



# **A Free and Accountable Media**

## ***Reform of press self-regulation: report and recommendations***

**Media Standards Trust Submission to the Leveson Inquiry**

The Press Review Group  
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## Foreword

### The purpose of this report

This report makes recommendations for a new framework of news media self-regulation. The recommendations are aimed at protecting free expression and a free press, enhancing the protection of good journalism in the public interest, addressing the problems revealed prior to and during Modules One and Two of the Leveson Inquiry, and better protecting the public.

The report also evaluates some of the other proposals made for reform, and analyses the extent to which these proposals will deal with the problems revealed by the phone hacking scandal.

It is a submission to the Leveson Inquiry, though the report will also be published following submission.

The report has been written in consultation with an advisory group of seven people, each of whom has extensive experience of the media. Each member of the group is acting in a personal capacity.

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*“The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.”*

Thomas Jefferson to Edward Carrington, January 16<sup>th</sup> 1787

*“I would never have thought that private information would have been obtained and used by the press in the way it has been. I certainly never would have thought that ordinary or vulnerable people like us would have been subject to phone hacking and that a newspaper would have accessed Milly’s voicemails during the time that she was missing and we were desperately trying to find out what had happened to her”*

Sally and Bob Dowler, Witness Statement to the Leveson Inquiry, 2011

## Executive Summary

This is, undoubtedly, a significant moment in the history of the British press. Though right now it is far from clear whether it will be seen as the postscript of one era, or a bridge to the next. For this, much relies on the determinations of the Leveson Inquiry.

We believe Lord Justice Leveson has a narrow window of opportunity to act effectively. The experience of the last sixty years suggests that moments like this pass quickly. The political will dissipates, and within months media and politics return to 'business as usual'.

At the same time no action should be taken in haste. Laws made quickly in response to shocking revelations tend to have unforeseen and often negative repercussions. In addition to this, the free press is a special case. It is not like the law, finance or medicine. We rely on the news media to tell us what the State is doing in our name. We need it to be free to do that without any direction or constraint from the State. In that way we expect it to play a semi-constitutional role.

Unfortunately parts of the press have abused that role and abused their power. They have corrupted areas of public life and distorted the democratic process. Perhaps most shockingly, they have betrayed ordinary people in vulnerable situations, people on whose behalf they claimed to be speaking.

The Inquiry has to recommend ways to prevent such abuse of power, without jeopardising the unwritten constitutional position and independence of the press. These two principles inform all of this report. There is no question that the task is a hard one. It is one that has been deliberately ducked by more than one administration in the past.

But the Inquiry is in a different position to its predecessors. There has been a general acknowledgement that past behaviour was unacceptable. There is a broad consensus that the previous system of press self-regulation was not adequate. And, the Inquiry has the benefit of participation by a third party, one that was largely absent from previous attempts at reform: the public.

It is therefore a tremendous opportunity to put the future development of the press in this country within a well-constructed framework of law and self-regulation. A framework that better protects members of the public from harm, and that properly protects independent journalism in the public interest. A framework that, over time, leads to cultural as well as regulatory change. This report aims to set out just such a framework. We hope it makes a constructive contribution to the debate about a new system.

This report deliberately sets the current debate in its historical context, both to learn from the positive experiences of the past, and to avoid previous mistakes. One unavoidable lesson from the past is that an effective system – any effective system – will require a degree of statutory backup. This is primarily to deal with two failings of earlier attempts at voluntary self-regulation, notably:

- to ensure that those media organisations that should be within the regulatory scope cannot simply opt out
- to ensure that there are mechanisms by which the public can achieve appropriate redress from powerful media organisations

We believe that there is no truly effective way of achieving these other than through statute.

The role of statute recommended in this proposal is simply as a backstop, doing only what is needed to enable an effective system of self-regulation. Our belief is that self-regulation is the best system for the media, as long as it works. Our framework is therefore created with appropriate checks and balances to ensure proper self-regulation that works on behalf of the public and the public interest. Freedom to publish within the law without any fear of State interference is fundamental to the framework.

The recommendations aim to avoid any serious concerns that statutory backing will allow government intervention in decisions to publish. We do not, for example, recommend any form of obligation to external pre-clear publication – beyond whatever legal rights already exist in law to seek injunctions. Furthermore oversight of compliance with a Code of Practice would be a matter for a self-regulatory organisation set up by news publishers but subject to an approval process. So we recommend what is fundamentally a self-regulatory system, and it is designed with an eye to similar systems adopted in other professions.

To do this, the proposal adapts and combines aspects of different regulatory approaches to create a system that incorporates the flexibility, freedom and informed rule-making of self-regulation, with the compliance and enforcement powers that can be made effective through backstop regulation. It applies some the characteristics of co-regulation and enforced self-regulation, informed by precedents in other regulated industries and professions, and theoretical approaches to regulation.

The proposal also tackles head-on the question of who should be in the system. Our belief is that free speech should be distinguished from the speech of large corporations. Too often the two are unhelpfully blurred together. As Onora O’Neill said in her Reuters Institute lecture (2011):

“Powerful institutions, including media organisations, are not in the business of self-expression, and should not go into that business. An argument that speech should be free because it generally does not affect, *a fortiori* can’t harm, others can’t stretch to cover the speech of governments or large corporations, of News International or the BBC”<sup>1</sup>.

For this reason this proposal puts no regulatory obligations on individuals or small publishers above those that already exist within the law. Instead, it focuses reform on large corporations, where evidence of abuse of power has been revealed: publishers who have enough reach and influence to cause serious harm to individuals.

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<sup>1</sup> O’Neill, O. (21<sup>st</sup> November 2011) ‘The Needs of Journalism and the Rights of Audiences’, Oxford Reuters Institute for the Study of Journalism lecture

Fortunately, we already have existing, established definitions within the law to distinguish between small and large organisations. The Companies Act 2006 sets out the definition of a small company.<sup>2</sup> We recommend that any news publisher at this threshold or below should have no regulatory obligation beyond the law.

Large news publishers, who fall above this threshold, should be required to take responsibility for their actions. In the same way as such companies already have obligations with regards to financial and legal reporting, health and safety and information management, so they should have obligations to the public that correspond to their power as large news publishers.

These large news publishers should be obliged to: institute adequate internal complaints and compliance mechanisms, and set up and/or join an external self-regulatory organisation.

Although the external self-regulatory organisations (SROs) would be set up and paid for by their members, they would need to be approved by a Backstop Independent Auditor (BIA). Approval would depend on the organisation meeting various minimum standards set in consultation with the industry – standards for which there already exist many good examples. The BIA, established in statute, would then audit the SROs on an annual basis to ensure they were functioning properly in the public interest. The powers of such an auditor would be limited to process. It would have no influence over content.

At their most basic these SROs would: provide the public with an independent forum for resolving complaints about member organisations; provide meaningful, proportionate and timely redress to the public, particularly with regard to inaccuracy, unfairness, and unjustified privacy intrusion; and protect the freedom of journalists to report in the public interest.

In this way content regulation is left entirely in the hands of self-regulation, independence is protected, and the public are guaranteed adequate, transparent, accountable and proportionate avenues of redress and accountability.

We also recognize that greater clarification of the boundaries between privacy and freedom of expression – the balance between Articles 8 and 10 of the Human Rights Act – is necessary for a new system to work properly. Such clarification would be significantly enhanced by a better, and more concrete, definition of the public interest. A strong definition would also better protect publishing in the public interest, even when it might involve breaches of the law. For this reason we believe that in addition to regulatory reform, there ought to be a general public interest defence in law.

We are clear that the light shone by the Leveson inquiry shows the need for large news organisations to accept responsibility and to be publicly accountable. The recommendations here focus on encouraging this within the organisations and the

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<sup>2</sup> Section 382 of the Companies Act (2006) states that: 'The qualifying conditions [of a 'small company' are met by a company in a year in which it satisfies two or more of the following requirements': turnover not more than £6.5m; balance sheet total not more than £3.26m; number of employees not more than 50. <http://www.legislation.gov.uk/ukpga/2006/46/section/382>, accessed 31-5-12





establishment of a Backstop Independent Auditor to ensure that there is a sufficient light shone into the darker corners of such organisations. Responsible editors will be expected to establish to their peers and the public that proper consideration was given to decisions on intrusion and accuracy. We have no intention of holding back investigative journalism – but we do want powerful press organisations to accept similar transparency to that which they expect of other institutions that wield power.

## Summary

### **A new system must:**

- Be demonstrably independent – from the State and from undue influence of media corporations
- Protect the public from abuse, particularly those – like Bob, Sally and Gemma Dowler, Kate and Gerry McCann and their family, and Christopher Jefferies – in vulnerable situations
- Focus attention on the three key causes of concern: invasions of privacy; unfairness; inaccuracy
- Protect journalism in the public interest – from both the State and corporate compulsion

### **To achieve these aims, we propose a new system that:**

1. Imposes no regulatory obligations, beyond the law itself, on individuals or small publishers
2. Focuses reforms on large news publishers that are larger than a ‘small company’ (as defined in the Companies Act 2006)
3. Obliges large news publishers to regulate themselves, by:
  - i. providing internal complaints and compliance mechanisms
  - ii. joining an external self-regulatory organisation
4. Gives large news publishers the freedom to build these self-regulatory organisations
5. Makes sure the public, and large news publishers, have a fair and independent appeals mechanism via an Appeals Board
6. Establishes a Backstop Independent Auditor in statute with responsibility for approving self-regulatory organisations and auditing them on an annual basis

## Structure of the report

The report is split into five parts.

**Part 1** sets the Inquiry in its historical context. This is the fourth attempt at reform of the regulatory system of the press since the General Council of the Press was set up following the first Royal Commission of the Press of 1947-49. To avoid the mistakes of previous attempts at reform we need to be conscious of this history. That is why Part 1 of this report charts the history of press reform since 1949, pulling out the key themes and identifying why past efforts did not work.

**Part 2** focuses on more recent problems within the press. To deal with the current situation it is imperative that we understand the more recent past, and analyse what happened in the last two decades that led directly to the setting up of the Leveson Inquiry – in particular, the inability of the PCC to deal properly with many of the problems it was set up to prevent. Part 2 of the report does this, examining the problems identified prior to, and since, the Inquiry was announced.

**Part 3** assesses some of the most prominent ideas put forward for reform since last July. This includes an analysis of the proposal for a system of self-regulation strengthened through commercial contracts. It also reviews the various schemes based around incentives.

**Part 4** sets out our proposal for a ‘new system entirely’.<sup>3</sup> This proposal protects freedom of expression for everyone to publish within the law. It focuses on the source of the problems. It preserves self-regulation. Yet, at the same time it provides for proper, independent and assessable accountability. In developing this proposal we have selected aspects of the proposals that have been put forward since last July, adopted features from regulation in other sectors and other countries, and sought to recognise the issues raised by technological convergence and by the challenging economics of the news industry.

**Part 5** looks at public interest defences within the law. The proposed system will, inevitably, sit within an existing legal framework. It therefore needs to work in concert with this framework, and be mutually compatible with it. Part 5 recommends that for the media ecology to work more successfully a specific change needs to be made in the shape of a statutory public interest defence. This would provide journalists with better clarity and freedom in embarking upon investigations with a clear public interest, and provide more protection and certainty when such investigations involve a breach of the law. Crucially, a public interest defence will help to clarify the balance between Articles 8 and 10 of the Human Rights Act – one of the fundamental problems affecting British journalism and private individuals.

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<sup>3</sup> David Cameron, 8<sup>th</sup> July 2011, press conference reported by the BBC <http://www.bbc.co.uk/news/uk-politics-14073718>, accessed 02-04-2012

# **PART 1**

## **Historical context**

## The Repetitive Cycle of Failure: Self-Regulation since 1949

The conclusion drawn in this report – that self-regulation on its own, without any greater independence or enhanced powers, does not provide adequate protection for the public or for journalists – is based in large part on an historical analysis of the continued failure of the various voluntary self-regulatory bodies that have existed since the first Royal Commission on the Press published its report in 1949. This has culminated in the widespread and routine use by certain parts of the press of intrusive methods to obtain personal information to source stories, including phone hacking, often where no discernible public interest justification can be demonstrated.

There have been repeated problems with press self-regulation since the immediate post-war period. The repetitive cycle can be expressed as follows:

1. An observed deficiency in the operation of the press (typically consisting of the detrimental impact of proprietorial control or commercial interests on journalistic standards, and/or concerns over existing privacy protection) gathers sufficient support in Parliament to lead to the setting up of an official inquiry.
2. The inquiry makes a recommendation that statutory regulation is – for the time being – off the agenda, but requests a number of reforms underpinned by the threat of possible statutory intervention if they are not fulfilled.
3. The press makes selective changes, avoiding those that are especially inconvenient or which affect commercial interests, while the root causes of the original problem remain unsolved.
4. Dissatisfaction with the reforms instituted by the press is softened by its temporary good behaviour which doesn't last, restarting the cycle.

Royal Commissions on the press have reported in 1949, 1962 and 1977. The Report of the Committee on Privacy and Related Matters (Calcutt I) was published in 1991. Each time, reform of self-regulation has been recommended; each time, the press has avoided implementing these reforms in full. The first Calcutt report recognised the pattern of failure in self-regulation over the preceding decades, and explicitly offered 'one final chance' for reform. Sir David Calcutt's follow-up review (Calcutt II, published in 1993) noted with some anger that – again – changes had been self-serving and insufficient. The phrase 'last chance saloon', when used with regard to the British press, has attained the status of parody.

Nineteen years ago the PCC was deemed incapable of regulating the press, and we now have another public inquiry, the majority of the press promising decisive self-reform, and concerted opposition to statutory intervention of any kind among most sections of the industry.

An analysis of press regulation from the first Royal Commission in 1947-1949 until the mid-1990s presents several themes with special significance for the present discussions about the future of regulation:

- *Sidelining of the interests of the general public, and of ordinary journalists:* The negotiation of press self-regulation has historically almost exclusively been a

conversation between politicians (and those selected to conduct inquiries on their behalf) and the managerial and proprietorial side of the newspaper industry. The NUJ, often sharply critical of the status quo, has mostly been marginalised when reforms are made. The general public (in whose name both sides claim to be acting) are almost completely absent from the debate.

- *The growing issue of privacy:* The undue invasion of individual privacy by the press has been identified as a problem requiring legislative or regulatory attention since 1938 and the Report of the Political and Economic Planning group. Since then, it has returned to the agenda in the late 1970s and throughout the 1980s. The present problems concerning the invasion of privacy stem in part from the inability of politicians and the press to deal with this issue in the past, combined with the advent of new technologies that facilitate the gathering of personal information without consent.
- *The dominance of industry interests:* Where reform has taken place in the wake of one of the various inquiries, the newspaper industry has, through the selective implementation of measures, sought to maintain industry control, most notably through appointments processes, and control of funding of the relevant bodies.
- *The substitution of tinkering in place of genuine reform:* It is significant that it took 40 years for the press to accept one of the basic tenets of the 1947-1949 Royal Commission Report (a general code of conduct), while the capacity to deal with third-party complaints on more than a discretionary basis – repeatedly requested in public and independent inquiries from 1949 onwards – was not instituted for 62 years, just prior to the proposed dissolution of the PCC in its present form (and even then only partially). The failure of the various public inquiries to elicit genuine reform has led to the entrenchment of certain flawed practices, and an inability to deal effectively with the underlying causes that tend towards poor press behaviour that have been recognised for decades.

This is the moment to learn from the past and establish a self-regulatory system that works, with statutory support – but only insofar as this is necessary to make it work.

# A Brief History of Self-Regulation

## The origins of self-regulation, 1947-1953

There were two broad catalysts behind the creation of the first Royal Commission of the Press in 1947: concentration of proprietorial power and consequent influence on journalistic content; and related concerns surrounding freedom and accuracy in news reporting.<sup>4</sup> These comprised a mix of short- and long-term issues, including attempts by certain newspaper proprietors to intervene directly in political affairs.

An additional concern – with the intrusion of journalists into the private lives of individuals, and subsequent public indignation against certain sections of the press – had been reported by the Political and Economic Planning (PEP) group in 1938, leading to the first significant proposal for formal self-regulation of the press.<sup>5</sup> The PEP report recommended the creation of a voluntary Press Tribunal – comprising an independent Chairman and a panel drawn from the newspaper industry – to deal with complaints by members of the public and to censure guilty publications.

In the aftermath of the Second World War and the subsequent Labour victory in the 1945 general election, the National Union of Journalists (NUJ) passed a resolution calling for the government to set up an independent commission examining the ownership and control of British newspapers. This reflected growing concern about the power of a small group of newspaper publishers who had obtained a greatly increased share of the newspaper market since the First World War.<sup>6</sup> This culminated in a successful motion passed in the House of Commons on 29 October 1946:

That, having regard to the increasing public concern at the growth of monopolistic tendencies in the control of the Press and with the object of furthering the free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news this House considers that a Royal Commission should be appointed to inquire into the finance, control, management and ownership of the Press.<sup>7</sup>

The Members tabling the motion were themselves journalists, and the position taken by those working in the press (both inside and outside the House) was that concentration of ownership and recent increases in the profitability of newspapers were having a direct impact on the progressive decline in the quality of British journalism.<sup>8</sup> Reflecting this concern with the causal relationship between journalistic quality and the economic and commercial context in which newspapers operated, the Commission widened its scope, interpreting the initial Terms of Reference<sup>9</sup> to encompass the following questions:

<sup>4</sup> See O'Malley, T. and C. Soley (2000) *Regulating the Press*, London: Pluto Press, pp51-56

<sup>5</sup> Political and Economic Planning (1938) *Report on the British Press*, London: PEP

<sup>6</sup> Moore, M. (2006) *The Origins of Modern Spin: Democratic government and the media in Britain, 1945-51*, London: Palgrave Macmillan, p106

<sup>7</sup> Quoted in Great Britain (1949) *Op. Cit.*, London: HMSO, p3

<sup>8</sup> *Ibid.*, p4

<sup>9</sup> "Whereas [w]e have deemed it expedient that a Commission should forthwith issue with the object of furthering the free expression of opinion through the Press and the greatest practicable accuracy in the

- i. What degree of concentration of ownership of newspapers, periodicals, and news agencies at present exists
- ii. Whether there is a tendency towards further concentration
- iii. Whether such concentration as exists is on balance disadvantageous to the free expression of opinion or the accurate presentation of news
- iv. Whether any other factors in the control, management or ownership of the Press or of the news agencies, or any external influences operating on those concerned in control, management or ownership, militate against this freedom and accuracy
- v. How this freedom and accuracy may best be promoted.<sup>10</sup>

Thus the first Royal Commission of the Press drew a direct line between structural ownership and management issues and the positive role of the press in democratic society – namely, accurate news free from distortion. The constructive aims of the 1947-1949 Royal Commission would be relevant today.

In the final report, the Commission recognised that industrial and commercial development had increased the capacity for newspapers to “[convey and interpret] to the public a mass of information on subjects as complicated as they are important”, but that this had not been demonstrated in practice.<sup>11</sup> However, it also drew the conclusion that statutory regulation of the press would unduly limit the free flow of information.

The solution proposed by the Commission was the creation of a ‘General Council of the Press’, voluntary and non-statutory. The Council was to consist of 25 members, with 20% lay representation, and was envisaged to exercise a wide remit, including: “to safeguard the freedom of the press; to encourage the growth of a sense of public responsibility and public service amongst all engaged in the profession of journalism [...]; and to further the efficiency of the profession and the well being of those who practiced it”.<sup>12</sup>

The General Council was intended to possess robust powers to maintain standards and impose sanctions on breaches of conduct:

It should have the right to consider any complaints which it may receive about the conduct of the Press or of any persons towards the Press, to deal with these complaints in whatever manner may seem to it practicable and appropriate, and to include in an annual report a statement of any action taken.<sup>13</sup>

The Report specified three preferred proposed components of Press regulation: a shared code of conduct; the capacity to receive and investigate complaints from any source; and discretionary power to impose sanctions.

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presentation of news, to inquire into the control, management and ownership of the newspaper and periodical Press and the news agencies, including the financial structure and the monopolistic tendencies in control, and to make recommendations thereon”, *ibid.*, piii

<sup>10</sup> *ibid.*, p4-5

<sup>11</sup> *ibid.*, p164

<sup>12</sup> O’Malley, T. and C. Soley (2000) *Op. Cit.*, p55

<sup>13</sup> Great Britain (1949) *Op. Cit.*



Although Parliament unconditionally accepted the recommendations of the Commission, it took more than four years, and the first serious threat of statutory regulation, for the General Council of the Press to come into operation.<sup>14</sup> The initial response to the report proposed by the press was criticised by the government as giving too much power to proprietors, contained terms of reference far narrower than those proposed by the Royal Commission, and was unacceptable to the NUJ. The union in turn accused proprietors of ignoring the Report's proposals in favour of their own.<sup>15</sup>

By November 1952 the delay prompted a Labour MP (C. J. Simmons) to promote a Private Member's Bill, backed by elements of the party leadership, proposing a statutory Press Council. The threat of government regulation quickly persuaded newspaper publishers to come to an agreement that was deemed satisfactory by the Cabinet, which took action to prevent a second reading of the Bill.<sup>16</sup>

Although accepted, the final composition of the General Council of the Press differed significantly from the model proposed by the Royal Commission in ways that benefited the industry: there was no lay representation and no lay Chair; a procedural clause was inserted to ensure that, except 'at its discretion', the Council would not accept third-party complaints (complaints from those not directly referred to in the press); the clause obliging the Council to promote methods of training was attenuated; potential economic interference (including pension scheme provisions) were removed; and the key standards clause 'to encourage the growth of the sense of public responsibility and public service' was replaced with the more passive role 'to maintain the character of the British press'.<sup>17</sup>

In light of these amendments, and in rather prescient language during the Commons debate, Simmons conditionally accepted the proposed General Council of the Press, agreeing:

[To] give the voluntary Press Council a chance to prove its worth, efficiency and competence to do the job to which it has set its hand. I give warning here and now that if it fails some of us will again have to come forward with a measure similar to this Bill.<sup>18</sup>

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<sup>14</sup> Snoddy, R. (1992) *The Good, the Bad, and the Unacceptable: The hard news about the British press*, London: Faber and Faber, p84

<sup>15</sup> O'Malley, T. and C. Soley (2000) Op. Cit., p56

<sup>16</sup> *Ibid.*, p57-58

<sup>17</sup> *Ibid.*, p59

<sup>18</sup> Quoted in O'Malley, T. and C. Soley (2000) Op. Cit., p58

## Regulation, 1961-1977: two Royal Commissions and a privacy committee

The 2<sup>nd</sup> Royal Commission on the Press (1961-1962), chaired by Lord Shawcross, was prompted by a series of closures of national and provincial newspaper titles and greater concentration of ownership. It laid a significant proportion of the blame for this directly on the failure of the General Council of the Press to implement many of the recommendations of the 1947-1949 Royal Commission, even after the four-year delay in creating the Council.

In the period between the creation of the General Council and the initiation of the Second Royal Commission, there had been strong criticism of the effectiveness of voluntary regulation. This was framed around the lowering of standards in the face of increased competition over circulation and intrusion into the private lives of individuals.<sup>19</sup>

Although the terms of reference of the two Royal Commissions differed substantially – there was to be no consideration of the performance of the press or with ethical questions in 1961-1962 – the causal effects of the Council’s failure to adopt the earlier recommendations were of significant concern to the Shawcross Commission: “Had they been carried out much of our own inquiry might have been unnecessary”.<sup>20</sup> The lack of any lay representation on the Council, and the Council’s decision to ignore recommendations that it monitor issues relating to concentration of ownership, were deemed to be at the root of the problems that had led to the formation of the Commission.

The Second Royal Commission on the Press reiterated the desirability – stated clearly in 1949 – of a voluntary basis for regulation, but stressed the need above all for an effective and credible body, with statutory backing if necessary: “If... the Press is not willing to invest the Council with the necessary authority and to contribute the necessary finance the case for a statutory body with definite powers and the right to levy the industry is a clear one”.<sup>21</sup> It was recommended that a time limit should be put in place by the government, after which point legislation should be introduced for the establishment of a Press Council, on the basis of that recommended in 1949, but with some additional functions. These included more proactive investigation and reporting on changes in concentration of ownership and control, and the ability to act as a tribunal in cases of undue influence on journalists from superiors or advertising agents.

Faced with the renewed threat of legislation, the press acted quickly in implementing some radical changes: the General Council of the Press was renamed the Press Council, and the Chairman and 20% of the members were designated lay appointments. The Press Council dropped some of the more obscure sections in its constitution concerning training and technical research, and adopted new clauses, including one defining the ability to consider complaints about the conduct of the Press, and to deal with them ‘in whatever manner might seem practical and appropriate’. This promoted the status of dealing with complaints from an aspect of procedure, to a key objective.<sup>22</sup>

<sup>19</sup> O’Malley, T. and C. Soley (2000) Op. Cit., p60

<sup>20</sup> Great Britain (1962) *Royal Commission on the Press 1961-1962: Report*, London: HMSO, p101

<sup>21</sup> *Ibid.*, p102

<sup>22</sup> O’Malley, T. and C. Soley (2000) Op. Cit., p64

These reforms did not, however, forestall criticism for long. They received a mixed reception at the time, and growing concerns throughout the 1960s about the efficiency and credibility of the Council eroded confidence in its operations. Press payments for stories relating to the Profumo affair, and to witnesses in the Moors Murders case, indicated that the reforms to the regulator had done little to increase its effectiveness in reining in the press.<sup>23</sup>

By 1969 a series of calls by MPs for a new Royal Commission and for an inquiry into the workings of the Press Council (which had become perceived ‘more as a champion of the press than as a watchdog for the public’<sup>24</sup>), culminated in a Private Member’s Bill on privacy that ultimately persuaded the government to take action. The Committee on Privacy, chaired by Kenneth Younger, dealt with a wide range of issues relating to individual privacy, but included a strong critique of the then role and powers of the Press Council.

The Younger Committee heavily criticised the ability of the Press Council to command public confidence while it continued to lack substantial public representation through lay membership. It wanted the Council to increase lay membership to half, and introduce an independent element into the method of appointment of lay members.<sup>25</sup> More significantly, it recommended that in future a critical adjudication by the Council should be given similar prominence to that given to the original article<sup>26</sup>, and that the Council should codify its adjudications on privacy.<sup>27</sup> Notably, the Committee was not unanimous on the recommendations, and a minority report was produced claiming that the reforms did not go far enough and recommending a general law of privacy.<sup>28</sup>

The Press Council again responded by making some concessions, but without incorporating the more substantial recommendations made by the Committee. The lay membership of the Council was increased as a proportion of the total (to 10 out of 30), but its chairman, Lord Pearce, claimed that the report contained ‘no evidence’ to support the link between lay membership and public confidence, and instead the Council appointed equal numbers of public and industry appointments to the Complaints Committee.<sup>29</sup> The Council chose to ignore recommendations on similar prominence of adjudications, and a codification of rulings on privacy. The minor changes were implemented in July 1973.

In the wake of the Younger report, ‘assaults on the principle of self-regulation became more frequent’.<sup>30</sup> Industrial and social conflicts during the 1970s added to the existing political concerns around media policy and the economics of the industry, but the perceived inadequacies of the Press Council – less than a year after it implemented some recommendations of the Younger Committee – also prompted the government to

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<sup>23</sup> *Ibid.*, pp64-67

<sup>24</sup> Robertson, G. (1983) *People Against the Press: An enquiry into the Press Council*, London: Quartet, p13

<sup>25</sup> Frost, C. (2007) *Journalism Ethics and Regulation*, London: Pearson, p217

<sup>26</sup> Great Britain (1972) *The Report of the Committee on Privacy*, London: HMSO, p13

<sup>27</sup> O’Malley, T. and C. Soley (2000) *Op. Cit.*, p69

<sup>28</sup> Snoddy, R. (1992) *Op. Cit.*, p88

<sup>29</sup> O’Malley, T. and C. Soley (2000) *Op. Cit.*, p69

<sup>30</sup> *Ibid.*, p71

include in the scope of the inquiry of the 3<sup>rd</sup> Royal Commission on the Press (1974-1977) an investigation of “the responsibilities, constitution and functioning of the Press Council.”<sup>31</sup>

The Commission, chaired by Professor Oliver – later Lord – McGregor, accepted that on the basis of the evidence put before it that there was no political consensus on the role of the press in society other than that it should be subject neither to state control nor to the unregulated forces of the market.<sup>32</sup> Nonetheless, it was largely critical of the Press Council, and the number and nature of recommendations it made regarding the Council are indicative of the Commission’s lack of confidence in the Council’s functions and composition at that time.

Twelve recommendations were made in all, including a reiteration of the need for equal lay representation on the Council under a lay chairman, the creation of a code of behaviour, and the equal prominence and appropriate location of adjudications – all features advocated by previous Commissions. In the case of adjudications, the McGregor Commission went further, recommending that the Council should actively participate in obtaining fast publication of counter-statements, and in approaching editors to secure front-page publication of adjudications. Innovative proposals included:

- The creation of a Conciliator, drawn from the staff of the Council, to propose remedies between complainants and newspapers;
- The extension of the Council’s doctrine of right of reply, and to uphold a newspaper’s making space available to those it has criticised inaccurately (although the Commission rejected the introduction of a legal right of reply on the principle that the press should not be subject to different laws than ordinary citizens);
- The power to investigate the conduct of the press without waiting for a formal complaint; to introduce the practice of undertaking wider reviews of publications and journalists involved in disputes;
- The amendment of the Council’s existing position on accuracy and bias, so that inaccuracy should be *prima facie* evidence for upholding a complaint;
- The Chairman’s role to be extended to chairmanship of the Appointments Commission; and
- That the Council should accept recommendations for lay appointments from any source.<sup>33</sup>

The Commission’s concluding statement regarding reform to the Press Council ended with the hope “that these recommendations will be accepted and acted on by the Press Council, and that it will fulfil the hopes that were held for it in 1949”, reflecting the continued latitude offered to the Council to reform itself voluntarily.<sup>34</sup> The spectre of statutory intervention was again raised by the Commission.<sup>35</sup> Again, however, the Commission was split. Again, dissent stemmed from a perception that the report, while

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<sup>31</sup> Great Britain (1977) *Royal Commission on the Press: Final Report*, London: HMSO, p(i)

<sup>32</sup> *Ibid.*, p11

<sup>33</sup> *Ibid.*, pp235-236

<sup>34</sup> *Ibid.*, p215

<sup>35</sup> Snoddy, R. (1992) *Op. Cit.*, p91

generally acceptable, did not go far enough in dealing with reform of the Press Council, and a minority report was appended, advocating more robust reforms.<sup>36</sup>

As in 1963, there was public criticism of the report, reflecting a belief that its measures in relation to the Press Council were not suitably robust. This was partly fuelled by a growing belief that self-regulation had not demonstrated itself an effective means of limiting harmful press behaviour. In addition, the extent of the criticism of the Council in the report “did little to improve the long-term credibility of that body”.<sup>37</sup>

Repeating previous outcomes of 1953, 1963 and 1973 (when the recommendations of the first two Royal Commissions and the Younger Report were implemented), recommended reforms were again met with selective implementation (including seemingly willful misunderstanding<sup>38</sup>). The recommendation on lay representation was adopted, as was the appointment of a Conciliator and the recommendation to seek nominations ‘from any source’. Five recommendations were explicitly rejected, including the drafting of a code of behaviour (on the table since 1949), while several were ignored.<sup>39</sup> Despite the extensive calls for reform and the restatement of specific recommendations of previous reports, the McGregor Commission again failed to elicit substantial changes in voluntary press regulation.

### **The failure of the Press Council: Calcutt 1 & 2, and beyond**

The period between the 3<sup>rd</sup> Royal Commission and the dissolution of the Press Council in 1990 witnessed a reduction in the strength of consensual support for the concept of voluntary self-regulation of the press. This was in part inspired by shifting ideological and academic positions and greater scrutiny of media content, in parallel with upheavals in industrial relations and political economic orthodoxy. In addition, a lengthening list of high-profile incidents involving harmful press behaviour tested public and Parliamentary support for the Press Council and led to a ‘crescendo’ of criticism.<sup>40</sup>

This erosion of support for voluntary self-regulation had its roots in a growing ideological divide in British politics, expressed in the Labour Party’s 1974 report “The People and the Media”. The report was sparked by criticism of the economic circumstances and ethical practices of the press, alongside accusations of lack of accountability and bias. The radical report rejected the present composition of the Press Council, proposing an amalgamation of press and broadcasting regulation, and also promoting greater transparency through publicly available reviews and more robust sanctions, including the ability to enforce a right of reply.<sup>41</sup>

<sup>36</sup> Great Britain (1977) Op. Cit., p241

<sup>37</sup> O’Malley, T. and C. Soley (2000) Op. Cit., p77

<sup>38</sup> Ibid., p78: “[The Council] rejected ‘the commission’s suggestion that it should seek undertakings that newspapers would publish adjudications upholding complaints against them on their front page’. This was, of course, a recommendation, not a ‘suggestion’”.

<sup>39</sup> Ibid., pp77-78

<sup>40</sup> Bingham, A. (2007) “Drinking in the Last Chance Saloon’: The British press and the crisis of self-regulation, 1989-95, *Media History* 13 (1), p80

<sup>41</sup> Labour Party (1974) *The People and the Media*, London: Labour Party

A similar argument for radical reform of the Press Council was made by the Campaign for Press Freedom (CPF – later CPBF: the Campaign for Press and Broadcasting Freedom) – another group with ties to Labour. The CPF articulated the theme of union hostility to the ownership structures and content of newspapers, and explicitly criticised the lack of effective press reform as a result of self-regulation:

It would be better if these Press Council reforms were introduced voluntarily. But when one examines the history of the Press Council it becomes clear how irrelevant its ‘voluntary’ nature has been in extending press freedom or giving the public any adequate means of redress. Newspaper proprietors preach a hatred of any government involvement but happily accept zero VAT on newspapers, beg for newsprint subsidies and co-operate with the government in ‘D’ notice committees to shield certain areas of government activity from journalistic investigation.<sup>42</sup>

The CPF set up an independent inquiry into the Press Council which culminated in the 1983 Robertson Report on the Press Council. The Report criticised the Council, but recommended its continuation, dependent on some major changes: legal reform to aid investigative reporting, including a Freedom of Information Act and relaxation of existing libel and contempt laws; a statutory press ombudsman (proposed seriously for the first time<sup>43</sup>); and a reformed Press Council with a published code of conduct, auditing powers, responsibility for professional-conduct training, and the power – backed by contract – to direct prominent publication of corrections.<sup>44</sup>

The succession of measures introduced to Parliament from across the political spectrum during the 1980s highlights the extent of the lack of confidence in the ability of the Press Council to police the press:

- In June 1981, Frank Allaun MP (Labour) presented a bill ‘to give members of the public the right to reply to allegations made against them in the press, or on radio or television’
- In January 1982, Teddy Taylor MP (Conservative) asked the attorney-general to review the remedies available ‘to individuals, groups and organisations in the event of newspapers or the broadcasting media publicising inaccurate or misleading reports’ and legal remedies available to newspapers and broadcasters in the event of industrial action looking to influence their content
- In December 1982, Allaun moved another right of reply bill (with cross-party support, which fell ten votes short of moving to Committee stage)
- In June 1984, Alf Dubs MP (Labour) pressed unsuccessfully for a Bill to make newspapers declare payments to non-regular contributors, and Austin Mitchell MP (Labour) moved a right of reply bill
- In February 1987, Lord Longford (Labour) moved a debate in the Lords on ‘Tabloid press: moral standards’
- In October 1987, Ann Clwyd MP (Labour) introduced an Unfair Reporting and Right of Reply Bill, which sought to establish a Media Complaints Commission
- In November 1987, Bill Cash MP (Conservative) introduced a Right of Privacy Bill

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<sup>42</sup> Quoted in O’Malley, T. and C. Soley (2000) Op. Cit., p79

<sup>43</sup> The 1947-1949 Royal Commission explored but dismissed this option

<sup>44</sup> O’Malley, T. and C. Soley (2000) Op. Cit., p82

- On 21 December 1988, Tony Worthington MP (Labour) presented a Right of Reply Bill and John Browne MP (Conservative) a Protection of Privacy Bill.

During and after this period, a series of high-profile incidents involving the tabloid press – the *Sun's* lost libel case against Elton John (1987), the treatment of TV presenter Russell Harty's illness and death (1988), and the coverage of the Hillsborough disaster (1989) increased anxieties about the ability of the Press Council to keep journalistic excesses in check. Despite an earnest attempt to reform, the Press Council was ultimately closed following the *Report of the Committee on Privacy and Related Matters*, chaired by David Calcutt QC.<sup>45</sup> The historical pattern – already evident at this point – of “bouts of reform followed by relapse and failure”<sup>46</sup> informed this decision.

The Report, as its title suggests, was primarily concerned with measures required to protect individual privacy from the press, and adequate recourse for the public, including the possibility of a right of reply (later rejected). The terms of reference highlight the privacy-oriented nature of the Committee's investigation:

In the light of the recent public concern about intrusions into the private lives of individuals by certain sections of the press, to consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, taking account of existing remedies, including the law on defamation and breach of confidence; and to make recommendations.<sup>47</sup>

The members of the Committee interpreted its remit as encompassing reform of the system of self-regulation.<sup>48</sup> The Report lists the shortcomings of the Press Council as a regulator:

- Its ineffectiveness as an adjudicator
- The lack of confidence in its independence from the newspaper industry
- Its tendency to reject large numbers of complaints
- The lack of clarity in its selection and categorisation of complaints
- The substantial delays in contested cases
- The lack of effective sanctions.<sup>49</sup>

Despite the highly critical conclusions of the report, the Committee recommended that the press be given “one final chance to prove that voluntary self-regulation can be made to work”:

*We recommend* that the press should be given one final chance to prove that voluntary self-regulation can be made to work. However, we do not consider that the Press Council, even if reformed as proposed in its internal review, should be kept as part of the system. We therefore *recommend* that the Press Council should be disbanded and replaced by a new body, specifically charged with adjudicating on complaints of press malpractice. This body must be seen to be authoritative,

<sup>45</sup> Home Office (1990) *Report of the Committee on Privacy and Related Matters*, London: HMSO

<sup>46</sup> O'Malley, T. and C. Soley (2000) *Op. Cit.*, p88

<sup>47</sup> Home Office (1990) *Op. Cit.*, p1

<sup>48</sup> *Ibid.*, Para 2.7 (d), p5

<sup>49</sup> *Ibid.*, Paras 14.28-14.34, p63-64

independent and impartial. It must also have jurisdiction over the press as a whole, must be adequately funded and must provide a means of seeking to prevent publication of intrusive material. We consider it particularly important to emphasise the break from the past. The new body should, therefore, be called the Press Complaints Commission.<sup>50</sup>

The Calcutt report marked a clear break with the past sequence of Royal Commissions that had specified relatively minor reforms. Instead, it proposed a list of desirable measures and gave the press an indeterminate period of time (later set at 18 months<sup>51</sup>) in which to demonstrate its ability to set up an adequate self-regulatory body, on the explicit understanding that failure to do so would result in statutory regulation.

The terms were strict; two separate triggers were specified. First: failure by the press “to implement all the recommendations... on setting up and supporting the Press Complaints Commission within 12 months of the publication of this report”.<sup>52</sup> Second, on the assumption that the PCC was satisfactorily established: “a less than overwhelming rate of compliance with the Commission’s adjudications” or “a large-scale and deliberate flouting of the code of practice by the press or a total collapse in standards” would invalidate self-regulation.<sup>53</sup>

In terms of its recommendations for the composition and powers of the PCC, the Report made a number of specific requests. Beyond the fact of the replacement of the Press Council with a new body, the PCC was to have an independent Chair and no more than 12 members, appointed by an independent commission with explicit freedom to appoint whoever it considers best qualified. The purpose of the PCC was to provide an effective means of redress for complaints against the press, including the ability to consider complaints of unfair treatment and unwarranted infringements of privacy. In addition, the Commission was to “publish, monitor and implement” a comprehensive code of practice for the guidance of both the press and the public” and operate a 24-hour hotline for complainants. Adjudications procedures should be clear and fast, and should contain the capacity for the inclusion of recommendations that apologies – public or private – should be given to the complainant, including the ability to recommend the nature, form and placing of replies or corrections<sup>54</sup>. Regarding sanctions, the report was silent, relying instead on the willingness of the press to adhere to adjudications.

In response, the Press Council was duly disbanded, a Press Standards Board of Finance (PressBof) created to raise money for the new Commission, and a Chair – Lord McGregor – appointed.<sup>55</sup> The Commission itself was appointed by McGregor, ignoring the Calcutt Report’s specification of an independent appointments process, with an appointments board appointed later.<sup>56</sup> The PCC, though instituted quickly, did not adhere to many of Calcutt’s directions: the code was created by the industry rather than

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<sup>50</sup> *Ibid.*, Para 14.38, p65 (italics in original)

<sup>51</sup> Bingham, A. (2007) *Op. Cit.*, p84

<sup>52</sup> Home Office (1990) *Op. Cit.*, Para 16.10, p74

<sup>53</sup> *Ibid.*, Para 16.11, p74

<sup>54</sup> *Ibid.*, Chapter 15, pp66-72

<sup>55</sup> Bingham, A. (2007) *Op. Cit.*, p84

<sup>56</sup> Shannon, R. (2001) *Op. Cit.*, pp44-45



the PCC itself; the appointments process was not independent; the Commission struggled to impose authority on the industry; and by failing to commit to dealing with third-party complaints or launch its own inquiries (echoes of 1949), it 'gravely weakened' its regulatory potential.<sup>57</sup>

During the period of review, the press pursued a large number of stories on the private lives of public figures (most notably members of the Royal family), indicating a distinct lack of initial impact of the PCC on press behaviour.<sup>58</sup> In 1992, Clive Soley MP introduced a Private Member's Bill on Freedom and Responsibility of the Press to Parliament. The Bill signified continued dissatisfaction with self-regulation and was intended to influence Sir David Calcutt QC's forthcoming follow-up review. The Bill recommended a statutory Independent Press Authority, able to enforce its rulings through the courts. The Bill was ultimately defeated (alongside Calcutt's follow-up recommendations) by delays and a lack of government support.<sup>59</sup>

The second Calcutt Report (*'Review of Press Self-Regulation'*) was published in January 1993. This reviewed the first eighteen months of the PCC. It could not have been more forthright in its denunciation of the new system of self-regulation in its failure to achieve sufficient independence from the press:

On an overall assessment, the Press Complaints Commission is not, in my view, an effective regulator of the press. The Commission has not been set up in a way, and is not operating a code of practice, which enables it to command not only press but public confidence. It does not, in my view, hold the balance fairly between the press and the individual. The Commission is not the truly independent body which it should be. The Commission, as constituted, is, in essence, a body set up by the industry, financed by the industry, dominated by the industry, operating a code of practice devised by the industry and which is over-favourable to the industry.<sup>60</sup>

In addition, Calcutt expressed his view unequivocally that the press was neither capable nor willing to initiate reforms that would form a credible alternative to statutory regulation:

It has been argued that two years is too short a time in which to judge the Press Complaints Commission. But the way forward was clearly spelt out in the Privacy Committee's Report. In particular, the Committee stressed the need for the Commission to be seen as an independent body which would command the confidence of the public. Both the Committee, and subsequently the Government, gave a clear indication that this was the last chance for the industry to put its own house in order. It has to be assumed that the industry, in setting up the present Press Complaints Commission, has gone as far as it was prepared to go. But it has not gone far enough.

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<sup>57</sup> Bingham, A. (2007) Op. Cit., pp84-85

<sup>58</sup> Shannon, R. (2001) Op. Cit., Chapters 4 and 5

<sup>59</sup> O'Malley, T. and C. Soley (2000) Op. Cit., pp91-93

<sup>60</sup> Department of National Heritage (1993) *Review of Press Self-Regulation*, London: HMSO, Para 5.26, p41 (our emphasis)

In my view too many fundamental changes to the present arrangements would be needed. Nothing that I have learnt about the press has led me to conclude that the press would now be willing to make, or that it would make, the changes that would now be needed.<sup>61</sup>

The conclusion was clear: despite a “final chance” to reform, the press had failed to do so: therefore the Calcutt Review recommended that the original Privacy Report’s provisions for a statutory Press Complaints Tribunal go ahead. This would have had significant new powers, including:

- To draw up and keep under review a code of practice
- To restrain publication of material in breach of the code
- To receive complaints (including from third parties) concerning alleged breaches of the code
- To inquire into complaints against the press
- To initiate its own investigations without a complaint
- To require a response to its inquiries
- To attempt conciliation
- To hold hearings
- To rule on alleged breaches of the code
- To warn
- To require the printing of apologies, corrections and replies
- To enforce publication of its adjudications
- To award compensation
- To impose fines
- To award costs
- To review its own procedures
- To publish reports
- To require the press to carry adverts specifying how complaints could be made<sup>62</sup>

The proposed model failed to gather sufficient support, however. Even amongst staunch critics of the press and self-regulation these measures were felt to go too far.<sup>63</sup> The Calcutt follow-up review proposals were quietly rejected by the government, ostensibly to await the outcome of a National Heritage Committee report. Nonetheless, that report, when it was published, itself supported statutory measures to improve standards. According to O’Malley and Soley, the revisions proposed in the report consisted of the following:

Editors and journalists should be obliged by contract to comply with the industry code of practice; there should be a Protection of Privacy Law and a new voluntary Press Commission would be able to pay compensation to victims of the press. Individuals would have the right to appeal from the Commission to a press ombudsman with statutory powers to supervise the wording, position and format

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<sup>61</sup> *Ibid.*, Paras 7 and 8, pXl (our emphasis)

<sup>62</sup> *Ibid.*, Chapter 6, pp45-50

<sup>63</sup> Shannon, R. (2001) *Op. Cit.*, p119

of corrections, apologies and retractions, and who would also have 'statutory authority to impose a fine'.<sup>64</sup>

In the aftermath of the creation of the Press Complaints Commission (which, with modifications to the Editor's Code and revised structures following the PCC's 2010 review, remained intact until 2012) "two official inquiries had backed the creation of statutory measures to improve standards, and another Private Member's Bill [Soley's] had gained substantial Parliamentary support".<sup>65</sup> Press self-regulation had won few admirers outside the industry itself, but government and opposition will to reform the press had evaporated by the mid-1990s.

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<sup>64</sup> O'Malley, T. and C. Soley (2000) Op. Cit., p93

<sup>65</sup> Ibid., p93

## Conclusion

The history of press self-regulation in the UK since its inception in 1953 demonstrates the pressing need for a new system that is effective, accountable, transparent, able to provide adequate redress for the public and command public confidence. There have been genuine improvements in press regulation over the decades – gradual increases in public representation, the eventual introduction of a generally agreed code of practice, and the PCC’s overhaul of complaints-handling functions – but the failure to resolve several endemic problems has demonstrated the fundamental weaknesses of the system.

Voluntary incremental reform has been shown to be wholly insufficient at dealing with such problems as the independence of the regulatory system from industry interests, or the continuing problem of privacy and intrusion. Indeed, the most egregious forms of intrusive reporting – phone-hacking and the routine use by certain sections of the press of private investigators to obtain personal information – have occurred when the PCC has arguably had its most robust code of conduct, following the reforms after the death of Princess Diana.

The cycle of repetition outlined at the beginning of this section could easily happen again. Strong voices in the press have called for the chance to put their own house in order. These calls are markedly similar to those made following the three Royal Commissions and the Calcutt Review. Each time the government of the day chose to give the press that chance. Each time the press failed to make adequate reforms. But, by the time their inadequacy became clear, the political will for change had dissipated.

One of the most striking lessons of the past is how easy it is to miss the opportunity for change. 2012 represents just such an opportunity. Any delay could continue the repetitive cycle of failure demonstrated in the past six decades of press regulation.

# **PART 2**

**What was wrong with the previous system?**

## The problems reform needs to address

The Leveson Inquiry presents the opportunity to address the unresolved issues made clear by the failed historical efforts at reform, specifically in the context of those that have been exposed more recently and in light of the changing media landscape.

The Inquiry has exposed at least eight problems that go to the culture, ethics and practices of the press, and were not adequately dealt with by the Press Complaints Commission or its members. These are:

1. Unjustified privacy intrusion, harassment, and abuse by media organisations and those working on their behalf
2. Misrepresentation, distortion, inaccuracy and unfairness
3. Inadequate redress
4. Inadequate governance mechanisms (especially complaints and compliance mechanisms)
5. A lack of effective and transparent accountability
6. Excessive pressure on some journalists and bullying in the newsroom
7. A lack of proper protection for public interest journalism
8. The ability of news organisations to choose not to be bound by self-regulation

Some of the inadequacies first came to light through the exposure of phone hacking at the *News of the World*.

Since then, further evidence of illegal or unethical behaviour at some News International titles has been presented to the Inquiry. It has heard evidence that certain news outlets, and third parties working on their behalf, were:

- Hacking into the phones of victims of crime, bereaved families, and people who happened to be caught in the public eye, as well as public figures, celebrities and politicians<sup>66</sup>
- Hacking into personal emails<sup>67</sup>
- Bribing police and public figures across many areas of public life<sup>68</sup>
- Intimidating and blackmailing public figures and sources<sup>69</sup>
- Compromising the police witness protection programme<sup>70</sup>
- Jeopardising ongoing police investigations<sup>71</sup>

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<sup>66</sup> Davies, N. (Witness Statement to Leveson Inquiry, 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Nick-Davies.pdf>

<sup>67</sup> Green, D. A. (Witness Statement to Leveson Inquiry, 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-David-Allen-Green.pdf>. Also in the written evidence of the editor of The Times, James Harding (paragraph 19), and Brett, A. (Evidence to Leveson Inquiry, 15<sup>th</sup> March 2012 – Afternoon Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Transcript-of-Afternoon-Hearing-15-March-20121.pdf>

<sup>68</sup> Akers, S. (2<sup>nd</sup> Witness Statement to Leveson Inquiry, 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-DAC-Sue-Akers1.pdf>

<sup>69</sup> Hames, J. (Witness Statement to Leveson Inquiry, 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Jacqueline-Hames.pdf>

<sup>70</sup> Paddick, B. (Witness Statement to Leveson Inquiry, 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Brian-Paddick1.pdf>

- Harassing public figures and their children<sup>72</sup>
- Bullying journalists within the newsroom<sup>73</sup>

The Inquiry has also heard about systemic unethical – and in some cases illegal – behaviour by other national news outlets:

- *The Sun* and *The Daily Mirror* were found guilty of contempt of court in their coverage of Christopher Jefferies. Eight newspapers in all paid libel damages to Mr Jefferies<sup>74</sup>
- *The Daily Express*, *the Sunday Express*, *the Daily Star* and *the Daily Star Sunday* acknowledged that they published many "utterly false and defamatory" stories about Kate and Gerry McCann over a sustained period<sup>75</sup>
- Over two dozen national newspapers and magazines were found to have commissioned over 17,000 transactions, many of them alleged to be in breach of the Data Protection Act, to gather personal information. *The Daily Mail*, *the Mail on Sunday*, *the Daily Mirror* and *Sunday Mirror*, as well as many other titles commissioned the private investigator Steve Whittamore to acquire, for example: criminal record checks, friends and family numbers, X-directory numbers, DVLA records, and other private details<sup>76</sup>

Victims of this, and other, behaviour have described to the Inquiry the harrowing impact it had on their lives. According to testimony, it caused people to lose their job, their reputation, their relationships, their friends, their freedom, their health, and even

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<sup>71</sup> Harrison, D. (Evidence to Leveson Inquiry, 19<sup>th</sup> March 2012 – Morning Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Transcript-of-Morning-Hearing-19-March-20121.pdf>

<sup>72</sup> Rowling, J. K. (Evidence to Leveson Inquiry, 24<sup>th</sup> November 2011 – Afternoon Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-24-November-20112.pdf>

<sup>73</sup> Driscoll, M (Written Evidence to Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Matthew-Driscoll.pdf>. See also NUJ evidence to Leveson Inquiry (Michelle Stanistreet, Second Witness Statement) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/MS-Exhibit-11.pdf>

<sup>74</sup> 'Sun and Daily Mirror guilty in Jo Yeates contempt case', *Press Gazette* 29<sup>th</sup> July 2011: <http://www.pressgazette.co.uk/story.asp?storycode=47609> accessed 12-04-12

<sup>75</sup> Front page apologies on the Daily Express and the Daily Star, 19<sup>th</sup> March, 2008 (and Sunday editions 23<sup>rd</sup> March). See also Nicole Patterson (Evidence to Leveson Inquiry, 12<sup>th</sup> January 2012 – Morning Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-12-January-2012.pdf> and

Hill, P. (Evidence to Leveson Inquiry, 12<sup>th</sup> January 2012 – Afternoon Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf>

<sup>76</sup> Outlined in ICO (2006a) *What Price Privacy?* and ICO (2006b) *What Price Privacy Now?* supplemented by evidence to the Leveson Inquiry by Richard Thomas (<http://www.levesoninquiry.org.uk/evidence/?witness=richard-thomas>) and Alec Owens (<http://www.levesoninquiry.org.uk/evidence/?witness=alex-owens>)

– it has been alleged – their life.<sup>77</sup> MediaWise has detailed similar stories from many other victims, who did not give evidence directly to the inquiry.<sup>78</sup>

The failings were not only those of newspapers and the PCC. There were other failures by:

- The police; who failed to investigate properly evidence of malpractice and some of whom, it is alleged, colluded with certain newspapers and accepted bribes from them<sup>79</sup>
- The Information Commissioners' Office: which failed to pursue the news organisations who commissioned thousands of personal data transactions, many of them – according to the ICO – likely to have been illegal<sup>80</sup>
- The politicians who failed to take seriously the *prima facie* evidence of widespread illegal privacy intrusion<sup>81</sup>

It has been argued, at the Leveson Inquiry and outside it, that phone hacking and related activities were illegal and should be dealt with by the law. Therefore, this argument continues, reforming regulation is a red herring. This is a misleading, unhelpful and ill-considered argument.

There are numerous reasons why reform of regulation is necessary, chief amongst these are:

- Regulation creates a framework where these problems are not able to grow to such a level that they become routine and institutionalised. Part of the purpose of regulation is to ensure that problems are dealt with early and in a proportionate way. Much of the illegal behaviour examined by the Leveson Inquiry remained undealt with for years - despite some publicity. It took the Milly Dowler story and persistence by *The Guardian* to prompt action.

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<sup>77</sup> Notably the evidence to the Leveson Inquiry from: Mary Ellen-Field, Christopher Jefferies, Gary Flitcroft, Sheryl Gascoigne, JK Rowling, Baroness Hollins, Max Mosley, Margaret Watson. 'We have no doubt', Margaret Watson wrote in her witness statement to the Inquiry, 'that the way Diane's murder was misreported by Meg Henderson, Jack McClean and others contributed directly to [our son's] tragic death', <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Margaret-Watson.pdf>, accessed 08-05-12

<sup>78</sup> MediaWise, submission to the Leveson Inquiry: <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Media-Wise-Trust.pdf>

<sup>79</sup> Starmer, K. (Evidence to Leveson Inquiry, 4<sup>th</sup> April 2012 – Afternoon Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-4-April-2012.pdf>

'John Yates: I failed victims of *News of the World* phone hacking,' *The Telegraph* 9<sup>th</sup> July 2011: <http://www.telegraph.co.uk/news/uknews/phone-hacking/8628052/John-Yates-I-failed-victims-of-News-of-the-World-phone-hacking.html> accessed 12-04-12

<sup>80</sup> The Motorman files (2003) revealed, the ICO reported, 'not just an isolated business operating occasionally outside the law but one dedicated to its systematic and highly lucrative flouting (*What Price Privacy?* 2006). The ex-Information Commissioner told the Leveson Inquiry 'the sheer cost and logistical challenge of going against the press' meant the ICO focused on the middlemen (Oral Evidence to Leveson Inquiry, 9<sup>th</sup> December 2011, <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf>, p54)

<sup>81</sup> 'We turned a blind eye to phone hacking scandal,' says PM as he announces public inquiries into Press regulation', *Daily Mail* 8<sup>th</sup> July 2011: <http://www.dailymail.co.uk/news/article-2012505/News-World-phone-hacking-Cameron-announces-public-inquiries-Press-regulation.html> accessed 12-04-12. This was not true of all politicians.



- There was, and continues to be, dispute over whether many of the news gathering activities – outside phone hacking – were illegal. Associated and News International do not accept, for example, that their use of Steve Whittamore and his associates was illegal, despite claims to the contrary by the Information Commissioner.
- The law is an awfully blunt tool for dealing with these problems. We have just had a short era when it has become almost commonplace for the police to walk into newsrooms and remove documentation and even staff. Due to the scale of the alleged illegal and unethical activity this has been necessary. But this era needs to come to an end and we need mechanisms to make it much less likely that this happens again. Reform is aimed partly at avoiding the involvement of police and the courts.
- The law is inaccessible to all but a tiny few, and however the law is reformed it will remain relatively inaccessible. Regulation helps to make redress accessible and reduces disparities of power (whether between large news corporations and vulnerable members of the public, or between large and small news publishers).

It is clear that the supposed system of press self-regulation was inadequate and failed. It has essentially been a voluntary system without the incentives to make it work. It is also clear that it is now in urgent need of radical reform.

## What was wrong with the Press Complaints Commission (PCC)?

The PCC claimed to provide ‘independent self-regulation’.<sup>82</sup> Regularly and frequently the PCC made the case that it was not only successfully regulating bad practice within the industry, but that it was raising standards as well:

“[It] took years to persuade officials that self-regulation was a viable and respectable alternative to statutory regulation” Tim Toulmin, then director of the PCC, said in 2005. “...We will make the case [to Brussels] that self-regulation of the press – wherever it may be – can produce high standards of editorial good practice – and that there is no need to harmonise rules, or introduce statutory rights to reply, and so on”.<sup>83</sup>

In 2011, only months before the phone hacking revelations, the then chair of the PCC claimed that the PCC ‘has firmly established itself as the appropriate form of regulation for fast-moving online newspaper and magazine content’.<sup>84</sup>

In September 2011, two months after the phone hacking revelations, the PCC’s director of communications reacted strongly to those who said that the PCC was not a regulator. Responding to an article by Professor Julian Petley in the *New Left Review* Jonathan Collett wrote:

‘Julian Petley is obviously wrong to try to characterise the PCC as merely a mediator and not a regulator. He is wrong to suggest there is nothing in the PCC’s Articles of Association to suggest it performs a regulatory function when those articles actually specifically state that the PCC has responsibility to: “consider and pronounce on issues relating to the Code of Practice which the Commission, in its absolute discretion considers to be in the public interest”’<sup>85</sup>

Prior to July 2011, there was a general consensus within the press that the PCC was an effective regulator. Few, for example, were prepared to agree with the Media Standards Trust when it published its 2009 report, *A More Accountable Press*. This stated that “Based on the assessment in this review, the current system of press regulation was not set up to deal with press standards but rather as a complaints body”, and that the existing system was ‘not successfully protecting either the press or the public’. As it was then operated and was constituted, ‘the system [was] not effective enough, accountable enough, transparent enough or sufficiently reflective of the transformed media

<sup>82</sup> See, for example, the PCC’s Annual Review 2008 ([http://www.pcc.org.uk/assets/111/PCC\\_Ann\\_Rep\\_08.pdf](http://www.pcc.org.uk/assets/111/PCC_Ann_Rep_08.pdf)) and 2010 (<http://www.pcc.org.uk/review10/>)

<sup>83</sup> ‘British self-regulation in a European context’, Tim Toulmin speech to the European Newspaper Publishers’ Association, 29<sup>th</sup> April 2005 <http://www.pcc.org.uk/news/index.html?article=Mzk=>

<sup>84</sup> Chairman’s Perspective, Baroness Buscombe, Annual Review 2010, <http://www.pcc.org.uk/review10/perspectives/chairmans-perspective.php>

<sup>85</sup> Response by the PCC to article on New Left Project website, <http://pcc.org.uk/news/index.html?article=NzMxOA==> accessed 30-03-2012

environment'.<sup>86</sup> The report was met with little public enthusiasm in political and press circles, was rejected out of hand by the PCC and its chairman Sir Christopher Meyer, and was generally viewed as over-alarmist. Today, just three years later, it could be criticised if anything for understating its case.

Even in October 2011, as the Leveson Inquiry began, the Press Standards Board of Finance titled its announcement of the appointment of Lord Hunt as the new chair of the PCC: 'Lord Hunt appointed to oversee the "regeneration and renewal" of the system of independent, non-statutory regulation of the UK press.'<sup>87</sup>

Yet there is now a broad consensus, within the press as well as outside, that the Press Complaints Commission (PCC), did not offer regulation. It offered complaints mediation.

As Tim Toulmin said when he gave evidence to the Leveson Inquiry: Q. 'Do you think [the PCC is] a regulator?' A. 'I think it's a complaints body.'<sup>88</sup>

Lionel Barber, also in evidence to the Inquiry, was asked by Lord Justice Leveson: 'Is [the PCC] really a regulator at all? It's a complaints mechanism'. A. 'No, it is a complaints mechanism, and if I may say, I was just about to explain why I think we need to have a little bit more of the regulatory aspect and not just the mediation.'<sup>89</sup>

Lord Hunt, the current Chairman of the PCC, wrote in his witness statement to the Inquiry that 'I begin from the belief that the Press Complaints Commission was never intended to be, and is not, a regulator in the formal sense of the word as it has no enforcement, compliance or monitoring powers'<sup>90</sup>

As a result of ineffective self-regulation, the problems we now know about were not addressed. Not only were they not addressed, they were hidden from public view, and as a consequence became routine. A culture developed in some newspapers, partly due to a lack of accountability, in which any methods necessary to get a story were considered legitimate. This included, we now discover: bribery of public officials, hacking into voicemails, hacking into email accounts, engaging in long term surveillance, and accessing private information about health, family, and finances.

There were aspects of the PCC that were valuable and which helped many people. In particular, the service run by the PCC secretariat provided a courteous, accessible mechanism through which people with individual complaints could raise those

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<sup>86</sup> Media Standards Trust (2009) *A More Accountable Press* (available from <http://mediastandardstrust.org/projects/press-self-regulation/a-more-accountable-press/>)

<sup>87</sup> Lord Hunt appointed as new chair of PCC, announcement by Press Standards Board of Finance, October 13<sup>th</sup> 2011, <http://www.pcc.org.uk/news/index.html?article=NzQwMA==> accessed 02-04-2012

<sup>88</sup> Toulmin, T. (Evidence to Leveson Inquiry, 30<sup>th</sup> January 2012 – Morning Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf>

<sup>89</sup> Barber, L. (Evidence to the Leveson Inquiry, 10<sup>th</sup> January 2012 – Morning Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf>

<sup>90</sup> Lord Hunt of the Wirral (2012) Witness Statement to the Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Lord-Hunt.pdf>

complaints with a newspaper and ensure they were not ignored. But this service obscured the limits of the PCC's role and powers, and its inability to regulate.

The PCC was not able to regulate because it lacked independence, powers, a consistent and systematic Code of Practice, and meaningful sanctions. The choice of some newspapers not to be part of the PCC also meant that it was not able to effectively regulate the industry.

## Independence

The PCC, as established by the press in 1991, was not independent. It was controlled by, paid for by, policed by, and its rules drawn up by, senior figures within the news industry itself.

The funding body, PressBof ("the powerhouse of the whole machine"<sup>91</sup>), was designed along the lines of the funding body for the Advertising Standards Authority, but with an extremely opaque funding formula, preventing any public understanding of how the PCC's budget was financed. As PressBof has remained in place, the funding and therefore the capacities of the Press Complaints Commission have been limited to the size of the levy that the newspaper industry has been prepared to provide. In addition, prior to the 2010 independent review of the PCC, PressBof exercised full control over the appointment of the PCC Chair and a prominent role in appointing new members to the commission.

As ex-PCC chair Baroness Buscombe said in her written evidence to the Leveson Inquiry: "It is hard to argue that we are entirely independent from those whom we oversee when one of the key components of a self-regulatory system is strong engagement between the regulator and those whom it regulates. Many non-statutory oversight bodies are in the same position. Much more problematic, however, is the fact that the PCC is paid for, on a voluntary basis, by those over whom it sits in judgment".<sup>92</sup>

Nor could other elements of the self-regulatory system be properly described as independent. The Editors' Code Committee consists entirely of editors and senior executives. There are no journalists (who are not editors) or lay members of the public.

This dominance of editors and senior executives jeopardises the independence of the system and limits its effectiveness. This can perhaps best be illustrated with reference to phone hacking itself.

In 2003 the Editors' Code Committee edited and expanded the code with respect to subterfuge. The new Clause 10 included 'provisions expanded to prevent the interception of private or mobile telephone calls, messages or emails'.<sup>93</sup> It is not clear what action, if any, the PCC took to raise awareness of the new code and enforce it.

<sup>91</sup> Shannon, R. (2001) Op. Cit., p38

<sup>92</sup> Baroness Buscombe, (2012) Witness Statement to Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf>, Paragraph 37.

<sup>93</sup> Abell, S. (2012) Witness statement to the Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf>, p242

The chair of the Editor's Code Committee at the time of this change to Clause 10 of the code had chaired the Committee since 1999, and continued to do so until 2008. This was the Chief Executive of News International from 1997 to 2005, Les Hinton.

The evidence within the files of private investigator Glenn Mulcaire suggests that the *News of the World*, owned by News International, was breaching Clause 10 on a significant scale between 2002 and 2006 – while Les Hinton was Chief Executive. It is not known, nor has the Inquiry heard evidence about, whether Mr. Hinton knew about illegal practices at News International at this time. However, evidence has been presented that such practices were widespread at the *News of the World* and that no action was taken, despite the changes in the Code, to investigate or stop them.

There was apparently recognition within the industry, as shown by the Code changes, that there needed to be stronger safeguards against telephone and email interception. Yet voluntary self-regulation clearly did not do enough to implement the safeguards reflected in the Code.

## Powers

The PCC system lacked the remit, the resources or the powers to regulate. It was set up not so much as a complaints body, but as a complaints mediation body.

It did not:

- Determine whether or not the publication breached the code, except in a very small minority of cases
- Accept complaints from those other than first parties who had been directly referenced in the press (except at its own discretion with respect to accuracy)
- Examine prima facie evidence of unethical or illegal behaviour prior to, during, or following legal action
- Examine news gathering techniques to assess compliance with the code
- Publish information for the general public about publishers' compliance with the code
- Award compensation or impose financial sanctions
- Hold oral hearings to cross examine editors and proprietors about adherence to the code
- Oblige news organisations to create internal mechanisms of complaints or compliance

The role of a mediator is fundamentally different to that of a regulator, which typically takes responsibility for deciding when a regulated organisation has breached its rules, and thereby maintains the standards of those it regulates. In this way a regulator:

- Creates precedents to inform future adherence to its code
- Through its response indicates how it regards the relative seriousness of different breaches
- Sets precedents as to what constitutes adequate redress for different types of breaches
- Keeps a record of breaches by particular publishers

- Can take action in relation to particular publishers in the light of the previous regulatory record of that publisher
- By giving publicity to breaches, sets standards of behaviour

Where effective mediation took place, the PCC appeared generally not to hold particular publishers to account, even if there was evidence of a breach of the Code.

For example, in 2010 there were 63 substantive complaints made to the PCC against the *Daily Mail*. In 47 of these the *Daily Mail* appeared to admit to a Code breach (by correcting or apologizing for the story), yet in the whole of 2010 there was not one upheld complaint against the *Daily Mail*. In other words, even though the *Daily Mail* may have breached the Code almost on a weekly basis, it looked as though it had an entirely clean record.<sup>94</sup>

### The Code of Practice

The Editor's Code of Practice has, following its initial drafting, developed through a process of accretion and tinkering over the last two decades.<sup>95</sup> At the same time it has grown up outside of public scrutiny, framed by those responsible for putting it into practice.

For this reason, it perhaps should not be a surprise that the Code is inconsistent and unsystematic. Indeed in places it is virtually un-enforceable.

Clause (1)(iii), for example, "The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact", is rarely respected, and broken by some publications – without consequence – on a daily basis.

Other parts of the Code do not comply with the law. Clause (10) 'Subterfuge', has a public interest defence within the Code. Yet there is no such defence in the Regulation of Investigatory Powers Act or the Computer Misuse Act<sup>96</sup>

Other clauses are framed in such a way that, without constant monitoring, no code breaches would ever come to light. For example Clause (13) on 'Financial journalism' where no party is likely to make a complaint, any effective regulation would require the regulator to monitor the industry.<sup>97</sup> The PCC did not appear to do this.

<sup>94</sup> See 'PCC Statistics: a critical analysis by the Media Standards Trust', second submission to the Leveson Inquiry, pp18-19 <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/02/PCC-Statistics.pdf>

<sup>95</sup> Abell, S. (2011) Witness Statement to the Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf>, para 356, p236

<sup>96</sup> Clause 10 (Clandestine devices and subterfuge: i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent. ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means', from [www.pcc.org.uk](http://www.pcc.org.uk), accessed 03-05-12

<sup>97</sup> Clause 13 (Financial journalism: i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others. ii) They must not write about shares or securities in whose performance

Other parts of the Code have been criticised in evidence submitted to the inquiry – notably Clause 5 ('Intrusion into grief and shock'), Clause 12 ('Discrimination'), and the definition of the public interest.<sup>98</sup>

## Sanctions

The PCC did not have any enforceable sanctions. An upheld 'adjudication' – its ultimate punishment of a newspaper or magazine – would be published by agreement in the publication concerned. The PCC could not force publication, nor determine the place of publication.<sup>99</sup> The PCC could not award compensation or levy fines. The PCC did not hold editors or proprietors to account (for example through oral hearings, as at the Leveson Inquiry).

Editors argued, and still argue, that an upheld adjudication is an effective punishment that has a strong disciplinary effect on them, and can have serious internal repercussions. The editor of the Southampton Daily Echo told a public meeting (organised by the PCC) that an adjudication was very serious and newspaper editors lost their jobs for breaching the code<sup>100</sup>. The PCC website states that 'As most editors (and, increasingly, many journalists) have adherence to the PCC Code written into his or her employment contract, a serious breach can have severe consequences in terms of their future employment.'<sup>101</sup>

But this is not borne out by analysis. According to the PCC's Annual Review, in 2010 there were 18 upheld adjudications, out of over 7,000 complaints and 1,687 rulings.<sup>102</sup> Two publications had more than one upheld adjudication against them. None of the editors who received these adverse adjudications lost their jobs.<sup>103</sup> There is no public evidence that they were further disciplined.

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they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor. iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

<sup>98</sup> For Clause 5 see: Submission by the Samaritans to the Leveson Inquiry, and the submission by Disaster Action. For Clause 12 see: Submission by the Irish Traveller Movement in Britain to the Leveson Inquiry

<sup>99</sup> Although from January 2012 the Editor's Code Committee announced a change such that editors who breach the Code will be required 'to publish the PCC's critical adjudication in full and with due prominence agreed with the PCC's Director', [http://www.editorscode.org.uk/downloads/press\\_releases/Codechange2011-12PR1.pdf](http://www.editorscode.org.uk/downloads/press_releases/Codechange2011-12PR1.pdf), accessed 03-05-12

<sup>100</sup> PCC Open Day, Southampton, November 2010, reported on PCC Watch, <http://pccwatch.co.uk/pcc-open-day-southampton-2010/>, accessed 05-04-2012

<sup>101</sup> PCC website, FAQs, #6 [http://pcc.org.uk/faqs.html#faq1\\_5](http://pcc.org.uk/faqs.html#faq1_5), accessed 5-4-2012

<sup>102</sup> This number of complaints (7,000) 'includes multiple complaints (where more than one person complained about the same article), as well as those that did not fall within the Commission's remit or were not pursued after an initial contact' PCC Annual Review 2010, <http://www.pcc.org.uk/review10/statistics-and-key-rulings/complaints-statistics/key-numbers.php>, accessed 04-04-2012

<sup>103</sup> 'PCC Statistics: a critical analysis by the Media Standards Trust', p16 <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/02/PCC-Statistics.pdf>, accessed 05-04-2012

Moreover, the PCC used its ultimate sanction very sparingly. Indeed the PCC's use of adjudications, never high, declined over the PCC's history to a tiny proportion of complaints made. There were 44 adjudications out of over 7,000 written complaints in 2010.<sup>104</sup> In 1989, the Press Council adjudicated 142 out of 1871 complaints.<sup>105</sup>

Without any meaningful sanctions, the PCC was forced into the position of supplicant. It would appeal to newspapers and magazines to offer the complainant an appropriate response. Such a system is neither fair to the complainant, nor likely to provide incentives for maintaining good and responsible press standards. Without meaningful sanctions many complainants are unlikely to receive fair redress. If code breaches go unpunished, lessons are not learnt, and bad practice may become established.

Although the PCC did perform a useful and valuable role in mediating complaints, it gave the misleading impression that the press was being regulated according to a generally agreed code of conduct. It provided a smokescreen for parts of the press to develop behaviour in pursuit of stories which was only controlled to the extent that editors and owners chose to do so. It has become clear that many did not. Radical reform is needed to create an effective regulatory system.

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<sup>104</sup> This number of complaints (7,000) 'includes multiple complaints (where more than one person complained about the same article), as well as those that did not fall within the Commission's remit or were not pursued after an initial contact' PCC Annual Review 2010, <http://www.pcc.org.uk/review10/statistics-and-key-rulings/complaints-statistics/key-numbers.php>, accessed 04-04-2012

<sup>105</sup> Home Office (1990) *Report of the Committee on Privacy and Related Matters*, London: HMSO, paragraph 1425-1426, pp62-63. The total number of complaints is used in order to compare like with like, though it should be noted that in each case many complaints were rejected as falling outside the respective remits.



# **PART 3**

**Will any of the proposals on the table work?**

## Assessing existing proposals for reform

Since last July various proposals have been put forward by individuals and organisations, advocating potential solutions to address the problems revealed by – and prior to – the Leveson Inquiry. These include a number of possible replacements to the former system of self-regulation as existed under the PCC.

In this section we assess two approaches to reform.

First, we analyse the proposal put forward by the new chairman of the PCC to reinforce voluntary self-regulation with a system of commercial contracts.

Second, we look at a range of incentives that have been proposed as potential ways in which to ensure effective compliance with future self-regulation. These include:

1. VAT benefits conditional on membership
2. Withdrawal of access to certain information
3. Legal incentives
4. Accreditation schemes

It should be noted that the proposals are not necessarily mutually exclusive.

## Why voluntary self-regulation underpinned by commercial contracts is not sufficient

In mid-December 2011 Lord Hunt, who took over as Chairman of the PCC in October, gave a presentation to newspaper and magazine editors. This presentation outlined his plans for reform of the PCC.

Two months later he presented a two-page paper to the Leveson Inquiry giving a similar outline.<sup>106</sup> The analysis here is based on those outlines and on the use of contract law for this purpose. It is not based on his completed contractual model, which is yet to be published.

### The Proposal

Lord Hunt proposes a system of press self-regulation underpinned by a system of commercial contracts. These contracts would be between each publisher individually and the regulator, and would be for a substantial period of time (5-year rolling contracts have been suggested). The new regulator would be able, under the terms of the contract, to compel cooperation with the regulator, by “enabling it to sue for any contractual breaches”. Lord Hunt has suggested that the contents of these contracts could include the following:

- To fund the regulator according to an agreed formula;
- Undertaking to abide by the Code and relevant laws;
- Responding positively to individual complaints that have been handled by the complaints arm;
- Support for clearly defined compliance and standards mechanisms which could be audited by the regulator;
- Accepting proportionate financial sanctions via the funding formula should serious standards breaches be found;

Without more detailed information, it is difficult to determine the full effectiveness of this proposal. However, there are five main areas of concern:

1. There appears to be insufficient incentive to join the system
2. There appears to be insufficient incentive to remain within the system, particularly if an organisation decides it to be disadvantageous
3. It is difficult to imagine how fines could be calculated contractually, given the variety of possible breaches of the code or breaches of contract. For this reason it is hard to see how fines would not be challenged
4. Any fine which a newspaper considers excessive could be contested in court, should the publisher wish to do so<sup>107</sup>
5. Given the lack of sufficient commercial incentives for participation in the system, it, being voluntary, inevitably relies on goodwill. It is easy to see how that

<sup>106</sup> [http://www.pcc.org.uk/assets/0/Draft\\_proposal.pdf](http://www.pcc.org.uk/assets/0/Draft_proposal.pdf)

<sup>107</sup> i.e. if it can be argued that the fine is not a realistic pre-estimate of damages

goodwill could be tested as soon as a meaningful sanction is imposed or a contentious position is taken against a powerful publisher

These concerns are based on the outline version of Lord Hunt's proposal. However, these issues (the balance of incentives and disincentives, the ability to enforce fines, and the continued goodwill of signatories) are of fundamental importance to the viability of the plan. As Lord Hunt himself conceded, without the agreement of all major publishers, the system fails.<sup>108</sup> In addition, learning from the history of press regulatory reviews, the current climate of enhanced press scrutiny may impel publishers to join the system, but withdraw in future, if the system does not meet their individual needs.

An effective regulator should have the power to sanction breaches of contract through appropriate fines.<sup>109</sup> To do this by contract, the contract would either need to clearly specify definitions of the types of failure that represent a breach of the contract and the applicable fines (again, bound by the principle of liquidated damages), or else require that contracted publishers agree to a general power for the regulator to impose fines as it sees fit over the duration of the contract. In the first instance, it is difficult to imagine how all conceivable breaches of contract (based on obeying a Code of Practice, responding positively to complaints, or supporting compliance and standards mechanisms) could be set out in such a way that a publisher could not contest rulings, as often happens under the PCC. In the second instance, it is unlikely that a publisher would sign up to a contract with undefined grounds for imposing fines, or, if it did, it is unlikely that it would not contest the fines if it disagreed that the quantum was reasonable in the circumstances.

The issue of goodwill is an important one. The history of press self-regulation in the UK is a story of periodic short-lived commitments to robust self-governance in the face of threatened statutory intervention, followed by a perceived decline in standards and public pressure for reform. Should publishers fail to renew contracts, or choose to dispute sanctions, the proposed contract system will fail to meet the need for an effective and credible system, and would effectively remain on a voluntary basis.

### Proposed Precedents

The case was made in a *Times* article on 19<sup>th</sup> March 2012<sup>110</sup>, and by Lord Hunt himself at the Westminster Media Forum on 20<sup>th</sup> March 2012, that the proposed plan would be modeled on existing examples of regulatory arrangements consisting of a contractual agreement among their members, but with the power to set rules and guidelines and to impose sanctions, and which – most importantly – had been successful in regulating standards and behaviour, and acting decisively when rule breaches occurred. These were: (according to the *Times* article) the football Premier League, the Jockey Club, the

<sup>108</sup> *The Media Show* (BBC Radio 4), 14<sup>th</sup> March 2012

<sup>109</sup> Lebedev, E. (Evidence to Leveson Inquiry, 23<sup>rd</sup> April 2012, Afternoon Session), <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf>; Barber, L. (Evidence to Leveson Inquiry, 10<sup>th</sup> January 2012, Morning Session), <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf>;

<sup>110</sup> Gibb, F. (19<sup>th</sup> March 2012) 'MPs back plans for new system of press self-regulation', <http://www.thetimes.co.uk/tto/news/medianews/article3355896.ece>

Lending Standards Commission; and (according to Lord Hunt) the England and Wales Cricket Board (ECB).

The sports organisations here (the Premier League and the ECB) represent self-regulatory bodies with a significant amount of leverage to compel member bodies to remain inside the system. The Premier League, for instance, comprises the 20 Premier League clubs, who own equal shares (shares are passed from relegated clubs to newly-promoted clubs at the end of a given season). The Premier League then constructs and enforces the Rule Book, changes to which can be made by a two-thirds majority of clubs (each having one vote).<sup>111</sup> In the case of a serious breach of the rules by a club, a 3-man independent tribunal hears the case, ascertains guilt, and sets the punishment, ranging from fines, to point deductions, and – ultimately – expulsion from the Premier League.<sup>112</sup>

This ultimate sanction has never been used, which is a clear strength of the system. In addition, clubs have, for good commercial reasons, accepted punishment (for example a 9-point deduction for Portsmouth FC for entering administration in February 2010). The fundamental difference between the leverage of the Premier League (and the ECB, which can also suspend “for any period” the eligibility of any member to participate in any competition<sup>113</sup>) and the leverage of a press self-regulator is the overwhelming financial incentive to remain a member of the Premier League, which shares out revenue broadcast and other commercial rights each year.<sup>114</sup>

A Premier League club that chose to leave the system would be unable to compete in the competition, losing the financial benefits of membership, and would not be guaranteed entry to the Football League. This would undermine the entire business model of the club to the extent that it is difficult to imagine circumstances that would lead to a decision to leave the organisation, or perpetuate behaviour that invites expulsion. The leverage is therefore key.

The Jockey Club is an odd analogy, given that following a series of horse racing scandals, it was decided in 2006 that the Jockey Club was unable to continue as an effective self-regulator. It has since been replaced by the British Horseracing Authority (BHA)<sup>115</sup>, which now effectively licenses all participants in the sport.<sup>116</sup> Due to the proximity of horseracing to the gambling industry and its potential susceptibility to abuse from members, the BHA imposes serious sanctions if codes of behaviour are breached, ultimately through the withdrawal of licenses.

For instance, in the case of a jockey who had been expelled by the BHA for race-fixing offences but who had reapplied for a licence to ride in the UK, the Authority ruled that

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<sup>111</sup> The Football Association (FA) can also vote on certain issues.

<sup>112</sup> <http://www.premierleague.com/en-gb/about/who-we-are.html>

<sup>113</sup> ECB (2012) ‘First Class Regulations and Playing Conditions 2012: Cricket Discipline Commission Regulations and Guidelines’, <http://static.ecb.co.uk/files/2924-fc-disciplinecommission2012-p439-462-lr-11950.pdf>, Para 8.1.5.1, p9

<sup>114</sup> <http://www.premierleague.com/en-gb/about/who-we-are.html>

<sup>115</sup> The Jockey Club presently owns and operates racecourses, estates, the National Stud, and Racing Welfare: <http://www.thejockeyclub.co.uk/about/our-structure>

<sup>116</sup> [http://www.britishhorseracing.com/inside\\_horseracing/about/whatwedo/licensing/default.asp](http://www.britishhorseracing.com/inside_horseracing/about/whatwedo/licensing/default.asp)

the closest existing statutory provisions relevant to the case were in the Solicitors Act 1974:

“Lawyers must perform their duties with integrity, probity and complete trustworthiness. The public must be able to trust solicitors “to the ends of the earth”... To ensure and maintain that trust, it is normally the case that solicitors who have been dishonest should be removed from the Roll and thereafter be denied re-admission. This applies even where the solicitor has made every effort to re-establish himself and redeem his reputation... In our decision similar considerations apply to jockeys, albeit in this different context”.<sup>117</sup>

The final sanction is expulsion from the system, and the subsequent inability of the expelled member to participate in any of the events or venues that the BHA licenses. An additional factor in the punishment was that the jockey in question was then unable to participate in the sport in the USA, where the relevant authority would not grant permission to ride without possession of a licence or endorsement from the BHA. Therefore, expulsion from the self-regulatory system results in a *de facto* ban from participation in the UK and at least some other jurisdictions. Again, this demonstrates powerful leverage – failure to adhere to the code and other rules of the self-regulator effectively nullifies the ability of the expelled member to his employment as a jockey. Self-regulation in these circumstances essentially takes the form of licensing. This, however, should not and could not be the case in terms of journalism; exclusion from self-regulation could never be equated with an inability to publish.

The Lending Standards Board is, however, an example of a self-regulator that enjoys near-universal membership of relevant bodies and which sets and enforces the Lending Code. The Lending Code “sets standards of good lending practice in relation to loans, credit cards and current account overdrafts”, and applies to individual consumers, micro-enterprises (firms with less than 10 employees and turnover or balance sheet not exceeding €2m), and charities with an income of less than £1m.<sup>118</sup>

The Code is administered by the three sponsoring bodies – the British Bankers’ Association, Building Societies Association and the UK Cards Association. The Lending Standards Board has the power to initiate a review of the Lending Code, but “in line with the concept of self-regulation the sponsoring bodies control the content of the Lending Code”.<sup>119</sup>

While the Lending Standards Board’s powers are “derived from contracts with subscribing firms to comply with rules made under voluntary industry arrangements”, there are substantial areas of overlap between the Board and both the Financial Services Authority (FSA) and the Office of Fair Trading (OFT), as set out in memoranda of understanding between the Board and each regulator.<sup>120</sup> Complaints procedures for all subscribers to the Lending Standards Board are enforced by the FSA and are in line

<sup>117</sup> <http://www.britishhorseracing.com/resources/licensing/ResultsLynch28-02-11.pdf>

<sup>118</sup> <http://www.lendingstandardsboard.org.uk/about.html>

<sup>119</sup> [http://www.fsa.gov.uk/pubs/mou/lsb\\_fsa.pdf](http://www.fsa.gov.uk/pubs/mou/lsb_fsa.pdf)

<sup>120</sup> [http://www.fsa.gov.uk/pubs/mou/lsb\\_fsa.pdf](http://www.fsa.gov.uk/pubs/mou/lsb_fsa.pdf);

[http://www.oft.gov.uk/shared\\_of/MoUs/MoU\\_between\\_the\\_OFT\\_and\\_the1.pdf](http://www.oft.gov.uk/shared_of/MoUs/MoU_between_the_OFT_and_the1.pdf)

with the FSA Handbook *Dispute Resolution: complaints rules*.<sup>121</sup> As a result, individual consumer complaints against subscribers to the Lending Code on the basis of perceived failures to comply with the Code are dealt with by the Financial Ombudsman Service (FOS).<sup>122</sup>

The Lending Code can therefore be seen as self-regulation with a statutory backstop: the Code is owned by representative bodies of financial services, who are in turn regulated by the FSA; the complaints handling mechanism relating to aspects of the Lending Code are set, and enforced by the FSA via the Financial Ombudsman Service. While the composition of the Lending Code and the mechanisms of investigation, amendment and censure on the basis of code breaches are voluntary, the operation of self-regulation is set within a range of statutory provisions. The Code itself is created with respect to the Consumer Credit Act 1974, as amended and associated Regulations made under it; the Consumer Credit (EU Directive) Regulations 2010; the Equality Act 2010; and other relevant legislation (such as the Payment Services Regulations (PSRs) and, for consumers, the Consumer Protection from Unfair Trading Regulations).

Overall, the analogies proposed to illustrate the Hunt Plan do not provide adequate support for a contract-based system for press self-regulation.

This leverage simply does not exist in relation to the press. In the cases of sports organisations the inability to continue in the relevant sporting activity would, if applied to the press, amount to the prevention of the publisher from producing news. This would be indistinguishable from licensing.

Nor does the Lending Services Board provide an appropriate example of a contract-based self-regulator. Its effectiveness comes from the backstop of statutory regulation.

### Evaluation

The Hunt Plan has a number of positive attributes. The use of contract law to strengthen the system of self-regulation is a sensible response to one of the main problems – how to compel members to obey and apply a code of practice. It has been suggested before, by Geoffrey Robertson in 1983 (although dependent on the creation of a Press Ombudsman by statute)<sup>123</sup>, and also by the Media Standards Trust in 2010.<sup>124</sup> It does not ultimately provide the assurance that when put to the test publishers will stay in the system and comply with the self-regulatory rulings.

The proposal aims to maintain self-regulation without any statutory involvement, presumably fearing that statutory backing will be taken as offering potential for government intervention. A contract-based system of self-regulation is arguably the most robust system of voluntary self-regulation that could be advanced. But in our view,

<sup>121</sup> <http://fsahandbook.info/FSA/html/handbook/DISP>

<sup>122</sup> <http://www.lendingstandardsboard.org.uk/howdo.html>

<sup>123</sup> Robertson, G. (1983) Op. Cit., pp152-153

<sup>124</sup> Media Standards Trust (2010) 'Can Independent Self-Regulation Keep Standards High and Preserve Press Freedom?' <http://mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf>, pp17-18



as presently understood, it does not overcome the fundamental problems demonstrated by such self-regulation in the past.



## Why incentives on their own are not enough

One of the key elements missing from Lord Hunt's proposed plan is a motivation for joining, or for remaining a member after having joined. This is sometimes referred to as 'The Desmond Dilemma' in reference to Richard Desmond, the owner of Express Newspapers and other publications. Desmond pulled out of the old system, destabilising it and undermining its comprehensiveness and credibility.

Lord Hunt's system will impose more upon its members than the previous one, since they will have to sign up to more painful sanctions and grant the new self-regulator more powers. The system is also likely to be more expensive, although Lord Hunt has argued it could be made to cost the same as the PCC.

If this system is more onerous, if it exposes members to greater risk of investigation and sanction, and it could be more expensive, it would be understandable if some news organisations thought twice before joining. There appears to be little incentive for membership of Lord Hunt's PCC2 beyond a general aspiration to shared good practice, and a fear of regulation backed up by statute.

This illustrates the fragility of a plan underpinned solely by a system of commercial contracts. Any system of regulation that does not provide simple and compelling reasons for participation will necessarily have limited powers, will struggle to impose sanctions, and will be difficult to sustain.

Recognising this, a number of people have suggested various incentives for participating in a future system of regulation. These can best be grouped into; fiscal incentives, legal incentives, and incentives based on privileged access to information.

Such incentives have the key benefit of avoiding compulsion. If organisations enter the system voluntarily then one avoids having to force anyone to be regulated. This is both attractive in principle and much more pragmatic in a digital media environment. It is therefore important to explore whether these proposed non-statutory incentives are sufficient to create a resilient system of self-regulation that is likely to be enough to avoid the inherent weaknesses demonstrated over recent decades.

This report analyses whether the four incentives-based schemes that have been proposed to date are possible, practical and provide the necessary degree of incentive. The four are:

1. VAT benefits conditional on membership
2. Withdrawal of industry information privileges
3. Legal incentives
4. Accreditation schemes

## 1. VAT benefits conditional on membership

One potentially powerful fiscal incentive that has been proposed is the withdrawal VAT zero-rating for non-members of the new system, and the extension of VAT zero-rating to those who join the new system.

This has been put forward as a possible incentive by editors from the *Sunday Times*<sup>125</sup> and the *Guardian*<sup>126</sup>, by Lord Hunt<sup>127</sup> and by media commentators<sup>128</sup>, although without detailed analysis of its function or implementation.

### How does VAT zero-rating for newspapers work?

At present, UK VAT ratings are set out by the Value Added Tax Act 1994<sup>129</sup>, in accordance with European Union law. EU law permits a minimum standard rate of VAT of 15%, with one or two reduced rates (not lower than 5%) for approved products permitted in member states<sup>130</sup>. There are, however, a number of temporary derogations on VAT rates, including the UK's zero rating. While the EU has an interest in further harmonising VAT rates, super-reduced rates are proving difficult to abolish<sup>131</sup>, and so the UK's zero-rating of newspapers seems set to continue for the foreseeable future.

Significantly, the EU only permits reduced rates on certain products "for clearly defined social reasons and for the benefit of the final consumer"<sup>132</sup>.

In the UK, newspapers are subject to zero-rated VAT (a status only shared by some – but not all – newspapers in Belgium and Denmark<sup>133</sup>). The practice of offering reduced rates of VAT to newspapers is based on recognition of the fundamental importance a robust and vibrant press holds for society. The application of the zero-rating is, however, dependent upon a precise legal definition of 'newspaper'. HMRC define a newspaper as follows:

<sup>125</sup> John Witherow, testimony to Leveson Inquiry, 17<sup>th</sup> January 2012:

<http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-17-January-2012.pdf>, p46

<sup>126</sup> Alan Rusbridger, supplementary witness statement to Leveson Inquiry, January 2012:

<http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Supplementary-Statement-of-Alan-Rusbridger.pdf>

<sup>127</sup> Lord Hunt, 'Priorities for Press Regulation', Westminster Media Forum Seminar, 20<sup>th</sup> March 2012,

<http://www.westminsterforumprojects.co.uk/forums/event.php?eid=406>

<sup>128</sup> Elstein, D. (2011) 'Press Regulation: Issues, Ethics, Options',

<http://www.opendemocracy.net/ourkingdom/david-elstein/press-regulation-issues-ethics-options>, 3<sup>rd</sup> October 2011

<sup>129</sup> Great Britain (1994) *Value Added Tax Act*, London: HMSO:

<http://www.legislation.gov.uk/ukpga/1994/23/contents>

<sup>130</sup> Council Directive (EC) 2006/112/EC of 28 November 2006, on the common system of value added tax:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF>

<sup>131</sup> Kogels, H. (2010) 'The Application of the Zero VAT Rate on Children's Footwear', *British Tax Review*, 2010 (6), pp688-698

<sup>132</sup> EC (2006), Op. Cit., Art. 110 (2)

<sup>133</sup> European Commission (2012) *VAT Rates Applied in the Member States of the European Union*, available from: [http://ec.europa.eu/taxation\\_customs/index\\_en.htm](http://ec.europa.eu/taxation_customs/index_en.htm) Similar

'Newspapers are issued at least once a week in a continuous series under the same title. Each issue is usually dated and/or serially numbered. They usually consist of several large sheets folded rather than bound together, and contain information about current events of local, national or international interest.

Publications which do not contain a substantial amount of news are not newspapers.

Many newspapers also carry items such as readers' letters, sports news, the weather forecast, crosswords and features (including feature supplements) on fashion, gardening, etc., or more specialised topics.'<sup>134</sup>

As a definition of the news publishing techniques of the contemporary press this is fast becoming inadequate; it fails to accommodate online content, including the increasing convergence of media publishing and the move towards combining video and audio information with text. It also fails to recognise the growth of digital journalism independent of the traditional press. However, it does provide a targeted definition of that aspect of the press upon which the existing basis of indirect subsidy currently lies.

#### How much value do newspapers gain from VAT zero-rating?

Exact figures for the value of zero-rated VAT on newspapers in the UK are not readily available. Therefore, existing values must be calculated using secondary data. HMRC estimates the cost of zero-rated VAT on books, newspapers and magazines for the year 2011-2012 as approximately £1700m<sup>135</sup>, while Timo Toivonen, using secondary analysis of circulation figures, calculated the total value for UK paid-for newspapers as £594m (2008 figures).<sup>136</sup> Although dwarfed by the direct public subsidy for the BBC, indirect UK press support was calculated at €12.2 per capita – almost double the level of Germany, and comparable with France.

While Toivonen's figures are based on the total paid-for market, we are more concerned with the financial value to major publishers of adherence to a regulatory body with the power to grant VAT zero-rated status. Therefore we have produced our own figures on the basis of the most recent ABC circulation figures (see Table3.1):

<sup>134</sup> HMRC (2011) Notice 701/10: 'Zero-rating of books, etc.', available from <http://customs.hmrc.gov.uk/> (Accessed February 2012)

<sup>135</sup> HMRC (2012) *Estimated Costs of the Principal Tax Expenditures and Structural Reliefs*, [http://www.hmrc.gov.uk/stats/tax\\_expenditures/table1-5.pdf](http://www.hmrc.gov.uk/stats/tax_expenditures/table1-5.pdf) (accessed February 2012)

<sup>136</sup> 'Appendix' in Nielsen, R. K. and G. Linnebank (2011) *Public Support for the Media: A Six-Country Overview of Direct and Indirect Subsidies*, Oxford: Reuters Institute for the Study of Journalism

**Table 3.1: Maximum annual value of VAT zero-rating on UK copy sales by publisher**

Publisher	Annual Value of Zero-Rating of National Newspaper Titles (£m) <sup>137</sup>	Annual Value, Excluding Bulk Sales, where Applicable (£m)
Northern and Shell	41.7	N/A
Associated Newspapers	95.3	89.4
Trinity Mirror	56.0	56.0 <sup>138</sup>
News International <sup>139</sup>	98.9	N/A
Telegraph Media Group	56.0	N/A
Guardian Media Group	23.4	N/A
Pearson	14.5	9.5
Independent Print Ltd	12.8	8.7
<b>Total</b>	<b>398.6</b>	<b>383.6</b>

- UK circulation figures and cover price values are drawn from ABC April 2012 figures (accessed via MediaTel)
- Value of zero-rated VAT calculated with regard to differences between Monday-Friday, Saturday and Sunday prices<sup>140</sup>
- Values are aggregated for each publisher, and only national newspapers have been included, following ABC's definition. Therefore Northern and Shell's figures do not include magazines, while Trinity Mirror's include their major Scottish titles (counted as national by ABC), but not regional papers.
- These figures represent a maximum value of zero-rated VAT status for national newspapers. Due to the lack of available subscription figures, final VAT zero-rating values are based on net circulation figures at full cover price. Actual totals will therefore be lower, reflecting the lower prices charged for subscription sales. However, the Office of Fair Trading<sup>141</sup> and Nielsen and Linnebank<sup>142</sup> studies indicate that the vast majority of newspaper copy-sales revenue comes from full-price sales.

These figures are undeniably large, although an indicator of the true value of this form of indirect subsidy was demonstrated by a study in the early 1990s by Price Waterhouse (now PricewaterhouseCoopers) suggesting that the introduction of a 6% rate of VAT on newspapers would have resulted in the closure of most regional daily newspapers, a 10% drop in national newspaper circulations, and significant increases in cover prices.<sup>143</sup> It is highly unlikely that the present newspaper market would be better able to withstand an imposition of VAT.

<sup>137</sup> 'National Titles' defined by the ABC – data gathered via MediaTel

<sup>138</sup> Trinity Mirror bulk sales for *Daily Record* and *Sunday Mail* only – total value approx. £52,000

<sup>139</sup> Does not include *Sun on Sunday* figures

<sup>140</sup> Daily Newspapers: ((Daily Circulation x Price (Mon-Fri)) x 261) + (Daily Circulation x Price (Sat) x 52)) x Standard VAT Rate (0.2);

Sunday Newspapers: (Sunday Circulation x Price (Sun) x 52) x Standard VAT Rate (0.2)

<sup>141</sup> (2008), Op. Cit.

<sup>142</sup> (2011), Op. Cit.

<sup>143</sup> McQuail, D. and K. Siune (eds.)(1998) *Media Policy: Convergence, Concentration, and Commerce*, London: Sage, p13

If VAT were only zero-rated for those publishers that were inside a new self-regulation system, it is clear that the potential disadvantage to remaining outside the regulatory system would be substantial, both in terms of potential revenue lost and to related benefits to rivals. This would manifest itself in the increased cost to customers through a rise in cover price, or by the reduced next profit per paper sold if cover prices were to remain the same. This would also apply to subscription charges.

Since potential VAT revenue is directly linked to circulation figures, present trends in print circulations would see the value of indirect subsidy decline over time. This represents something of a 'built-in obsolescence' in the withdrawal of zero-rating as a financial incentive.

### Evaluating VAT zero-rating as a potential motivation for membership

There are, however, a number of practical and legal issues that would make the enactment of this incentive extremely difficult, and perhaps ultimately impossible.

First, since VAT is a tax on unit price it applies only to those news publications which are paid for at the point of access. Changes in VAT rates, then, would have no effect on freesheets or on online news publishers located in the UK and accessible free of charge. It therefore suffers both from incomplete coverage across the landscape of non-broadcast news outlets, and diminishing power as circulations decline and paid-for online content remains an uncertain business strategy.

There are also potential legal barriers to implementation in the shape of UK and EU VAT legislation. At present, the UK's zero-rating of certain items is permitted only by a temporary abrogation from EU VAT guidelines which allows a reduced rate of 5% VAT on certain items for "clearly defined social reasons and for the benefit of the consumer".<sup>144</sup> Any changes to UK VAT law would require complex and sensitive negotiations with the European Commission and with other member states where similar temporary abrogations apply.<sup>145</sup>

A further problem is that applying different VAT rates to newspapers on the basis of participation in a new regulatory system is likely to be in contravention of the EU's Principle of Fiscal Neutrality, which "prohibits the application of different VAT treatments on equal/similar competing products since it leads to a distortion of competition". This highlights the inherent difficulty in applying tax legislation designed to apply across the EU to a wholly domestic regulatory issue.

There is no direct precedent for this. Pharmacists at present must be registered to apply for zero rated status in order to dispense certain items VAT-free, including prescriptions supplied by NHS or privately-registered doctors, although this is more

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<sup>144</sup> European Commission (2006) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF>), Article 110

<sup>145</sup> European Commission (2012) *VAT Rates Applied in the Member States of the European Union*, available from: [http://ec.europa.eu/taxation\\_customs/index\\_en.htm](http://ec.europa.eu/taxation_customs/index_en.htm)

akin to a form of licensing, and is specifically designed to prevent the unregulated circulation of controlled medical substances.<sup>146</sup>

Therefore while a financial incentive based on conditional VAT zero-rating would clearly be an extremely powerful tool for a new regulator, it is likely that it would not pass the European Commission, even assuming that UK authorities demonstrate the political will to negotiate complex tax negotiations with other member states. At the same time, such an incentive would offer only partial coverage of UK news publishers, while declining newspaper circulation would decrease the value of a VAT-based incentive.

Though possible in theory, the use of VAT zero-rating as an incentive would require considerable political will, and would likely take some years to put into practice.

## 2. Withdrawal of access to certain information

It has been proposed that non-members of a new self-regulation system could be denied access to certain industry resources, including the independent auditing of publication circulation by the Audit Bureau of Circulations (ABC), information on readership via the National Readership Survey (NRS), and access to Press Association (PA) copy.

At present, ABC provides a vast range of media organisations, advertisers, academics and public members with data on circulation and web traffic. This is of obvious importance to potential advertisers, and the reputation and reliability of ABC data-gathering and reporting provides further assurances. Given the range of organisations that hold ABC membership, forcing the withdrawal of a news publisher would deny them the ability to use those figures for commercial purposes.

This would be a more nuanced incentive than VAT rating, and would apply more broadly across the spectrum of news providers without requiring any intervention in tax legislation or EU law. It would also impact upon any publisher that relies on sales of any form of advertising. Since over one-third of print revenue, and almost all of that of free-to-access online news, comes from display advertising, the ability to provide reliable circulation and reach figures for advertisers is essential.<sup>147</sup>

However, making access to ABC figures conditional upon membership of a regulator again poses problems of enforceability and efficiency. First, it is difficult to see how enforcement would apply in practice. The ABC Board (minus the independent Chair) is comprised of representatives from across the media industry and is nominated by industry trade associations. An overhaul of the ABC governance structure would need to be established, as would a formal link with all publishers subject to a new regulator.

The data generated by the ABC is not, however, only of financial benefit to news organisations; it is also used by advertisers. Ejecting a news organisation from the

<sup>146</sup> HMRC (2011) Notice 701/57, 'Health professionals and pharmaceutical products', available at <http://customs.hmrc.gov.uk/>, (Accessed 26-02-2012)

<sup>147</sup> Enders Analysis (2011) *Competitive Pressures on the Press: Presentation to the Leveson Inquiry* <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-Claire-Enders1.pdf>

auditing system would disadvantage advertisers seeking to reach the markets served by that organisation. While this would in practice mean that errant news publishers must go elsewhere to provide advertisers with information on circulation and web traffic (and assurances of the veracity of the information provided), the greater costs that this would entail would not necessarily deter non-compliance with a regulator, should it be offset by savings elsewhere.

The suitability of this proposed incentive is based on two suppositions: that ABC audit reports cover the entirety of potential members of a new regulatory system (or could be extended to do so); and that the ABC system of supplying figures commands universal support among publishers. While the ABC is clearly dominant and enjoys high levels of trust and confidence, neither of these suppositions is necessarily true.

Several news organisations at present are not members. According to the online member list, this includes national newspapers.<sup>148</sup> Certain regional newspapers have also recently chosen to withdraw from the ABC auditing system, indicating a desire to obtain information by other means.<sup>149</sup> At the same time, news publishers are free to supplement or replace the ABC's auditing functions by employing other organisations.

There is, therefore, nothing to stop news publishers using other means by which to provide print circulation and/or online traffic data to advertisers. While this may be more costly than using the ABC, and advertisers may be more reluctant to use data from audits that have been directly commissioned by publishers, this seems unlikely to represent an overriding economic incentive for membership of a new regulatory system that may apply further costs to news publishers.

Denial of access to the National Readership Survey (NRS) would affect newspapers in largely the same way. The NRS is a large-scale continuous survey gathering readership data for over 260 publications, supplementing the circulation data provided by the ABC with information on the numbers of readers-per-copy of each publication. The survey also gathers lifestyle and classification information on the 36,000 UK adults that are interviewed each year.<sup>150</sup>

The company is governed and funded by three trade bodies: the Institute of Practitioners in Advertising (IPA); the Newspaper Publishers Association (NPA); and the Periodical Publishers Association (PPA).<sup>151</sup> The withholding of the data generated would – in conjunction with lack of circulation data – further disadvantage publications in terms of their ability to sell advertising space. In particular, it would be difficult for a non-compliant publication to replicate the quality of information gathered by the NRS.

The Press Association (PA) is the main multimedia news agency in the UK and Ireland, providing newspapers (among other businesses) with access to its news content, as well as images, listings, sport and weather information. It acts as shared news resource for the UK press.

<sup>148</sup> <http://www.abc.org.uk/About-us/Our-Members/>

<sup>149</sup> <http://www.guardian.co.uk/media/greenslade/2012/feb/15/abcs-independent-news-and-media>

<sup>150</sup> <http://www.nrs.co.uk/interview.html>

<sup>151</sup> <http://www.nrs.co.uk/structure.html>

The PA is owned by 27 shareholders, largely consisting of major national and regional newspaper titles, including: Daily Mail and General Trust; News Corporation; Trinity Mirror Plc; Guardian Media Group; The Telegraph Group; and DC Thomson and Co. It is, therefore, largely owned by the newspaper industry.<sup>152</sup>

Newspapers rely heavily on PA wire copy for content. This is especially true for local and regional publications, but a 2008 study has demonstrated that a large portion of news content of the quality newspaper market included large amounts of information obtained from the Press Association.<sup>153</sup>

PA wire copy is therefore a fundamental resource for newspapers, based on contemporary business models: a newspaper denied access to the resource would be denied a ready source of material from which to generate stories, and would either need to produce the majority of its own foreign and national news content, incurring the cost of extra foreign and local staff and offices, or forego such information altogether.

Interestingly, a move to limit access to the journalism produced by the PA cuts across one of its major founding tenets, stating that: “The Press Association is formed on the principle of co-operation and can never be worked for individual benefit, or become exclusive in its character”.<sup>154</sup>

The combination of restrictions on information proposed via conditional access to ABC and NRS data, and PA copy is undesirable for two reasons. Firstly, it further concentrates power within the industry. Secondly, through conferring direct commercial benefits to publishers through their ability to restrict the business practices of existing or potential rivals, it could be viewed as anti-competitive.

Part 1, Chapter I, Section 2(1) of the Competition Act 1998 prohibits “...agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom”.<sup>155</sup> An agreement among media organisations would not qualify for exemption under Schedules 1-4 of the Act.

The “agreements, decisions or practices” in Section 2(1) are listed in subsection (2) as those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) Limit or control production, markets, technical development or investment;
- (c) Share markets or sources of supply;
- (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>152</sup> <http://www.pressassociation.com/about-us/shareholders.html>

<sup>153</sup> Davies, N. (2008) *Flat Earth News*, London: Chatto & Windus, pp52-53.

<sup>154</sup> <http://www.pressassociation.com/about-us/history.html>

<sup>155</sup> <http://www.legislation.gov.uk/ukpga/1998/41/section/2>



These definitions correspond to Articles 81 and 82 of the Treaty Establishing the European Community.<sup>156</sup>

Should a situation arise in which participants in a particular market (newspapers and other periodicals) can combine to withhold important information services from existing competitors or potential competitors seeking access to the market, it can be assumed that such a practice – regardless of intent – would be anti-competitive.

Those publishers acting to restrict access to these resources would gain a direct commercial advantage over competitors from whom information privileges had been withdrawn. This would also entrench power among existing publishers; given the prevalence of PA wire copy as the backbone of much contemporary editorial content, any new entrant to the market attempting to provide a similar product or service could only compete on equal terms by permission of the existing members of the market.

### 3. Legal Incentives

It has also been suggested that potential members of a new regulatory system be rewarded with legal dispensation to lessen the costs of fighting libel cases. In the existing attempts to provide a comprehensive model of press regulation following the Leveson Inquiry, special legal dispensation in privacy and defamation cases has figured strongly.

According to Appendix 17 of the Preliminary Report of the Review of Civil Litigation Costs<sup>157</sup>, the cost for publications as a result of settlements and court judgements in libel and privacy cases in 2008 was £17,801,217 (see Table 3.2 below). Most (around 60%) of these costs are accounted for in cases where claimants made use of Conditional Fee Arrangements (CFAs) – ‘no win, no fee’ arrangements – with their lawyers. Since the use of CFAs in libel cases is to be phased out, these figures cannot be entirely representative of future costs, although overall sums paid will be considerably higher than the £7,061,176 paid in non-CFA cases.

Notably, in almost all cases a settlement was reached before judgment (95% of total cases). While the available figures do not indicate at what stage of the process they were settled, it is evident that claimants are in most cases prepared to come to an agreement rather than go to Court. It is also clear that the vast majority of sums paid out (£14,539,000 – 82% of the total) were on defendants’ and claimants’ costs. Any benefit of membership based on the substantial reduction of payment of costs currently accrued in libel cases would have significant financial implications for publishers.

<sup>156</sup> [http://frontex.europa.eu/assets/Legal\\_basis/12002E\\_EN.pdf](http://frontex.europa.eu/assets/Legal_basis/12002E_EN.pdf)

<sup>157</sup> <http://www.judiciary.gov.uk/NR/rdonlyres/B8CB2DEE-E442-40B8-9C0B-68AC8B7BB9FD/0/app17.pdf>

**Table 3.2: Combined Costs of Libel and Privacy Claims Against the Media Resolved by Settlement or Judgment in 2008**

	<b>Defendants' Costs</b>	<b>Claimants' Costs</b>	<b>Damages</b>	<b>Total</b>
Total	£4,819,462	£9,719,538	£3,262,217	<b>£17,801,217</b>
Total (minus CFAs)	£2,367,203	£3,528,506	£1,165,467	<b>£7,061,176</b>
Total (trials won by claimant only)	£1,676,001	£2,166,381	£175,000	<b>£4,017,382</b>

Two main models of reducing the costs and complexity of libel cases currently exist: the proposal for a Media Standards Authority put forward by Hugh Tomlinson QC<sup>158</sup>; and Max Mosley's 'Press Tribunal' scheme. Each proposes some form of mediation or arbitration to promote a satisfactory settlement between claimant and publisher without using the Courts.

The Media Standards Authority (MSA) would be statutorily recognised in order for it to provide legal benefits to its members. It would perform the multiple roles of a regulator in setting a Code of practice and in sanctioning those publications in breach. In terms of legal sanctions, it would have three main incentives:

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.<sup>159</sup>

The dispute resolution function of the MSA would deal with breaches of the Code and with cases concerning defamation, misuse of private information, or breach of confidence. The process would involve three stages: mediation, based on the present approach of the PCC; a statutory adjudication scheme which members (and complainants against members) will be compelled to use before proceeding to the Courts; and arbitration, should there be a consensus between parties that a qualified independent arbitrator (or group of arbitrators) can provide a definitive resolution to the dispute.

Enhanced defences in legal proceedings would be available to members of the MSA in both libel and privacy proceedings<sup>160</sup>:

- 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

<sup>158</sup> Media Regulation Roundtable (2012) *A Proposal for Future Regulation of the Media: A Media Standards Authority* <http://inform.files.wordpress.com/2012/02/proposal-for-msa-final.pdf>

<sup>159</sup> Media Regulation Roundtable (2012) Op. Cit., p5

<sup>160</sup> NB: These points are also pending legal advice for clarity

requirements of the Code. The determination of the MSA on this point in the individual case would be taken into account (though not binding on a court).<sup>161</sup>

Finally, 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.<sup>162</sup>

The ‘Press Tribunal’ proposed by Max Mosley and submitted to the Leveson Inquiry would be a statutory body (and therefore used here as an illustrative example of a cost-reducing mechanism rather than a non-statutory incentive), the main aim of which is to make libel actions against publishers affordable for the public. A side-effect of this is the reduction of costs for publishers at the same time, through the promotion of quick resolution and the removal (in most cases) of lawyers from the process. Like the MSA, it exercises a mediation and adjudication function with substantial powers, including awarding damages, ordering corrections and preventing publication.

The Press Tribunal would be funded through a combination of fines and a levy of a suggested 0.1p per copy of every publication that exceeds copy sales of 30,000. It is estimated that a levy of this kind would raise over £4,000,000 a year, substantially less than the costs outlined in Table 3.2 above.

While the attempts at creating legal dispensation mechanisms that reduce the costs of defending libel cases for publishers appear to benefit all parties in a dispute, it is not clear how they could be implemented without statutory intervention of some kind. Both the MSA and the Press Tribunal require statutory powers to create and empower adjudication bodies, and without the power to adjudicate or arbitrate, the mediation functions of both bodies go no further than those presently exercised by the Press Complaints Commission.<sup>163</sup>

#### 4. Accreditation schemes

A revised system of accreditation for journalists has been proposed, both by Paul Dacre at the Leveson Inquiry<sup>164</sup> and almost simultaneously by the Carnegie UK Trust.<sup>165</sup> Under such a scheme journalists with accreditation would be allowed privileged access to certain news sources, institutions and events, including sporting occasions, press conferences and restricted areas. Since journalism thrives on information-gathering and provision, the idea is that a clear incentive (access to information) would be withheld from non-members or withdrawn from those guilty of breaches of standards or practice.

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<sup>161</sup> Ibid., p8

<sup>162</sup> Ibid., p8

<sup>163</sup> NB: Again, legal clarification is being sought on how additional damages could work

<sup>164</sup> Dacre, P. (Evidence to Leveson Inquiry, 6<sup>th</sup> February 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-6-February-20121.pdf>

<sup>165</sup> Carnegie UK Trust (2012) *Better Journalism in the Digital Age*, [http://www.carnegieuktrust.org.uk/getattachment/e0e6cbc2-31cc-4c99-bee3-cd6e69936f30/Better-Journalism-in-the-Digital-Age-\(Full-Report\).aspx](http://www.carnegieuktrust.org.uk/getattachment/e0e6cbc2-31cc-4c99-bee3-cd6e69936f30/Better-Journalism-in-the-Digital-Age-(Full-Report).aspx)

Non-membership would supposedly represent self-identification by a news provider (individual or collective) as not being a serious news source, while those with full accreditation under the new system would be recognised as adhering to approved codes of practice and thus rewarded with privileged information. It would be doubly beneficial – access to significant news sources and events would be enhanced, as would the credibility of the publisher.

This approach to securing voluntary self-regulation sits uncomfortably close to the licensing of journalists, by making the distinction between those who can function effectively and legally as journalists, and those who cannot. It also raises the question of possible sanctions against a non-accredited journalist who has gained access to a restricted event.

In practical terms it runs against the interests of the majority of events or news sources for which press access is a vital source of publicity and, subsequently, revenue. Effective enforcement would presumably require agreement among the regulator and those institutions and events that recognise the accreditation system. How this would override commercial publicity strategies is not clear.

An accreditation plan is also technologically anachronistic: where accredited journalists can blog or use twitter to report on events, non-accredited journalists are only disadvantaged by the time-lag involved in reconstructing an event or public statement from these sources. In addition, it would discriminate against potential bloggers or interested individuals who, lacking the means to obtain accreditation, are deprived of the ability to obtain information, amounting to a significant barrier to freedom of expression on issues with possible public importance. This is a particular concern should public bodies or local government be involved in the system, and where the public's ability to subject public bodies to scrutiny would be reduced.

Finally, accreditation would cut against the grain of blogging or citizen journalism where a badge of accreditation could just as easily be seen as a form of deference to authority or of access to heavily controlled flows of information. The place of free-lance journalists could also be made more precarious in the absence of accreditation.

A system of accreditation as a means of incentivising voluntary membership of a new regulatory is flawed: it is outdated in an age of digital media; discriminatory against the individual blogger or concerned citizen; most likely at odds with the commercial interests of many of the organisations it seeks to engage with; and perilously close to a licensing of journalism by non-state means.

## The flaws within an incentives-based system

Any new system should not rely wholly on incentives. Although incentives will be important for making the system sustainable, and for incentivising journalism in the public interest, they should not be the sole basis for a new system. This is for three reasons:

**a. There is a danger that incentives could disadvantage the public and independent journalism**

Offering large media organisations too many carrots to attract them into the system could disadvantage members of the public, compromise the scheme's independence, and create barriers to people doing journalism outside large media organisations.

For example, proposals for a compulsory adjudication scheme have attracted criticism from those who believe members of the public may be unfairly constrained from taking legal action. Similarly, accreditation, another possible incentive, has been criticised by the NUJ amongst others for disadvantaging those who are not part of a major news organisation, and for putting too much power in the hands of those organisations to prevent a journalist from 'doing journalism'.

**b. There is a danger the incentives would not be effective, or would cease to be so**

Some of the incentives that have been proposed to date may not be, or continue to be, attractive enough to bring news organisations into the system, or to keep them there once inside.

Withdrawal of auditing by the Audit Bureau of Circulation, for example, is unlikely to severely impact large news organisations, since they can (and some already do) have their advertising audited elsewhere.

Also legal incentives, though valuable to the industry overall, will tend to be most valuable to those news organisations that get into the most legal difficulties. The Express Group, for example, paid out in almost two dozen libel claims between March 2008 and January 2011.<sup>166</sup> This is more than any other news group, and considerably more than most. Newspapers that take particular care to avoid legal claims would probably gain less financially by joining such a system, though the publisher may see it as protection against occasional 'black swan' legal challenges.

There will also be proprietors for whom monetary incentives will not make a sufficient difference.<sup>167</sup>

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<sup>166</sup> Analysis by Roy Greenslade, 13<sup>th</sup> January 2011, <http://www.guardian.co.uk/media/greenslade/2011/jan/13/express-newspapers-medialaw>, accessed 12-04-2012

<sup>167</sup> In evidence to the Leveson Inquiry, Richard Desmond cited reasons for wanting to withdraw Northern and Shell from the PCC that were not financial (12<sup>th</sup> January 2012), <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.txt>, p76

**c. Incentives will always be an indirect solution**

Even if a viable combination of incentives could be found, they will still be an indirect solution to the problem. In other words, organisations will participate in the scheme for one reason (e.g. to get special legal dispensation), and – as a consequence of participation – be required to adhere to a separate set of standards.

# **PART 4**

## **A 'New System Entirely'**

## Introduction

When the Prime Minister announced in July 2011 that there would be a full public inquiry into the press following the phone hacking affair, he said he believed there should be a 'new system entirely'.<sup>168</sup>

We agree.

This report so far has drawn three conclusions regarding the future of UK press regulation:

- Voluntary self-regulation, as embodied in the Press Council and the Press Complaints Commission, has repeatedly resisted instituting recommended reforms, and as a result has failed to resolve long-standing concerns over independence, press standards on intrusion, and adequate systems of redress for the public. Nor has it been able to deal adequately with publishers who chose to remain outside the system.
- The PCC, insofar as it was ever a regulator, regulated largely in the interests of the industry, rather than acting independently in the interests of the public to give assurance on press standards. The risks to independence of any voluntary system would be grounds enough for a new system, but the drastic changes facing journalism also favour a significantly new approach to the regulation of news publishers.
- A replacement system based solely on incentives, or through a strengthening of existing arrangements via a system of commercial contracts, would not itself be sufficient to solve problems of compliance.

We need a system which is properly independent, which gives confidence that it would address the sorts of malpractice exposed, which protects free speech and a free press, and which is fit for a digital future. We need a system which is credible and effective, and which leads to cultural change within the industry.

We therefore propose a new system that: maintains the benefits, efficiencies and freedoms conferred by self-regulation; reflects plurality, not only in the traditional news publishing market but also in the fragmenting digital news environment; and protects freedom of speech by imposing no regulatory burdens on publications and publishers whose scale is below a particular threshold. Only large news publishers will be within its scope.

Such a system should, we believe, be informed by the way in which self-regulation has evolved in other industries and professions. At the same time, however, on the basis of the investigations in Parts 1-3 of this report, there has to be a mechanism to ensure that self-regulation works and is resilient. Accordingly, our system would be overseen by an auditor (independent of the industry and government) with powers defined in statute.

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<sup>168</sup> David Cameron, 8<sup>th</sup> July 2011, press conference reported by the BBC <http://www.bbc.co.uk/news/uk-politics-14073718> accessed 02-04-2012



The assertion that there is a simple choice between a wholly-free self-regulating press on the one hand, and a government-controlled press on the other is false. Regulation in many industries lies somewhere on a spectrum between self-regulation, co-regulation and statutory-based regulation.

The press is a special case, in that its existence and its operations are fundamental to our democracy, and our understanding of the world we inhabit and the people and institutions we live alongside. We are all affected by the actions of the press. It stands to reason, therefore, that those sections of the news publishing industry that wield substantial corporate power and reach should be obliged to act in the interests of the public, and face sanctions proportionate to the harm they can cause if they fail to do so.

Press freedom, as Professor Julian Petley has argued, is too often portrayed in negative terms – freedom from interference of any degree.<sup>169</sup> From the perspective of the public, however, there are positive freedoms associated with the news media - freedom to access the kind of information that allows them to participate fully and effectively in democratic society. This is echoed by Professor Onora O’Neill, who recently argued that “any adequate account of press freedom must... focus on the needs of audiences both to understand what is said, and to assess what is done in saying it”.<sup>170</sup> A new system ought to take into account both the needs of press freedom and the needs of the audience.

### **The Proposed System – Strengthened Self-Regulation with Backstop Independent Auditing**

Our proposal adapts and combines aspects of different regulatory approaches to create a system that incorporates the flexibility, freedom and informed rule-making of self-regulation, with the compliance and enforcement powers that can be enabled through legislation. It applies some of the characteristics of co-regulation and enforced self-regulation, building on precedents in other regulated industries and theoretical approaches to regulation.

In our proposal – outlined in full in this part of the report – we recommend that only large media organisations be subject to regulatory obligations, and that such organisations be required by statute to:

1. Institute effective internal complaints and compliance mechanisms
2. Create, and participate in, independent and effective self-regulatory organisations (SROs).

These SROs would be overseen by a Backstop Independent Auditor (BIA), to ensure that they function properly and in the public interest.

Understanding that the press cannot be treated as similar to other regulated industries, our system has been formulated to ensure that it:

- Is independent of both government interference and industry control
- Leaves regulation of content in the hands of the SROs

<sup>169</sup> Petley, J. (Witness Statement to Leveson Inquiry, 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Professor-Julian-Petley1.pdf>

<sup>170</sup> O’Neill, O. ‘The Needs of Journalism and the Rights of Audiences’. Oxford Reuters Institute for the Study of Journalism lecture, 21<sup>st</sup> November 2011

- Protects freedom of speech by exempting individuals and small publishers from any regulatory obligations
- Targets regulation at those publishers that demonstrate the greatest need for it, being those with the greatest capacity to do harm
- Serves the interests of the public by providing adequate, transparent and accessible avenues of redress and accountability

## Defining Effective Regulation for the Future of News

Self-regulation has been, and remains, the dominant approach to press regulation in liberal democracies.<sup>171</sup> It has persisted in the UK since 1953 despite the many invocations of the ‘last chance saloon’. The Media Standards Trust, amongst many others, has previously argued that self-regulation is the best form of press regulation.<sup>172</sup> The analyses presented in Parts 1-3 of this report demonstrate, however, that the past models of voluntary self-regulation have not been, and show no signs of providing, an adequate guarantee that the public interest will be served and the public fairly protected.

We have taken an evidence-based approach to formulating an alternative system that is better able to fulfill these objectives. The proposed new system has been developed by drawing on existing systems of regulation operating in the UK, as well as theoretical approaches to regulation, in accordance with principles reflecting the specific characteristics of news publishing.

Since news publishing is not directly comparable with most other regulated professions due – among other things – to the centrality of press freedom in democratic society, we have taken care to construct a model that ensures the best functioning of the news media and maximises freedom of speech. A commitment to the self-regulatory component of the new system is central to achieving this.

The decision to propose a bespoke model of regulation is in part determined by the need for a system that will be durable over the coming years as the media landscape changes to accommodate nascent and entirely new technologies. A significant motivation behind the proposed system is that it should not be an over-reaction to understandable public outrage, and that it should serve as more than a stop-gap to deal with the aftermath of recent failings of voluntary press self-regulation.

### **The regulatory context – solving the problem with ‘best fit’ regulation**

Our system is intended to meet certain objectives. The first is to create an effective and enforceable means of ensuring that major news publishers abide by certain commitments to serving the public. The second is to adhere to certain principles of regulatory ‘best practice’ within the UK context. The third is to ensure that the system achieves these goals while maximising: the accountability of both members and regulators; transparency of processes, performance and audits; and independence from government and industry interests.

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<sup>171</sup> Organisation for Security and Co-operation in Europe (2008) *The Media Self-Regulation Guidebook*, Vienna: OSCE, pp10-12

<sup>172</sup> Media Standards Trust (2010) *Can Independent Self-Regulation Keep Standards High and Preserve Press Freedom*, <http://mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf>, pp5-6

We reject the argument that there are only two regulatory alternatives: either ‘free’ self-regulation; or state-controlled statutory regulation. The Advertising Standards Authority, which is generally admired, combines both industry involvement and a statutory backstop. As accounts of regulatory theory state:

‘There is no clear dichotomy... between ‘self-regulation’ and ‘public regulation’, but rather a spectrum containing different degrees of legislative constraints, outsider participation in relation to rule formation or enforcement (or both), and external control and accountability.’<sup>173</sup>

‘Unreflective invocation of binary labels in policy discourse retards rather than advances thoughtful dialogue. In the case of binary classifications of complex regulatory systems, this impairs weighing the relative advantages of using various forms of provisions to achieve varying objectives.’<sup>174</sup>

We believe that media regulation requires extra consideration of questions of autonomy from government and the fundamental importance of a free press. However, wholesale rejection of the entire regulatory spectrum is unhelpful – as the above quotes demonstrate, regulation can take the form of various combinations of measures, provided it achieves its intended aims, and is structurally coherent.

### **Favouring Self-Regulation**

We agree that a form of self-regulation is the best means of regulating the press, and so our system has been designed to maintain the highest possible degree of self-regulation, while ensuring effectiveness and adequate representation of the public interest. We agree with the assertion that “It may be that... a combination of self-regulation and regulation will offer a level of performance and acceptability that is unobtainable by resorting to either strategy entirely”.<sup>175</sup>

This represents a progression from the old system of voluntary self-regulation in line with Ayers and Braithwaite’s ‘pyramid strategy’, whereby “self-regulation is favoured as the initial response to a mischief and where desired results are not achieved, enforced self-regulation involving greater state monitoring is seen as appropriate”.<sup>176</sup> Accordingly, we think that the addition of a Backstop Independent Auditor (BIA) created by statute is a necessary and appropriate response to the failures of self-regulation.

In addition to this, the National Consumer Council’s proposed statutorily-defined framework provides a clear guide as to what a hypothetical general system of self-regulation should include:

<sup>173</sup> Ogus, A. I. (1995) ‘Rethinking Self-Regulation’, *Oxford Journal of Legal Studies*, 15(1), p98

<sup>174</sup> Cunningham, L. A. (2007) *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, Boston College Law School, Research Paper 127, March 2007, available from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=970646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970646), p63

<sup>175</sup> Baldwin, R. and M. Cave (1999) *Understanding Regulation: Theory, strategy and practice*, Oxford, Oxford University Press, p133

<sup>176</sup> Ayers, I. and J. Braithwaite (1992) *Responsive Regulation*, Oxford, Oxford University Press – cited in Baldwin, R. and M. Cave (1999) *Op. Cit.*, p41

- Strong, external involvement in the design and operation of the scheme
- As far as practicable, a separation of the operation and control of the scheme from the institutions of the industry
- Full representation of consumers and other outsiders on the governing body of the scheme
- Clear statements of principles and standards governing the scheme – normally published in a code
- Clear, accessible, and well-publicised complaints procedures to deal with code breaches
- Adequate sanctions for non-observance of codes
- The maintenance and updating of the scheme
- Annual reporting<sup>177</sup>

A form of self-regulation is appropriate for press regulation through its inherent strengths as well as its separation from government interference. It is comparatively efficient and operates with low cost to the public, and benefits from access to industry expertise for decisions on suitable rules to govern their business and on the seriousness of alleged breaches of rules. It also, crucially, allows rapid adjustments to changing circumstances.<sup>178</sup>

Our system builds upon these strengths, while dealing with perceived weaknesses of self-regulation, some of which are outlined in Table 4.1:

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<sup>177</sup> Cited in Baldwin, R. and M. Cave (1999) Op. Cit., p132

<sup>178</sup> Ibid., p40

**Table 4.1: Remedying the weaknesses of self-regulation**

Criticism <sup>179</sup>	Proposed Solution
Seen as lacking accountability, as it grants power to groups with no link to the body politic through conventional channels	Any new system should ensure that any self-regulatory body is subject to effective oversight by a body that is independent and representative of the public
SROs have a poor record of enforcing their standards against recalcitrant members	Oversight of the operation of SROs should ensure that failure effectively to regulate members would result in some form of sanction for the SRO
Rules written by self-regulators may be self-serving and risk regulatory capture	By giving powers of approval to an oversight body, a mechanism is in place to prevent the use of codes of practice that are too close to the interests of the industry
Can lead to inconsistencies of standards among SROs	A means of ensuring a threshold of minimum standards in SRO rules would limit potential disparities
Compliance units within firms may not retain independence	A means of regularly auditing SROs would ensure that failures in compliance processes are discovered and, if necessary, sanctioned
Public trust is damaged where procedures and rules are not seen to be transparent or open	Publication of audits would maximise transparency of performance, while the application of minimum standards in rule-making would build public trust

Our suggested system reflects the belief that neither ‘Principles-Based’ nor ‘Rules-Based’ regulation, alone, is a sufficient means of governing rule-making for a regulatory system.<sup>180</sup> We therefore recommend a system that incorporates both approaches, where each will work best.

By empowering the BIA to set principles-based parameters through its minimum standards for SRO composition, and giving SROs rule-making powers to create codes of conduct (incorporating the minimum standards set by the BIA), our system allows for the benefits of both approaches.

### Maintaining Regulatory Relevance

Our proposal has been developed with recent developments in thinking on regulation in mind. In particular, the five principles of good regulation – proportionality, accountability, consistency, transparency and targeting<sup>181</sup> – have been used as a guide to construct the model.

Bearing in mind the present government’s commitment to a ‘One-In-One-Out’ approach to regulatory reform, our model also retains the capacity – in a rapidly changing media environment – to be extended to accommodate regulatory rollback in other media sectors (see ‘Fit with existing regulation’ below).

<sup>179</sup> Adapted from Ogus, A. I. (1995) Op. Cit., pp98-99, and Baldwin, D. and M. Cave (1999) Op. Cit., pp41 and 132-133

<sup>180</sup> Cunningham, L. A. (2007) Op. Cit., pp2-3

<sup>181</sup> Better Regulation Task Force (2005) *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, A BRTF Report to the Prime Minister, <http://www.bis.gov.uk/files/file22967.pdf>, Annex B

## Learning from existing systems

In developing this system we have also sought to learn from existing models of regulation, both within the media, from other sectors, and internationally.

In other sectors, three of the most helpful comparative systems are in law, healthcare, and financial services.

In law, the Legal Services Act 2007 established the Legal Services Board (LSB). The purpose of the LSB is ‘to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system’.<sup>182</sup> When setting it up there was, as with the press, considerable concern about independence and concern that the autonomy of existing regulatory organisations, such as the Bar Council, be preserved.

In healthcare, the Council for Healthcare Regulatory Excellence (shortly to become the Professional Standards Authority for Health and Social Care), was established in 2003 ‘to supervise, audit, assist and report on the way in which they [the 9 regulators] operate’.<sup>183</sup> As with the Legal Services Board, the CHRE has oversight of regulators, and is constrained in its own activities.

In financial services, the Securities and Investments Board (SIB) was set up as a result of the 1986 Financial Services Act, which granted it responsibility over the “whole range of investment activities”<sup>184</sup>. Prior to the Act, the UK securities markets had been mostly governed by personal interaction, and were therefore left to regulate themselves. The main functions of the SIB were “to create and develop a framework of rules and regulations for the industry and to grant recognition to other self-regulating organisations (SROs) and recognised professional bodies (RPBs) who were prepared to enforce such rules and regulations on their members”.<sup>185</sup>

In the establishment of each of these systems, the sector concerned has had to balance its understandable anxieties about independence with its accountability and with the needs of the public. The media, though clearly different from each of these sectors, can usefully learn from their experience.

The system recommended in this proposal integrates those aspects of these systems that are appropriate to fulfill its objectives.

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<sup>182</sup> Legal Ombudsman, Scheme Rules, 1.8, [http://www.legalombudsman.org.uk/aboutus/1\\_introduction\\_and\\_definitions.html#approved\\_regulator](http://www.legalombudsman.org.uk/aboutus/1_introduction_and_definitions.html#approved_regulator), accessed 04-04-12

<sup>183</sup> Council for Healthcare Regulatory Excellence, <http://www.chre.org.uk/>, accessed 03-05-12. Also referenced by Mather, Op. Cit.

<sup>184</sup> Financial Services Act 1986, [http://www.legislation.gov.uk/ukpga/1986/60/pdfs/ukpga\\_19860060\\_en.pdf](http://www.legislation.gov.uk/ukpga/1986/60/pdfs/ukpga_19860060_en.pdf)

<sup>185</sup> Alcock, A (2000) *The Financial Services and Markets Act 2000: A guide to the new law*, Bristol: Jordan Publishing, p6

## **The Proposal**

### **Strengthened self regulation with an independent statutory auditor**

Our recommendations:

1. Impose no regulatory obligations, beyond the law itself, on individuals or small news publishers
2. Focus reforms on large news publishers that are larger than a 'small company' (as defined in the Companies Act 2006)
3. Oblige large news publishers to regulate themselves, by:
  - i. providing internal complaints and compliance mechanisms
  - ii. joining an external self-regulatory organisation
4. Give large news publishers the freedom to build these self-regulatory organisations, that meet the accepted standards of self-regulation
5. Make sure the public, and large news publishers, have a fair and independent appeals mechanism from the self-regulatory complaints process via an Appeals Board
6. Establish a Backstop Independent Auditor in statute with responsibility for approving self-regulatory organisations and auditing them on an annual basis



## 1) Impose no regulatory obligations, beyond the law itself, on individuals or small publishers

In a digital world in which anyone can publish it is – both in principle and in practice – unwise to try to impose any regulatory obligations on individuals or small publishers above those that exist within the law.

In principle this would be unwise because it would, inevitably, restrict free speech. Free speech, in the sense of speech that is not intended for sale through mass distribution, ought to have no limitation beyond the law.

This would support J.S. Mill's belief that, when it comes to individual freedom of expression there should be '...absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological'.<sup>186</sup>

Individual speech, as Professor Onora O'Neill said in her 2011 Reuters Institute lecture at Oxford, 'is merely self-regarding... Since speech that doesn't affect others won't harm them, issues of self-protection won't arise in this case. If we accept the harm principle, we should neither prevent nor constrain self-regarding speech'.<sup>187</sup>

To impose any regulatory limitations on individual speech or on small publishers – particularly given that the Leveson Inquiry has not seen evidence of abuse of power at this level, would be misplaced and inimical to freedom of expression.

In practice, it is also hard to see how any such regulation could work given the multiplicity of statements published online at any moment. Would a regulator seek to make rulings on what was published on an individual's social networking profile, for example? Would it seek to regulate individual twitter comments made from the UK when the same comments are being made from many other jurisdictions? Would it seek to regulate individual comments, the platform on which they are published, or both? These sorts of questions illustrate how deeply problematic and impractical it would be to seek to regulate individual or small scale publishing.

The system proposed here is not intended to affect small publications, independent publishers, bloggers, tweeters, or anyone else who is not earning substantial amounts of money from their news publishing activities.

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<sup>186</sup> Mill, J.S. (1859 [1998]), *On Liberty, and other essays*, Oxford: Oxford University Press, p16

<sup>187</sup> O'Neill, O. (November 2011) *The Needs of Journalism and the Rights of Audiences*, Reuters Institute Lecture, Oxford University

## 2) Focus reforms on large news publishers that are larger than a ‘small company’ (as defined in the Companies Act 2006)

Reforms ought to be focused where serious problems have been identified. This should be on large news publishers. A number of these have acknowledged unlawful or unethical behaviour, and of failing to establish effective internal controls.

Large news publishers have voices far louder, with significantly greater impact, than any individual. They have the power to frame and influence opinion and public understanding. They also have exceptional power to seriously harm private citizens through their influence.

Focusing on large news publishers distinguishes between freedom of expression, which we believe should be entirely unconstrained within the bounds of the law, and corporate speech, which due to its power and influence ought to be accountable.

As Professor Onora O’Neill said in her Reuters Institute lecture:

“Powerful institutions, including media organisations, are not in the business of self-expression, and should not go into that business. An argument that speech should be free because it generally does not affect, *a fortiori* can’t harm, others, can’t stretch to cover the speech of governments or large corporations, of News International or the BBC”<sup>188</sup>.

It therefore makes sense to focus attention on large news publishers.

We suggest the distinction between large and small publishers should be set high.

To set it low carries four major risks:

- It risks capturing organisations that are not regular news publishers
- It risks placing obligations on organisations who would struggle to deal with compliance obligations
- It risks making it more difficult to create a coherent, effective system
- It risks placing constraints on the freedom of individual speech

To set it too high carries far fewer risks:

- Small and medium sized news organisations have not, in the Inquiry, been found to have seriously breached the law or the Editors’ Code of Practice
- Large news publishers still dominate daily consumption (the top four national daily newspapers, for example, represent 70% of national daily circulation<sup>189</sup>).

Helpfully, UK law makes a distinction between large and small UK companies. The Companies Act 2006 defines a ‘small company’ as one which fulfils two out of three criteria: having a turnover at or less than £6.5m turnover; a balance sheet total at or less

<sup>188</sup> O’Neill, O. (November 2011) The Needs of Journalism and the Rights of Audiences, Reuters Institute Lecture, Oxford University

<sup>189</sup> ABC circulation figures, January 2012: *The Sun, The Daily Mail, Daily Mirror, Daily Star*

than £3.26 million; or 50 employees or less.<sup>190</sup> None of the major UK news publishing groups is smaller than this.<sup>191</sup> Most are far larger.

Accordingly, we suggest that the new regulatory system should not affect any news publisher that comes within the category of small company or small group for the purposes of the Companies Act 2006. That way, the *Congleton Chronicle* will not be affected by the reforms, but any publication within the Telegraph Media Group will.

We suggest that 'News Publisher' includes any publisher, in any medium from print to online, who meets the following criteria:

1. a significant proportion of its publishing activities involve the generation of news, information and opinion of current value;
2. it disseminates this information to a public audience;
3. it publishes regularly;

This definition is based closely on the definition of 'news media' in the New Zealand Law Commission report on the news media.<sup>192</sup>

Based on this threshold and definition:

- The large news publishers who would be within the system include: The Daily Telegraph, part of Telegraph Media Group (2010 revenues £323.8m); the Daily Mail – as part of DMGT (2010 revenues £1,968m); The Guardian – part of Guardian Media Group (2010/11 revenues £255m); The Manchester Evening News – part of Trinity Mirror Group (2010 revenues £761.5m)<sup>193</sup>. Large publishers that produce regular publications but do not produce news (for example, academic journals) would not be included.
- Those publishers who would be outside the system include: Congleton Chronicle; Private Eye; Huffington Post.<sup>194</sup>

Smaller publishers should not be prevented from joining self-regulatory schemes, or from starting their own schemes (e.g. to suit their own particular circumstances), but they would not be obliged to do so. The same would apply to international news publishers.<sup>195</sup>

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<sup>190</sup> The Companies Act 2006, Section 382, 'Companies qualifying as small: general', <http://www.legislation.gov.uk/ukpga/2006/46/part/15/chapter/1/crossheading/companies-subject-to-the-small-companies-regime>, accessed 30-04-12

<sup>191</sup> The definition would apply to the parent or holding company, provided that publishing is its primary activity. The Companies Act 2006 also defines a small group of companies. It is envisaged that the self-regulatory system would generally deal with publishing groups comprising a number of companies under common ownership as if they were a single entity.

<sup>192</sup> New Zealand Law Commission (2011) *'The News Media Meets 'New Media': Rights, responsibilities and regulation in the digital age*, available from <http://www.lawcom.govt.nz/publications>, p8, accessed 15-05-12

<sup>193</sup> Figures taken from Telegraph Media Group Annual Report 2010, DMGT Annual Report 2010, Guardian Media Group Annual Report 2010/11, Trinity Mirror Group Annual Report 2010

<sup>194</sup> Based on publicly recorded accounts of Heads (Congleton) Ltd. (31-01-11) and Private Eye (31-07-11) at Companies House. Huffington Post is not a UK incorporated company (according to Companies House)

<sup>195</sup> The Companies Act 2006 criteria would apply to companies incorporated in the UK. Further consideration needs to be given to large news publishers incorporated outside the UK

### 3) Oblige large news publishers to regulate themselves

We have concluded that a system based on commercial contracts alone is potentially fragile and unlikely to offer the robustness and resilience needed. We have also concluded that proposals for a system that relies on proposed incentives is not likely to be sufficient to ensure compliance. Accordingly, there needs to be a simpler, more direct approach to the problem.

The simplest and most direct approach is to oblige large news publishers to take responsibility for regulating their own behaviour.

Why should large news publishers be put under such an obligation?

- They wield significant political and social power
- It has been shown that without effective controls they have demonstrated a tendency to abuse that power
- It has been shown, through the Inquiry, that there is a clear public need for greater protection and availability of redress
- It has also been demonstrated, through the Inquiry, that journalists would benefit from mechanisms to limit undue editorial pressure in the newsroom<sup>196</sup>
- It has become apparent, over many years, that some large news publishers will not take such responsibility unless obliged to<sup>197</sup>

Most large organisations already have various obligations under the law:

- Data protection
- Health and safety
- Financial reporting
- Law reporting

Some media organisations have already taken such steps, both in respect of good governance and as part of their commitment to the public that they claim to serve. But many have not.

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<sup>196</sup> For example through the evidence submitted to the Inquiry by the National Union of Journalists: Second Witness statement of Michelle Stanistreet, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/MS-Exhibit-11.pdf> accessed 28-05-12

<sup>197</sup> See Part 1 of this report on the historical context

### **3. (i) Oblige large news publishers to regulate themselves: by providing internal complaints and compliance mechanisms**

In order to be more accountable for their own behaviour all large news publishers should be obliged to institute minimum internal complaints and compliance mechanisms.

#### **Complaints**

For complaints, the publisher should provide a clear and transparent opportunity for members of the public to contact the publisher in order to correct, question or complain. The publisher should also set out how complaints and corrections will be dealt with, including time limits and remedies.

#### **Compliance**

For compliance, the publisher should institute straightforward, transparent and auditable processes of decision making with respect to:

- a decision to intrude on someone's privacy
- a decision to publish content which may have breached the law or the applicable code of practice but where publication is considered to be in the public interest

These decisions would have to be signed off by a senior named individual within the organisation who would then take responsibility for this decision (similar to the designation of a 'responsible editor' in the Finnish system).

Such processes would:

- Provide a 'paper trail' of decision-making which can later be used as a defence by the publisher, and as a way to hold the publisher accountable for standards
- Make clear which senior executives and editors take primary responsibility for decisions involving judgments as to legality or ethical standards, rather than the individual journalist
- Change the culture in newsrooms, especially with respect to decision-making on privacy intrusion (and other methods of gathering information)

This would, for the first time in the press, provide transparency about editorial decision-making that is to the benefit of both journalists and members of the public.

These internal mechanisms would also provide an opportunity for mediation, similar to the service previously provided by the PCC. This would help distinguish mediation from regulation, as practiced by the self-regulatory organisation.

The House of Lords Select Committee on Communications, in its 2012 report on investigative journalism, recommended 'that media organisations implement a two-stage internal management process whereby they track and formally record their decisions first to investigate and secondly to publish a story if such decisions rely on the public interest' (paragraph 108). The regulator can then 'take such an audit trail into

account when evaluating the responsibility or otherwise with which investigative journalism has been undertaken' (paragraph 109).<sup>198</sup>

In this system large news publishers would be required to have similar mechanisms.

The major UK broadcasters have detailed compliance procedures that provide a helpful guide as to how aspects of compliance can work. Steve Hewlett described this in the British Journalism Review in 2011:

'In TV-land, proposals to invade someone's privacy – with surveillance, secret recording and so on – must go through a formal process of approval. Stage one requires the journalist to convince their editor that sufficient *prima facie* evidence exists about the activities of an individual or company or whatever to justify the intrusion occasioned by whatever measures are being proposed to get or prove the story. If it's serious enough then someone higher up the TV company – not usually operationally involved, but with the requisite background and experience – might have to be consulted. And if the story is so serious and the public interest strong enough – and if the evidence appears to stack up – then the covert operation goes ahead. Even then, once the material has been gathered, a further approval to use it, based on what, if anything, has been discovered and whether in that context the invasion of privacy still appears warranted, must be obtained. This might sound bureaucratic but it creates a paper trail for decision making, and forces proper consideration of the issues'.<sup>199</sup>

In Finland such basic internal complaints and compliance mechanisms are ensured as a consequence of the 2003 Act on the Exercise of Freedom of Expression in the Mass Media. Under this Act:

- publishers and broadcasters have a duty to 'designate a responsible editor'
- each publisher has a 'duty of disclosure' so that the public can get in contact with them
- the public have a 'right of reply' and a 'right of correction', and
- the responsible editor has a 'duty to publish a reply or correction'

Given these responsibilities, Finnish publishers are incentivized to institute internal complaints and compliance mechanisms. If they do not, the public can take legal action.<sup>200</sup>

<sup>198</sup> House of Lords Select Committee on Communications (2012) *3<sup>rd</sup> Report: The Future of Investigative Journalism*, <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/256.pdf>, p32

<sup>199</sup> Hewlett, S. (2011) 'PCC2 Can Learn a Lot About Privacy from TV', *British Journalism Review*, 22(4), [http://www.bjr.org.uk/data/2011/no4\\_not\\_leveson\\_report](http://www.bjr.org.uk/data/2011/no4_not_leveson_report)

<sup>200</sup> Finland (2003) Act on the Exercise of Freedom of Expression in Mass Media, available from <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460>,

### 3. (ii) Oblige large news publishers to regulate themselves by: joining an external self-regulatory organisation

Large news publishers would be required to be a member of an approved independent external self-regulatory organisation (SRO).

An SRO should be created by the publishers themselves. Each SRO would need to be approved by the Backstop Independent Auditor (BIA), and would need to satisfy the BIA that it met certain basic criteria (see below). These criteria should incorporate the successful aspects of the previous PCC system, as well as addressing the specific weaknesses of that system.

The BIA would audit each SRO annually to check that it was functioning satisfactorily and would publicly report its findings.

SROs (we contemplate that there might be more than one, for example to cater for different types of publishing business) should be obliged to:

- Provide the public with an independent forum for resolving complaints about member organisations;
- Provide meaningful, proportionate and timely redress to the public, particularly with regard to inaccuracy, unfairness, and unjustified privacy intrusion;
- Protect the freedom of journalists to report in the public interest

#### Complaints

The primary function of the SRO would be to provide the public with an independent forum for complaints. This would need to be accessible, transparent, and free at the point of use. Unlike the current system, it would be expected to make rulings on complaints that fall within the code.

Third party complaints ought to be accepted in this system. However, the system should be primarily for individuals not corporations. The purpose of regulation is, at least in part, to address disparities in power, not to enable corporations to lodge complaints against one another. The law provides an appropriate regime for such complaints. For this reason we suggest applying a similar threshold for complaints as for participation in a self-regulatory organisation. In other words, organisations larger than a small company (as defined for Companies Act purposes) should not be able to use the complaints system.<sup>201</sup>

#### Investigations

The SROs should be responsible for investigating *prima facie* evidence of malpractice. An investigation by the SRO ought to be funded in a similar way to investigations by the Financial Services Ombudsman. In other words, the SRO might bear the cost of the first

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<sup>201</sup> There should also be constraints on the use of the system by political parties or those seeking election to public office, to prevent potential misuse for partisan purposes.

three investigations against a news group, after that the news group itself would pay costs (the 'polluter pays' principle).

## Accountability

SROs should be encouraged, but not required, to hold public hearings with editors of publications for which they have responsibility. The Leveson Inquiry has demonstrated the benefit of holding editors publicly accountable for their decisions. Again, transparency ought to provide the best form of regulation.

## Reporting

The SRO should produce an annual report each year containing reasonable and adequate information detailing its performance with respect to its objectives.

It should also write a letter to each of its members detailing their performance in relation to their self-regulatory obligations, and providing comparison of that performance to other news outlets. In its annual report the SRO would summarise the performance of its members, providing a consistent means by which the public can assess the performance of different news outlets. This is based on a similar process undertaken by the Local Government Ombudsman.

This will ensure there is continued transparency in the operation and effectiveness of self-regulation. Such openness will be critical to retaining public confidence in self-regulation and encouraging an improvement in standards.

### *Case Study: Reporting – the Local Government Ombudsman*

The Local Government Ombudsman publishes annual reports setting out how effective and efficient each local authority has been in complying with the office of the ombudsman. This report takes the form of a letter to the chief executive of the local authority which sets out the performance of that authority in the context of how his organisation compares with other local authorities.

These reports, which are available on its website, set out:

- a dashboard of the type of complaints and the matter under complaint
- the number of enquiries and complaints that were received about the authority
- the number of actions taken against the authority
- the average length of time it has taken for the authority to respond to the ombudsman, in comparison with other authorities.<sup>202</sup>

## Funding

Each member organisation of a self-regulatory organisation should contribute to its necessary funding. The amount each should pay would be determined by the members' arrangements for each system, under the proviso that the funding has to be adequate to enable the SRO to fulfill the minimum criteria set out by the BIA. The funding arrangements would have to be transparent (see Appendix II on funding).

<sup>202</sup> See, for example, the letter from the LGO to the Chief Executive of Arun District Council, 2011 <http://www.lgo.org.uk/documents/annualreview/2011/arun.pdf>, accessed 04-04-12



### **Refusal to participate**

If a large news publisher, which meets the criteria necessary for self-regulation, refuses to participate in a self-regulatory organisation then it will be liable to a fine. These fines would be set and recovered by the Backstop Independent Auditor.

## 4. Give large news publishers the freedom to build these self-regulatory organisations

Subject to these minimum responsibilities, large news publishers should be given as much freedom as possible to develop these accountability systems.

This is because:

- it provides safeguards against regulatory creep or State interference
- there is significant value in organisations taking ownership of applicable industry standards – especially in terms of cultural change
- the organisations themselves have the most knowledge of how their business works
- self-regulation builds in flexibility and permits evolution as the context changes
- the organisations have a self-interest in making the systems better value for money

Therefore large news publishers should be able to develop their own internal compliance and complaints mechanisms, according to generally agreed standards, which they then pay for and run.

Similarly, large news publishers ought to have the freedom – with other large news publishers – to create or join their own external self-regulatory membership organisations, as long as they support certain agreed outcomes.

### More than one self-regulatory organisation

The opportunity to set up a self-regulatory organisation for a particular part of the news publishing industry provides an appropriate degree of choice. Not to have such a choice would be unduly restrictive. It would only provide the same – limited – freedom as Henry Ford did to his customers. ‘Any customer can have a car painted any colour that he wants’ Ford said of his new Ford car, ‘so long as it is black’<sup>203</sup>.

Given the atomisation of media outlets and audiences there is a real risk that forcing all publishers into one tent would not work to the advantage of the public or the publishers. This lack of cohesion will increase as consumption of news online or on mobile platforms rises.

In such an environment it makes sense to create a system that allows for different self-regulatory organisations, that builds in flexibility, and that provides scope for future publishing outlets and methods as yet undefined.

On the other hand, a proliferation of SROs would risk inconsistency in minimum standards. Accordingly, we suggest that SROs should be required to establish an adequate rationale to the BIA of the need for a separate system.<sup>204</sup> Such a potentially

<sup>203</sup> Ford, H. (1922) *My Life and Work*, Garden City, NY: Doubleday, Page and Co. p71

<sup>204</sup> Similar to the guidance in the Financial Services Act (1986) which stated that an application [for a self-regulatory organisation] could be refused on the basis of the fact that the proposed functions of the applicant body are already covered by an existing SRO, and therefore the new body is unnecessary.

diverse system of self-regulation would not only reinforce media freedom but would also better suit an atomizing digital media environment.

### **Protecting against ‘licensing’**

The proposed system has been designed to protect against any risk of ‘licensing’. Freedom of expression would be constrained by a system that prevented publication under certain conditions, or that corralled all publishers into a mandatory organisation that had some control over content. This system does neither of these things.

Within this system anyone is free to publish anything they wish within the law. News publishers below the minimum threshold (of ‘small company’) have no regulatory obligations. Those publishers over the statutory threshold are still free to publish what they like, but are also be obliged to take responsibility for what they publish, reflecting their reach and potential capacity to do harm.

These large news publishers will be required to set up or join a Self-Regulatory Organisation (SRO) that fulfils the minimum criteria set by the Backstop Independent Auditor (BIA). The only stipulation being that they are a member of an SRO, any SRO. Each approved SRO would be set up and funded by the industry, and any content restrictions contained in a Code of Conduct, beyond the minimum provisions set out by the BIA, set by the members themselves.

The BIA’s relationship is with the approved SRO not with the individual titles or owners. Even if the BIA enacts its most extreme sanction – striking off a poorly performing approved SRO – that has no effect on a publisher’s right to publish or remain in business, it simply means that the publisher must set up or join another approved SRO. Moreover, as stated clearly throughout this proposal, the locus of the BIA is only in relation to process, not content.

In the event that a large news publisher makes a willful choice not to join an SRO, they will be subject to a statutory fine. Continued failure to join would result in cumulative fines. This is the only suitable means of punishing a publisher who refuses to abide by the regulatory system, and is much less strict than most industry regulators in the UK (for example: professional regulators which have the power to suspend or ban members; or the Health and Safety Executive, which can issue prohibition notices to prevent firms working until they comply with their rules, while serious failure to comply can lead to a fine, suspension or imprisonment<sup>205</sup>).

Applying a financial penalty of this kind is also less onerous and restrictive than most of the incentives-based proposals outlined in Part 3 of this report. Were VAT-based incentives viable, they would be equivalent to multi-million pound penalties for refusal to join a single regulator. In the same vein, accreditation schemes would effectively license journalists by removing the ability to gather information freely.

There is no authority granted anywhere in this proposal to prevent the publication of any material in any way. There must be, however, a disincentive to publishers who

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<sup>205</sup> *Enforcement Policy Statement*, <http://www.hse.gov.uk/pubns/hse41.pdf>, accessed 28-05-12

might otherwise be inclined to stay outside the self-regulatory system. Our proposal will not lead to the licensing of newspapers or journalists.

### Meeting the accepted standards of self-regulation

Self-regulatory organisations would need to meet certain minimum criteria to the satisfaction of the BIA, as outlined below:

- A. *A code of practice*: each self-regulatory organisation would require a code which:
  - Is supplementary to, and compatible with, the law
  - Includes, as a minimum, commitments to:
    - the protection of individual privacy, in accordance with Article 8 of the Human Rights Act
    - the promotion of accuracy
    - fairness to the public (including a right of reply<sup>206</sup>)
  - Is revised and updated from time to time in the light of experience and with a view to maintaining public confidence in code
  
- B. *A contract*: a form of membership contract setting out the rules of membership of the organisation (including agreement to sanctions and minimum time commitments for addressing complaints) that members have to sign as a pre-condition of membership
  
- C. *An independent body*: an executive with adequate governance arrangements to assure independence and with the principal purpose, in its constitution, to act on behalf of the public and in the public interest to uphold and maintain confidence in the observance of the code of practice. The responsibilities of each SRO should include, but not be restricted to:
  - Accepting and investigating complaints against members that fall within the code
  - Setting out a clear and transparent process and timetable for dealing with complaints
  - Ruling on complaints that fall within the code
  - Investigating and reporting on areas of clear public concern or where there is *prima facie* evidence of malpractice
  - Recording, and making publicly available its decisions on, compliance with the code
  - Publishing regular reports on compliance with the code by its members
  - Setting out, imposing and administering sanctions for breaches of the code<sup>207</sup>

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<sup>206</sup> Where there is an accepted inaccuracy. Further consideration will need to be given to the most effective means of correcting the electronic record

<sup>207</sup> This list has been developed with reference to the previous remit of the Press Complaints Commission, Sir David Calcutt's recommendations in 1993, and the Irish Press Council as recognised within the Irish Defamation Act 2009.

Self-regulatory organisations would also be required to satisfy the BIA with respect to their:

- Proportionality: does it provide an adequate and accessible means of redress for the public?
- Accountability: is it possible properly to assess the performance of the SRO (for example through the provision of comprehensive and consistent data)?
- Consistency: are there mechanisms to ensure a consistent and fair outcome to all parties?
- Transparency: are funding and decision-making processes suitably transparent?
- Targeting: does it sufficiently encompass those most in need of its services?

These are the five principles of good regulation as set out by the Better Regulation Task Force (2005).<sup>208</sup>

*Case study: approving and intervening in regulators – the Legal Services Board*

The Legal Services Board plays a similar role in approving regulators in law. In approving a regulator the LSB has to be satisfied that it will meet certain objectives, for example:

- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of services in the legal sector
- encouraging an independent, strong, diverse and effective legal profession

After approving a regulator the LSB is prohibited from interfering with its representative functions (Part 4, Section 29).

The role of the LSB is limited to:

- issuing directions to the regulator
- publishing a public censure
- imposing a financial penalty
- making an intervention direction
- recommending the cancellation of the regulator's approval<sup>209</sup>

*Case study: approving separate SROs – the Securities and Investment Board (SIB)*

In financial services, the Financial Services Act (1986) laid out provisions for approval of different self-regulatory organisations in financial services.

The Securities and Investment Board was able to make or refuse to make a recognition order on the basis of the information supplied to it by – or requested from – the applicant. An application could be refused on the basis of the fact that the proposed functions of the applicant body were already covered by an existing SRO, and therefore the new body was unnecessary.

Schedule 2 set out the requirements for recognition of an SRO, as exercised by the SIB, including:

<sup>208</sup> Better Regulation Task Force (2005) *Regulation – Less is More: Reducing Burdens, Improving Outcomes, A BRTF Report to the Prime Minister* <http://www.bis.gov.uk/files/file22967.pdf>, Annex B

<sup>209</sup> Legal Services Act (2007) as referenced by Graham Mather, President, European Policy Forum and Chairman of its Regulatory Best Practice Group, submission to Leveson Inquiry

- 'Rules and practices ensuring that members are fit and proper persons regarding every form of investment business they are authorised to undertake
- Rules and practices relating to admission, expulsion and discipline of members must be fair and reasonable, with provision for appeals
- Rules must provide safeguards for investors
- SROs must have adequate powers of monitoring and enforcement
- The governing body must be balanced with respect to the nature of the SRO, and to the balance between industry and public interests
- Each SRO must have arrangements in place to investigate complaints against itself or its members
- The SRO must be able and willing to “promote and maintain high standards of integrity and fair dealing in the carrying on of investment business”, and to cooperate with the Secretary of State and any other relevant authority, body or person’<sup>210</sup>

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<sup>210</sup> Financial Services Act (1986),  
[http://www.legislation.gov.uk/ukpga/1986/60/pdfs/ukpga\\_19860060\\_en.pdf](http://www.legislation.gov.uk/ukpga/1986/60/pdfs/ukpga_19860060_en.pdf), accessed 15-05-12

## 5. Make sure the public, and large news publishers, have a fair and independent appeals mechanism from the SRO complaints process via an Appeals Board

To assure fairness to individual members of the public and to large news publishers there should be an opportunity to appeal decisions made by SROs, especially if they involve any financial sanction or compensation.

This appeal process has to be, and be seen to be, fair and independent. It must be fully accessible to members of the public and avoid becoming overly formal, legalistic, drawn out and expensive.

The relatively new system of press regulation in Ireland, and the Takeover Appeal Board in the UK, both offer useful guides as to how such an appeal process might work.

The advantages of the Takeover Appeal Board process are that it is relatively formal, independent, and judicial. The Board is separate from the Takeover Panel. It is headed by a Chairman and Deputy Chairman (appointed by the Master of the Rolls) who then appoint further members (an undisclosed number). Rulings are initially made by the Takeover Panel executive. Appeals from their rulings are to the Hearings Committee, comprising members of the Takeover Panel. Decisions of the Hearings Committee can be appealed to the Takeover Appeal Board. The Board may 'confirm, vary, set aside, annul, or replace' the decision of the Hearings Committee.<sup>211</sup>

The advantages of the Irish Press Council process are in setting out a clear rationale for why an appeal will, or will not, be accepted. 'A formal decision of the Press Ombudsman can be appealed to the Press Council of Ireland on one or more of the following grounds: that there has been an error in procedure; that significant new information is available that could not have been or was not made available to the Press Ombudsman before he made his decision [or]; that there has been an error in the Press Ombudsman's application of the Principles of the Code of Practice. Mere disagreement with the decision of the Press Ombudsman is not grounds for appeal.'<sup>212</sup> In other words, the Ombudsman's decision on facts stands.

Based on this we suggest that an appropriate appeals process might be as follows:

- Complaints are first considered by the SRO executive, in accordance with published process
- Appeals from the executive are heard by a Special Appeals Committee of the Board of the SRO, with a balance of membership suited to the purpose, and to give confidence as to independence
- There is an Appeals Board, which sits outside the SROs and outside the BIA. The Chairman and Deputy Chairman of the Appeals Board are appointed by the BIA (Backstop Independent Auditor) as and when there is a need for such a Board to be formed. The Chairman and Deputy Chairman can then appoint up to three

<sup>211</sup> From the Takeover Appeal Board, <http://www.thetakeoverappealboard.org.uk/>, and the Takeover Panel, <http://www.thetakeoverpanel.org.uk/>, accessed 30-04-12

<sup>212</sup> From the Press Council of Ireland, <http://www.presscouncil.ie/cases-and-appeals/decided-by-the-press-council-on-appeal.299.html>, accessed 30-04-12

other members. The Appeals Board stands down when it is not needed, i.e. it is not a permanent bureaucracy.

- Appeals made to the Appeals Board would only be on a similar basis to the Irish system (i.e. error in procedure, new information, error in application of the Code)
- To prevent an imbalance of power, neither side should have legal representation unless the Committee or Board decided that such representation would assist fairness. Generally, therefore both complainant and publisher would be encouraged to make representations in person; the relevant person on the publishing side being the appropriate editorial figure. In certain circumstances, the member of the public might be allowed in the interests of fairness to bring a non-lawyer colleague to assist in their representation
- The Appeals Board may confirm, vary, set aside, annul, or replace the decision of the self-regulatory organisation



## 6. Establish a Backstop Independent Auditor (BIA) in statute with responsibility for approving self-regulatory organisations and auditing them on an annual basis

If large news publishers are to be given the freedom to regulate themselves – internally and externally – according to basic minimum outcomes, there needs to be a mechanism for defining those outcomes and making sure the established systems achieve them.

We suggest that the most effective way of doing this would be through a Backstop Independent Auditor (BIA).

### Objectives

The BIA, which needs to be demonstrably independent of both government and the news publishing industry, should have six key objectives:

- To protect and promote the individual interests of the public and the public interest
- To define basic minimum standards for SRO codes of conduct
- To define adequate and proportionate complaints and compliance mechanisms within large news publishers
- To ensure the independence and effectiveness of self-regulatory organisations for large news publishers
- To provide mechanisms for the public and journalists to report bad practice
- To protect and promote reporting in the public interest

The powers of the BIA would be highly constrained:

- It would have no influence on any decisions regarding published content
- It would not act as a ‘court of appeal’ for complainants, since this would necessarily involve decisions regarding content
- It could never stop anyone from publishing

The Financial Services Authority, the Legal Services Board, and the General Medical Council, have similar key objectives which direct, and constrain, their activities.<sup>213</sup>

### Responsibilities

Its chief responsibilities would be to approve the self-regulatory organisations (SROs) and audit them on an annual basis to make sure they were functioning well. These audits should be consistent and transparent such that they also serve to reassure the public as to the effectiveness of the system.

In order to provide a fair and consistent process of SRO approval and audit, the BIA should produce written guidance on:

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<sup>213</sup> The Legal Services Board has eight regulatory objectives with which it is obliged to act. See [http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/regulatory\\_objectives.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf) accessed 22-05-12. The purpose of the General Medical Council is to ‘to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine’. This translates into four chief functions. See <http://www.gmc-uk.org/about/role.asp.j>, accessed 22-05-12.

- Minimum commitments within a code of practice
- Basic requirements of a contract of membership (including sanctions)
- Basic expectations with respect to independence
- Adequate governance arrangements, with regard to:
  - Proportionality
  - Accountability
  - Consistency
  - Transparency
  - Targeting

## **Constraints**

The BIA could not become involved in decisions regarding content, only process. If, for example, there was a complaint which could represent a serious breach of the code, a decision about the breach could only be made by the SRO, subject to a right of appeal to the Appeal Board. The BIA would not be involved in such appeals.

## **Sanctions**

The BIA should have four sanctions available to it. It should be able to:

- Report publicly on the failure of SROs to regulate themselves effectively
- Call the representatives of SROs to public hearings to answer questions
- Impose fines on SROs that fail their annual audits, and that fail to put into action recommendations made by the BIA
- Strike off SROs that are repeatedly found to have failed to achieve their obligations

The BIA could only fine an SRO on the basis of its annual audit, and on the failure to put into practice recommendations from that audit.. It would be at the discretion of the SRO to pass these fines on to its members.

The BIA could only fine news organisations that refuse to join an SRO.

Further consideration needs to be given to whether the BIA should be able to enforce fines that the SROs are unable to recover from member organisations.

## **Independence**

To work, the BIA would have to be demonstrably independent of both government and from the self-interest of major media organisations.

For this reason it would need:

### An Independent Board

It would not be suitable for the chief executive, the other executives, or the non-executive Directors of the BIA to be appointed by the government, or even by Parliamentarians. This would cause concern about State interference.

Instead, there should be an entirely separate appointments commission, made up of figures who are demonstrably independent, which would be assembled expressly for the purpose of choosing the BIA Board of Directors. The chief executive and other executives would then be selected by the Board of Directors.

The appointments commission could, for example, consist of the office holders of six prominent, independent, positions in British public life, such as:

- The Chair of the Arts Council
- The Chair of Channel 4
- The Information Commissioner
- The Chair of Ofcom
- The Chair of the Press Association
- The President of the National Union of Journalists

### Independent Funding

The Backstop Independent Auditor would be funded by a transparent levy on all large news publishing organisations of 0.05% of revenues.

This is similar to the method by which the Legal Services Ombudsman is funded, which is by a levy from approved regulators and case fees. Other systems internationally are also based on a levy, notably the Irish Press Council and Office of the Press Ombudsman.

Such a levy, based on 2010 turnover, is estimated to equate to just over £4m.<sup>214</sup> However, given that some publications and news organisations will fall under the threshold, it is likely that the levy at this rate would yield less than this.

A full budget will need to be drawn up for the BIA, but one can make estimates based on existing similar organisations. The current PCC costs approximately £2m per annum. Ofcom has estimated that the activities it performs that are analogous to the PCC on broadcast regulation cost approximately £3.4m per annum.<sup>215</sup> The Legal Services Board, which has similar functions to the BIA, has 30 staff and nine Board members. Its annual budget for 2011/12 is £5 million. Given these examples the BIA is estimated to cost between £2-£4m per annum. The costs are likely to be significant as it sets itself up but should reduce if the system achieves the cultural change as intended.

### Independent accountability

The BIA would be an independent body, free from influence by the State or large news publishers. However, it cannot itself be unaccountable. For this reason it should be required to publish its accounts and a review of its activities on an annual basis and be subjected to a public hearing by an oversight body. This oversight body should not be the government or government department. It does, however, need to be suitably authoritative, and recognise that the BIA has been set up in statute.

<sup>214</sup> Based on estimated revenues of the UK press in FY2010 of £8,200m. Of this, the national and regional press accounted for £5,910m (from Enders Analysis, Leveson Seminar presentation, 2011)

<sup>215</sup> Richards, E. (2012), Second witness statement to the Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-Ed-Richards1.pdf>

We suggest three potential oversight bodies:

The Culture, Media and Sport Select Committee.

- The CMS Select Committee has experience of examining press self-regulation, notably in its inquiries of 2003, 2007, and 2009
- The Press Complaints Commission accepted the authority of the CMS Select Committee to scrutinise its performance
- The CMS Select Committee could scrutinise the BIA's accounts, question the Chairman, chief executive, and potentially other members of the Board and publish a report of its findings
- The CMS Committee's powers would be limited to requesting evidence and accounts, and asking questions, to evaluate the BIA's performance with a view to publishing a report of its findings

The Public Accounts Committee (PAC).

- The PAC is the oldest Parliamentary committees in continuous existence, established in 1861, and one of the most independent. It is supported by the National Audit Office, making it capable of doing more in-depth and rigorous investigations than many select committees.
- The PAC currently scrutinises the BBC, focusing on value for money, effectiveness and efficiency (for example see 2012 PAC report on the BBC's efficiency programme)<sup>216</sup>.
- The PAC could scrutinise the accounts, question the Chairman, chief executive, and potentially other members of the Board of the BIA and publish a report of its findings.
- The PAC's powers would be limited to requesting evidence and accounts, and asking questions, to evaluate the BIA's performance with a view to publishing a report of its findings

A special Parliamentary Committee appointed specifically for this purpose.

Any decision on the specific method ought to be made to maximise accountability and independence. The appointments of the Chair and the other non-executive directors of the BIA could be subject to reappointment each year after publication of the oversight body's findings.

### **Enabling statute**

This system requires an enabling statute. Such a statute would establish the BIA and its functions and powers, as well as the functions and powers of the Appeals Board.

It would define a sustainable system of self-regulation of large news publishers. Built into the enabling statute would be mechanisms to ensure the independence of the system, and to limit the powers of the BIA.

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<sup>216</sup> Public Accounts Committee (2012), *73<sup>rd</sup> Report, The BBC's efficiency programme*, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/bbc-report-/>, accessed 02-05-12

Without an enabling statute, the BIA would not have the power to:

- Require major media organisations to participate in self-regulation
- Impose fines on SROs, or on those who refuse to participate in a system

A similar enabling statute created the Legal Services Board (the Legal Services Act 2007), and the Securities and Investments Board (the Financial Services Act 1986).

In addition to the mechanisms built into the system to ensure its independence, such a statute ought to make absolutely clear the inviolability of freedom of expression within the law. This could, for example, be expressed in a manner similar to the objectives in the Finnish Act on the Freedom of Expression in the Mass Media:

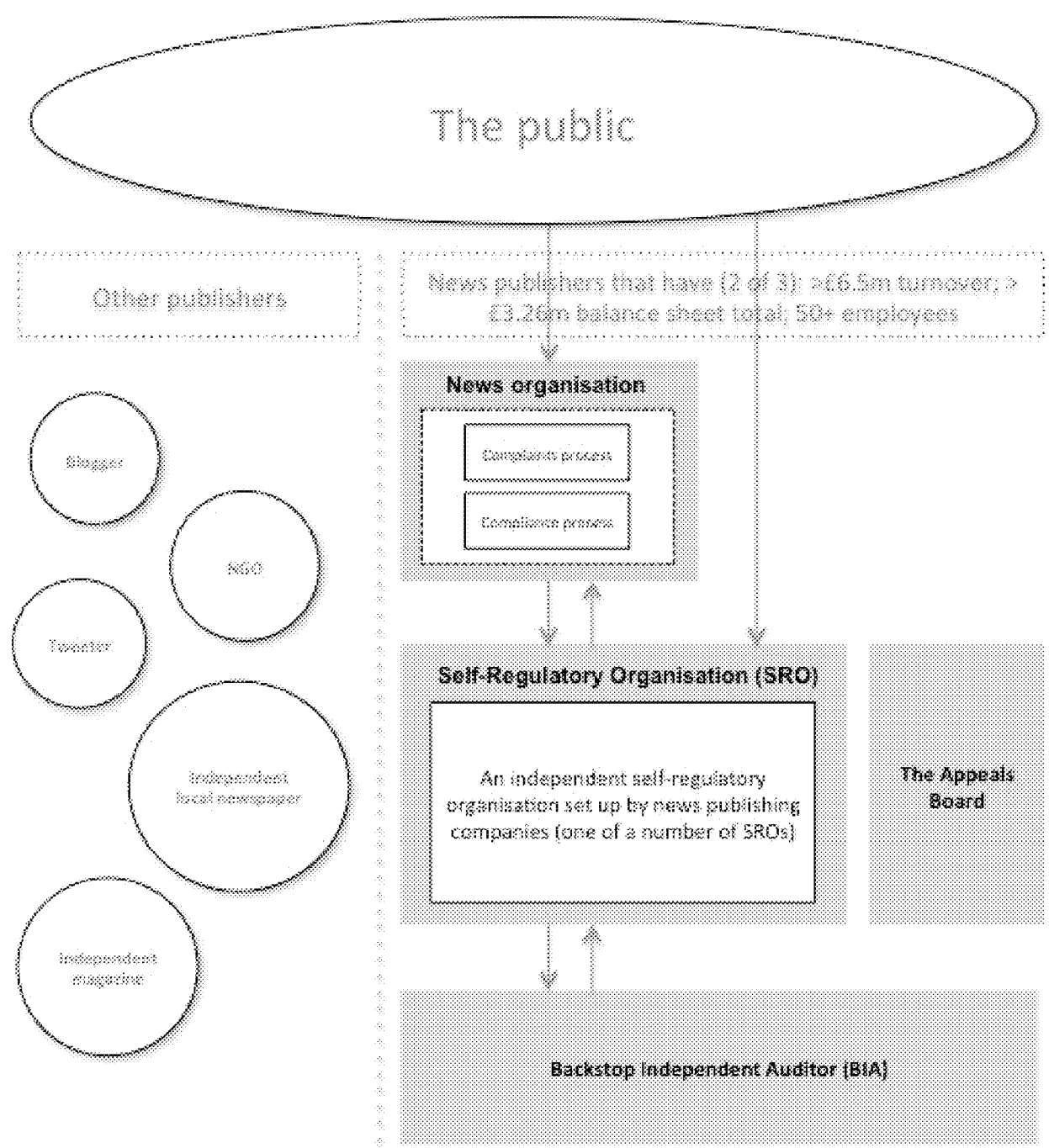
'In the application of this Act, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law.'<sup>217</sup>

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<sup>217</sup> Act on the Exercise of Freedom of Expression in the Mass Media, Finland (2003), <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf>

# How would this system work in practice?

Diagram of how the system would work



### How it works: individual complaints

1. A member of the public who wishes to make a complaint would find the contact details of the publication, and the SRO of which it is a member, displayed prominently on whatever medium they are using (i.e. website, print paper, broadcast).

This is similar to the way in which every company regulated by the Financial Services Authority is required to make this clear at each point of contact with their customers, so large news publishers would have to provide contact details and membership of SRO.

2. If the member of the public wanted to make a formal complaint they would be directed to the compliance officer in the news organisation concerned. The details of their complaint would be taken by the officer and a commitment made to respond within a short and specified timeframe.
3. If the complaint was not resolved within that timeframe then the compliance officer within the organisation concerned would be obligated to escalate it to the SRO and notify the complainant.
4. The SRO would take the details of the complaint and, following submission of evidence by both parties, make a ruling as to whether the complaint had breached the code.
5. If the SRO decides the complaint has breached the code it would, record the ruling publicly, and determine the appropriate redress.

### How it works: third party complainants

Third party complaints would work in a very similar way, except when regarding privacy issues. In these cases the publisher should contact the subject concerned to alert them to the complaint and see if they wish to pursue it.

A complaint would not need to be considered if it fell outside the Code of Practice.

The SRO system is designed for individuals and the public interest, not corporate complainants (see restrictions on corporate complainants above).

### How it works: *prima facie* evidence of malpractice

A member of the public, or a journalist, who finds *prima facie* evidence of malpractice and wants to report it has three options:

- Report it to the internal compliance officer at the relevant news organisation
- Report it to the SRO responsible for regulating the relevant news organisation
- Report it to the whistle-blowing unit of the BIA

The BIA should have a secure whistle-blowing unit for journalists and members of the public to report *prima facie* evidence of malpractice. The unit should be able to accept

evidence anonymously, and pass that evidence on – anonymised if necessary – to the relevant SRO to deal with. It would have oversight of the process by which the SRO dealt with the investigation.

#### How it works: learning from mistakes and improving systems

Each participating news group would be responsible for providing details of its complaints and compliance to its SRO.

That SRO would then collect these and add them to its own record of compliance for news outlets. The SRO would be responsible for writing a letter to the proprietor of the news group at the end of each year, giving an assessment of the performance of the outlets, by comparison with other outlets. The model for this is the local government ombudsman service (LGO).

#### How it works: sanctions

The SROs would develop their own sanctions regimes based on guidance from the BIA. These would then be approved by the Backstop Independent Auditor as part of the approval process for SROs. The BIA would have the opportunity to interrogate the application of these sanctions as part of its annual audit.



## Regulating for the future? – fitting a new system within existing media regulation

The new system proposed here is intended to encompass those parts of the news publishing industry not currently regulated by existing bodies underpinned by the 2003 Communications Act (including amendments as a result of EU Directives)<sup>218</sup>, or by the BBC Trust's obligations set out in the present Royal Charter.<sup>219</sup>

However, the changing media landscape, and the challenges and opportunities presented to existing and prospective news publishers by the various effects of convergence, means that regulation in future is less likely to be effective if it remains platform-specific. The system here has therefore been developed so that it may equally apply to news publishers whose output consists of text, audio, visual, linear or on-demand content.

### Media regulation in the UK with present statutory backing

Ofcom currently regulates all content on UK television and radio broadcasts (except for some BBC content regulated by the BBC Trust), via the Broadcasting Code.<sup>220</sup> It is not presently responsible for content on websites of licensed broadcasters, except – indirectly – where they are defined as 'audiovisual media services' (see below).<sup>221</sup>

The BBC Trust regulates the BBC, though there is a degree of regulatory overlap with Ofcom in certain areas of content provision.<sup>222</sup> The BBC Editorial Guidelines set out the Trust's guidelines on content on all BBC outlets, in parallel to the Ofcom Broadcasting Code. There are similar commitments to accuracy, impartiality, fairness, and privacy, among other provisions.<sup>223</sup> BBC on-demand content falls under the jurisdiction of the BBC Trust, Ofcom, or ATVOD depending on where it is delivered.<sup>224</sup>

The Authority for Television On Demand (ATVOD) is responsible for co-regulating (with Ofcom as a statutory backstop) all services that it designates as fulfilling the definition of an On-Demand Programme Service (ODPS) as defined by Section 368A of the Communications Act (incorporating the EU Audiovisual Media Services Directive<sup>225</sup>).

<sup>218</sup> Communications Act 2003, Part 1: <http://www.legislation.gov.uk/ukpga/2003/21/contents>

<sup>219</sup> Department for Culture, Media and Sport (2006) *Broadcasting: Copy of Royal Charter for the continuance of the British Broadcasting Corporation*, [http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

<sup>220</sup> <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

<sup>221</sup> Fielden, L. (2011) *Regulating for Trust in Journalism: Standards regulation in the age of blended media*, Oxford: Reuters Institute for the Study of Journalism and City University London, p13

<sup>222</sup> House of Lords Select Committee on Communications (2011) *2nd Report – The Governance and Regulation of the BBC*, <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/166/166.pdf>, Paras 36-40, pp19-20

<sup>223</sup> <http://www.bbc.co.uk/editorialguidelines/guidelines/>

<sup>224</sup> Fielden, L. (2011) Op. Cit, p13

<sup>225</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

## The potential application of the new system

While, as stated above, the new system is not explicitly intended to take over duties from these existing regulators, there have been exhortations that a new Communications Bill should include provisions for Ofcom to wield greater flexibility to amend its regulatory duties in the face of rapid market change.<sup>226</sup> Deregulatory approaches to broadcasting regulation are strongly contested, however, and the continuing popularity of the main Public Service Broadcasters following digital switchover means that change is not inevitable. The model proposed in this report could, if needed, absorb some of the regulatory duties attached to television news and current affairs.

Hypothetically, the main broadcasters under the auspices of Ofcom and the BBC maintain codes of practice and internal compliance mechanisms that would satisfy the BIA. The statutory definition of a news publisher could then be applied to those broadcasters who fulfil its criteria, subject to the minimum obligations set by the BIA.

The provision of video on-demand would be more problematic, as the current regulatory guidelines fall far short of the principles of the proposed system. While it is unclear how many 'notified services' currently regulated by ATVOD would reach the revenue and employee thresholds set by the new system, further provisions would need to be made determining firstly how on-demand news provision or current affairs provision is defined (ATVOD currently has loose guidelines on these definitions<sup>227</sup>), and secondly where a right of appeal would exist for a service that disputed its designation as an On Demand Programme Service.

These are not, however, questions that the new system is intending to answer at this point, but the system may have potentially wider application in the more fragmented and convergent electronic media of the future.

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<sup>226</sup> British Screen Advisory Council (2011) *Working Group on Content Regulation: BSAC Communications Bill Report*, available at <http://www.bsac.uk.com/policy-papers.html>

<sup>227</sup> The Authority for Television On Demand (2012) *Rules and Guidance: Edition 2.0*, [http://www.atvod.co.uk/uploads/files/ATVOD Rules and Guidance Ed 2.0 May 2012.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf), p15 (accessed 15-05-12)

# **PART 5**

## **A Public Interest Defence in Law**

## Introduction

The principles that inform and uphold good practice in the media are, in the main, better dealt with through self-regulation than through the law. Hence the proposal as laid out in the previous section.

When it works, self-regulation ought to be able to provide faster and more proportionate redress than the law.

However, there are circumstances where the law is more appropriate and provides a more proportionate response; notably with respect to instances of gross misrepresentation and harmful and unjustified intrusions of privacy.

But there are also circumstances when the law should protect publishing in the public interest, even when it might involve breaches of the law.

At the moment there is no general public interest defence in law. In order properly to protect public interest journalism and to make the system outlined in this proposal more effective, we believe there should be.

This section outlines the reasons why.

## A public interest defence in law

A new system of media regulation would benefit from the introduction of a public interest definition in law. In principle, we believe that self-regulation is strengthened by a clear commitment to transparent and dependable rules that underline the unique role of the media in public life. There are also, however, a number of practical benefits associated with the introduction of a legal definition of the public interest:

1. *Empowering Journalists*: Creation of a reliable and transparent definition of what constitutes the public interest would allow journalists to make informed decisions on the methods available to them in pursuing stories. It would provide a defence, where none presently exists in certain pieces of legislation, where information-gathering potentially breaches criminal law. This would also reduce any ‘chilling effect’ caused by lack of certainty on the consequences of pursuing a particular story.
2. *Strengthening the Legitimacy of Codes of Practice*: Since public interest clauses act as a mechanism to bypass the ethical positions enshrined in codes of practice, better certainty in the definition of the public interest would more effectively uphold the integrity of a given code.
3. *Inspiring Public Confidence*: By providing for the protection of journalists pursuing genuine investigative journalism with a demonstrable public interest and underpinning the ethical codes by which journalists operate, it would help restore public support for a more accountable and transparent industry.
4. *Providing Better Clarification on Privacy*: A clear public interest definition would provide a framework to inform journalists and citizens of the boundaries between expectations of privacy and justifications for the publication of personal information. More importantly, it would provide judges in privacy actions with a means to evaluate individual cases and increase accountability in the development of case law on privacy.
5. *Establishing Guidelines for News Organisations*: A public interest definition would help to underpin internal compliance procedures with regard to stories with potential legal implications. This would provide a framework for maintaining a transparent decision-making process in such cases, providing organisations with a defence in criminal or civil court proceedings.

In the practice of robust and inquisitive journalism, it is highly likely that illegal or unethical acts will be committed in obtaining information to hold power to account and protect individuals from being misled in a manner affecting their decision-making in public life. Yet these are highly valued functions of journalism. Building a reliable public interest defence would to an extent safeguard these activities while presenting a regulator with the ability to evaluate where abuses of the public interest have taken place.

Having a more reliable and transparent public interest definition, and greater accountability around its use in news publishing organisations when complaints have been raised, should also help to challenge certain cultural practices that rely on a strict application of the letter, rather than the spirit, of the rules. At present, ‘the public interest’ is often used as a *post hoc* justification for intrusive reporting of questionable

public benefit. Where such reporting elicits complaints, a reliable public interest definition in statute allows the complainant more scope to challenge the justification for the story, and better guidance for those mediating, or making judgments on, the case.

The House of Lords Select Committee on Communications identified three levels at which the public interest operates: the criminal law; regulatory codes; and internal management and governance of news publishers.<sup>228</sup> By introducing a public interest definition into legislation, problems at each of these levels would be addressed.

## Empowering Journalists

There has been much evidence given in Module 1 of the Leveson Inquiry on the difficulties for journalists caused by ambiguity in the application of the public interest when embarking on stories. In the testimonies of a number of journalists, both at the Inquiry and at Parliamentary Committees' investigations of journalism, where the issue has been explored, there is a distinct lack of consensus.<sup>229</sup>

Previous empirical studies have identified that a variety of self-definitions of the public interest guide the judgments of journalists. These are all shaped in part by existing public interest definitions in industry codes of conduct (see below, this section), but result in substantially different conceptions of the boundaries of what constitutes legitimate public interest, and therefore what justifies the use of intrusive or illegal methods.<sup>230</sup>

Ambiguity arises from the fact that the merits of each case are unique. As the *Guardian* journalists Nick Davies and David Leigh pointed out to the Leveson Inquiry, this can result in difficulties:

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<sup>228</sup> House of Lords Select Committee on Communications (2012) *3rd Report: The Future of Investigative Journalism*: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/256.pdf>, paras 80-107, pp29-32; The committee did, however, come down against the idea of a statutory definition of the public interest on the basis that it could be enforced solely through regulatory codes (para 97, p29). We believe that this has proved insufficient in the past.

<sup>229</sup> See for example: Casey, R. (Evidence to Lords Select Committee on Communications, 13<sup>th</sup> December 2011) <http://www.parliament.uk/documents/lords-committees/communications/Investigativejournalism/ucCOMMS131211ev11.pdf>: "Celebrity exposure sells papers. It is of interest to readers and there is an argument of course about whether all of it is in the public interest or not, and it's probably worth debating some that are and some that are not"; Mahmood, M. (Evidence to Leveson Inquiry, 12<sup>th</sup> December 2011 – Morning Hearing) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-12-December-2011.pdf>: "Public interest is, for me, moral wrongdoing, obviously criminal acts, hypocrisy, with the public being deceived, all aspects that are encompassed by the PCC Code"; Davies, N. (Evidence to Leveson Inquiry, 29<sup>th</sup> November 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-29-November-2011.pdf>: "Different journalists have completely different definitions. So people from the *News of the World* will tell you, in all sincerity, that it was in the public interest that they exposed Max Mosley's sex life. I profoundly and sincerely disagree with them. I do not think that was in the public interest".

<sup>230</sup> Morrison, D. E. and M. Svennevig (2002) *The Public Interest, the Media and Privacy*, <http://www.ofcom.org.uk/static/archive/bsc/pdfs/research/pidoc.pdf>

Whittle, S. and G. Cooper (2009) *Privacy, Probity and Public Interest*, Oxford University: Reuters Institute for the Study of Journalism

“If I’m working on a particular story in particular circumstances, do I or do I not have the public interest on my side? The answer very often is: I don’t have the faintest idea because we don’t know where the boundary lines are.”<sup>231</sup>

“It’s a problem for me like it’s a problem for all serious journalists where to draw this line about public interest and we do spend a certain amount of time thinking about that. That’s the area of difficulty for this Inquiry too, I suspect.”<sup>232</sup>

The absence of a clearly-defined public interest defence for journalists, with the authority to set reliable parameters for the practice of investigative journalism, is a significant contributor to the recent failings of the press. Lack of clarity works in two ways, both detrimental to the public function of journalism: firstly, it presents the opportunity for publishers cynically to ‘game the system’, claiming fulfilment of the public interest under the letter of the law, where no reasonable public benefit may exist; secondly, it exerts a ‘chilling effect’ where journalists are unsure of the likelihood of criminal charges resulting from a course of action.

This is further exacerbated by the fact that public interest defences exist in some legislation relevant to the activities of journalists, but not others.<sup>233</sup>

Where no public interest defence exists in law, journalists may be prosecuted for the act of obtaining information of material benefit to a significant section of the public. The authorities may or may not choose to prosecute, but the present lack of transparency in decision-making at this stage provides no certainties for journalists; while news organisations can advise and support, they cannot protect their employees from criminal proceedings.

### **Strengthening the Legitimacy of Codes of Practice**

Codes of conduct play a vital role in any industry that is bound by legal or ethical principles. They foster public confidence by acting as a conspicuous, reliable and formally agreed-upon set of principles, open to scrutiny, while at the same time providing a dependable set of guidelines for practitioners.

In journalism ethics, the concept of the ‘public interest’ is pivotal in maintaining a balance between the conflicting rights of freedom of expression, individual rights, and the laws of the land:

“All codes require a mechanism that allows practitioners to balance the constraints they face under the code with their right to freedom of expression.

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<sup>231</sup> Davies, N. (Evidence to Leveson Inquiry, 29<sup>th</sup> November 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-29-November-2011.pdf>

<sup>232</sup> Leigh, D. (Evidence to Leveson Inquiry, 6<sup>th</sup> December 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-6-December-20111.pdf>

<sup>233</sup> For instance, the Computer Misuse Act 1990, the Regulation of Investigatory Powers Act (RIPA) 2000, the Official Secrets Act 1989, and the Bribery Act 2010 all do not contain a public interest defence, despite covering activities by which journalists could conceivably obtain information with of clear interest to the public good.

Freedom of expression allows journalists to say what they want, but limits must be arranged to avoid invading someone else's privacy, reputation, right to a fair trial, or to prevent them being offended by what we publish, without a good reason."<sup>234</sup>

The 'public interest' performs this role, providing a means of breaching the rights (enshrined elsewhere within codes of conduct) of individuals or groups, to the benefit of the public in general. Its power derives from its function as the ultimate caveat overriding certain otherwise inviolable clauses in a given code of conduct. Therefore, a definition of the public interest must be clear and practical if it is to ensure that, where the ethical principles of codes are broken, they are done so with a clear dedication to the public good in mind.

## Existing Public Interest Definitions

The main codes of conduct currently in use by journalists – the PCC Editors' Code of Practice, the BBC's Editorial Guidelines, and the Ofcom Broadcasting Code – each contain their own broadly similar definitions of the public interest, shown in Table 5.1:

**Table 5.1: Public Interest Justifications<sup>235</sup>**

Justification	PCC Editors' Code of Practice <sup>236</sup>	BBC Editorial Guidelines <sup>237</sup>	Ofcom Broadcasting Code <sup>238</sup>
1. Exposing or detecting crime or significantly anti-social behaviour, including serious impropriety	✓	✓	✓
2. Preventing the public from being misled by some statement or action of an individual or organisation	✓	✓	✓
3. Disclosing information that allows better decision-making about matters of public importance, or incompetence that affects the public		✓	✓
4. Protecting public health and safety	✓	✓	✓
5. Public interest in freedom of expression in its own right	✓	✓	

<sup>234</sup> See Frost, C. (2007) *Journalism Ethics and Regulation, Second Edition*, London: Pearson, p253

<sup>235</sup> This table combines similar clauses where wordings are slightly different. For instance, while all three express a justification in exposing or detecting crime, the PCC Code adds 'or serious impropriety', while the BBC Guidelines contain 'exposing significant anti-social behaviour'. Certain stand-alone clauses of the BBC's 7-point definition have been amalgamated where they correspond to other definitions in other codes, for example 'anti-social behaviour' and 'significant incompetence or negligence' have been grouped in Justifications 1 and 3 respectively.

<sup>236</sup> PCC Editors' Code of Practice: <http://www.pcc.org.uk/cop/practice.html>, accessed 26-02-12

<sup>237</sup> BBC Editorial Guidelines, Section 7.1: Privacy (The Public Interest): <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidelines-privacy-introduction/>

<sup>238</sup> Ofcom Broadcasting Code, Section 8.1: Privacy: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section8.pdf>



The three definitions display an overarching similarity – protection of the public from criminal activities or abuses of power, while maximising the flow of correct information on public matters. Few would disagree with these statements in their broad definitions. This also suggests that the creation of a general public interest definition for insertion into legislation can build on a broad foundation of consensus. However, problems can arise due to the lack of clarity in the specific language of public interest definitions.

### **Current Problems with the PCC's Public Interest Definition**

The existing definition of the public interest in the PCC Editors' Code of Practice is a good example of a code that contains reference to all the positive functions of the public interest (public protection, empowerment through increasing the circulation of relevant and correct information about public life, etc.), while retaining language that can be exploited:

1. The public interest includes, but is not confined to:
  - i) Detecting or exposing crime or serious impropriety.
  - ii) Protecting public health and safety.
  - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.<sup>239</sup>

In Clauses 1(i) and (ii), there can be no argument with justifications for exposing crime or protecting public health and safety – these are self-evidently of clear benefit to the public in all circumstances.

The addition of the phrase 'or serious impropriety' adds unnecessary uncertainty. Conduct that is deemed to be 'improper', without some qualification or definition, is open to purely subjective interpretation. This places editors or journalists as the ultimate judge of which acts are 'improper' and therefore worthy of exposure. A case must be made that 'serious impropriety' in some way affects the lives of a significant portion of the public; the 'revelation of sin' is not sufficient, and involves a subjective moral framework imposed by editors and journalists on the public.<sup>240</sup>

Clause 1(iii) suffers a similar problem. A misleading statement can be, and has been, defined as anything ranging from selective truth or falsehood in government or other public statements, to disjunction between the public personas and private lives of celebrities. It lies at the heart of the ubiquitous 'hypocrisy' justification. Without some demonstration of a relationship to a clear public benefit, or a link to optimising public decision-making, it can be easily used as a *post hoc* justification for the invasion of privacy.

Clause 2, while containing an admirable defence of the fundamental right of freedom of expression, serves no further functional role in a code of conduct than to potentially

<sup>239</sup> PCC Editors' Code of Practice: <http://www.pcc.org.uk/cop/practice.html>, accessed 26-02-12

<sup>240</sup> Whittle, S. and G. Cooper (2009) Op. Cit., pp65-72

justify the circumvention of any and all rights to privacy if it is deemed expedient to do so.

A statutory public interest definition would build upon the existing areas of consensus in regulatory codes of practice, while providing a template that could be applied equally as a defence in law, and for insertion into, or guidance for, future regulatory codes. A discussion of a possible statutory definition of the public interest, based in part on the existing industry definitions, is discussed below.

## Inspiring Public Confidence

Where a public interest definition is open to abuse, or used in bad faith as a *post hoc* defence for intrusion or criminality for commercial gain, codes of conduct may be fatally undermined, with significant negative effects on public confidence in the press. Where it can be used to justify any behaviour it acts not as an enabling provision to enhance the public benefit of journalism, but a get-out clause to circumvent the safeguards that ethical codes put in place.

The introduction of a public interest definition that is visible, set in legislation, and drafted in a manner that minimises the potential for abuse, would increase the transparency of the processes by which journalism derived from intrusion or contravention of criminal laws is based. This would aid public understanding of the motives and justifications of investigative journalism, and enhance the public debate on the role of journalism in society.

## Providing Better Clarification on Privacy

The disclosure of private information is often retrospectively defined as having been ‘in the public interest’, relying on an extremely broad reading of the current public interest clause in the PCC Code advocating the prevention of the public being misled by “some statement or action of an individual or organisation”.<sup>241</sup> News organisations often include within this a justification for intrusion and publication on the basis of ‘hypocrisy’ or that the individual involved was a ‘role model’. These justifications are often tenuous.<sup>242</sup>

Newspaper publishers and editors often claim that continued sales are the purest indicator that the type of journalism they engage in has commercial, and therefore public, support. However, in the case of privacy there is little evidence to suggest that the public supports intrusive journalism, or sees a strong public interest in revelations about the private lives of celebrities and public figures.

A survey in 2002 found that a majority of those polled (80%) agreed with the statement that “If some people want to be celebrities, they have to accept some intrusion into their

<sup>241</sup> <http://www.pcc.org.uk/cop/practice.html>

<sup>242</sup> Whittle, S. and G. Cooper (2009) *Privacy, Probity and Public Interest*, Oxford University: Reuters Institute for the Study of Journalism, pp65-74

private lives”.<sup>243</sup> However, when given specific examples of stories involving private information, such as pop stars undergoing cosmetic surgery or the marital infidelities of celebrities, respondents were overwhelmingly likely to view these as “probably not” or “definitely not” in the public interest (83% and 80% respectively).<sup>244</sup>

In terms of public articulations of the public interest, the survey demonstrated that public belief in the value of covering the private lives of ordinary people, celebrities, sports personalities and politicians was extremely low in comparison with the desire for journalism to perform a stronger ‘watchdog’ role in society.<sup>245</sup>

Despite an intervening decade in which the definition of privacy has in many ways been redefined, recent polling data continues to demonstrate a disjunction between the attitudes of the general public and those of certain news organisations regarding privacy. Research conducted by Ofcom in 2010 recorded that 66% of respondents thought that there was “too much” intrusion into the lives of celebrities, politicians and public figures.<sup>246</sup>

This year, a survey conducted for the *British Journalism Review* by YouGov revisited some of Morrison and Svennevig’s 2002 research to measure current views on privacy and the public interest. In response to questions (in some cases identical to those posed by the 2002 survey) about the private lives of celebrities and public figures, the majority of the public claimed that the story “is a private matter and should not be published”. This was in response to questions such as “A well-known England footballer, who is married with young children, is having an affair” (58% believed it should not be published); “A member of a leading pop group has had cosmetic surgery to change the shape of her face” (66%); and “A contestant on Britain’s Got Talent who has reached the final once tried to commit suicide” (80%).<sup>247</sup>

A common justification for press intrusion into private lives – that it is an accurate reflection of what the public wants (i.e. the public interest is that which interests the public) – is therefore not borne out by evidence gathered from opinion surveys. A public interest defence defined in statute could both take this into account and weaken the case for journalists and editors to cite the public interest as a justification for such stories.

The public interest is a key balance between Articles 8 and 10 of the Human Rights Act; defining clearer parameters regarding justifications for the invasion of individual privacy would aid better understanding for journalists and the public of where the boundary lies.

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<sup>243</sup> Morrison, D. E. and M. Svennevig (2002) *The Public Interest, the Media and Privacy*, <http://www.ofcom.org.uk/static/archive/bsc/pdfs/research/pidoc.pdf>, p89

<sup>244</sup> *Ibid.*, p98

<sup>245</sup> *Ibid.*, p99

<sup>246</sup> Ofcom (2011) *Public Service Broadcasting Annual Report: Section F – The Ofcom Media Tracker Survey: 2010 Survey Results*, <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2011/Perceptions-F.pdf>, p50

<sup>247</sup> Barnett, S. (2012) ‘Public interest: the public decides’, *British Journalism Review*, 23(2), pp18-20. Poll conducted by YouGov, 7-8 May 2012, sample size 1,658 GB adults

## Establishing Guidelines for News Organisations

Just as a statutory public interest definition would provide journalists with greater certainty of a defence in law, so it would provide the basis for a transparent decision-making process within news organisations based on an authoritative definition of the public interest.

Effective internal compliance mechanisms based on a definition of the public interest already operate in broadcast journalism, but while Table 5.1 shows that there are general similarities between the public interest definitions employed by both print and broadcast journalists, there are clear differences in the processes different media organisations employ. The BBC employs a rigorous three-stage process to ensure that content is in accordance with their Editorial Guidelines<sup>248</sup>, while ITN provides staff with a compliance manual to ensure that content is in line with Ofcom’s Broadcasting Code.<sup>249</sup> ITV News employs a two-stage test of proportionality<sup>250</sup> and at *Channel 4 News* meetings between production teams and the Head of Compliance are documented.<sup>251</sup>

While the PCC Code states that “Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time”, the introduction of a more rigorous and accountable internal compliance mechanism would put in place safeguards that could provide protection against needless litigation or potential criminal proceedings. The House of Lords Communications Committee has echoed this, recommending that news organisations should employ a two-stage internal process concerning the decision to commence an investigation, and then the decision to publish.<sup>252</sup>

There are a number of process-based precedents that could be used to determine how news publishers approach the public interest as a guide to publication. The adoption of a proportionality test could provide guidance on decisions to breach the code to gather or publish information. *Channel 4 News* and the *Guardian* have employed guidelines based on principles set out by the former Director of GCHQ, Sir David Omand, which can be summarised as follows:

1. There must be a sufficient cause – the intrusion needs to be justified by the scale of the potential harm which might result from it;
2. There must be integrity of motive – the intrusion must be justified in terms of the public good which would follow from publication;
3. The methods used must be in proportion to the seriousness of the story and its public interest, using the minimum possible intrusion;

<sup>248</sup> House of Lords Select Communications Committee (2011) *Second Report – The Governance and Regulation of the BBC*:

<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/166/16602.htm>

<sup>249</sup> Battle, J. (2012) Witness Statement to Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-John-Battle.pdf>

<sup>250</sup> Battle, J. (Evidence to Leveson Inquiry, 23<sup>rd</sup> January 2012): <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-23-January-2012.pdf>

<sup>251</sup> Gray, J. (Evidence to Leveson Inquiry, 23<sup>rd</sup> January 2012): <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-23-January-2012.pdf>

<sup>252</sup> House of Lords Select Committee on Communications (2012) Op. Cit., paras 108-109, p32

4. There must be proper authority – any intrusion must be authorised at a sufficiently senior level and with appropriate oversight;
5. There must be a reasonable prospect of success: fishing expeditions are not justified.

Should a publisher be able to prove that these steps had been followed in stories where the public interest is cited as a justification for publication, this defence could be taken into account.

## **Towards a Statutory Public Interest Definition**

The general similarities between the public interest definitions set out in Table 5.1 are encouraging. They demonstrate that, where attempts have been made to codify the public interest, broad agreements have been reached on the areas it should focus on and the centrality of public life and civil society in relation to its composition.

No definition will be watertight, but this should not negate attempts at the creation of a workable definition for insertion into statute. As Professor Brian Cathcart said at the Leveson Seminars:

“It is true that none of the definitions provides absolute clarity for all journalists in all circumstances. But that is asking too much. The most carefully crafted contracts can be disputed in the courts, as can Acts of Parliaments – in fact such disputes are expected. Yet we still write contracts and pass Acts of Parliament. That there can be no perfect definition of the public interest does not mean that we can’t have a workable one in most circumstances”.<sup>253</sup>

A public interest defence should perform two main tasks: permit acts that protect and empower the public along the lines of the existing codifications, while minimising to the greatest extent the potential for manipulation of the definition in ways that produce the opposite effect on public wellbeing and confidence.

At the Leveson Inquiry, Professor Steven Barnett set out a possible statutory public interest definition of the public interest.<sup>254</sup> Based on the broadcasting codes of conduct rather than the PCC Code, it remains the only public attempt to do so. It is replicated here, with minor modifications, as an example of how a tighter public interest defence, backed up by more robust regulation, might look:

There is a clear public interest in:

- Exposing or detecting crime, incompetence, injustice or significant anti-social behaviour amongst private or public officials in positions of responsibility;
- Protecting the public from potential danger;

<sup>253</sup> Cathcart, B. (7<sup>th</sup> October 2011) Presentation to Leveson Inquiry Seminar, <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-Brian-Cathcart-PDF-18.3KB.pdf>

<sup>254</sup> Barnett, S. (2011) Witness Statement to Leveson Inquiry, <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Professor-Steven-Barnett.pdf>

- Preventing the public from being misled by erroneous statements or by the hypocrisy of those attempting to create a false image for potential material gain;
- Revealing information which fulfills a democratic role in advancing a better understanding of issues that are of importance to a significant portion of the public, or that assists the public in making important decisions in public life.

This definition provides, this proposal recommends, a useful starting-point for the development of a public interest defence in law, instituted within existing legislation, and referenced across the law where applicable.



## Appendix I: Press self-regulation recommendations grid

The history of press self-regulation is, as explained in Part 1, one of repetitive cycles. Increasing public and Parliamentary concern at the ownership, culture, ethics or practices of the press leads to the establishment of a Royal Commission, Review or Inquiry. The Inquiry takes evidence and makes recommendations for change. The industry is then given responsibility for turning these recommendations into practice. In the process of translation these recommendations are altered. Within 10-15 years public concern rises again and the pattern is repeated.

The grid below illustrates this. Attempts at reform are ordered chronologically, with the date and nature of the attempt on the left hand side. There is an indication of what the 'catalyst' was for the attempt at reform, followed by the proposed solutions. The grid then lays out the actual, enacted solutions, and the proposed and enacted sanctions.



## History of Regulatory Interventions by Government, 1947-1993

Year	Event	Catalyst	Proposed Solutions	Enacted Solutions	Proposed Sanctions	Actual Sanctions
1947-9	<b>1<sup>st</sup> Royal Commission on the Press (Ross Commission)</b>	<ul style="list-style-type: none"> <li>• NUJ pressure on government, concerned with press standards (exploitation of 'right to publish', and 'loss of special interest' in the practice of producing news)</li> <li>• Political concern over press behaviour and impact on the public</li> <li>• Terms of reference included investigation into press freedom, standards and accuracy, and ownership</li> </ul>	<ul style="list-style-type: none"> <li>• Creation of a 'General Council of the Press' (voluntary, non-statutory)</li> <li>• Gen. Council to have 25 members (20% lay representation)</li> <li>• Wide remit, including: press freedom, training, cohesion, fostering 'sense of public responsibility and public service', considering complaints, 'public face' of the press</li> <li>• Code of Practice proposed</li> <li>• Large and well-funded</li> <li>• Rejection of privacy law due to concerns of practicality in enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• 4-year delay</li> <li>• 25-member Council created; no lay representation</li> <li>• No code of practice or common pension scheme as recommended</li> <li>• Specific concern with fostering 'sense of public responsibility and public service' removed</li> <li>• Active promotion of training function removed</li> <li>• Minimal funding</li> </ul>	<ul style="list-style-type: none"> <li>• To deal with complaints "in whatever manner may seem to it practicable and appropriate"</li> <li>• Power to censure 'undesirable types of journalistic conduct'</li> </ul>	<ul style="list-style-type: none"> <li>• Complaints function excluded, replaced with procedural clause that first-party complaints only would be considered</li> <li>• No mention of censure</li> </ul>
1961-2	<b>2<sup>nd</sup> Royal Commission on the Press (Shawcross Commission)</b>	<ul style="list-style-type: none"> <li>• Economics/ownership: Council criticised for failing to anticipate problems; perceptions of a link between standards and economics, and the negative effects of industrial action by unions</li> <li>• Press behaviour, including payments to</li> </ul>	<ul style="list-style-type: none"> <li>• 'Second chance' for self-reformation, or face statutory action</li> <li>• General Council becomes Press Council</li> <li>• Lay Chairman and substantial lay membership</li> <li>• Active reporting on potential concentration or monopoly</li> <li>• Tribunal function to hear</li> </ul>	<ul style="list-style-type: none"> <li>• Adopted complaints function in constitution, making it a key objective</li> <li>• Adopted lay chairman and 20% lay function</li> <li>• Accepted function to 'report publicly on developments that may tend towards greater</li> </ul>	<ul style="list-style-type: none"> <li>• "To consider complaints about the conduct of the Press or the conduct of persons and organisations towards the Press; to deal with these complaints in whatever manner might seem practical and appropriate and</li> </ul>	<ul style="list-style-type: none"> <li>• Complaints function codified</li> <li>• No concern with standards</li> </ul>

		<p>witnesses and defendants in criminal trials</p> <ul style="list-style-type: none"> <li>• Broadsheet complaints about the efficacy of the Council</li> <li>• Acute criticism of the implementation of the recommendations of the 1<sup>st</sup> Royal Commission</li> </ul>	<p>editor/journalist complaints about undue influence from advertisers or from superiors</p> <ul style="list-style-type: none"> <li>• Greater powers to deal with complaints and standards</li> </ul>	<p>concentration or monopoly in the Press</p> <ul style="list-style-type: none"> <li>• Funding increased</li> <li>• Addition of 3 clauses to constitution, including: "To consider complaints about the conduct of the Press or the conduct of persons and organisations towards the Press; to deal with these complaints in whatever manner might seem practical and appropriate and record resultant action"</li> </ul>	<p>record resultant action"</p>	
1974-7	<b>3<sup>rd</sup> Royal Commission on the Press</b>	<ul style="list-style-type: none"> <li>• Economics of the Press</li> <li>• Industrial disputes, especially proposed 'closed shop' arrangements at the NUJ</li> <li>• Concern over ethical standards of the Press, and the impartiality of the Press Council</li> <li>• Public dissatisfaction with the Press Council</li> </ul>	<ul style="list-style-type: none"> <li>• 50/50 lay/industry representation on the Council</li> <li>• Chair to also chair Appointments Commission</li> <li>• Nominations to Council to be accepted from any source, and to be representative of the nation</li> <li>• Conciliator position proposed, with power to propose remedies in disputes</li> <li>• Extension of Council's doctrine of Right of Reply, and ability to uphold</li> </ul>	<ul style="list-style-type: none"> <li>• 50/50 lay/industry representation accepted</li> <li>• Agreed to nominations from any source</li> <li>• Appointed conciliator to propose remedies in disputes</li> </ul>	<ul style="list-style-type: none"> <li>• Upholding space available to claimants</li> <li>• Enforcement of equal prominence and space of counterstatements</li> <li>• Duty to approach publishers to secure front-page corrections</li> <li>• Censure of contentious opinions based on inaccurate information</li> </ul>	None

			<p>newspaper's making space available to those it has criticised inaccurately</p> <ul style="list-style-type: none"> <li>• Code of Behaviour and freedom to censure breaches in letter and spirit of law</li> <li>• Provision of funds to allow advertising, as with ASA</li> <li>• Duty to approach publishers to secure front-page corrections</li> <li>• Wider review of journalist/publication concerned in a given complaint</li> <li>• Take into initiative beyond formal complaint</li> <li>• Inaccuracy, even if corrected, to be <i>prima facie</i> evidence for upholding complaints; censure of contentious opinions based on inaccurate information</li> </ul>			
1991	<b>Committee on Privacy and Related Matters (Calcutt I)</b>	<ul style="list-style-type: none"> <li>• Concerns with unfair reporting, right of reply, and privacy</li> <li>• Progression to Committee Stage in Commons of Protection of Privacy Bill and Right of Reply Bill</li> <li>• Consideration of measures to protect individual privacy from the press, and recourse</li> </ul>	<ul style="list-style-type: none"> <li>• Replacement of the Press Council with a Press Complaints Commission</li> <li>• Last chance to prove the worth of voluntary self-regulation</li> <li>• Reduction in size of Committee</li> <li>• Ability to publish and monitor a comprehensive Code of Practice</li> <li>• 24-hour complaints line</li> </ul>	<ul style="list-style-type: none"> <li>• PCC created, dissolution of Press Council</li> <li>• Press Board of Finance created to collect funds</li> <li>• Appointments procedure remained in the hands of industry figures</li> <li>• Ability to handle and judge complaints</li> </ul>	<ul style="list-style-type: none"> <li>• Generally avoided specifying sanctions, relying on the willingness of the Press to adhere voluntarily to adjudications</li> </ul>	<ul style="list-style-type: none"> <li>• Publication of critical adjudications</li> <li>• Letter of admonishment to editors</li> <li>• Formal referral of editor to publisher</li> </ul>

		for citizens against the press	<ul style="list-style-type: none"> <li>• Ability to recommend an apology and, where appropriate, influence the position of apologies</li> </ul>	<p>which raise a <i>prima facie</i> breach of the Code</p> <ul style="list-style-type: none"> <li>• Ability to negotiate remedies</li> <li>• Advisory function for editors about interpretation of the Code and journalistic ethics</li> <li>• Aim to achieve public recognition and support through accessibility and independence of judgment</li> </ul>		
1993	<b>Review of Press Self-Regulation (Calcutt II)</b>	<ul style="list-style-type: none"> <li>• Public and political criticism of Press Complaints Commission</li> <li>• Failure of PCC to fulfil recommendations of Calcutt I</li> </ul>	<ul style="list-style-type: none"> <li>• Dissolution of PCC and replacement with a statutory Press Complaints Tribunal, with powers: <ul style="list-style-type: none"> <li>○ To draw up and keep under review a Code of Practice</li> <li>○ To restrain publication of material in breach of Code</li> <li>○ To receive complaints (inc. 3<sup>rd</sup>-party) of alleged breaches of the Code</li> <li>○ To inquire into these complaints</li> <li>○ To initiate its own investigations without a complaint</li> <li>○ To require a response to its inquiries</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• N/A – rejected</li> </ul>	<ul style="list-style-type: none"> <li>• Ability to restrain publication of material in breach of Code</li> <li>• To enforce publication of adjudication</li> <li>• To impose fines</li> <li>• To award costs and compensation</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>

			<ul style="list-style-type: none"><li>○ To attempt conciliation</li><li>○ To hold hearings</li><li>○ To rule on alleged breaches of the Code</li><li>○ To give guidance</li><li>○ To warn</li><li>○ To require the printing of apologies, corrections and replies</li><li>○ To enforce publication of its adjudications</li><li>○ To award compensation</li><li>○ To impose fines</li><li>○ To award costs</li><li>○ To review its own procedures</li><li>○ To publish reports</li><li>○ To require the press to carry adverts specifying how complaints could be made</li></ul>			
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## Appendix II: Funding the new system

### Current funding arrangements

At present, funding for the PCC is provided by the Press Standards Board of Finance (PressBof), which is charged with raising a levy from its constituent members, which is then passed to the PCC. The member agencies of PressBof are:

- The Newspaper Publishers Association (NPA) – trade body for the national press
- The Newspaper Society – regional press
- The Professional Publishers Association (PPA) – periodicals and magazine publishers
- The Scottish Newspaper Society (SNS) – Scottish national and regional press.<sup>255</sup>

From publicly available information (which is limited) it would appear that national newspapers (via the NPA) contribute 54% of the total, with regional newspapers contributing 39% (NS and SNS) and magazines and periodicals 7% (via the PPA).

In FY2011, PressBof raised £2,099,369 in total, of which £1,957,000 was passed to the PCC, £10,000 less than in FY2010. Operating costs of PressBof were £148,317.<sup>256</sup>

Proportionately, an estimated breakdown of funding for the PCC from publications in FY2011 was:

- National Press: £1.06m
- Regional and Scottish Press: £0.76m
- Magazines and Periodicals: £0.14m

### Funding Process and Levy

PressBof provides all funding for the PCC, setting the size of the levy, requesting its members to collect it, and receiving it in a lump sum twice a year.<sup>257</sup>

The exact scale of the levy and how it is calculated is kept secret. The detailed financial figures of both PressBof and the PCC are not available to the public. The Board of PressBof consists entirely of industry figures appointed by its member agencies. The specific details of the formula by which publishers subscribe to the levy, and therefore how much each pays, are not known by the PCC or PressBof, according to the Chair of PressBof, Lord Black.<sup>258</sup>

<sup>255</sup> Lord Black (1<sup>st</sup> Witness Statement to Leveson Inquiry, 2011) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Lord-Black1.pdf>

<sup>256</sup> Data obtained from Companies House; once interest is taken into account, PressBof recorded a profit of £134 for the year

<sup>257</sup> Lord Black (Oral Evidence to Leveson Inquiry, 1<sup>st</sup> February 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf>

<sup>258</sup> Lord Black (Oral Evidence to Leveson Inquiry, 1<sup>st</sup> February 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf>

Information on individual contributions to the levy (in the case of national newspapers at least) is therefore unavailable for public scrutiny.

It is possible to make an informed calculation of the breakdown of the levy on the basis of available figures, however:

- Revenues for the UK press in FY2010 were £8200m
- Of this, the national and regional press accounted for £5910m (£3719m for nationals; £2191m for regionals)
- Copy sales revenue was, respectively, £2089m (56% of total revenue) and £592m (27%)<sup>259</sup>
- The financial burden of the PCC on national and regional newspapers therefore works out at approximately 0.05% of copy sales revenue for nationals and 0.13% for regionals.<sup>260</sup>

## **Funding Independent Regulators in the UK**

### **The Advertising Standards Authority (ASA)**

The ASA's funding is acquired via two bodies: the Advertising Standards Board of Finance (Asbof<sup>261</sup>), and the Broadcast Advertising Standards Board of Finance (Basbof<sup>262</sup>).

Each body extracts a levy through its member agencies of 0.1% of the advertising cost to clients for non-broadcast (Asbof) and broadcast (Basbof) advertising. Asbof also gathers a levy of 0.2% of the Royal Mail's Mailsort contract. The funding model of the PCC and PressBof used the ASA structure as a broad template.<sup>263</sup>

- In 2010-2011, Asbof's income was £4,967,000: £4,146,000 of which came from the Advertising Levy, and £814,000 from the Mailing Standards Levy (the remainder from interest) – of which £4,334,000 went to the Advertising Standards Authority<sup>264</sup>
- Basbof raised £3,497,000, of which £3,180,000 was paid to the ASA.
- In total, the ASA obtained £7,514,000 from its levies, almost four times that of the PCC. This figure marked a significant increase on 2009-2010, indicating that the ASA's funding levels – based as they are on a fixed-rate levy – are susceptible to market fluctuations.

### **The Financial Ombudsman Service (FOS)**

The Financial Ombudsman Service is an independent body set up in 2001 after being outlined in the Financial Services and Markets Act 2000. Its role is to resolve complaints

<sup>259</sup> Enders Analysis (2011) *Competitive Pressures on the Press: Presentation to the Leveson Inquiry* <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-Claire-Enders1.pdf> (pp4-6)

<sup>260</sup> Calculated using Enders analysis FY2010 figures, and PressBof and PressBof FY2011 figures: £1.06m from £2089m for nationals; £0.76m from £592m for regionals. Recalculating using PressBof FY2010 figures to the same precision (2 sig. figs) gives identical results.

<sup>261</sup> All Asbof figures taken from the *Thirty-Sixth Annual Report*, available at <http://www.asbof.co.uk/>

<sup>262</sup> Basbof figures taken from the *Seventh Annual Report*, available at <http://www.basbof.co.uk/>

<sup>263</sup> Lord Black (2011) Op. Cit.

<sup>264</sup> £300,000 also went to the Mailing Preference Service, which allows the public to block unsolicited mail

between consumers and financial businesses. The service is free to consumers, and funding is provided by a combination of a levy, and case fees charged to any business involved in a complaint that is considered by the FOS, where that business has used up its yearly allocation of free cases. The FOS does not fine businesses; instead it can order a business to cover the financial losses of a successful complainant, or direct the business to take action to put a problem right.

### The Levy

- The FOS covers all financial businesses regulated by the Financial Services Authority (FSA) and the Office of Fair Trading (OFT).
- The FSA collects the levy at the same time that it collects both its own regulatory fees and the levy for the Financial Services Compensation Scheme (FSCS).
- The amount that each FSA-regulated business pays currently ranges from around £100 per year for a small firm of financial advisers to over £300,000 for a high-street bank or major insurance company.
- The OFT collects the levy at the same time that they apply for their standard consumer-credit licence and, after that, every five years. Currently the amount each OFT-regulated business pays is £150 for each five-year period.

### Case Fees

Case fees are charged in all cases where a complaint progresses to the FOS. The business is charged regardless of the outcome of the case.

- Each business gets three “free” chargeable cases that are closed per financial year. Fourth and subsequent cases are charged at £500.
- Less than one-in-six cases become “chargeable” – i.e. passed from the Customer Contact Division to one of the casework teams of adjudicators.
- The number of “free” cases is based on the need for the FOS to meet costs, calculated by forecasting expected complaints and cases in future years.
- Approx 1% of businesses pay case fees.
- Businesses covered by the ombudsman service – including those that are no longer regulated – are also required to pay an individual case fee.

The funding of the Financial Ombudsman Service is heavily weighted in favour of case fees. In FY2011, of a total income of £97.7m, £77.1m was obtained via case fees.<sup>265</sup> Combined, the Compulsory Jurisdiction Levy (£18.4m), and the Consumer-Credit Jurisdiction Levy and Voluntary Jurisdiction Levy (£2.5m), accounted for £20.9m.<sup>266</sup> The balance of industry-derived income is therefore 79% case fees and 21% levy.

### The Legal Ombudsman

The Legal Ombudsman was set up in 2010 by the Office for Legal Complaints (OLC), which – along with the Legal Services Board (LSB) – was outlined in the Legal Services Act 2007. The Ombudsman is designed to resolve complaints between consumers of legal services, and providers of those services. Funding, much like the Financial Ombudsman Service, is provided by a combination of a levy collected from Approved

<sup>265</sup> In recent years, the caseload and budget of the FOS has been inflated by the exponential increase in complaints concerning Payment Protection Insurance (PPI)

<sup>266</sup> Financial Ombudsman Service (2012) *Our Plans and Budget, 2012/2013*, <http://www.financial-ombudsman.org.uk/publications/pdf/plan-budget-2012-13.pdf>, p27



Regulators (such as the Bar Standards Board or the Council for Licensed Conveyancers), and case fees. The total budget of the Legal Ombudsman is set by the OLC, with the levy being adjusted on the basis of the volume of income from case fees.

The OLC levy burden on each Approved Regulator is based on the number of complaints received concerning members of each regulator over a 3-year period, as a proportion of the total number of complaints.<sup>267</sup> So, an Approved Regulator whose members attracted 15% of all complaints would be required to provide 15% of the total levy.

Case fees are currently set at £400, and each member is given two “free” chargeable cases in a financial year. Where a case is found in favour of a lawyer, or the Ombudsman is satisfied that the lawyer took reasonable steps to try to resolve the complaint, the case will not be treated as chargeable.<sup>268</sup>

The balance of funding gathered by the OLC to run the Legal Ombudsman is substantially different from that of the FOS: in FY2011, from a combined income from levy and case fees of £12,847,000, the levy accounted for £12,826,000, or 99.8%.<sup>269</sup> However, for the first 6 months of FY2011 the Legal Ombudsman was not yet operational, and so it would be expected that the volume of income derived from case fees would substantially increase in future years as more cases are brought and resolved.

## Press Council Funding Around the World

### The Press Council of Ireland and Office of the Press Ombudsman

Non-broadcast regulation in Ireland is recognised in statute and consists of the Press Council of Ireland and the Office of the Press Ombudsman. Budget and finance decisions for the organisation are made by the Administrative Committee, consisting of industry representatives and chaired by an independent member. Membership is voluntary, including Irish versions of UK publications, and funding is provided by a levy based on the circulation of member publications.

2010 costs for the Council were approximately £474,000 in total, of which £286,000 was on staff costs.<sup>270</sup>

### The Netherlands Press Council

The Netherlands Press Council – Raad voor de Journalistiek – is an independent self-regulator set up by the Press Council Foundation, which consists of the Netherlands Union of Journalists (NVJ), the Netherlands Society of Chief Editors, and major print and broadcast news organisations. The Council is in theory funded by the industry, with the

<sup>267</sup> Great Britain (2010) *The Legal Services Act 2007 (Levy) (No.2) Rules 2010*:  
[http://www.legislation.gov.uk/ukxi/2010/2911/pdfs/ukxi\\_20102911\\_en.pdf](http://www.legislation.gov.uk/ukxi/2010/2911/pdfs/ukxi_20102911_en.pdf)

<sup>268</sup> Legal Ombudsman (2012) *Legal Ombudsman Scheme Rules*  
[http://www.legalombudsman.org.uk/downloads/documents/publications/OLC\\_Scheme%20rules\\_v1\\_201104-1\\_FINAL.pdf](http://www.legalombudsman.org.uk/downloads/documents/publications/OLC_Scheme%20rules_v1_201104-1_FINAL.pdf)

<sup>269</sup> Office for Legal Complaints (2011) *Annual Report and Accounts for the Year Ending 31 March 2011*  
[http://www.legalombudsman.org.uk/downloads/documents/publications/Annual\\_Report\\_2010\\_2011\\_Final\\_v1.pdf](http://www.legalombudsman.org.uk/downloads/documents/publications/Annual_Report_2010_2011_Final_v1.pdf)

<sup>270</sup> Press Council of Ireland and Office of the Press Ombudsman (2010) *Annual Report 2010*  
<http://www.presscouncil.ie/fileupload/PCI-PO%20Annual%20Report%202010.pdf>

NVJ and Society of Chief Editors contributing around 6.5% each, and other participating organisations the remaining 87% of a total annual budget of around £120,000 (2007 figures).<sup>271</sup>

The Netherlands Press Council is dependent on large one-off industry contributions in order to undertake significant projects, such as expanding secretarial support services in 2004/2005. To allow the Council to continue to operate at the new level, it receives substantial donations from the 'Democratieen Media Foundation.'<sup>272</sup> Since 2004, however, the income of the Press Council has been unable to meet running costs, and so additional support is provided by the government.<sup>273</sup>

### The New Zealand Press Council

The New Zealand Press Council is an independent complaints handling body for the press. Its costs are set and funded largely by the Newspaper industry via the National Proprietors' Association (NPA), and the Engineering, Printing and Manufacturing Union (EPMU), which represents journalists. Other voluntary contributors are magazines, and the Community Newspapers Association.

The Press Council handles a comparatively small number of complaints (149 in 2010, of which decisions were issued in 65 cases<sup>274</sup>) and, while there is a belief among the public that the Press Council is underfunded, the industry supports the current funding model on the basis of the remit of the Council as a complaints handling body only.<sup>275</sup>

Of a total 2010 budget of £126,044, the NPA provided £116,271 (92%), and the Union £1,427 (1%). The remaining proportion was contributed by the Community Newspapers Association, magazines and interest.<sup>276</sup>

<sup>271</sup> Koene, D. C. (2009) *Press Councils in Western Europe*, The Hague: Netherlands Press Fund  
<http://www.rvdj.nl/rvdj-archive/docs/Research%20report.pdf?PHPSESSID=a7529bd07dd005cc0f1bb69fd0f416a4>, p28

<sup>272</sup> Ibid., p29; see also <http://stdem.org/en/>

<sup>273</sup> Electoral Reform International Services (2011) *Comparative Study of Media Councils: Resource Report, January 2011*

<http://www.eris.org.uk/images/userfiles/File/Ethiopia%20Media%20Council%20report%202011.pdf>

<sup>274</sup> New Zealand Press Council (2010) *38<sup>th</sup> Report of the New Zealand Press Council*

<http://www.presscouncil.org.nz/articles/NZ%20Press%20Council%20Annual%20Report%202010.pdf>, p12

<sup>275</sup> Barker, I. and L. Evans (2007) *Review of the New Zealand Press Council*

[http://www.presscouncil.org.nz/articles/press\\_council\\_review.pdf](http://www.presscouncil.org.nz/articles/press_council_review.pdf)

<sup>276</sup> New Zealand Press Council (2010) *38<sup>th</sup> Report of the New Zealand Press Council*

<http://www.presscouncil.org.nz/articles/NZ%20Press%20Council%20Annual%20Report%202010.pdf>, p86