such a sanction may be very difficult to apply and enforce in any meaningful way.

All of these options need careful thought and consideration. At the same time, it is critical to balance these possibilities with the need to ensure that any penalties that may be applied are fair and proportionate – as it is critical that any new approach does not deter good journalists from pursuing leads and stories which may be challenging, but where there is a clear public interest at stake. It is therefore essential that the new regulatory regime recognises and understands the significant risks involved for the press in covering and reporting on particular stories – as this is a vital function of the press in any democratic society.

#### 9. What are the limits of regulation?

It is important that any debate about regulatory models and approaches, in whatever industry, recognises the limits of regulation. Some activities are clearly illegal and if people are prepared to act outside of the law then there are limitations upon the extent to which any regulatory framework can prevent this. Any such behaviour correctly falls within the remit of the police and the courts.

Given these points, it is essential to consider the different ways in which regulatory standards might be promoted, achieved and upheld. Whilst tougher penalties can undoubtedly play a role in ensuring compliance, it should not be assumed that this is the only way in which regulatory standards can be met. In any industry, the fear of the punishments that might be handed down through strong enforcement mechanisms is undoubtedly what ensures that some businesses adhere to the standards that are required. But businesses are also likely to meet these standards because there is a common belief that these represent the ‘right’ way to behave and it is the industry norm not to violate these. Intrusive practices, such as phone hacking, can emerge because they are an effective way of gathering information that might give a reporter a competitive advantage within the newsroom, and give a newspaper a competitive advantage over its rivals. Such practices may thrive because of the incredible pressures that currently exist in the newspaper industry due to declining circulations and the 24/7 news agenda; if there is a culture of acceptance surrounding them; and because there may be a lack of awareness and understanding of alternative, more ethical approaches of obtaining information.

Therefore, while regulation clearly has a vital role, it may be very difficult to completely eradicate some of the issues that have emerged

<sup>36</sup> Press Standards, Privacy and Libel; House of Commons Culture Media and Sport Select Committee 2010

through the phone hacking crisis unless there is also an attempt to systematically address some of the factors that appear to have contributed to the emergence of these activities in the first place. Within this context, it should be understood that regulation is only one of a range of options available to public policy-makers wishing to intervene in any market. Other solutions may be available to help achieve the desired results. For example, the Office of Fair Trading has suggested that alongside, or even instead of, regulation in any given market, governments may consider whether they can:

- use taxes and subsidies to incentivise particular activities and behaviours amongst both customers and businesses;
- run information campaigns to influence the actions of consumers and businesses;
- design public procurement processes to help drive particular behaviours and approaches; or
- provide goods and services directly<sup>37</sup>.

Clearly there are significant limitations in the extent to which any of these options could be applicable or appropriate to the national newspaper market. For example, no one seriously believes that it would be desirable for the government to directly provide a national daily newspaper.

However, the broader point remains relevant – that stronger regulation is potentially only one of a package of interventions that could be used to help ensure we have access to a plural, ethical and sustainable national press. It is therefore important that the full range of possible approaches that might be used in order to achieve this overall goal are properly investigated and explored. Thus issues such as improved training for journalists, new funding models for the provision of news content, the promotion of kite marks, and the development of a more coherent and sophisticated understanding of the opportunities and risks presented by new digital technologies should be considered, alongside the deliberations about the potential for a new regulatory regime.

#### 10. Concluding remarks

This paper is not intended to provide an exhaustive review of all of the different questions involved in regulating the press, or to present a detailed examination of all of the evidence that already exists in relation to these key questions. This is a highly complex and challenging debate and we do not seek to provide definitive answers to the issues involved – a wide range of different parties must play a role in identifying an appropriate way forward. However, we hope that by outlining the key questions and issues civil society organisations will be encouraged to play their part in this vital

debate – as their input is essential to identifying a viable and balanced set of solutions.

Our forthcoming report by Blair Jenkins, Carnegie Fellow, will examine the broader issues around the future of news, media and journalism.

If you wish to discuss any of the issues raised in this paper please contact Douglas White, Senior Policy Officer at the Carnegie UK Trust, on [douglas@carnegieuk.org](mailto:douglas@carnegieuk.org)

<sup>37</sup> Governments in Markets; Office of Fair Trading; 2009

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