Submission to the Leveson Inquiry: Culture, Practice and Ethics of the Press, January 2012

Index on Censorship is one of the world's leading freedom of expression organisations, celebrating its 40th anniversary this year. It is a unique NGO in the free speech field: not only campaigning for freedom of expression both at home and abroad, but providing a forum on its website and in its award-winning magazine for reporting, analysing and discussing the latest developments for freedom of speech. We are proud to count among our supporters, campaigners and editorial contributors some of the world's finest writers and bravest voices. Index's Chief Executive ***John Kampfner*** *will submit evidence to the Leveson Inquiry on 24 January.*

In this submission, we will:

- Identify the current situation for UK media and free expression
- Detail our work on free speech laws, and identify laws pertaining to free speech
- Examine advantages and pitfalls of press models in European nations

We will outline areas for proposals for reform in the following areas:

- Legislative change
- Practices of the press regulator
- Corporate governance and editorial management
- Mediation and alternative dispute resolution

We will contend that statutory regulation of UK press is unnecessary and would endanger free expression

Introduction

Index on Censorship has led one of the world's most successful civil society campaigns of recent years: the reform of the English libel law. Along with our partners in the Libel Reform Campaign[1], we have succeeded in winning cross-party support, transforming a long neglected chill on free speech into a matter of both national and international concern.

Index, along with English PEN, has been at the forefront of research into Alternative Dispute Resolution, which provides inexpensive and equitable access to justice in disputes between the press and private persons.

Our international campaigns and advocacy in Iran, Belarus, Tunisia and Azerbaijan have kept free expression in the public eye, put pressure on western governments and businesses to change their policy and pushed for the release of political prisoners. We

[1] Libel Reform Campaign – http://www.libelreform.org/

intervene regularly in international court cases where we believe freedom of expression is at risk. We are guided by the principle that the right to free speech must be protected, aware that at times of crisis it is often the first right to be curtailed. Index on Censorship's work also involves scrutiny of laws and regulation in democratic states. In this submission we will examine how different EU member states working under the European Convention of Human Rights regulate their media.

Our brief is wide because freedom of expression has the broadest scope of any human right, from the right of any citizen to speak their mind freely, to dissent or offend, to the right of a newspaper editor to expose corruption in the pages of his or her publication. Free expression is fundamental to the enjoyment of all rights and, as such, while it must take its place alongside the rest of human rights in international law, its protection is paramount for the preservation of an open society.

This Inquiry was triggered by public revulsion at revelations of phone-hacking practices at the News of the World, in particular the hacking of the mobile phone of Milly Dowler.

We share that revulsion. Index on Censorship has published many critical articles about hacking and the cosy relations between the press, police and politicians that are being examined by this Inquiry; some of these articles were published as far back as September 2010, before the full extent of the scandal became known. We recognised at an early stage that phone hacking would bring the issue of press ethics, and by extension press freedom, to the fore. Index welcomes the Inquiry, and we believe there is no conflict between good journalism and free expression.

Index condemns the industrial-scale hacking that took place at the News of the World, and sympathises with those who have suffered unjustified intrusion. At its best, the British popular press is energetic, vibrant and unafraid of taking on corruption, scandal and wrongdoing. At its worst, the press use illegal practices in situations where they could not be justified by any proper test of public interest.

The Inquiry provides an opportunity for us to re-examine the press and its relationship with society. Index on Censorship welcomes this. There have been insights into newsroom culture as well as testimony of what it is like to be an object of press interest and intrusion.

Index's advocacy abroad gives the organisation excellent insights into the differing models of press and media regulation throughout the world. In this submission we will point to different press models in European Union member states, highlighting the potential pitfalls that could be encountered in the formulation of any new set of standards (whether legal, statutory or voluntary).

Free expression and press freedom

Any proposal by the Leveson Inquiry that would curb freedom of the press in the name of protecting the privacy of the individual must also consider the broader impact on the public's right to free expression.

While it has long been recognised that safeguarding press freedom is crucial to democracy, the revolution in publishing and the public's increased access to information have transformed the traditional territory of journalism.

Reporting is no longer the exclusive preserve of the mainstream but also of independent bloggers and whistleblowing sites.

In recent years, we have seen organisations and individuals outside the traditional press break stories. The blogger Guido Fawkes, for example, unearthed the story of Gordon Brown aide Damian McBride's emails discussing "smearing" Conservative politicians, while whistleblowing site Wikileaks published scoops from the dubious practices of Icelandic bank Kaupthing to the controversial "Cablegate" documents – the latter in partnership with the news media. The traditional model of news gathering still exists, but increasingly, and particularly at local level, blogs and microsites perform this function.

The divide between news gatherers and news consumers is increasingly blurred. To that extent, any discussion of press regulation must take into account the increasingly diverse nature of media.

While the Inquiry considers how best to address any failings of the press to adhere to ethical standards, it needs to simultaneously have regard for the wider repercussions of its conclusions and the potential impact on any citizen who seeks to expose or publish a matter in the public interest.

International impact

We urge the Inquiry to be mindful of the global repercussions its recommendations will have. Decades of working on the ground internationally have shown us the impact that UK laws and practices can have in the rest of the world. For example while blasphemy was still on British books it was difficult for the UK to campaign for the abolition of blasphemy legislation elsewhere; when seditious and criminal libel were still offences Britain couldn't call for their removal in other jurisdictions without being accused of double standards.

Be assured that any move towards a system of greater oversight and control of journalists will be seized upon by non-democratic states to justify their own policies. When the British government considered imposing restrictions on social networks during the summer 2011 riots, China[2] and Iran[3] cast the suggestion as a vindication of their own censorious cultures. A commentary by China's Xinhua news agency noted: "We may wonder why western leaders, on the one hand, tend to indiscriminately accuse other nations of monitoring, but on the other take for granted their steps to monitor and control the Internet [...] For the benefit of the general public, proper web-monitoring is legitimate and necessary."

Weaknesses of UK journalism

British journalism is guilty of some crimes and many misdemeanours. The phone hacking scandal is but the latest, if most egregious, example of bad practice.

But there is another problem, potentially the biggest of all: the weakness of the profession. It can be argued that many publications fail in the most basic task of journalism – to ferret out information that those with power wish to hide.

As John Kampfner told the Inquiry seminar in October: "Look back over the big news stories over the past decade – from weapons of mass destruction to the banks to much more besides – and ask yourself: have the media found out too much or too little? Are newspapers really staffed by feral beasts or by sometimes lazy and often pliant hacks all too eager to accept the line of those in authority?"[4]

For years the Fourth Estate has abdicated its responsibility to speak truth to power. Journalists too often swallow spin, regurgitating information that benefits their sources. While commentary can descend into hysteria and hyperbole, news gathering has moved in the direction of conformity.

In sports journalism, the back pages of newspapers are full of stories about possible football transfers, courtesy of agents or players who seek to ramp up their sale price or put pressure on clubs. The journalists are useful conduits in this auction process.

In business journalism, reporters are perfectly prepared to fly a kite for a particular company in terms of possible take-overs, with stories that move markets (a murky

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[2] "Squelching social media after riots a dangerous idea", Rebecca MacKinnon, CNN, 15 August 2011 – http://edition.cnn.com/2011/OPINION/08/12/mackinnon.internet.britain/index.html
[3] "Iran urges UK to restrain police", Press TV, 9 August 2011 – http://www.presstv.ir/detail/193030.html
[4] "Defending Freedom of Expression", presentation by John Kampfner to Leveson Inquiry Seminar 3: Supporting a free press and high standards – Approaches to Regulation, 12 October 2011- http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-John-Kampfner-PDF-34.7KB2.pdf

relationship even where, as in the vast majority of cases, no financial benefit is involved).

In entertainment and celebrity journalism, stories are often garnered not through reporting, but through deals struck between stars and their PR people and agents.

In political journalism, the interdependency is most invidious and obvious. Some lobby correspondents have become stenographers to power[5]. When a minister or spokesman telephones, they take it down and reproduce. The more faithful the end product is to the caller's intent, the more likely the journalist will receive a story in the future. All sides get what they want. The label "exclusive" is fair, technically, in that nobody else has the story, but these are not scoops in the sense that the term was originally intended. This is not intrepid reporting or digging, but services rendered in return for access.

Risk aversion

Proper journalistic inquiry is an increasingly difficult endeavour in this country and further afield. We are pleased that the Inquiry has chosen to include the economics of journalism within its remit. The economics militate against investigative journalism, and other forms of high-value journalism. A forensic team can take months beavering away and then end up with nothing. Editors worry about justifying their investment to their managing editors and finance directors. Administrators want instant returns. But economics is not the only reason for the decline of investigative journalism. Reporters rewrite press releases mainly because they are required to fill page after page; but they do so also out of the desire for an easy life. Risk taking, in the correct sense of the term, is not encouraged enough. By that we mean a careful risk assessment, with lines of responsibility and accountability clear.

Some hold out the BBC as the model to follow, in terms of both internal regulation and the culture of journalism. Naturally, there is a huge amount to commend, particularly the reliability of information and the aspiration to balance and objectivity in news reporting. But there is a flip side, a culture of caution that discourages original story-getting. Risk aversion is deeply embedded in the BBC. On the occasions when it has broken from this, the corporation has suffered. The Inquiry might recall Kate Adie's reports on the US bombing of Libya in 1986 and Norman Tebbit's furious response. Within a few months the BBC director general was gone. More recently, one remembers Alastair Campbell's assault on the BBC after the Hutton report. Within a few days of the report's publication, the director general and the chairman were gone. The organisation became more careful and political relations "improved". With the right levers in place, governments can “remind” editors and managers of their responsibilities. Now, with compliance forms

[5] 5 “Less stenography and more reporting, please”, John Kampfner, The Guardian, 16 July 2007 – http://www.guardian.co.uk/media/2007/jul/16/politicsandthemedia.mondaymediasection

for each piece of output, and the BBC Trust conducting reviews of major aspects of coverage, it is unsurprising that journalists will seek not to put their heads above the parapet.

A vigorous press

Is the broadcast model of "responsible" journalism really a desirable prototype for newspapers? In Index on Censorship's view, newspapers should be fearless, beholden to no one, irreverent and challenging. Print journalism can and must still fulfil this role. In January 2012, dogged campaigning by the Daily Mail in the Stephen Lawrence case played a significant role in the events that led to convictions for Lawrence's murder. If the Mail was forced to operate under strict regulation, in an atmosphere demanding prior notification, it is doubtful the newspaper would have been able to take the risk of running its famous front-page[6] on the Lawrence case; this campaign was an exemplar of the power of a free press.

Even those witnesses who advocated the strongest form of regulation, and retribution for wrongdoers, profess support for investigative journalism. This is one area where consensus appears to have been achieved. Lord Justice Leveson, in a number of remarks during the hearings, has reiterated his strong support for this. We are delighted about this. Holding power to account is the bedrock of journalism and one of the cornerstones of democracy itself.

However, it is not the only attribute of a thriving media. The freedom to engage in robust or even grubby comment must be defended. Laws already exist to tackle hate speech and incitement to violence. It is not the place of this Inquiry or of this submission to examine this issue. What, however, is in danger of being forgotten amid all the various options for regulation and punishment is that issues of taste and decency must surely be left to editors and proprietors, and journalists themselves. Offence and taste should not be a matter for a regulator – but this could become a reality under statutory regulation.

An over-zealous framework of regulation is likely to lead to a culture of self-censorship and "trimming" that goes far beyond the requirements set out in law and in the code. Risk aversion is likely to be the norm. The word will come down from proprietors, editors, news editors – "just take that line out" or "tone this down" – to ensure an easy life. The result will be newspapers that are anodyne, that sit on the fence. What might, rightly or wrongly, pertain to the culture of caution at the BBC and among other broadcasters should not seep into newspapers.

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[6] "The Mail's victory: How Stephen Lawrence's killers were finally brought to justice years after our front page sensationally branded the evil pair murderers", Stephen Wright, Mail Online, 3 January 2012 – http://www.dailymail.co.uk/news/article-2080159/Stephen-Lawrence-case-How-killers-finally-brought-justice.html

Some witnesses to this Inquiry have not bothered to conceal their disdain for tabloid and mid-market journalism, wishing to inhabit a world exclusively of Financial Times or Independent readers. In some countries such elitism has long existed. In France, three extremely strong "serious" papers – Le Monde, Le Figaro and Liberation – dominate the national conversation (although the regional Ouest France is the country's top seller). The relationship between journalists and those with power is already incestuously close (see "Weaknesses of UK journalism"). Do we want to reinforce that?

Tabloids, when at their best, distil difficult issues for a mass audience. Bild-Zeitung in Germany is a good example of that – although it too has made mistakes over the years. Every newspaper has an imperfect record and in the UK the tabloid legacy is better than one might think.

Across the popular press, there are many examples of excellent public interest journalism. This Inquiry has frequently and rightly heard praise of the News of the World's Pakistani cricketer scoop. Former News of the World investigative reporter Mazher Mahmood, known as the "fake sheikh", claimed his investigations led to 260 criminal prosecutions. The Daily Mirror faced down libel threats when criticising now liquidated MRI Overseas Property, whilst the Daily Mail has brought significant attention to a group of South Tyneside Councillors who used public money to bring a defamation action in the US against an independent councillor. It is clear that the popular press in this country plays a major role in exposing and challenging wrongdoing and hypocrisy. The Inquiry should be careful that it does not merely seek to protect the so-called "quality" papers.

Public interest and current laws affecting the press

There are already many laws that impact on press freedom: amongst them, the Contempt of Court Act, the Terrorism Act, the Defamation Act, the Official Secrets Act and the Data Protection Act.

In assessing the need for a new, improved Press Complaints Commission or regulatory body, we believe that the Inquiry should first consider whether these existing laws work both in safeguarding press freedom and in providing redress to members of the public who believe that their rights have been violated by the media.

It has already been observed that until the case of Chris Jefferies, Contempt of Court prosecutions against the press were a rarity[7]. While Index asserts that these laws should always be deployed with full regard for the press' right to freedom of expression,

[7] "Courts and Controversy", Brian Cathcart, Index on Censorship, 31 August 2011 - http://www.indexoncensorship.org/2011/08/courts-and-controversy/

we suggest that any investigation into the ethics and conduct of the press also needs to assess the legal framework as a whole with regard to freedom of expression and the role that the police, the courts and the attorney general have played – both in using the existing law to protect the public and in inhibiting the media from reporting in the public interest.

The uncertainty of public interest defences in libel and privacy affects investigative journalism. The absence of a public interest defence in the Official Secrets Act, Regulation of Investigatory Powers Act 2000, or Computer Misuse Act creates significant risks for journalists, including imprisonment.

It is important to recognise that in the pursuit of a story, such as the Daily Telegraph's expose of the MPs' expenses scandal, journalists may transgress the law. In these instances that touch upon criminal law considerations of public interest are useful in ascertaining whether such a transgression is justifiable.

Libel and free expression

Quality journalism is particularly hampered by England's defamation laws: the defences are too narrow, and according to the Centre for Socio-Legal Studies at the University of Oxford, the costs of losing a case are 140 times the European average[8]. The law makes Britain an international pariah as the UN Human Rights Committee noted. US President Barack Obama signed into law the SPEECH Act, specifically designed to protect American authors from English libel rulings[9]. This development was described as a "national humiliation" by the House of Commons Culture, Media and Sport Select Committee.

The purpose of libel law is to give individuals redress where their psychological integrity has been violated by an ungrounded attack on their reputation.

Several lawyers and legal academics have argued for the importance of reputation as an aspect of Article 8 rights, with a minority arguing reputation is more important as a human right than free speech. This argument is difficult to sustain. Reputation is important, but not as important as free speech, to democracy, to the pursuit of knowledge, and to self-expression. Individuals whose reputations are unjustifiably damaged deserve vindication. But to value reputation too highly risks creating precisely the situation we now find ourselves in, where free speech has to defend itself against attacks which may or may not be motivated by a genuine desire to protect one's

[8] A Comparative Study of Costs in Defamation Proceedings Across Europe – http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf
[9] Text of US SPEECH Act – http://www.gpo.gov/fdsys/pkg/PLAW-111publ223/html/PLAW-111publ223.htm

reputation. Damaging the reputation of an individual or corporation may be a justifiable consequence of the publication of a piece of investigative journalism.

The Libel Reform Campaign (led by Index on Censorship, English PEN and Sense About Science) has identified key areas where existing libel laws stifle free speech:

i) The Reynolds defence[10] for responsible publication has been shown to be impracticable for many investigative journalists and newspapers due to the expense and complexity of running such a defence. It is often not accessible, nor is it viewed as a safeguard for investigative journalism.

Index believes that, where genuine public interest can be demonstrated (rather than merely statements which may interest the public), and where any errors of fact are promptly corrected, the burden of proof in this defence should be shifted to the claimant, who should prove malice or recklessness on the defendant's part. This will give investigative journalists clarity as to how to approach their investigations in order to prove "responsibility", and also aid freelancers, or local reporters, who may not have legal advice on how to run a public interest defence.

ii) The law is used by corporations and other non-natural persons to manage their brand. Whilst non-natural persons may benefit from some human rights, they cannot benefit from Article 8's protection of psychological integrity.

The ability of corporate bodies to sue for libel should be tightly restrained, as recommended by the Culture, Media and Sport select committee and the publication of the Joint Select Committee on the draft Defamation Bill.

iii) The law allows trivial and vexatious claims designed to silence criticism even where no damage can be proved.

The Joint Select Committee on the draft Defamation Bill accepted our recommendation that litigants ought to prove that the comments complained of are both serious and substantial. This will protect journalists and newspapers from cases that have little prospect of vindication. Often cases have failed to be struck out by a judge even when only a handful of people have read the apparently defamatory allegation, while the cost to the publisher can still be substantial, resulting in a chilling effect on free speech.

[10] House of Lords Judgements: Reynolds v. Times Newspapers Limited and Others – http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm

The government has backed[11] Index on Censorship's and its partners' approach to reform[12], and last March published its draft Defamation Bill[13]. Since the publication of the bill, the legislation has received pre-legislative scrutiny from the Joint Select Committee on the draft Defamation Bill. We are optimistic that the bill will appear in the Queen's Speech in May 2012. We seek assurance from the Inquiry that its deliberations will take into account these developments and not in any way hinder their progress. We also hope that ministers will not delay on this much-needed reform by hiding behind this Inquiry.

Privacy

Much attention has been given to the perceived clash between the right to privacy and the right to free expression. Long before the events which led to the establishment of this Inquiry, Index was involved in this debate, having intervened in cases such as Mosley v UK[14] and MGN v UK (Naomi Campbell)[15] at the European Court of Human Rights in Strasbourg. These cases were important in defending the right to publish and defining the public sphere.

Privacy law can have a detrimental impact on journalism. Article 8 of the European Convention on Human Rights was created in the aftermath of World War II with the principle of protecting individuals and families from state intrusion. Formed to protect citizens' from the totalitarian state, Article 8 has now been interpreted to protect the privacy of corporations, beyond protecting individuals, which can have a chilling effect on the free speech of a regional newspaper or lone journalist, particularly when one compares their resources to those of a corporation.

Article 8 has given rise to the phenomenon of secret injunctions, superinjunctions and anonymised injunctions. The length of time it can take to challenge these can destroy the newsworthiness of a piece of investigative journalism. As Ian Hislop, editor of Private Eye, told the Culture, Media and Sport select committee:

"We attempted to run a story in January [2009] and we still have not been able to run it. The journalist involved put it to the person involved, which was an error; there was an immediate injunction; we won the case; they have appealed; we are still in the Appeal

[11] "While avoiding specifics, Nick Clegg makes the right sounds on libel reform", Gill Phillips, The Guardian, 7 January 2011 – http://www.guardian.co.uk/law/2011/jan/07/nick-clegg-libel-reform

[12] "Justice Minister tells campaigners libel law "is not fit for purpose", Libel Reform Campaign – http://www.libelreform.org/news/482-justice-minister-tells-campaigners-libel-law-is-not-fit-for-purpose

[13] Draft Defamation Bill, Ministry of Justice – http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf

[14] Index on Censorship submission to European Court of Human Rights in case Mosley v United Kingdom – http://www.scribd.com/doc/46603636/Mosley-v-United-Kingdom-Submission-Dated-23-03-10

[15] Judgment in case MGN v United Kingdom (Naomi Campbell) – http://www.scribd.com/doc/47095248/CASE-OF-MGN-LIMITED-v-THE-UNITED-KINGDOM

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Court. Essentially it is censorship by judicial process because it takes so long and it costs so much."[16]

Guardian editor Alan Rusbridger echoed this in his testimony to Radio 4's Privacy Commission:[17]

"The Barclays [injunction] was about 1 o'clock in the morning and the judge, I'm almost sure, was in his pyjamas and just said 'yes just take it off' and so suddenly the value of a piece of work that might have been going on for 3 months goes up in a puff of smoke. And sure you can be on the other end of the phone trying to make that case at 1 o'clock in the morning and what they usually say is take it down and we'll meet again in the morning and we'll have a good discussion about it then, but by then it might have been published for about half an hour and the exclusivity of it is lost, and what might be £30,000-40,000 worth of journalistic time and work has gone up in smoke."

A newspaper not present at the original hearing for an injunction can be served with an injunction, but may be prevented from accessing a copy of the evidence on which it was based. This can lead to journalists being bound by court orders which they were not given the opportunity to question.

As with libel, the cost of privacy cases is disproportionate to damages. In MGN v United Kingdom, the European Court of Human Rights found the total costs of Naomi Campbell's case against the Daily Mirror a breach of Article 10 rights in light of the use of a "no win, no fee" agreement (CFA) which doubled her total costs. The high cost of such cases highlights the necessity for mediation and alternative dispute resolution (see below).

Prior Notification

An issue that remains live is Max Mosley's attempt to force newspapers to give prior notification when they could be in breach of an individual's privacy. Although rejected by the European Court of Human Rights, Mosley reiterated this call during his evidence to the Inquiry[18] on 24 November.

Prior notification could lead to a significant amount of investigative journalism being injuncted prior to publishing. As the NGO Global Witness argues[19], prior notification could have prevented its publication of reports into the corruption in oil and mineral rich

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[16] Press standards, privacy and libel – Culture, Media and Sport Committee – http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36205.htm#note32

[17] Privacy Commission Day 4, Witness 1: Alan Rusbridger, BBC – PM – http://www.bbc.co.uk/blogs/pm/pmprivacy-rusbridger.shtml

[18] Witness statement of Max Mosley – Leveson Inquiry – http://www.levesoninquiry.org.uk/evidence/?witness=max-mosley

[19] "Ruling against Mosley privacy claim a victory for freedom of speech", Global Witness, 10 May 2011 – http://www.globalwitness.org/library/ruling-against-mosley-privacy-claim-victory-freedom-speech

regimes. Notification would also put its staff and sources in danger (at a privacy hearing, sources may need to be revealed to fight the injunction).

The European nations that currently require prior notification are: Albania, Azerbaijan, Latvia, Lithuania, Moldova, Poland, Russia and Ukraine.

Other laws potentially curtailing the press

The law has also proved inadequate for the protection of journalists' sources. The Contempt of Court Act 1981 was used by the UK Court of Appeal in an attempt to force the Financial Times to disclose a source. The FT had to take the case to the European Court of Human Rights, and, in March 2010, in Financial Times v United Kingdom, the Court held that any decision that requires the disclosure of journalistic sources was a breach of the Article 10 right to freedom of expression.

Sections 19 and 38 of the Terrorism Act 2000 make it an offence to withhold information likely to be relevant to a terrorism investigation, with a potential jail term of five years. Whilst working on "Leaving al Qaeda: Inside The Mind Of A British Jihadist", journalist Shiv Malik was instructed by Greater Manchester police to hand over source material used in his book. In "A knock at the door", *Index on Censorship* (2008: 37), Malik raises concerns that under Section 19, records of his interviews with alleged British terrorist Hassan Butt had to be given to the police to investigate. Malik told Index on Censorship that the police are not expected to reveal their sources, so neither should journalists.

Older legislation, such as the Official Secrets Act, does not have a public interest defence. In 1987, journalist Duncan Campbell was threatened with prosecution under the Act for making a documentary series which included exposes of Margaret Thatcher's secret and influential cabinet committees. In September 2011, the Metropolitan police threatened to use the Official Secrets Act to force a Guardian journalist to reveal sources in the phone-hacking scandal investigation. Alan Rusbridger, editor-in-chief of the Guardian, said that threatening reporters with the Official Secrets Act was a "sinister new device" to get round the protection of journalists' confidential sources.

The incomplete public interest defence across various laws leads to legal anomalies. Whilst the Daily Telegraph could have run a public interest defence if prosecuted under the Data Protection Act for leaking MPs' expenses claims, it could not have done if prosecuted under the Official Secrets Act. This uncertainty is damaging to free expression.

Internal and external regulation and dispute resolution

There are certain issues where there is consensus that changes must be made. Index Chief Executive John Kampfner has said[20]:

"The PCC, which failed not just on phone hacking but on the McCanns and other cases, needs radical reform. We can get snarled on the wording: self-regulation, independent regulation, statutory regulation. It is unsustainable for a regulator to have so little teeth, to be so dependent on its paymasters, the big newspapers, and therefore always susceptible to the charge of obeisance.

The regulator should regulate and not just mediate. It should be an authority on the big issues of the day. It should not wait to be asked to intervene. It should not, in my view, contain serving editors. Even if they recuse themselves from decisions affecting their organisations, the perception remains of a cosy cabal. Former editors and reporters should take their place. It should not oblige newspapers to join, but membership should be regarded as a gold standard. The same goes for the big bloggers. If a large media organisation chooses not to join, it should be known that they have put themselves in a lower division."

Within news organisations, clear lines of responsibility are crucial. From time to time, reporters may feel the need to engage in behaviour that would in normal circumstances be seen as dubious. This might include:

- phone hacking
- paying sources for information
- stealing documents or photographs
- forging documents
- impersonation
- obtaining information through secret recordings or accessing privately stored information
- "blagging" addresses, bank statements and other records

These actions should be supervised at a high level: any investigation that involves underhand methods needs the hands-on approval of the editor. The editor should, in outline, inform his or her managing editor. There can be no "I was in Tuscany" excuse for being unaware of these processes. While no organisation can ever absolutely bombproof itself against rogue elements, it should be nigh-on impossible for an editor to claim that they had not been aware of reporters' practices.

These are all internal, corporate matters, but they must be placed within the context of regulatory systems, which we will now explore.

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[20] Presentation by John Kampfner to Leveson Inquiry Seminar – http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-John-Kampfner-PDF-34.7KB2.pdf

Approaches to regulation have been widely discussed during the course of the Inquiry. We have heard suggestions that repeat offenders should lose their privilege to practise journalism, as well as many claims that self-regulation has failed and that the UK's current system is a "wrist-slapping exercise at best".

We need a more robust and trustworthy press, monitored by an enhanced regulator pushing improved standards, corporate governance and accountability.

The Press Complaints Commission's failure to properly investigate phone hacking in 2009, as well as its lax response to complaints filed by the McCanns, is evidence of its need for reform. Its investigatory powers must be strengthened if further wrongdoing is to be prevented. As stated earlier, the regulator should regulate and not just mediate complaints or wait to be asked to intervene. The regulatory code needs to be clearer, better understood and trusted than it is at present.

Public trust in journalism has significantly decreased, and more must be done to make the media more accountable and transparent in the way ethics are applied. A body with sufficient powers of holding the media to account is key to rectifying this and maintaining high professional standards.

Yet improved regulation of the British press must not occur at the expense of freedom of expression. We at Index emphatically oppose statutory regulation; it would strike at the heart of democracy, posing a danger to a free press and public discourse. We have been appalled by calls – by front bench spokesman and editors – to register journalists[21] and strike them off should they commit serious offences against regulations. This idea is a serious affront to free expression. The registration and licensing of reporters would lead us into the dangerous territory of how far the state is involved in what can or cannot be published.

Equally impractical is the argument of those who claim[22] that broadcast regulation - with its public service requirements and statutory backing - could be applied to print and online media. As BBC Chairman Lord Patten told the Society of Editors last November, while Ofcom may be suitable as a broadcast regulator, newspapers cannot be expected to provide the impartiality of the BBC[23]. Free speech would be damaged if a single group of people beholden to politicians had the power to decide what should or should not be printed.

21 "Independent editor backs plan for bad journalists to be 'struck off'", Dan Sabbagh, The Guardian, 28 September 2011 – http://www.guardian.co.uk/media/2011/sep/28/independent-editor-backs-journalist-plan

22 "Leveson and the lessons from broadcasting", Steven Barnett, Inforrm, 13 November 2011 – http://inforrm.wordpress.com/2011/11/13/leveson-and-the-lessons-from-broadcasting-steven-barnett

23 Society of Editors Lecture 2011 – http://www.societyofeditors.co.uk/page-view.php?pagename=The-SOE-Lecture-2011

International examples

Index on Censorship's work gives the organisation insight into regulatory and legal models throughout the world. Here we focus on relevant examples in two European Union states, France and Hungary.

Privacy in France

The origins of France's privacy laws go back to the 19th century when French law started to develop personality rights, including the right to control one's image. In 1970 a general right to respect for private life was added to the Civil Code (Article 9). This was modelled on Article 8 of the European Convention on Human Rights which, since its ratification by France in 1974, is now directly applicable in domestic law. In 1995, the right to privacy was given constitutional value in France by the Constitutional Court.[24]

Under the 1970 law everyone, including those in the public eye, regardless of rank, birth, wealth and present or future role in society, is entitled to have his or her private life respected; where this is infringed, damages can be awarded and the offending publication may be seized, pulped and required to publish the judgment against it. However, there are instances where it has been recognised that different types of public interest may allow interference with the right to privacy; for example, the French media has been allowed to publish a list of the 'hundred wealthiest French people', with details of their wealth, on the grounds that it is in the public interest that the position of these individuals in the business world be known.

Protection of privacy not only covers the disclosure of details of an individual's private life but also the taking and publication of photographs of an individual without prior consent. In the case of an interview, an individual's photograph may not be published for a purpose or in a manner which differs from the one which was originally agreed or in order to distort the manner in which the interviewee has elected to project their image or express their opinion. Intrusion into someone's private life can also be a criminal offence; anyone found guilty is liable to a term of a year's imprisonment and/or a fine up to a maximum of €45,000.

Problematically, the notion of what constitutes 'private life' has never been legally defined, although it has been established that private life includes family life, love life, illness and medical records and private address. Or, as a judgment from 1970 put it, Article 9 protects 'the right to one's name, one's image, one's voice, one's intimacy, one's honour and reputation, one's own biography, and the right to have one's past transgressions forgotten". Nonetheless, over the years, judgments have tended to

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[24] Eva Steiner, 'The New President, His Wife and the Media: Pushing away the limits of privacy laws in France', *Electronic Journal of Comparative Law*, volume 13.1, March 2009

decide that there is a legitimate right for the public to know about events relating to public figures such as birth, divorce or family conflict.

The most infamous privacy case took place in 1996, following Francois Mitterrand's death from cancer, with the publication of a book by his doctor called *Le Grand Secret*. It was alleged by Mitterrand's family that the book, in giving a detailed account of the president's illness whilst he was still in office, was in breach not only of medical confidentiality but also of the president's right to privacy. Mitterrand's family obtained an injunction for the immediate suspension of the distribution of the book. In his appeal the book's author did not rely on the public interest argument but instead on his right to freedom of expression.

In overturning the author's appeal the court took the view that details of the president's illness involved the most 'intimate' aspect of privacy. Given that the president himself had issued regular bulletins about his health, whilst never admitting to being ill with the cancer which later killed him, it has been argued that what actually prevailed in the court's decision, as the legal expert Étienne Picard has observed, was "the right of the subject of the invasion [of privacy] to reveal what he wishes about himself even if, as in this case, it was not the truth'. The ultimate decision of the Cour de Cassation – France's highest civil court – upheld the family's right to suppress the book, in effect maintaining what might be seen as a longstanding French tradition of suppressing information in the interests of political expediency.

Regulation in Hungary

A number of specific proposals for enhancing regulation and control of the media that have been proposed to this Inquiry have already been implemented in one European Union country. Hungary[25] has the European Union's most stringent statutory model, after a new media law came into force in January 2011. The law now includes co-regulation, the licensing of media, strict "fit and proper" tests for media owners, a strong media code of conduct, and regulation "with teeth".

"Co-regulation" in Hungary has created a self-regulator, enforced by a statutory code. In Hungary "co-regulation" has forced the press to sign up to a strict media code (portrayed as self-regulation). Media outlets that refuse to join face significant fines. All major media firms are now signed up to "co-regulation", such is the severity of fines.

Regulation covers all media that touches upon news or politics. Newspapers, radio stations, TV stations and satellite channels, as well as websites that provide news content (including commercial blogs) all have to register with the Media Authority.

[25] "Hungary: How not to regulate the press", Mike Harris, Index on Censorship, 17 November 2011 – http://www.indexoncensorship.org/2011/11/hungary-a-lesson-on-how-not-to-regulate-the-press/

The new law specifies that media owners should be “fit and proper”. In Hungary, under Articles 185 – 189 of the new law, media owners who have been the subject of complaints upheld by the Media Authority cannot bid for further licenses. While it is fashionable to suggest such provisions in the UK, the result in Hungary is chilling. Hungarian journalists have told Index on Censorship that media owners are keen to avoid any controversy, and reporters terms of employment are being edited to include reference to the new law.

The code of conduct enforced by the Media Authority is extensive and far wider than the legal prohibitions. The code includes provisions to prevent media content that offends “human dignity” or “the interests of minorities and majorities”, making large amounts content actionable under the code. The chill on freedom of expression has been extreme.

In a sign of the power of statutory regulation, Klubradio, one of the country’s leading political radio stations has lost its broadcasting license. The Media Council, the statutory regulator that silenced the popular station blamed local and international criticism of the decision on: “a consciously planned, premeditated, sheer political provocation” supported by prominent leftwing and liberal public figures, along with “members of foreign diplomatic corps”. The Chair of the Council is a former MP from the ruling FIDESZ party.

One of Index’s most pressing concerns over statutory regulation is that if the government decides to license newspapers, any decision to revoke a licence and close down a particular media outlet becomes a political one. A government right to revoke licences, however arms-length, will be open to politicisation with a detrimental effect on freedom of expression.

Hungary’s regulatory model has been condemned by the Organisation for Security and Cooperation in Europe and US Secretary of State Hilary Clinton, among others.

In December 2011 the Constitutional Court struck out key provisions of the media law including the limitations on the protection of confidential sources and the right of the Media Authority to obtain editorial materials from media outlets without prior court approval. That court has since been abolished and replaced, and the current court will have to adjudicate on the legality of the above provisions.

Hungary’s example shows how some of the proposals put forward to the Inquiry might seriously hamper the ability of the press to challenge power.

Alternative Dispute Resolution

As we have already laid out, the law as it stands prevents quality investigative journalism in the public interest. It is important to recognise that the cost of defamation and privacy actions prevents ordinary people accessing justice. As Sheryl Gascoigne told the Inquiry, she had to put her home on the market to cope with rising legal fees in her libel action.

At the core of a future regulatory framework should be swift and inexpensive mediation to allow more individuals access to justice.

Index on Censorship has been working with English PEN on the Alternative Libel Project, a Nuffield Foundation funded project investigating alternative dispute resolution in defamation. Our proposals would change the culture of dispute resolution – reducing the need for expensive and protracted court proceedings.

The cost and duration of libel and privacy cases deter claimants and have a significant chill on free speech. Our proposed solution, with an emphasis on mediation, would offer a fair, inexpensive and fast procedure that would benefit both claimants and defendants. Such a scheme would also increase the general public's confidence that any disputes with the media would be swiftly and satisfactorily addressed.

In our interim report, we outline research that shows 96 per cent of defamation cases can be successfully mediated, at low cost to both defendant and claimant.[26] In cases that are not mediated, we propose immediate Early Neutral Evaluation (ENE) before a judge to give an opinion on a likely outcome.

Mr Justice Akenhead, the judge in charge of the Technology and Construction Court says this process almost never fails, with settlements being reached within weeks of the evaluation taking place.

Beyond alternative resolution processes, we also propose far stricter case management and costs regime[27] to prevent "costs bullying" by wealthy parties, and a separate optional procedure to determine the ordinary meaning of the disputed words in question. Mediation works best when both parties believe they are being taken seriously, which means the journalist behind the article will be involved in the mediation, and potentially, the newspaper editor. A reformed PCC would be an ideal forum for the mediation of libel and privacy cases. This reformed body could also cover the cost of Early Neutral Evaluation in cases that could not be mediated.

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[26] The Alternative Libel Project Preliminary Report, October 2011- http://goo.gl/lehdl

[27] Libel Reform Campaign's response to the Ministry of Justice consultation on civil litigation costs – http://www.libelreform.org/news/485-libel-reform-campaigns-response-to-the-ministry-of-justice-consultation-on-civil-litigation-costs

The failure to make use of existing laws, such as the Contempt of Court Act, and the shortcomings of the PCC, has contributed to widespread frustration with the press. Index believes that these proposals offer a solution. In rare cases, where both parties do not wish to mediate, nor partake in ENE, hearing the case in front of a judge is the most satisfactory fix – statutory regulation is no substitute for the common law, and fines should only be reflected in damages awarded by judges.

The Alternative Libel Project's preliminary report was launched in October by Lord McNally, Minister of State at the Ministry of Justice, and Sir Steven Sedley, who chairs the Alternative Libel Project's advisory committee. The full report on Alternative Dispute Resolution will be published in March. Index on Censorship will be pleased to submit the report and discuss our findings with the Inquiry.

Conclusion

In this submission and in other forums, Index on Censorship has suggested a number of areas where regulation and practices can be improved, benefiting journalism and the broader public good.

Competent, accountable management and regulation will allow media to thrive and increase public confidence.

Self regulation will work if the regulator provides a low-cost forum or mediation and Early Neutral Evaluation, reducing the cost in time money and stress of defamation and privacy cases. Judges should be able to take into account publishers' and complainants' willingness to mediate when awarding costs and damages in cases that do come to court.

We have also shown how a number of proposals made to this Inquiry and elsewhere could lead to a significant chill on free speech. Freedoms taken away are hard to replace.

That is why we oppose the introduction of a statutory underpinning to press regulation. As we have pointed out, the only European Union country where this is being trialled – Hungary – has quickly imposed severe restrictions on free speech. This is clearly a dangerous precedent, and one the Inquiry should note in its deliberations.

In addition, beyond the principles, we also see dangers in the applications. Compelling news organisations to join a regulatory body is not just a backdoor route to licensing, but would be very difficult to enforce. Which websites and bloggers would join? What about foreign publications, including those who publish in the UK?

It would also produce a cartel approach, an exclusive club with privileges; this might suit some in the press, but it would not help the citizens' right to know.

The press will never be perfect. But we must ask: do we want a press that is tamed into deference and compliance, or a press that probes and questions and will, on occasion, get things wrong?

Freedom of expression is a bigger prize than a free press. It is about the public's right to know. There is already a plethora of laws and codes that could and should be enforced to improve the practices of journalists, editors, managers and directors.

We conclude with the following quote**,** dating from another "last chance saloon" moment for the UK press: "There is a cancer gnawing at the heart of the British press. At the lower end of the tabloid market, journalism has been replaced by voyeurism. The reporters' profession has been infiltrated by a seedy stream of rent boys, pimps, bimbos, spurned lovers, smear artists bearing grudges, prostitutes and perjurers. That is the force that makes constituents say to members of parliament: 'get on and do something about it'."[28]

That MP was Jonathan Aitken – who tried to silence the press when it investigated his corrupt practices. To the Inquiry, our message is simple: be careful what you wish for.

Index on Censorship, 13 January 2012

[28] "Self regulation and the Calcutt report", David McKie, Index on Censorship 7/1990 http://www.indexoncensorship.org/2011/09/from-the-index-archive-self-regulation-and-the-calcutt-report/

John Kampfner, Index on Censorship's outgoing CEO, who appears before the Inquiry on 24 January, has had a long and varied career in journalism and public life.

He has previously worked for Reuters, the Daily Telegraph, the Financial Times and the BBC's Today Programme. He joined the New Statesman 2002, first as political editor and then editor, where he was named British Society of Magazine Editors Current Affairs Editor of the Year in 2006.

In 2002 he won the Foreign Press Association award for Film of the Year and Journalist of the Year for films on the Israeli-Palestinian conflict, called 'The Ugly War'. He has written four books, including the best-selling Blair's Wars. His most recent book, Freedom For Sale, was published in a number of languages and shortlisted for the Orwell Prize.

As Chair of Turner Contemporary in Margate, which opened in April 2011, he has presided over one of the most successful culture-led regeneration projects in the country.

At the end of March 2012 he stands down as CEO of Index after three and a half years at the helm which have seen the organisation transformed into one of the world's leading organisations promoting freedom of expression. His new work will include advising Google on free expression and culture issues and assisting the Global Network Initiative, a group comprising major internet private sector corporations, academics and NGOs monitoring governmental pressure on freedom of information online.

Submission compiled by John Kampfner, Emily Butselaar, Marta Cooper, Jo Glanville, and Michael Harris. Written and edited by Padraig Reidy.