Submission to the Leveson Inquiry on the future of press regulation

A response to Lord Justice Leveson's request

Submission date: 2 April 2012

Overview

On 1 February, at the end of our evidence session to the Inquiry, Lord Justice Leveson asked the Chairman and CEO of Ofcom the following:

> *I would welcome your views on how the press could be regulated in a way which preserves their independence and the rights of free expression.*

This paper discusses the potential public purposes of any regulation, the models and options for achieving effective regulation, the ability of self-regulation to deliver regulatory outcomes and some possible options for supporting effective regulation through statutory underpinning.

This paper builds on Ofcom's experience as the UK's broadcast regulator, as a co-regulator and through Ofcom's experience of working with various models of self regulation.

We draw from Ofcom's experience as the regulator of content and standards for broadcast and radio services in the UK. Whilst the statutory approach adopted in broadcast regulation derives from a different historic, commercial and institutional context to the press it may provide guidance on what the necessary building blocks are in creating effective, strong, independent and credible models of regulation.

We stress that Ofcom is not seeking to regulate the press.

Our starting point is Ofcom's experience of protecting the rights of free expression, which would be fundamental in establishing a new model of press regulation. We draw on Ofcom's experience of balancing rights of free expression with its other duties in this paper.

Establishing a new regulatory body with a clear scope and jurisdiction in a changing digital media landscape will be challenging. Boundaries between different digital media will be more permeable than ever before.

To address these challenges, we set out our views in this paper using the following structure:

Section 1: The possible public purposes of press regulation

Section 2: The principles of effective regulation, based on our experience

Section 3: Models of self regulation, co-regulation and statutory regulation

Section 4: Strengthening self regulation and where additional steps could be required

Section 5: Scope and jurisdiction in a changing digital media environment

Section 6: Conclusions

Section 1

The possible public purposes of press regulation

1.1 A new model of regulation for the press would need to:

- be built on a clear articulation of the public purposes of regulation; and
- establish a clear view on the outcomes required to ensure public trust, to provide a basis against which a new system can be evaluated in the future.

1.2 Successful regulatory regimes are based on a clear sense of role and public purpose. Ofcom itself has a clear public purpose set out in its central statutory duties:

"*to further the interests of citizens in relation to communications matters*" and "*to further the interests of consumers in relevant markets, where appropriate by promoting competition*". Ofcom's general duties in relation to broadcast standards are clearly defined in the Communications Act 2003. Ofcom is required to secure:

- *the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;*
- *the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes included in such services and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services;*

1.3 Ofcom must also have regard, in performing those duties to:

- *the need to secure that the application in the case of television and radio services of standards … is in the manner that best guarantees an appropriate level of freedom of expression*

1.4 In addition, under the Broadcasting Act 1996 (as amended), Ofcom has a duty to consider and adjudicate on complaints made to it which relate to unjust or unfair treatment in programmes, and to unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes. Other regulators have similarly clear public purposes set out for them[1].

1.5 In the case of the press, it is widely accepted that a free press is at the heart of a healthy democracy. It is able to hold politicians, public bodies, public figures and others who hold power and influence to account for their actions. In discharging this role the press holds a powerful position within our democracy.

1.6 In recognition of this powerful position, it also appears to be generally accepted that newspapers and the journalists working for them should agree ethical and

[1] Other regulatory bodies with clear public purposes set out for them include the BBC Trust, ASA, GMC, FSA, Legal Services Board and Lloyds of London.

professional standards beyond complying with the relevant law. This would make both journalists and the organisations which employ them more akin to other professions and organisations who aspire to operate in an environment of public trust.

1.7 In addition, the cost and complexity of seeking redress through the courts means that there is a need for some form of regulation to ensure that individuals can secure rapid and effective redress when they have been subject to unethical (and potentially illegal) journalistic practices.

1.8 The core of a new system of press regulation could be fast, accessible and effective redress for complaints where serious breaches of the public purposes of regulation have taken place. There could be a particular focus on areas where existing law stands behind the public purposes of the regulator, but where redress through the courts is costly and complex.

1.9 Civil and criminal law provides a base level of protection but Ofcom's experience of broadcasting regulation shows that it is in the public interest that standards and ethics are not enforced solely by recourse to the courts in the event of a breach of a standards code. It also suggests that it may be desirable to provide proportionate additional protections that are not provided by civil and criminal law, for example, requiring that news is reported with due accuracy.

1.10 The history of press regulation, both in the UK and in many other countries would seem to suggest similar principles apply to the press and that further safeguards and redress mechanisms are needed to ensure the exercise of power by the media is not abused. This would suggest that industry should apply standards of acceptable behaviour to prevent systematic unlawful and unethical behaviour.

1.11 In order for any regulatory system to function, the public purpose of press regulation would need to be defined. Key elements could include:

- a requirement to protect the rights of the press in relation to freedom of expression;
- a requirement on the regulatory body to protect the rights of individuals by giving prompt and effective rights of redress in relation to privacy, fairness and defamation[2]; and
- a requirement to promote ethical behaviour and standards of journalism in the press and to investigate practices that undermine confidence in journalistic standards.

1.12 Clear statements of public purpose are likely to be required to ensure the regulator, the industry and the general public understand what is at stake, to help establish its authority and, over time and in light of performance, to help build trust in the regulatory system. These would also be important in ensuring that the new body has a clear identity on which to build its institutional culture.

[2] This recognising the difficulties individuals currently face in seeking redress for these issues through the courts and also considering the chilling effects of the current laws (defamation in particular) on the press.

Section 2

The principles of effective regulation

2.1 Against the background of this discussion of the public purposes of regulation, Ofcom's experience in regulating a number of sectors and working with a variety of statutory, co-regulatory and self regulatory bodies suggests there are some core principles shared by all effective regulation.

2.2 These principles can be divided into two categories:

- principles which relate to the governance and accountability of the regulatory body; and
- principles which relate to the operational independence and capability of the regulatory body.

a) Principles which relate to the governance and accountability of the regulatory body

2.3 These principles are important because they establish independence and ensure safeguards against undue influence. They are an essential part of the credibility of the organisation. They are:

- **Independent governance and decision making**, ensuring that decisions are taken free from industry or political interference, consistent with principles of good corporate governance. Governance arrangements would need to ensure that there is no inappropriate influence over decision making by third parties and that these arrangements create a governing body which is independent, responsible and publicly accountable for the effective functioning of the regulator.
- **Clear public accountability**, to ensure that the regulator is held to account in delivering against its public purposes. This could be delivered by independent oversight of the regulator's activity on a periodic basis, to ensure that the governance, operation, processes and decisions of the regulator are regularly scrutinised and that the results of this scrutiny are transparent.
- **Clear regulatory objectives** set out in a Code which allows industry and the public to see the nature and scope of the regulation. This allows the regulator to set out the rules against which it would operate, to provide focus to its activities and to ensure that regulated parties understand clearly the standards they must meet, allowing them to develop their compliance programmes accordingly.
- **Clear and transparent processes**, to ensure that it is clear how regulatory investigations are conducted and that relevant parties can appropriately engage with those processes. Typically this would mean consulting on and publishing processes for complainants, processes for submissions by regulated parties, rights of third parties and rights of appeal. These processes need to find an appropriate balance between timeliness and principles of natural justice.

b) Principles which relate to the operational independence and capability of the regulatory body

2.4 These ensure public confidence, credibility and, over time, help to build public trust. They are:

- **Workable membership incentives/obligations**, ensuring the regulator has all relevant parties within its scope in order to produce a fair and consistent regulatory framework across the industry. This means developing incentives or obligations for membership or introducing mechanisms which set out who the regulated parties are. We say more about this crucial issue below.

- **Independent funding and budget control**, to ensure the regulator can deliver its public purposes with sufficient resources and without fear of interference from industry or Government. Typically this should mean budgets are agreed for a significant period, such as four years. During this period the regulator should be required to manage within these budget limits (excluding exceptional events), but that it would also have security in relation to this funding and not be subject to financial pressure that would be inconsistent with the ability to act independently.

- **Accessibility,** to ensure that individual financial circumstances are not a pre-requisite to securing redress, essentially requiring the system of regulation to be free at the point of use. This would mean setting up appropriate complaints handling mechanisms (e.g. phone, email and website) and securing a funding model to ensure that complaints are logged and investigated at no cost to the complainant.

- **Genuine powers of investigation**, to ensure that regulated parties cannot prevent effective investigation where wrongdoing is alleged. These are typically powers to seek and access information, powers to undertake own initiative investigations (i.e. without a complaint) and powers to impose meaningful penalties for failure to cooperate.

- **Effective powers of enforcement and sanction**, ensuring that regulatory action is a genuine deterrent both to the party being punished and as a warning to other regulated parties. These would give the regulator the power to levy proportionate sanctions on regulated parties to punish breaches of rules and to act as a deterrent to other parties in relation to future behaviour.

Section 3

Models of self regulation, co-regulation and statutory regulation

3.1 We have previously set out for the Inquiry[3] our views on when self regulatory, co-regulatory and statutory regulatory models are most effective. In summary our view is:

- Self regulatory models are industry designed and led, allowing the industry to define an approach best suited to achieving its desired outcomes. Self regulatory systems rely on a strong alignment between the incentives of participants and the wider public interest. Membership is voluntary and there are no formal legal backstops to enforce the rules of the schemes. In the absence of alignment between the interests of the industry and the public interest, self-regulatory regimes are unlikely to prove effective when confronted by circumstances which present a tension between the public interest and the corporate interests of industry players.

- Co-regulatory models typically provide more industry involvement than statutory regulation and can be particularly effective when there is widespread industry support for the objectives of regulation. They require periodic monitoring by a backstop body to ensure effectiveness and can require the backstop body to carry out enforcement activity. Co-regulation can, like self regulation, also struggle where there are pronounced tensions between commercial interests and the wider public interest, but usually less so than self regulatory models. This is because the existence of the backstop body obliges the participants to find a way of resolving the inherent problems, or else face some kind of sanction from the backstop body.

- Statutory regulation is usually carried out by an independent body, accountable to Parliament and subject to scrutiny by the National Audit Office. It is usually the most effective model where there is a clear divergence between commercial interests and the wider public interest.

3.2 The starting point for consideration of a future model of press regulation would be balancing the central importance of protecting the independence of the press against creating an effective model of regulation which can build and sustain public trust in the future. Given the importance of protecting the independence of the press, this is a different challenge from, for example, determining the best model for the regulation of the prices of telecommunications services or energy supply.

3.3 With this in mind two questions suggest themselves:

- In considering the core principles of effective regulation, what is the strongest version that might be designed while retaining a self regulatory framework?

- Where such a model may have weaknesses, what steps could be taken to improve the effectiveness of the model without threatening the independence of the press or the rights of free expression?

[3] Please see the teach-in slides we presented to the Inquiry on 5 October 2011.

Section 4

Strengthening self regulation and where additional steps could be required

4.1 A relatively effective self regulatory system could be designed if industry is a genuinely willing participant in such an enterprise. Critically, this would require industry to propose and implement a model which met the criteria of effective regulation described above, both in letter and in spirit.

4.2 There is clearly a relationship between the credibility of the self regulatory proposals presented and the need for measures which go beyond the ambit of self regulation. The more complete the former, the less need for the latter.

4.3 In delivering a workable model of regulation for the press, particularly in relation to areas relating to day to day operational effectiveness of the new body, significant progress could be made on a self regulatory basis:

a) in setting **regulatory objectives**, to capture the public purposes of regulation;

b) in establishing **transparent processes**, which is a matter for the regulatory body to determine, in line with principles of natural justice, and which do not require external prescription;

c) in relation to **funding**, where a model could be established to ensure that the providers of funding cannot influence the day to day decision making or overall strategy of the regulatory body;

d) in relation to **accessibility**, through establishing a system of complaints handling and appeals which is free at the point of use, which makes the outcomes of all decisions public and which publishes complaints data annually;

e) In relation to **investigations**[4], where the entity could hold powers to access information and powers to launch own initiative investigations. Such a model would give any new regulator powers commensurate with Ofcom's broadcasting powers (but not necessarily as strong as Ofcom's wider investigatory powers in relation to competition). This should include penalties for failure to cooperate with investigations. Ensuring powers of investigation are only available post publication would be consistent with preserving the independence of the press and rights of free expression; and

f) In relation to **sanctions and enforcement**[5], which have a critical role to play in creating an effective regime. A self regulatory regime could potentially confer powers to enforce sanctions, including:

[4] Any consideration of investigatory powers would have to be carefully balanced against the particular rights of the press. In particular, careful consideration would need to be given to the Article 10 rights of journalists to protect their confidential sources.

[5] We note that some parties have proposed contractual agreements as a potential enforcement mechanism. It is not clear to us that such contractual arrangements could ensure that information was provided. A further question would be the ability of regulated parties to terminate contracts in the event that they disagreed with regulatory decisions.

- Strong rules in relation to equal prominence apologies and corrections, with determination straightforwardly by the regulator, not as part of a process of negotiation with editors;
- proportionate but effective financial penalties; and
- full publication of decisions.

4.4 A self regulatory approach would need to have sufficient capacity and scale to ensure that each of these areas is delivered in a manner which is operationally effective in practice.

Each of these elements is central to establishing a successful self regulatory regime. In each case we believe it could be possible for a set of voluntary but binding rules to offer the basis of effective regulation, through an essentially self regulated model. However, they all rely on the successful establishment of three further core building blocks of effective regulation: membership, governance and accountability.

a) Membership

4.5 As we have stated to the Inquiry, we do not believe the broadcast licensing model is appropriate for the press. Even a simple authorisation regime, a model applied, for example, in the co-regulation of video on demand services which Ofcom oversees in the UK[6], is likely to meet with legitimate concerns in relation to the independence of the press and freedom of expression, given its proximity to a licensing type regime.

4.6 The central arguments against such an approach lie in the merits of a plural approach to media regulation and in retaining a distinct context for freedom of expression by the press.

4.7 Historically, the roots of broadcast licensing lie in spectrum scarcity and in the nature of radio and television. In order to provide a service, broadcasters needed to be allocated spectrum which then had to be protected from interference by other users. This required a licensing system[7]. Additionally, there is the intrinsic nature of the broadcast medium which is beamed into peoples' living rooms over the airwaves with an immediacy and visual impact which is arguably more powerful and more intrusive than other media. This is particularly relevant given the mass audience reach of both radio and television.

4.8 The broadcasting approach is different in nature to that of the press, where there has not been a licensing regime and where the regulatory code is both more limited in scope and does not have statutory backing. This means that freedom of expression for the press is qualified in a different and narrower way to broadcasting (although it is not an absolute right in either case)[8].

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[6] The Communications Act 2003 confers duties on Ofcom for the regulation of On Demand Programme Services and gives Ofcom power to delegate certain functions to an appropriate regulatory authority. Ofcom delegates responsibility to a co-regulator, ATVOD.

[7] Historically, the licence defined the right to use a given part of the spectrum and the right to have that use protected from interference. Both the allocation and the protection from interference are tasks fulfilled by a licensing authority (in the UK case, by Ofcom).

[8] In the UK, this approach has proven to be consistent with freedom of expression. Broadcasting regulatory codes place freedom of expression at their heart and broadcast regulation is under a legal obligation to adhere to the ECHR. Article 10 of the ECHR, which says everyone has the right to

4.9 This twin track approach has been reinforced over time by virtue of the general public developing a sophisticated understanding of what to expect in the broadcasting environment and what to expect in the press environment. These expectations are widely understood and well embedded.

4.10 This is reinforced by the difference in approach to the issue of impartiality. Licensed broadcasters must adhere to due impartiality rules, ensuring UK citizens have dedicated impartial news services. Conversely, the press are not subject to impartiality rules, allowing them to play a different role to broadcasters in relation to news provision and in particular the expression of opinion.

4.11 In our view, this plurality of approach is a strength of the UK system. It permits two subtly different approaches to co-exist and to offer distinct but complementary perspectives. In combination, they help support the diversity and richness of UK media, and in turn enhance the positive role the media is widely recognised as able to play in wider society.

4.12 In addition, there is a risk that a licensing regime for the press could be modified at a later date and runs the risk of interference by politicians in the freedom of the press. While such a risk exists for broadcasting, the incentives are limited because of impartiality regulation and because of the presence of a strong and independent statutory regulator. In contrast, the press deals more directly in opinion and influence, making the temptation for subsequent interference by politicians commensurately greater[9].

Promoting full relevant membership of a regulatory system for the press would be fundamental to establishing public trust, credibility and consistency.

4.13 It is likely that a self regulatory model for the press would need to focus on creating incentives to attract relevant industry players to join the regulatory scheme. Finding powerful membership incentives is very challenging, as has been widely acknowledged in the debate about the future regulation of the press. However, incentives in a self regulatory model could include:

- kitemarks reflecting freshly-stated industry standards;
- journalistic accreditation, although there are a number of difficult questions about how an accreditations system might work in practice, including defining a journalist in a digital environment. An accreditation system also could potentially have a restrictive effect on rights of free expression; and
- rights of mediation, adjudication and arbitration for participating members[10].

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freedom of expression, explicitly recognises that it does not prevent states from requiring the licensing of broadcasting.

[9] Equally, we note that broadcasting has been subject to the same risk for many years and that in our experience, at least since Ofcom's creation in 2004, there has been no attempt whatsoever to erode or infringe freedom of expression by attempting to extend the reach of legislation. However, one further merit of a plural system is to ensure that while one part of the media may in theory be subject to such a risk, there is a very significant alternative part of the media that is not so (or at least less so).

[10] A further option would be making it a condition that a publication was a member of the regulatory regime to participate in and use the services of the Audit Bureau of Circulations. The Audit Bureau of Circulations is a membership body whose Board includes advertisers, media agencies, media owners and trade bodies. We have not given consideration to the practicality of this proposal, although we believe it could require the Audit Bureau of Circulations to consent voluntarily to such a proposal.

4.14 The central consideration in relation to incentives would be how far choosing whether to participate materially affected, positively or negatively, the business in question? If the incentives were not of meaningful value, they would be unlikely to be successful.

4.15 It is important to seek to answer this question not only in the current context, but also to consider the likely effectiveness of such incentives at a future date, when circumstances might alter the perceived balance of costs and benefits for the relevant parties.

It could be difficult to establish voluntary self regulatory incentives which could reliably be expected to ensure full engagement on a continuing basis. An enabling statute could be needed to create sufficient incentives to ensure long-term and committed industry participation in regulation.

4.16 It is possible that, to create further incentives to membership, the new regulatory body could be recognised in statute so that incentives and minimum governance conditions for the regulatory body could be introduced[11]. The body could be built around a complaints handling model, with statutory underpinning to ensure that industry does engage with the new body[12]. These could include:

- statutory powers to operate a complaints handling process in which newspapers can choose to participate, either as a result of a received complaint or following an own initiative investigation;
- amending existing laws and procedures to give courts the power to penalise parties (by way of increased/decreased damages or increased/decreased costs) in legal cases where the party has not taken account of the complaints handling process offered by the new body[13];
- statutory changes to defamation laws to provide a new defence to any defamation action if the publication was fair and reasonable on a matter of public interest and the publisher could show compliance with the relevant code and the regulatory regime[14]; and
- a similar approach to privacy[15].

4.17 These should be in addition to the non-statutory incentives discussed above, to develop as strong a package of incentives as possible.

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[11] As per the Defamation Act 2009 in Ireland which recognises the Irish Press Council , sets out minimum requirements for the creation of the Press Council and creates incentives for publishers to join the Press Council, but the statute does not give the Press Council any statutory investigative or enforcement powers. It is a mechanism for maximising membership whilst at the same time maintaining a voluntary scheme.

[12] Whilst the incentives for most individuals to use a free at the point of use complaints resolution process would be significant because of the cost of court proceedings, there could be occasions where individuals want to pursue their claims through court. Whilst claimants should not be restricted from pursuing such claims, it is equitable that where they do not use the regulatory route first, they could risk being penalised with reduced damages or a limit to their cost recovery.

[13] Whilst Ofcom has the power to impose financial penalties on broadcast licensees, Ofcom does not have the power to award damages or costs to complainants. Ofcom's experience in fairness and privacy cases has not led us to believe that it is necessary to have such powers. It would inevitably lead to more litigation around Ofcom's decisions.

[14] As per the Press Council in Ireland. See section 26 Defamation Act 2009

[15] As suggested in the Media Regulation Roundtable submission to the Inquiry, 13 February 2012

4.18 We are aware of the suggestion that the VAT exemption could be made available only to those participating in regulation. We have not investigated this in detail, although we note that in its recent report on The Future of Investigative Journalism, the House of Lords Select Committee on Communications recommended consideration be given to whether this proposal would be legal under European Law.

4.19 Whether a package of incentives, taken together, is ultimately sufficient to ensure long-term full industry participation is ultimately a matter of judgment. However, it is not clear, if incentives are not sufficient, that there is any alternative other than a very limited, minimalist obligations regime, perhaps linked to a threshold such as turnover or some measure of audience/readership. This is undesirable for all the reasons noted above.

b) Independent governance

4.20 Governance structures must ensure that decisions are taken free from industry and political interference, and consistent with the principles of good corporate governance. Independent governance should be constructed to ensure that the regulatory body is protected from direct political or industry interference.

4.21 A new corporate governance framework would need to ensure clear strategic guidance for the regulator, the effective monitoring of management and clear accountability. This would require Board members to be able to act on a fully informed basis, in good faith, with due diligence and care in consideration of its public purposes and duties, taking into account the concerns of interested parties, but most fundamentally in the interests of the general public. It would require a formal and transparent Board nomination and election process. The Board would have to be able to exercise objective independent judgments on regulatory affairs.

4.22 When establishing this new framework, there are significant steps a self regulatory model could take:

- not having serving newspaper editors, management or proprietors on the Board or able to influence the Board or Executive. This reflects widespread practice in other regulatory bodies;

- the appointment process of the Chairman could be designed to ensure the selection is not controlled by industry. This could be through the establishment of an independent appointments panel with independent assessors to ensure an open and proper process. This should not be subject to any influence by those who are regulated;

- the configuration of a Board should be such that there is a majority of non-executive independent members on the Board and that there is a minority of executive Board members;

- the definition of independence should be that set out in the UK Corporate Governance Code; and

- consideration should be given to whether additional safeguards are required to ensure the credibility and independence of the Board, for example by ensuring fixed term appointments and/or by ensuring changes to governance arrangements cannot be made without the unanimous agreement of the Board.

4.23 In addition, it would be important that the new body had a strong understanding of the regulated businesses and a regular dialogue with them. It would be advisable to make provision for the representation of industry within the new framework, potentially through a formal Advisory Group of industry members, to assist the new body in its work.

However, because governance arrangements go to the heart of the legitimacy and authority of the new body, recognition in statute could be needed to establish the most important features of the new governance arrangements. This could act as an additional safeguard to help build public trust.

4.24 We believe that such arrangements could be set up in such a way as to ensure absolute independence, not only from industry but also from Government or politicians more generally. For example:

- Recognition in statute could include reference to basic structures and configurations for the Board and appointment processes (for example the process of appointment and the balance of the Board between non-executives and executives);
- key appointments could be subject to approval by either an independent appointments Panel, an independent commission of some form or an independent third party– thereby avoiding political or industry involvement; and
- make it clear that removal from key posts (outside fixed terms), once appointed, would not be possible except on very limited grounds (such as mental incapacity or criminal behaviour).

4.25 Establishing clear authoritative governance arrangements in statute, independent from both industry and politicians, could deliver an immediate check and balance into the effective operations of the new body. Statute would ensure that these arrangements were set and could not be amended without further primary legislation.

4.26 Recognition in statute for governance would also change the view of those appointed to the most senior posts about the source of their authority. It would be clear that their authority was embedded in law and not derived from industry and its representatives.

c) Accountability

4.27 In Ofcom's experience, periodic scrutiny by an independent third party is extremely important for the continued effective operation of regulatory regimes. Such scrutiny provides a clear point of review and assessment to examine the efficiency and effectiveness of the regime and allows adjustments to be made where weaknesses are identified.

4.28 Consideration could be given to both the conduct and scope of review, including whether it should cover all features of the model such as governance, funding, accessibility, transparency and the quality of decisions made by the regulator.

Consideration of the period of review would be important. In this case a wide ranging initial review of effectiveness could be required given the background to this Inquiry, probably within 3 years, to ensure that the effectiveness of the new regulatory regime could be verified.

4.29 This would be particularly important to establish public credibility in the light of the evidence before the Inquiry. It should also seek to prevent the need for further large scale inquiries in the future. After a comprehensive initial review, it could be possible to reduce the frequency or the scope of future reviews.

4.30 It would be possible for a self regulatory body to open itself up to voluntary audit and review by an independent assessor. However, whether this would be sufficiently independent in a self regulatory model could be questionable.

Recognising the remit and frequency of the periodic review in statute, including who should conduct it and to whom it would report, could provide an additional safeguard and provide a significant boost for any new system's ability to build public trust.

Summary

4.31 In summary, it is possible that, in some form, the principles of effective regulation could be achieved within a self regulatory, non-statutory model. Significant improvements towards more effective regulation could be made in all these areas without crossing into a statutory regime. However, this would require industry to participate in a binding system of regulation which would be capable of meeting the core principles of effective regulation, and to bring forward a model capable of passing this test.

4.32 There could be reservations in key areas about how commercial pressures could undermine the independence, effectiveness and credibility of the press regulator in the long term, particularly once the spotlight of public attention has diminished. Specific concerns could be:

- the risk of non-universal membership;
- whether governance arrangements are robust enough to secure and sustain public trust for a sustained period; and
- the ability to establish a strong, independent accountability mechanism to review periodically the new body's performance and thereby ensure that it was effective.

4.33 Depending on the efficacy of proposals brought forward for addressing such concerns in a self regulatory model, the greatest need for some form of recognition in statute would be in relation to securing sufficient incentives to promote universal membership, because a new regulatory body which does not bring all major industry players under its umbrella would be unlikely to be able to establish public credibility. We would also recommend consideration of similar recognition in statute of the principles of independent governance and periodic auditing of effectiveness.

4.34 In making these observations we note and recognise the risk that any statute in this area creates the possibility that, once in place, legislation could be amended at a future date in a way that could be to the detriment of the independence of the press and to freedom of expression.

Section 5

Establishing scope and jurisdiction in a changing digital media environment

5.1 A new regulatory body for the press would be faced with a changing media landscape in which all content companies (including newspapers and other news providers) are complementing traditional models of distribution, such as print and broadcast, with the new opportunities afforded by digital media, to reach consumers using the internet, at home and on the move.

5.2 Digital media mean providers no longer have to choose between being a dedicated provider of the written word or a dedicated provider of audiovisual material. Today's digital media are developing in a way which is blurring the lines of the past which separated, for example, the press from broadcasters.

5.3 Digital media also remove traditional barriers to mass communication, leading to a new range of online providers of news and current affairs, from commercial online newspapers to individual online bloggers.

5.4 Over the last decade, audiovisual regulation has had to contend with a similar challenge, as television has become available online and on demand. The regulatory response has been to start with consumer expectations about regulation and the consequence of that approach has been to establish a definition in legislation of 'TV like' services, for services which include TV like programmes, for which editorial responsibility can be established and where those services are made available for the public. Through handling scope appeals[16] in relation to our co- regulator ATVOD, Ofcom has begun to establish precedents on the interpretation and scope of this regulatory regime.

5.5 Therefore a new regulatory regime for the press would need to consider two questions:

- What would be the scope of press and 'press like' services to which the new regulatory regime applies?
- How would this be drawn so as to prevent undue overlap with the 'TV like' statutory definition we have today, as newspapers increasingly provide video rich material?

5.6 Consideration would need to be given to how a new body fitted into the wider developing regulatory landscape for digital media. A single cross media regulator would almost certainly be undesirable. However it would be important that different regulatory bodies work together to ensure that there are common and consistent principles applied across digital media. The aim should be to simplify where possible.

[16] Ofcom has responsibility for considering scope appeals in relation to ATVOD scope decisions. Ofcom has recently published a decision that the Sun Video section of The Sun website did not constitute an On-Demand Programme Service.
http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf

Section 6

Conclusions

6.1 In this paper, we have used Ofcom's experience of regulation to set out views on how the press could be regulated in a way that preserves their independence and the rights of free expression. This follows a request from Lord Justice Leveson to provide this input to the Inquiry.

6.2 The key conclusions of this paper are:

a) Determining the public purposes of regulation and ensuring independent governance would set the mandate of the new body. It would be important to create an organisational culture based on a clear understanding of objectives and the importance of the integrity of decision making.

b) There are ways in which a willing industry could provide an effective model of self regulation, including the setting of regulatory objectives; funding arrangements; establishing transparent processes; ensuring accessibility of a new system; investigations; enforcement and sanctions.

c) In the areas of membership and governance, there could be concerns about whether self regulation would be sufficient to develop a system with genuine legitimacy and capable of building public trust. A minimal enabling statute – or recognition in statute - could be necessary in these areas.

d) A periodic independent review of effectiveness could be important in ensuring continuing effectiveness and in delivering the accountability necessary to sustain public trust over time.

e) A new model of press regulation would have to be flexible enough to cope with the changing nature of digital media provision.

f) It should be acknowledged that legislation, once in place, could be amended, including potentially to the detriment of the press's independence and rights of free expression. This is a credible risk, although it is one that could be reduced to a degree by ensuring that there is no provision in primary legislation to enact secondary legislation.

6.3 Properly constituted, effective, independent self regulation could be the principal, or conceivably, even the sole basis of a new model of regulation. Such an approach might be supported by a clearly defined and early review of the effectiveness of the arrangements. This, in turn, might be backed by a clear intent to introduce an enabling statute if the self regulatory arrangements proved to be ineffective or inadequate.

6.4 An approach of this kind would require genuine confidence that the proposals for self regulation were sufficient to ensure an independent and effective model of press regulation which was capable of building and sustaining public trust.

6.5 Ultimately, the importance of public confidence in the press cannot be overstated. Confidence in a system can be undermined very quickly by the actions of individual commercial enterprises acting against the interests of the industry as a whole. An effective regulatory mechanism which builds public trust is in the interest of the press as well as the public.