

# **Media Regulation Roundtable:**

**FINAL PROPOSAL FOR FUTURE REGULATION OF THE MEDIA:  
A MEDIA STANDARDS AUTHORITY**

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## Section 1: Introduction

1. In February 2012 we published an initial proposal for independent, voluntary and effective media regulation by a Media Standards Authority. The proposal was to establish a body which was voluntary but whose powers and independence were underpinned by statute. We invited comments on the initial proposal and we held a number of public meetings at which the proposal was presented and debated. The proposal has now been revised and expanded in the light of the comments made both in writing and at the meetings. It will be submitted to the Leveson Inquiry in Module 4.
2. The initial proposal was the product of a series of meetings and discussions between a diverse and independent group of academics, journalists, lawyers and others brought together under the auspices of the Reuters Institute for the Study of Journalism to discuss issues of Future Media Regulation. Participants in the initial discussion are listed in the Appendix. The initial proposal was drafted by Hugh Tomlinson QC after the discussions. He has also drafted this final proposal. As before, the proposal represents the views of a number of those who took part in the Round Table. It is not a unanimous or collective proposal and all were taking part as individuals rather than as representatives of any organisation.
3. It is important to bear in mind the commercial and technological context in which proposals for future regulation of the media are being considered. The news industry is undergoing rapid and fundamental change. Any proposal for a new system of regulation must take into account the transition from the old news model (oligopolistic, with major commercial players having a stranglehold on distribution) to a new world where distribution is "free" and the issues revolve more around problems of dominance of major international players operating in an environment without agreed rules or ethical principles. The recent crisis in the financial sector has demonstrated the risk of allowing private bodies to pursue their own interests without regard to the wider public interest. What is needed are clear rules of engagement, particularly in relation to major commercial players, but also for small and individual players, to set out for the public the basic principles governing the practice of news journalism in the public interest. There is a lack of established international models and whatever 'rule book' is drawn up in this country is likely to be highly influential elsewhere.

## Section 2: Outline of the Proposal

4. Our proposal is for a system of media regulation which is robust and effective whilst, at the same time, protecting the independence and freedom of expression of the media. The intention is to provide a balance between the expression rights of journalists and publishers and the rights of individuals to privacy and reputation whilst giving proper effect to the rights of the public to accurate information on matters of public concern. These principles are fundamental and guide the detailed specific proposals which are set out below.

5. The proposed system has two objectives:
  - To promote and protect the right of the media to publish information on public interest matters and the right of the public to receive it by promoting and protecting public interest journalism in all its forms and by protecting and encouraging high standards of ethical and responsible journalism.
  - To protect the privacy and reputational rights of individuals and the right of the public to receive accurate information by providing a mechanism for the swift and cost effective resolution of disputes involving the media, thus providing greatly enhanced rights of access to justice for both the general public and the media whilst reducing the unacceptably high costs to both claimants and defendants of defamation or privacy related litigation.
  
6. At the centre of the system would be a new Media Standards Authority ("MSA") which would have a number of key elements:
  - The MSA would be established, by enabling legislation, as entirely independent of both government and the media – although its governing council would include a minority of former editors and some working journalists;
  - The enabling legislation which established the MSA would contain a guarantee that the authority would itself be independent as well as, for the first time, guarantees of media freedom and independence.
  - Media participation in the MSA would be voluntary but there would be substantial incentives for those who become participants; the most important of these would be an adjudication scheme for complaints which anyone wishing to bring legal proceedings against a participant would have to use before going to Court. In addition there would be enhanced defences in any legal proceedings pursued after the MSA system had been used and additional remedies and rights against non-participants including a statutory right of reply and correction.
  - Although established by enabling legislation the MSA would not have the power to impose statutory sanctions on the media. Sanctions would be imposed under the terms of a 5 year "rolling contract" which participants would be required to enter into with the MSA.
  - The MSA would regulate the participants - it would draw up a Code of Media Ethics and Responsibility ("the MSA Code") and would receive regular reports and carry out audits to ensure that participants were complying. The MSA Code would be designed to provide a set of clear principles for ethical journalism and media practices, with specific examples and clear guidance adapted to the developing needs of the modern media.
  - The MSA would have investigatory powers (deriving from the contract of participation). Participants who were found to have breached the MSA Code would be subject to directions and sanctions, including increased subscriptions where there were

repeat breaches of the Code and, in the most serious cases, fines.

- The MSA Code would require prior notification in ordinary circumstances where the media was intending to infringe Article 8 rights. When approached by a member of the public, the MSA would be able to issue “desist notices” on an advisory basis to both to participants and to other publishers where journalists or “paparazzi” photographers were harassing an individual or threatening to infringe their Article 8 rights.
- The MSA would provide pre-publication advice and assistance – both to participants and to complainants. If a complaint was made about a threatened publication which it was claimed would constitute an invasion of privacy, the MSA would require a participant to state whether it was going to rely on a public interest defence and to demonstrate that it had used proper procedures to assess public interest. If there was publication and no such defence was in fact relied on, the participant could be sanctioned by the MSA.
- The MSA would mediate and determine disputes between the public and participants and would have the power to order the publication of fair and accurate summaries of its rulings and corrections. In appropriate cases it could also order the payment of compensation. The MSA would also publish recommendations in order to encourage continued adherence to the MSA Code.
- The MSA would be a public body and its actions in relation to complainants and participants would be subject to judicial review by the High Court (although, as a specialist regulator, it would be given a wide “margin of appreciation”).
- The medium term aim could be for the MSA to form part of a comprehensive system for regulation of all types of media - a “second tier” in between the “first tier” of strict regulation of those who use public resources (along the lines of the present Ofcom system) and a “third tier” subject only to “regulation” by the criminal laws against offensive speech, incitement of violence and so on. A worked-through version of such a scheme can be found in Lara Fielden's recent publication *Regulating for Trust in Journalism: Standards Regulation in the age of blended media* (Reuters Institute, 2011).

7. In the remainder of this paper we set out the details of the proposal, under the following headings:

- (1) Independence, Appointment and Functions
- (2) The MSA Code and its Enforcement
- (3) Promoting Ethical and Responsible Conduct
- (4) Voluntary Nature of Participation
- (5) Incentives to Participate
- (6) Conclusion

### Section 3: Independence, Appointment and Functions

#### *Independence and Appointment*

8. It is obviously fundamental that a body which regulates the media should be wholly independent of government and politicians. Government and politicians should play no role in the appointment of its members, the establishment of the rules of its operation and the preparation of a code. However, it is also important that a regulator should be independent of the media when dealing with disputes between complainants and the media or taking regulatory actions. Working editors should not be involved in regulating their competitors. Freedom of expression is best protected not by media "self-regulation" – which leaves out of account the interests of the public – but by "independent regulation" underpinned by statute.
9. Nevertheless, those responsible for media regulation should have practical experience of operation of the media - should understand the demands and pressures placed on working journalists and the practical obstacles which they face. The governing body of a regulator should, therefore, have a substantial minority of former editors and of journalists and others with experience of all forms of media publication, including digital news. Working editors and journalists would be involved in the formulation of the MSA Code.
10. The independence of the MSA would be established and recognised by statute. The statute would be "enabling" - setting up the body, setting out the process for the appointment of its governing council and "Code Committee" and for the drawing up of the Code. In addition, the statute would provide for "incentives" for participation - the advantages which would accrue to participants and the disadvantages for non-participants. A statute is essential for these limited purposes.
11. The legislation which established the MSA could, for example, contain a provision along the following lines:

#### MEDIA STANDARDS AUTHORITY

- (1) There shall be a body corporate to be known as the Media Standards Authority (in this Act referred to as "the Authority").
- (2) The Authority shall be the regulator for the publishers of newspapers, magazines, periodicals, websites or other media supplying information to the public or a section of the public (referred to in this Act as "News Publishers") which agree to participate in the regulatory system which it establishes. News Publishers who agree to be regulated by the Authority are referred to as "Participants" in this Act.
- (3) Any News Publisher who publishes in England and Wales shall be entitled to become a Participant, subject to the rules of the Authority,

whether or not the News Publisher has a place of business in England and Wales.

- (4) The principal objects of the Authority shall be to—
  - (a) ensure the protection of the freedom of expression of the media,
  - (b) protect the public interest by ensuring ethical, accurate and truthful reporting by the media,
  - (c) maintain certain minimum ethical and professional standards among the media,
  - (d) ensure that the privacy, dignity and reputation of individuals are properly and appropriately protected;
- (5) The Authority shall be independent of Government and of News Publishers in the performance of its functions.

12. The members of the MSA could be appointed by an independent body (for example the Judicial Appointments Commission) in accordance with the Code of Practice published by the Commissioner for Public Appointments. The legislation should set out the duties and responsibilities of the members in general terms and in accordance with the Nolan principles. Membership should be for a set term of no more than 3 years.

13. It is envisaged that the enabling legislation – a “Media Freedom and Standards Act” – would contain some general provisions designed to clarify and, where appropriate, enhance the rights of the media. In particular, the legislation could contain a guarantee of media freedom in the following terms:

#### GUARANTEE OF MEDIA FREEDOM

- (1) The Secretary of State for Culture, Olympics, Media and Sport and other Ministers of the Crown and all with responsibility for matters relating to the media must uphold the freedom of the press and its independence from the executive.
- (2) The Secretary of State for Culture, Olympics, Media and Sport must have regard to—
  - (a) the importance of the freedom and integrity of the media;
  - (b) the right of the media and the public to receive and impart information without interference by public authorities;
  - (c) the need to defend the independence of the media.
- (3) Interference with the activities of the media shall be lawful only insofar as it is for a legitimate purpose and is necessary in a democratic society, having full regard to the importance of media freedom in a democracy;

*Functions*

14. The precise details of the rules of the MSA would be a matter of the terms of its contract with participants but the MSA's general functions could be outlined in the enabling legislation in terms such as the following:

FUNCTIONS OF THE AUTHORITY

- (1) The Authority shall:
- (a) establish a Code Committee to prepare, after due consultation with the media and the public, a Code of Practice (referred to in this Act as "the Code"), the Code Committee shall contain a minority of working editors and journalists;
  - (b) establish a system for regulation of the media including mechanisms for dealing with pre-publication advice and assistance including desist notices and also post-publication claims and complaints by members of the public against News Publishers by mediation, and adjudication;
  - (c) set out the rules of participation for News Publishers which may include matters such as eligibility, rules of conduct, the payment of participation fees and a requirement that Participants are subject to the Authority's dispute resolution system to be contained in a contract of participation which Participants would be required to enter into with the Authority;
  - (d) establish "Dispute Resolution" tribunals;
  - (e) appoint suitably qualified persons to act as mediators, and adjudicators in accordance with the procedures set out in this Act.
- (2) It shall be the duty of the Authority to exercise the powers and perform the duties conferred on it by this Act in the manner that it considers best calculated to secure and maintain the freedom of the media, ethical and responsible standards of journalism and the promotion of public access to information which is accurate and not misleading or distorted.
- (3) Nothing in this Act shall confer any power on the Authority to compel any News Publisher to participate in its regulatory system or to give any directions to any News Publisher which does not agree to participate in the Authority.
15. The contract of participation would be drawn up by the MSA after public consultation. Participants would be required to sign a 5 year "rolling contract" and would not be permitted to withdraw from the MSA until the end of the contract term. The contract would set out the

powers of the MSA and the duties of participants. Participants would be required to give the MSA investigative powers, including powers to call for documents and to require the attendance of employees of participants to give evidence. The contract would be specifically enforceable – in other words, if a participant refused to comply with its terms, the MSA would be able to obtain a court order (an injunction or specific performance) to require compliance. If necessary, this could be spelled out in the enabling legislation.

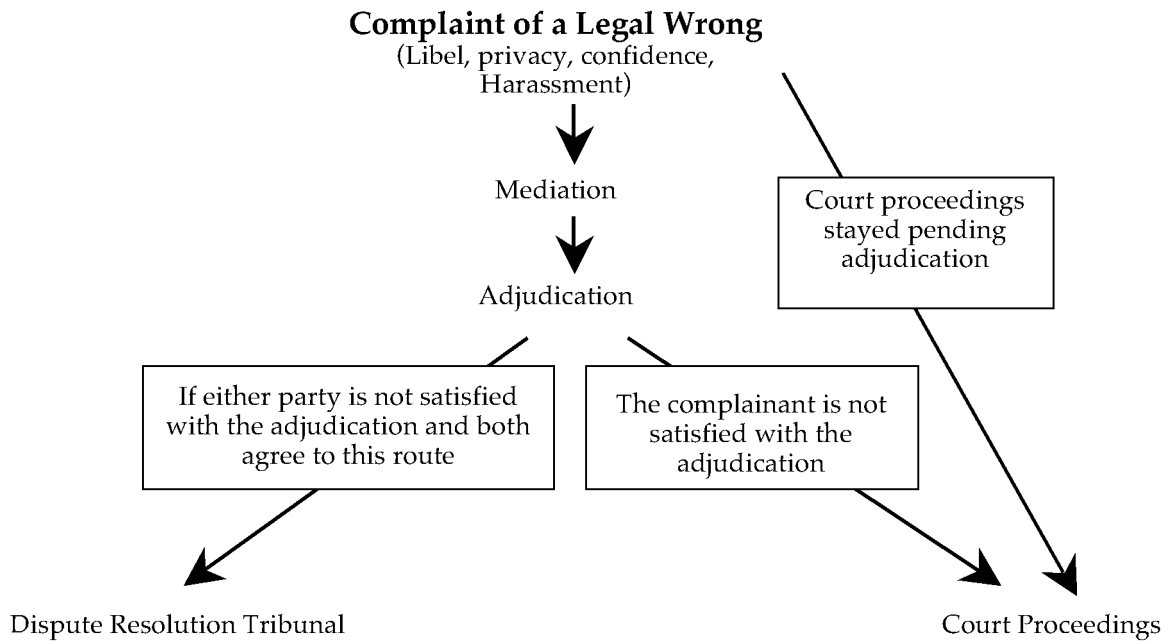
## **Dispute Resolution**

### *Introduction*

16. The central functions of the MSA are the drawing up of the MSA Code and the enforcement and promotion of standards of ethical and responsible journalism. It is, however, essential that these functions are supported by the dispute resolution mechanisms. The MSA must provide quick and cost effective resolution of disputes concerning compliance with the MSA Code. It can also provide dispute resolution mechanisms which provide a credible alternative to litigation.
17. The MSA would seek to resolve all complaints and disputes without recourse to the Courts through using appropriate methods of dispute resolution, depending on the nature and scale of the complaint. The MSA system for dealing with complaints and claims would have the following elements:
  - a "mediation" process (modelled on the present approach of the PCC) for alleged breaches of the Code;
  - an "adjudication" process (modelled on the statutory adjudication scheme which applies to construction contracts) – to which all legal claims against participants would, initially, be subject;
  - a Dispute Resolution Tribunal for resolving code violation complaints against participants where mediation is unsuccessful and for resolving legal claims against participants (when both parties agree to use this mechanism).
18. The "adjudication" process is central to this proposal. It is designed to provide compulsory "alternative dispute" resolution in all claims against news publishers who participate in the MSA, bringing them very substantial financial benefits and hence a strong incentive to participate. The proposed adjudication system is outlined in more detail below (see paragraphs 78 to 82).
19. The proposed dispute resolution system is set out below in diagrammatic form:



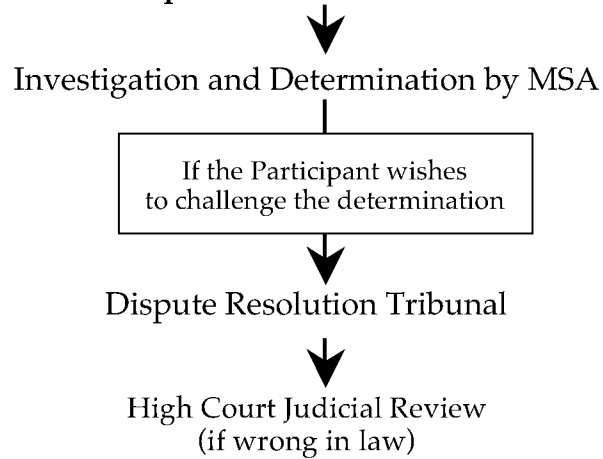
**MSA DISPUTE RESOLUTION DIAGRAM**



**Individual Complaint of a Breach of MSA Code**



**MSA Complaint of Breach of MSA Code**



#### MEDIATION

20. In relation to the "mediation" process, a person who claimed that a participant had acted unlawfully or that the MSA Code had been breached could make a complaint to the MSA whether or not s/he was a "victim" of the breach (although only victims would be entitled to claim compensation). An individual complaint would, in the first instance, be referred to the mediation process. This process would not normally involve lawyers or hearings. The mediation process would be designed to achieve a resolution agreed by the complainant and the participant. Resolution of a complaint could include the publication of a correction or agreed apology and, in appropriate cases, the payment of compensation.
21. If a complaint of a violation of the MSA Code could not be resolved within a short set time-frame the complainant would have the option of referring it to the more formal MSA dispute resolution process either by adjudication (which would not be final and binding) or by use of the Dispute Resolution Tribunal which would lead to a determination of the complaint which would (subject to the possibility of Judicial Review in the High Court) be final and binding. A claim for breach of the MSA Code could not, of course, be the subject of Court proceedings: complainants would not have rights under the MSA Code which were enforceable against participants in the courts.

#### ADJUDICATION

22. A claim of unlawful conduct which could not be resolved by mediation could be referred to a fast track statutory adjudication process. If a claimant brought Court proceedings without first using the adjudication system then a participant would be entitled to an automatic "stay" of those proceedings. The adjudication system would be central to the incentives provided for MSA participation. It would provide swift and effective resolution of legal disputes for participants usually within 28 to 42 days from the appointment of an adjudicator. It is considered in more detail below in the section on "Incentives to Participate".

#### DISPUTE RESOLUTION TRIBUNALS

23. The MSA would establish "Dispute Resolution Tribunals" – comprising a legally qualified chair and two members of the MSA Council (including one "lay member").
24. A complainant who wished to make a complaint of violation of the MSA Code and who was not satisfied with the result of mediation could refer the complaint to a Dispute Resolution Tribunal which would make a final determination (subject to judicial review) as to whether there had been a violation. The Tribunal would, in each case, decide whether or not to have a hearing. The Tribunals would also deal with complaints about MSA Code violations initiated by the MSA itself
25. In both cases, the Dispute Resolution Tribunal's decision would be final, subject only to review by the High Court. The Dispute Resolution Tribunal could award compensation in respect of breaches

of the Code, order the publication of a fair and accurate summary or a correction and give directions as to the future actions of the participants.

#### **Section 4: The MSA Code**

##### *Drawing up the MSA Code*

26. The central function of the MSA would be to draw up and administer the MSA Code. A broadly representative "Code Committee" could be established by the MSA – this committee (as opposed to the MSA itself) would include working editors, as well as journalists and independent figures. The MSA Code would then be drawn up after the widest consultation with the media and other interested parties.
27. The MSA Code would draw on the present Editors' Code (and on others used by broadcasters and newspapers) – and could also set out the principles which constitute best practice in the industry and underpin responsible and ethical journalism. These principles could be supplemented by examples of what happens in specific cases (as is done in many "Codes of Practice"). The intention would be to provide clear practical guidance to journalists and editors.

##### *Public Interest*

28. The "public interest" section of the MSA Code would be of particular importance. The precise terms of this would be a matter for the Code Committee but some general guidance would be given by the enabling legislation. This could, for example, include a provision along the following lines:

###### **PUBLIC INTEREST DEFENCE**

- (1) In all civil proceedings against the media (save for proceedings for defamation) it shall be a defence for the media to show that the actions or omissions in issue were in the public interest.
- (2) In order to be in the public interest the action or omission must be warranted by and proportionate to the public interest served and must have been authorised or approved by the media in accordance with appropriate internal procedures.
- (3) For the purposes of this section the public interest includes but is not limited to:
  - (a) revealing that a criminal offence has been committed is being committed or is likely to be committed;
  - (b) revealing that a person has failed, is failing or is likely to fail to comply with any legal or regulatory obligation to which he is subject;
  - (c) revealing a potential miscarriage of justice or seriously anti-social behaviour;
  - (d) protecting public health or safety;
  - (e) revealing that the environment has been or is likely to be damaged;

- (f) exposing misleading public claims made by individuals or organisations;
  - (g) disclosing recklessness, incompetence or negligence that affects the public;
  - (h) raising or contributing to an important matter of public debate.
  - (i) disclosing that anything falling within any one of the above is being, or is likely to be, deliberately concealed.
- (4) In proceedings for defamation the public interest defence is that contained in section 4 of the Defamation Act 2013.
- (5) Any Code governing the conduct of the media shall contain public interest provisions which include the matters listed in sub-sections (2) and (3).
29. This provision would provide a general public interest defence in any civil proceedings to the media but would make the defence conditional on the actions or omissions having been authorised under "appropriate internal procedures". This formulation would allow a court to consider, in each case, whether the procedures were appropriate and would not lay down any fixed, inflexible, rules. It could, however, also be provided that compliance with the MSA Code would constitute "appropriate internal procedures" for the purposes of this provision, thus giving additional protection to MSA participants.
30. The "Public Interest" section of the MSA Code would also deal with process as well as content: the processes by which editorial approval is obtained for potentially intrusive investigation and the processes whereby prior notification is given to the subject of potentially intrusive publications. Prior notification should be the norm - save in cases where a countervailing public interest could be clearly established (where, for example, notification might involve "tipping off" a wrongdoer). A participant which sought to rely on the "public interest" provisions of the MSA Code would also be required to demonstrate that appropriate processes had been used for the assessment of whether or not the public interest was engaged in a particular case, including the use of the MSA's own pre-publication advice and assistance service (see paragraphs 49 to 51 below).

### *Procedural Provisions*

31. The MSA Code would also contain a "procedural" section which would deal with matters such as the following:
- The systems which participants should have in place for ensuring compliance with the Code and for investigating and dealing with breaches or alleged breaches. This would include the appointment of a "responsible editor" and the establishment of rigorous internal procedures governing matters such as obtaining approval for intrusive investigations or the payment of cash to private investigators or sources.

- The designation and responsibilities of a “responsible individual” to deal with complaints from members of the public and who would liaise with the MSA about specific issues which arose. This could be a readers’ editor, or someone else given a high degree of independence.
- The “audit” process – it is anticipated that after the first two or three years of operation of the MSA, participants should be able to do this themselves through their internal Code compliance mechanisms with occasional “visits” by the MSA to check. In general, the MSA will only audit participants on an exceptional basis, in the light of concerns about their compliance with the MSA Code.
- The way in which complaints are dealt with by the media and by the MSA (with appropriate tight time scales).
- The remedies which could be granted by the MSA – these would include non-monetary remedies for breaches of the MSA Code (orders for the publication of summaries of rulings or corrections), advisory notices – and, in very serious cases, fines. The last would be a remedy of last resort.

#### *Enforceability of the Code*

32. The procedure for the drawing up of the MSA Code would be set out in the enabling legislation and its drawing up and enforcement would be a central function of the MSA. However, the details of the MSA Code would not be prescribed by statute and the code itself would not be directly enforceable by statute. Participation in the MSA would, for the reasons set out in Section 8 of this Proposal, be voluntary. Participants would, by joining the MSA, agree to abide by the terms of the MSA Code which would be enforced by the MSA under the terms of the contract of participation.

#### *Dealing with alleged breaches of the MSA Code*

33. The MSA would provide a process to deal with alleged breaches of the MSA Code. These could either be “individual complaints” (whether or not made by an individual who claims to be a “victim” of the breach) or investigations instigated by the MSA itself.
34. If the complaint is by an alleged “victim” of the breach, in appropriate cases, the MSA would have the power to order the publication by the participant of a fair and accurate summary of a ruling or a correction with equivalent prominence and to restrict future publication of specified material. Although the primary remedies for breach would be the publication of a ruling and/or correction in some, exceptional cases, the MSA would, have power to order the payment of compensation. The compensation would be on an appropriate scale determined by the MSA. In the light of the other remedies available it would not be necessary for compensation to be as substantial as common law damages.
35. Compensation would not be payable to a complainant who was not the “victim” of the breach but who was raising an issue concerning the treatment of a third party or general issues such as alleged inaccurate treatment of a particular racial or religious group.

36. Individual complaints would, in the first instance, be required to be dealt with by an MSA mediation process – on paper. If mediation was not successful then, if the complainant wished to pursue the matter, it would be dealt with by a Dispute Resolution Tribunal either on paper, or if the Tribunal believed it appropriate, at a hearing.
37. In addition, the MSA would have the power to investigate apparent breaches of the MSA Code by participants without a specific complaint having been made by members of the public. The MSA would have the power to appoint an investigator - and participants would be contractually obliged to cooperate with him or her in investigating breaches of the Code including by the provision of documents and, if necessary, oral evidence.
38. If there was a dispute about the findings of the investigation, the matter would be referred to a Dispute Resolution Tribunal and it is likely that a hearing would be required. If the Tribunal determined that there had been a breach, the MSA would have the power to give appropriate directions to participants. Such directions could involve changes in procedures, further training and other remedial measures. In very serious cases - or cases of persistent breaches - the MSA would have the power to require the payment of enhanced subscriptions or to impose "fines". The power to do so would derive from the contract of participation.

## **Section 5: Promoting Ethical and Responsible Conduct**

### *Introduction*

39. One of the MSA's most important functions would be the promotion of ethical and responsible journalism. The basic principles would be contained in the MSA Code which would be consulted on and promoted.
40. The MSA Code will make explicit the rules of conduct for participants. These rules will apply to all participants in the MSA and those who work for them. Participation in the MSA will require that participants make explicit the values by which they conduct their business which must meet or exceed the requirements of the MSA Code, which will be incorporated and published in their 'Code of Conduct'.
41. Participants must embed their Code of Conduct by communicating to staff, contractors and readers what their values and standards are; training staff and supporting behaviour change with appropriate systems and processes and monitoring and accounting for performance annually, on the basis of "comply or explain".
42. A participant would be responsible for the overall conduct of the business including editorial standards as expressed in the participant's own Code of Conduct. In larger organisations good practice in demonstrating implementation of the Code of Conduct is

likely to include the appointment of a Standards Committee, made up of non-executive directors, which will report directly to the Board, to monitor adherence to the publicly declared values and provide regular reports on performance to the Board.

43. Participants would be required to designate a responsible editor who must ensure that the corporate commitment is met and for signing off the Annual Report of Performance/Compliance against the Code of Conduct. In the case of newspapers and magazines the responsible editor will normally be the editor. The responsible editor would be bound by contract to observe and implement the Code of Conduct. The responsible editor will have personal responsibility for ensuring that the editorial culture supports the Code of Conduct and for reporting on performance.
44. In addition, any media organisation employing more than, say, 50 people would be required to appoint a part or full time "responsible individual" who would act as an entirely independent monitor of complaints from the public.
45. Any journalist, whether employed directly, freelance, or in any other capacity, would be responsible for behaving in accordance the Code of Conduct and would be bound by contract to observe the corporate commitment to the Code of Conduct which includes the MSA Code
46. The participant should ensure that there is an "audit trail" record of what is judged to be in the public interest, including evidence that justifies the investigation/intrusion, who took those decisions, and who took the decision to publish.
47. The participant should also ensure that there is a confidential Whistleblowing Advice Service available to all employees and journalists whether employed directly, freelance, or on any other capacity, to support them in observing the Code of Conduct. Journalists who felt their stories had been rewritten to convey an impression different from that intended or who had been ordered to collect evidence to fit a pre-conceived thesis or had been ordered to breach the MSA Code, would be able to report such matters to this service.
48. In addition, the MSA would:
  - Organise and accredit relevant training for journalists and editors;
  - Publicise the findings of adjudicators and the results of investigations and audits;
  - Publish annual and "issue specific" reports, including "league tables" concerning compliance with the MSA Code.

### *Pre-Publication Steps*

49. The contract of participation would not include a pre-publication power for the MSA to order participants not to publish. "Prior restraint" is a matter which should continue to be dealt with by the Courts. The MSA would, however, provide pre-publication advice and assistance to both participants and complainants.
50. In relation to participants, the MSA would provide a confidential advice and assistance service on public interest issues. If a participant was in doubt as to whether the publication of particular private information was in the public interest, it could seek confidential guidance from MSA advisors. If the MSA advisors expressed the view that the publication would be in the public interest then this would be taken into account if a subsequent complainant was made of a breach of the Code and it could also be taken into account by an adjudicator or Court if a privacy claim was brought. If the advisors expressed the view that the publication would not be in the public interest, that could be disclosed to a complainant and used in support of his or her complaint (although it would not bind any subsequent adjudicator or Court).
51. In relation to complainants, if an individual became aware that a participant was intending to publish private information, he or she could refer the matter to an MSA advisor who could express a provisional view as to whether the information was private. If the information was private the participant would be asked whether or not it intended to rely on a "public interest" justification for publication and if so, what the public interest was and the advisor would provide a view as to the legitimacy of the justification. It is likely that a publication where no such reliance was possible would be a breach of the Code and, if the participant proceeded to publication, the MSA would itself commence an investigation. If the participant did not, in the event, rely on a public interest defence this would also be a breach of the Code and would be the subject of a sanction by the MSA. If the participant did, indeed, rely on a public interest defence then its validity would be the subject of adjudication and, if necessary, resolution by the Courts (taking into account any pre-publication views expressed by the MSA advisor).

### **Section 6: Governance and Funding**

52. As already indicated, the MSA would be established by statute with a "governing council", independently appointed, with a substantial minority of former editors, former and current journalists and others from the full range of media. The majority of members would, however, be independent of media interests.
53. The intention would be that a substantial proportion of the funding of the MSA would come from subscriptions from participants. These would be based on an agreed funding formula. Local press, publishers of small circulation magazines and individual bloggers would pay very low subscriptions. The "polluter pays" principle



would be used so that the participants who breached the MSA Code would be required to pay enhanced annual subscriptions. The MSA would, however, enable substantial savings to be made on publishers' legal costs as a result of the use of adjudication. Complainants and respondents to complaints could be charged a "handling fee" in appropriate cases.

54. It is, unfortunately, difficult to obtain accurate figures from the press as to the costs of handling libel and privacy complaints and hence as to the likely savings which would be made if a substantial proportion of such complaints were dealt with quickly and cheaply by adjudication. The only figures readily available are those provided to Lord Justice Jackson by the Media Lawyers Association in relation to costs in 2008 (forming Appendix 17 to his Preliminary Report). That detailed 154 cases, with average costs per case (of both sides) of more than £90,000. This figure may be distorted by a small number of very large cases. But even if the three largest cases are removed, the average cost per case is more than £40,000. If this figure could be cut by half using the adjudication system this would result in a saving of the order of £3,000,000 per annum. It would, therefore, make economic sense for media organisations to join the MSA system if the cost was less than this sum.
55. It is, however, likely that an element of state funding will also be required – in particular, to cover start up and transition costs.

## Section 7: Voluntary Participation

### *Introduction*

56. Participation in the MSA would be voluntary: no one would be compelled to join. Any media organisation outside the statutory system of broadcast regulation could join – publishers of newspapers and magazines, website publishers or bloggers. Any person who publishes news and information in England and Wales – wherever they are based – could become a participant. This could include foreign newspapers and magazines but also bloggers and online publishers based in other countries.
57. There are three fundamental reasons for proposing such a voluntary system: principle and credibility, difficulties of enforcement and positive advantages of the need for consent.

### *Problems of Principle and Credibility*

58. First, any system of "compulsory" regulation of the media gives rise to serious issues of principle. There is a strong argument that compulsory regulation is objectionable in principle and it may now be difficult to justify under Article 10(2) of the European Convention on Human Rights. Such regulation would have to be backed by "compulsory registration" as a media organisation. The Inter-American Court of Human Rights has held a requirement that journalists are members of a "College of Journalists" is an unjustified interference with the right to freedom of expression (Advisory

Opinion, OC-5/85 of November 13, 1985, *The Compulsory Membership in An Association Prescribed by Law for the Practice of Journalism*). There is a risk that a similar analysis would apply to a law which would, in substance, impose a "licensing regime" on all sections of the media (as opposed to the specific regime covering broadcasters which are generally recognised to be a special case).

59. Furthermore, a media organisation which breached the regulatory requirements would have to be sanctioned. In the first instance, the sanction could be a fine – presumably on an escalating scale if the media organisation refused to comply with a direction of the regulator. However, as with other regulators, the ultimate sanction would have to be "striking off the register", in other words forbidding a media organisation from continuing to publish. This would, in turn, have to be backed by legal sanctions: either criminal prosecution or proceedings for injunctive relief (with committal for contempt of court as the ultimate sanction).
60. The possibility of prosecution or committal of media organisations or individual publishers for a refusal to take part in a system of compulsory regulation or for "publishing whilst not being registered" would be perceived by the media and the public as censorship and would not be credible. It is too high a price to pay for the advantages of comprehensive regulation.

#### *Difficulties of Enforcement*

61. Second, compulsory regulation would be extremely difficult to enforce in practice. Although newspaper and magazine publishers based in England and Wales could be made subject to compulsory regulation, the position is very different in relation to publishers based abroad. In the absence of international agreements, there would be considerable difficulties in applying compulsory regulation outside the United Kingdom. Publishers based in other EU countries could not be prevented from exporting printed material into the United Kingdom. This means that, if the regulatory regime imposed significant costs or constraints, even print publishers might seek to avoid regulation by operating offshore.
62. The enforcement difficulties would be even more acute in relation to internet only publishers. It should be borne in mind that none of the large internet companies such as Google and Twitter have any UK base. Any internet publisher whose place of business is outside England and Wales could not be made subject to a compulsory regulatory regime without wide ranging "internet blocking" of a kind not currently practised by liberal democracies. If internet publishers presently based in England and Wales wished to avoid the costs and constraints of compulsory regulation it would be straightforward for them to relocate offshore.

63. The so-called "Desmond" problem of large newspaper groups refusing to participate in a voluntary system of regulation should not be allowed to obscure the legal and practical difficulties of compulsion. A system of compulsory registration would be likely to lead to the rapid creation of a "two tier" system of news publication: a small (and diminishing) number of large "regulated" newspaper and magazine publishers and a large (and increasing) number of "unregulated" publishers. The position as to issues of fairness and accuracy in relation to the latter group would be worse than it is at present. Without wholesale censorship of the internet a voluntary regime is the only way in which to bring internet only publishers within a regulatory system.

#### *Positive Benefits of Consent*

64. The third argument in favour of voluntary regulation is a positive one. We believe that a voluntary system itself has substantial positive benefits, in particular:
- A voluntary system would have to be designed to obtain the fullest cooperation of the media, both in drawing up and enforcing the MSA Code. A code prepared in this way would be more likely command wide support and thus to be effective in practice.
  - By actively involving the media in its operation a voluntary system would assist in promoting changes in the journalistic culture which has led to recent abuses.
  - If the system is voluntary, media organisations who are not based in England and Wales could become participants. Participation could be open to publishers based offshore and to individual publishers (such as bloggers) who were prepared to subscribe to the MSA Code (insofar as it applied to them). This would assist in promoting the culture of responsible and ethical journalism across all platforms.

#### *"Partial Registration"*

65. In order to overcome the obvious problems of compulsory regulation, a number of commentators have suggested a "half way house" of partial compulsion for substantial publishers in order to avoid the position where large newspaper refuse to participate in a voluntary body. A "readership" threshold has been suggested – a publisher of a newspaper, magazine or online publication with a readership above the threshold would be compelled to participate in regulation.
66. We do not agree with such a proposal. It would involve imposing statutory sanctions on publishers who did not comply and would fundamentally undermine the voluntary, incentives based, structure of the proposed system of regulation.

#### *"Compulsion" through a system of media tribunals*

67. An alternative route to compulsory regulation would be through the establishment of a system of media tribunals to deal with all cases brought against the media. This system could be compulsory if it was a "court system": independent of the state and impartial. Such a system could, like other tribunals, be one in which ordinarily no legal

costs were recoverable by either party. This would mean that there would be possible costs saving for the media in libel and privacy litigation (as they would not be liable for the costs of the claimants). This system would also (from one perspective) improve access to justice as it would mean that claimants could bring cases against the media without facing the risks of potentially very large exposures to pay the other side's costs in the event that they were unsuccessful.

68. Although this approach has some attractive features it suffers, in our view, from a number of serious problems which make it unattractive as a solution to the problems which give rise to the need for media regulation in the first place. In particular, we would draw attention to the following:
- If the media tribunal system included only individual complaints based on the current causes of action it would not address many of the "structural" and "systemic" issues which require regulatory intervention.
  - If a media tribunal did address wider issues then it would be necessary to have a new "media law" – imposing wider obligations on the media which could then be the subject of complaints to the tribunal.
  - It is unclear whether there would in fact be substantial costs savings for the media from such a system. The savings on cases where there was liability for the claimant's costs would be at least partially offset by an inability to recover costs when successful and by the likely increase in cases resulting from the availability of a cost free system of litigation.
  - There would be "equality of arms" issues if, as seems likely, many cases pitted unrepresented claimants against the lawyers employed by media organisations. Similar issues would arise if powerful claimants brought tribunal claims against small publishers or bloggers.
  - A tribunal system is likely to be very much more expensive than a regulator, of whatever kind.
69. For these reasons we do not think that a "media tribunal" system would provide an effective answer to the "Desmond problem" and would, in addition, generate a number of problems of its own.

## **Section 8: Incentives to Participate in the MSA**

### *Introduction*

70. The crucial feature of the proposal for the establishment of the MSA is a system of incentives - advantages accruing to participation and disadvantages arising from non-participation. These incentives would be established by the enabling legislation.
71. Various "commercial" and "legal" incentives have been discussed. They are, collectively, designed to encourage (but not compel) participation in the MSA. Publishers would remain free to choose whether or not to participate.

### *Commercial Incentives*

72. The following "commercial" incentives could be available to participants in the MSA:
- The ability to display the "MSA Kitemark" which would indicate that the publisher operated in accordance with the professional standards laid down in the MSA Code. This could be of particular value to smaller publishers and bloggers. It would indicate that that publisher had signed up to the MSA fast track adjudication and mediation system and suing it without first going through the MSA statutory adjudication system would lead to any expensive High Court action being stayed. It would also be of value to consumers, providing a transparent system allowing consumers to navigate the range of media.
  - "Journalistic accreditation" - this would cover matters such as court reporting (including live text reporting) and access to confidential official briefings – this would not constitute "licensing of journalist" but would involve extending additional benefits to those working within the MSA regulatory framework.
  - Membership of collective commercial partnerships such as participation in industry standards.
  - Exemption from the regulation of audio-visual content by "ATVOD" – the MSA could take over the relevant regulatory functions.
73. Along with a number of other commentators we initially proposed that the exemption from VAT which currently applies to all newspapers and magazines could be restricted to the newspapers and magazines whose publishers participated in the MSA. We now believe that the differential removal of this exemption is unlikely to be compatible with EU law and we have removed it from this proposal.
74. Although the incentives mentioned above could be of some commercial value to publishers they would not, of themselves, guarantee participation. For example, the availability of the PCC "kitemark" has not, of itself, provided a sufficient incentive to persuade major publishers to remain participants. A key aspect of the MSA proposal is the incentives offered in relation to legal proceedings.

### *Incentives in relation to Legal Proceedings: Introduction*

75. Four types of "incentives" to participation in the context of legal proceedings are proposed:
- (1) Efficient and cost effective dispute resolution mechanisms – providing access to justice to complainants and saving legal costs for participants;
  - (2) Enhanced defences in legal proceedings in the Courts for participants;
  - (3) Additional damages payable in legal proceedings in the Courts by non-participants.

- (4) New legal rights and remedies available to members of the public who make claims against non-participants.  
All these incentives would be contained in the enabling statute.  
They will be considered in turn.

## Dispute Resolution

### *Introduction*

76. First and most importantly, central to the advantages of participation would be a system for resolving individual legal claims brought against media organisations which would substantially reduce legal costs whilst providing access to justice to both complainants and participants.
77. The MSA would seek to resolve all complaints and claims without recourse to the Courts through using three methods of dispute resolution, depending on the nature and scale of the complaint. The MSA system for dealing with complaints and claims would have three elements:
- a "mediation" process (modelled on the present approach of the PCC)
  - an "adjudication" process (modelled on the statutory adjudication scheme which applies in the construction industry);
  - If adjudication was unsuccessful then the MSA could offer a binding resolution of the claim by a Dispute Resolution Tribunal if the claimant agreed.

### *Adjudication*

78. A fast track statutory adjudication process would be central to the incentives provided for MSA participation. It would provide swift and effective resolution of legal disputes for participants usually within 28 to 42 days from the appointment of an adjudicator.
79. Under the terms of the adjudication scheme, any legal complaint relying on a cause of action arising out of publication (defamation, malicious falsehood, misuse of private information, breach of confidence or harassment) could be referred to MSA adjudication by the claimant. If the claimant did not take this course but, instead, issued Court proceedings, the participant could apply for a stay and an automatic referral of the claim to adjudication (save in relation to claims for interim injunctive relief). In other words, every participant would be able to require complainants, in the first instance, to use the MSA adjudication system.
80. A reference to adjudication would not prevent claims being finally determined by the courts in due course but would mean that such claims would be stayed pending the decision of the adjudicator who would be a specialist in media law with a legal qualification. The pool of adjudicators for media disputes would not have to be anything like as wide as that under the Housing Grants, Construction and Regeneration Act 1996 but in order to command public support, the claimant would have to agree the appointment of any independent

MSA adjudicator from a pool of independent specialists. A complainant who was dissatisfied with the adjudicator's decision would still have a right of recourse to the courts.

81. The MSA adjudication process would have the following features:
- The adjudicators would deal with claims against MSA participants for defamation, misuse of private information or breach of confidence arising out of publication, intrusion or harassment by participants. Such claims could be brought directly (without the need to commence court proceedings) or would be dealt with after court proceedings had been stayed.
  - The MSA would operate a stringent filter system to prevent vexatious or hopeless claims being brought. This would involve initial assessment by an adjudicator who would apply a similar test to that applied by the Courts when considering whether to strike out claims which are an abuse of the process.
  - MSA adjudicators would be wholly independent, selected from a list of legally qualified individuals with experience and knowledge of media issues by the parties and, in default, by the MSA.
  - The MSA adjudicators would consider the claim and identify the key issues in dispute. These would be ruled on within a period of 28 days. If the claim was found to be established, the adjudicator would make an award of compensation and/or an order for other remedies (such as an order for the publication of a fair and accurate summary of the adjudication or a correction or an order restricting future publication of specific material).
  - This could be done on paper or, if the adjudicator decided this was appropriate (taking into account the complexity of the case and the matters in issue), after an oral hearing.
  - The adjudicator would be paid by the MSA but his/her fees would ordinarily be recovered from the participant. The participant would not, ordinarily, be entitled to recover legal costs from the complainant but the adjudicator could award costs against the participant. In other words, there would be a system of "qualified one way costs shifting".
  - The adjudicator's ruling or award would not be final or binding. If the complainant wished to challenge the award then s/he would have to commence Court proceedings within 28 days of the adjudicator's ruling or final award. In this case, any stay of existing proceedings could be lifted. However, as with the construction adjudication process, it is anticipated that in the large majority of cases both parties would be content to accept the conclusions of the adjudicator. If the participant did not accept the adjudicator's ruling or award it would have to give notice within 28 days. If the complainant wished to continue with the claim s/he would then have to commence court proceedings.
82. It should be noted that "adjudication" in this form is fundamentally different from arbitration. "Adjudication" involves a speedy non-binding decision. "Arbitration" leads to a final determination but can

take place only if the parties both agree to refer their dispute to arbitration. The parties cannot be forced to use arbitration (this would be a breach of their right to under Article 6 of the European Convention on Human Rights to have "access to court"). If adjudication was unsuccessful then, if the complainant agreed, the dispute could be resolved by an MSA Dispute Resolution Tribunal (acting as an arbitral tribunal).

### *Enhanced Defences to Legal Proceedings*

83. The second type of legal incentive would be the availability of enhanced defences in libel and privacy proceedings to participants in the MSA.
84. These defences, which could be included, in the enabling legislation could be as follows:
  - In libel proceedings there would be a new defence of "regulated publication" - a participant who was sued for libel who published a prompt suitable correction and sufficient apology and paid compensation and gave other redress as ordered by the MSA would have a complete defence unless the material was published maliciously.
  - In privacy proceedings, there would be a "public interest publication" defence for participants who could show that they had adhered to the public interest requirements of the Code. The determination of the MSA on this point in the individual case would be of persuasive effect (though not binding on a court).
85. The legislation which established the MSA could, for example, contain a provision along the following lines:

#### DEFENCES TO DEFAMATION AND PRIVACY CLAIMS

- (1) In any claim for defamation it shall be a defence (subject to sub-section (3)) for a publisher to show that it has complied with directions and requirements given or made by the Authority in relation to the publication in issue.
- (2) This defence shall be known as "regulated publication"
- (3) There is no such defence if the publisher knew or had reason to believe that the statement complained of—
  - (a) referred to the claimant or was likely to be understood as referring to him, and
  - (b) was both false and defamatory of the claimant.
- (4) In any claim for misuse of private information or breach of confidence it shall be a defence for a publisher to show that it has complied with the public interest requirements of the Code. In determining whether or not there has been such compliance a Court shall, unless there is good reason not to do so, follow any determination of the Authority in relation to the publication of the information in question.



### *Additional Damages*

86. Thirdly, non-participants in the MSA could be required to pay statutory "additional damages" if they published defamatory allegations or private information in breach of the provisions of the Code or by flagrantly disregarding a desist notice issued by the MSA. Those damages could be limited by statute with reference to the "non-pecuniary" damages which a court would otherwise award in accordance with established principles, depending on the seriousness of the breaches.

87. The legislation which established the MSA could, for example, contain a provision along the following lines:

#### ADDITIONAL DAMAGES

- (1) The court may in publication proceedings against a publisher having regard to all the circumstances, and in particular to the nature of the conduct complained of and the extent to which, the conduct in question was not in accordance with the Code or against any desist notice sent out by the Authority, award such additional damages as the justice of the case may require.
- (2) No additional damages may be awarded against a Participant

### *New Legal Rights and Remedies against Non-Participants*

88. Finally, the enabling legislation could grant other new legal rights and remedies against non-participants. These would have two, complementary, aims: providing an incentive to media organisations to participate in the MSA and providing access to effective remedies for complainants against non-participants.

89. We propose the following new legal rights and remedies which would only be available against non-participants:

- A statutory right of reply or correction. There would be a right to reply and have a correction with appropriate prominence published under the MSA Code (as there is under clauses 1 and 2 the Editors' Code). These are rights of fundamental importance in ensuring that the media is both fair and accurate. Non-participants are not bound by the MSA Code and should, therefore, be bound under the general law to provide similar replies or corrections.
- Statutory support for access to justice in publication proceedings against non-participants. This would be done by providing that such proceedings could be brought with the benefit of Conditional Fee Agreements with "staged" success fees - up to say 75% in cases which proceed to trial - and "qualified one way costs shifting" (that is, provision that costs would not ordinarily be recoverable against unsuccessful claimants). This is necessary because access to the Courts is severely restricted by the costs of legal proceedings. Complainants can have effective remedies under the MSA

Code without recourse to the courts. Similar effective remedies need to be available against non-participants. We believe that the fact that such success fees would only be available against non-participants, the non-recoverability of insurance premiums, the requirement of "staging" and fact that the highest success fee would be less than 100% would mean that this provision would be consistent with Article 10 as analysed in by the Court of Human Rights in the case of *MGN v United Kingdom* (Case No 39401/04, 18 January 2011).

90. As to the former, the legislation which established the MSA could, for example, contain a provision along the following lines (modelled on the equivalent legislative provision in Finland):

RIGHT OF REPLY OR CORRECTION AGAINST NON-PARTICIPANTS

- (1) Any person who claims that information published by a News Publisher to the public or a section of the public whether printed or online is inaccurate, misleading or distorted has a right to have a reply or correction published in the same publication. The person who makes such a claim is referred to, in this section, as the "Complainant".
  - (2) The News Publisher shall publish a proportionate and appropriate reply or correction, free of charge and without undue delay, in the same manner as the information on which the demand for a reply or correction is based, provided that the contents of the reply or correction shall not be illegal or offensive.
  - (3) A demand for a reply or correction shall be made by the Complainant in writing within 14 days of the publication of the information on which the demand is based.
  - (4) If the demand for a reply or correction is rejected, the rejection and the reasons for it shall be notified to the Complainant within 7 days of the receipt of the demand.
  - (5) The Complainant shall have the right to submit the issue of whether the preconditions for the right of reply or correction have been met to the Court, within 30 days of receiving written notification of the reasons for the rejection. The Court may order the News Publisher to comply with its duties under this section.
  - (6) The duty provided for in this section shall not apply to Participants.
91. The provision as to the recoverability of staged success fees of up to 75% and one way costs shifting could also be included in the enabling legislation. This would make it clear that such success fees could not be recovered from participants.

## Section 9: Conclusions and the Leveson Inquiry's Module 4 Criteria

92. In conclusion, we believe that the proposal for regulation by the MSA will provide a fair and effective system of, which could be extended to all forms of media, whether published onshore or offshore. Although set up by enabling legislation the MSA would be wholly independent of government and parliament and its powers over its members would derive, ultimately, from their agreement to be bound. It would enhance access to justice for both complainants and participants.

### *Leveson Criteria*

#### INTRODUCTION

93. The Leveson Inquiry has proposed five criteria against which any proposed regulatory solution for the media should be measured. Their application to the above proposal will be addressed in turn under the headings set out

#### EFFECTIVENESS:

94. The proposal is designed to provide an effective regulator which recognises that public interest journalism is essential to a democratic society and also that accuracy and fairness in media reporting serves the public interest. It is designed to be sensitive to the concerns of the media whilst providing swift and effective remedies to the public.
95. The MSA would aim to alter the culture of the media so that invasions of individual rights are properly considered and justified before they take place. It would set appropriate ethical standards – after the widest consultation – train the media in their operation and monitor compliance.
96. A central feature of the MSA is its voluntary nature and offshore and online publishers would be encouraged to join. It is not just designed to regulate the (shrinking) onshore print media but to provide a framework in which developing forms of media could be regulated.

#### FAIRNESS AND OBJECTIVITY OF STANDARDS

97. The MSA Code would be prepared by a committee including substantial industry representation within a framework set out in the enabling legislation. The Code Committee would be independent of government and would have a majority of “non-media” representatives.

#### INDEPENDENCE AND TRANSPARENCY OF ENFORCEMENT AND COMPLIANCE

98. The MSA would be operationally independent of both government and the media and would command public respect. The appointment processes would be independent of government, parliament and the media.
99. The “responsible editor” would be responsible for compliance with the MSA Code and there would be regular audits and reports to ensure compliance. All substantial media organisations which

participate would be required to appoint an internal ombudsman to deal, in the first instance, with readers' complaints and to assist journalists in complying with the MSA Code.

#### POWERS AND REMEDIES

100. The system would provide remedies of two kinds. First, in relation to breaches of the code affecting individuals, the MSA would be able to award compensation and make appropriate orders for the publication of corrections or summaries of its rulings. Second, in relation to "systemic" breaches, the MSA would publish reports and would have the power to impose fines and order the publication of summaries of its rulings.

#### COST

101. The availability of compulsory adjudication to participants would result in considerable savings of legal costs for the media which could, in part, be used to finance the operation of the MSA. Overall although the will cost more than the Press Complaints Commission it will provide a much wider range of services and benefits, both to the public and the media.

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