

Culture, Media and Sport Committee

Submission to DCMS consultation on commencement of Section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry

Introduction

1. From 2007 onwards, this Committee has repeatedly expressed concerns about the adequacy of the system of press regulation in this country, particularly in its failure to protect the privacy of individuals and to provide a robust system of adjudication and settlement of complaints about inaccuracy, unfairness and intrusion in newspaper and magazine articles. Since Lord Justice Leveson's report in November 2012, we and our predecessor Committee have kept a watching brief on how his recommendations were being implemented. We therefore agreed to contribute to the Secretary of State's consultation on commencement of Section 40 of the Crime and Courts Act 2013 (i.e. the courts cost incentives) and the second part of the Leveson Inquiry. This submission represents our view of what needs to happen now.

Background

2. It is over four years since the publication of the Leveson Report, and there is yet to be a fully functional system of self-regulation of the press, which is credible both to news publishers and the wider public.
3. On 18 March 2013, in an emergency debate in the House of Commons, the then Prime Minister announced that the three main political parties had reached agreement on a Royal Charter that would help deliver "a new system of independent and robust press regulation" in the United Kingdom.¹
4. The draft Royal Charter set down criteria against which any regulatory body established by the press should be measured (to ensure independence, robustness, transparency, accessibility and so on) and outlined the process of establishing and running a body that would be charged with assessing any regulatory body applying for recognition. A Crime and Courts Bill was before Parliament at this time and cross-Party amendments were tabled and made to the Bill to allow courts to award costs or exemplary or aggravated damages against news publishers in certain circumstances, including provisions that the publisher's membership of an approved regulator be taken into account as a

¹ HC Deb, 18 March 2013, col 632.

mitigating factor. After rejection by the Privy Council of the press industry's own application for a Royal Charter, on 30 October 2013 a cross-Party Charter received the Royal Seal. It was understood that the cost provisions in the 2013 Act would not take effect until an approved regulator was in place.²

Independent self-regulation and Leveson criteria

5. The Press Complaints Commission (PCC) continued in existence until the Independent Press Standards Organisation (Ipsos) was launched in September 2014. One of the major changes from the PCC to Ipsos is the contractual relationship that exists between the regulator and the regulated. Ipsos also has the power to launch standards investigations in specific instances and, at the end of an investigation, it has the power to issue fines of up to £1 million. Since Ipsos was established, there have been no standards investigations, nor has it levied a fine. Arguably there has been no meaningful evidence to show whether or not the new body is respected by the public. Circumstances have meant that it has acted more as a mediator and adjudicator of complaints than a regulator of standards. A fundamental flaw has been the industry's refusal so far to allow Ipsos to introduce a compulsory, low cost system of arbitration.
6. As an alternative to Ipsos, the IMPRESS project was set up with the intention of establishing a regulator that would aim to be fully compliant with Lord Justice Leveson's recommendations. And after a couple years in incubation, in October 2016 IMPRESS was recognised by the Press Recognition Panel under the Royal Charter process. So far it has attracted very few members and those that have subscribed appear to be relatively small news publishers. IMPRESS's recognition has come under some criticism and its independence has been questioned as almost all its funding comes from Max Mosley, through charitable, family trusts. The Press Recognition Panel, however, has satisfied itself of IMPRESS's independence and recognised it to be Leveson-compliant.
7. In contrast, IPSO's membership comprises about 90% of the national newspaper industry, including major magazine publishers and the majority of regional and local newspapers. However, significantly *The Guardian*, *Financial Times*, *Independent* and *Evening Standard* titles have not joined and, as yet, show no inclination to join either Ipsos or IMPRESS. Since Leveson, the advent of online news sources and social media are changing the way people consume news. Online news providers such as BuzzFeed and the Huffington Post have not signed up to a regulator. There is a wider question, given the ways news is consumed, of how the public can be assured of the accuracy of what they are reading, and how

² S 34-42 of the Crime and Courts Act 2013

any inaccuracies can be challenged. There also needs to be greater consideration of how self-regulation of the media works in the online world, and in particular how to inform and alert readers about sources of fake news.

8. A key criterion stipulated by Leveson for a system to be effective is that it should include all major publishers of news (if not all publishers of newspapers and magazines). Leveson was clear that he hoped that a voluntary system of independent self-regulation could be achieved, but that if some or all of the industry were not willing to participate the Government should be ready to consider establishing a statutory backstop regulator. Unambiguously, Leveson refused to recommend “another last chance saloon for the press”. It is now over four years since publication of his recommendations.
9. While Ipso maintains that it is an improvement on the old Press Complaints Commission, it plainly does not meet all the requirements set down in the Royal Charter and falls short of being Leveson-compliant. In November 2013, prior to Ipso becoming operational, the Media Standards Trust assessed the plans for Ipso against the Leveson recommendations. It concluded that “at almost every level the regulator would be dependent on the industry”. It noted that the Regulatory Funding Company (the industry funding body) had a substantial role not just in funding but in appointments, regulations, investigations, sanctions, arbitration, and voting. The Media Standards Trust questioned why the funding body should have any functions beyond calculating, gathering and distributing membership fees.
10. Nevertheless, following over a year of operation, Sir Joseph Pilling³ concluded that Ipso largely complied with Leveson in the main areas around effectiveness and independence. However, he said that it failed to comply with Leveson in providing a low cost arbitration system for complaints. Sir Joseph set out several recommendations to strengthen Ipso’s system of handling complaints and regulation. We consider some of these below.
11. Sir Alan Moses, Chairman of Ipso, has said that Ipso was set up on the basis that it would not be seeking recognition [under the Charter] and its Articles of Association prevented it from doing so. Ipso believes that after a suitable period it should be judged on its performance against the Leveson criteria for independent regulation of the press and not against the Charter. It is a matter of dispute as to whether any regulator needs to meet every detail of the Royal Charter’s requirements, but introducing a compulsory system of low-cost

³ Sir Joseph Pilling was appointed as an external reviewer of IPSO independence and effectiveness by Ipso’s appointment panel. His review was published in October 2016.

arbitration was regarded as absolutely essential to the type of regulatory system set out by Leveson.⁴ Yet Sir Alan Moses has said that the press hitherto had shown deep reluctance to join any regulator which was going to be recognised under the Charter and Recognition Panel because it feared compulsory arbitration.

12. Whether Ipso offers arbitration will be decided following a year's running of a pilot and following agreement of the industry funding body. In any event, Ipso has indicated that the scheme would be optional for publishers, meaning they could 'cherry-pick' which complaints they chose to take to arbitration. At the time of writing we understand no claimants have used Ipso's pilot arbitration scheme.
13. Clearly, the recognition of IMPRESS as an approved regulator by the PRP is a trigger point as to whether Section 40 should now be commenced, as had been the intention when the Crime and Courts Bill was amended by an overwhelming majority in the House in 2013.⁵ This was in line with Leveson's recommendation that there be cost incentives that give news publishers within a recognised system of self-regulation more protection, and leave those outside more exposed.⁶ In England and Wales, the measures to incentivise recognition are set out in the 2013 Act; it is up to the Scottish Government and Northern Ireland Executive to consider what further action is required to bring about improved standards as contemplated by the Charter in their nations.
14. The Press Recognition Panel noted in its first Annual Report to Parliament that a number of respondents to its consultation had directly linked the small number of publishers that had so far moved towards the recognition system in England and Wales with the fact that Section 40 has not been commenced.⁷ The fact that Section 40 has not been commenced has meant that publishers have not had the strong incentive to join a recognised regulator, giving the public access to the independent, low-cost arbitration envisaged by Leveson.
15. In response to the Secretary of State's consultation, there was a high-profile campaign by the press protesting over the Royal Charter process, which they argued was the imposition of "state-backed" regulation. Some of the arguments put forward were, in our view, unconvincing and misleading, not least those concerning the consequences of a system of compulsory arbitration. For

⁴ Launching "a fair, quick and inexpensive" arbitration scheme [free for claimants] for settling civil legal complaints was one of the key recommendations to arise from Leveson.

⁵ The amendments were passed by 530 votes to 13.

⁶ See Leveson's recommendation 74.

⁷ *Press Recognition Panel, Annual report on the recognition system*, October 2016, p 25

example, in relation to the financial impact, mandatory arbitration would have on local and regional publishers, there was no acknowledgement or acceptance that the final Royal Charter explicitly dealt with the issue. The Charter allows the Recognition Panel to decide whether the requirement to provide such an arbitral process could cause serious financial harm to local and regional publishers and if it were likely to, these publishers could be allowed to 'opt out' of the process without this resulting in the withdrawal of the recognition from the regulator.⁸ Moreover, the press portrayed local and regional publishers as being uniformly vulnerable small businesses, whereas the majority of the local press is owned and run by the national newspaper groups.

16. In addition, there was focus on the alleged chilling effect on investigative journalism that full commencement of Section 40 could have. It has been argued that enabling complainants to initiate court actions against publishers without any fear of financial consequence if proven to be baseless, could have a seriously detrimental effect on journalists and investigative journalism. Section 40 does not require judges always to award costs against the defence, but the provision does establish a strong presumption of an award of costs against a publisher who does not subscribe to a recognised regulator, with judges able to use their discretion to waive this only in special circumstances of a compelling nature, possibly spurious and vexatious cases. Nevertheless, if Section 40 was commenced there might be cases where costs were awarded against a successful defendant because they had failed to provide the complainant access to a recognised process of arbitration.
17. That would only be the case, though, where publishers have chosen not to join a recognised, independent, self-regulatory body. On this issue, too, the high-profile press campaign has also not set out the benefits which commencement of Section 40 would have in protecting publishers, editors and journalists if they were part of such a body, and therefore reducing the chilling effect of high court costs on investigative journalism. In January 2017, during the consultation and following the one-sided press campaign, the Press Recognition Panel issued a factsheet 'Myths and facts about the recognition system' addressing this issue, the benefits of low-cost arbitration and the safeguards in the system for local and regional publishers.
18. The press have not chosen to focus on the obvious advantages that partial commencement of Section 40 would provide (i.e. Section 40(2)). Partial commencement would afford further incentives for publishers to join a recognised self-regulator in that it would mean those which did sign up would be protected from the adverse costs arising from legal action brought by powerful

⁸ Royal Charter on self-regulation of the press, Schedule 2, Clause 7(c)

claimants, such as state actors or wealthy interests. Being part of a recognised regulator would provide robust legal protections to journalists and avoid them having to shy away from serious investigations over prominent people or organisations. For those publishers choosing to join, it would counter-act the chilling effect already felt, particularly by local newspapers with fewer resources to defend expensive legal claims.

What should happen now?

- 19. It appears to us that the press finds itself again confident of resisting substantial change four years after the Leveson Inquiry. The industry has taken some steps to be seen to be subjecting itself to tougher checks and balances but these still have not been tested so it is unclear whether the public has any greater protection or recourse to redress than under the PCC. By comparison, it is not clear to us why broadcasters should have to adhere to the Broadcasters' Code and regulation by Ofcom but the press be allowed to define their own terms vis-a-vis the public. While maximum press freedom is our default position, we believe that the industry should now be set a definite deadline by which to become Leveson compliant.**
- 20. In order to inspire public confidence in the previous Government's commitment to the past victims of press abuse to deliver a new system of independent and robust press regulation, the Government must now set out a clear route for Ipso and the wider industry to become compliant with Leveson's recommendations.**
- 21. We do not believe that Section 40 should be repealed now. Without secure legal and financial incentives to participate, any system of regulation is likely to falter.**
- 22. Several Members of the Committee are in favour of bringing Section 40 as a whole into force immediately. All of us are of the view that the press have been allowed enough time to create a fully Leveson-compliant regulator; it has chosen not to do so. We all consider there is a significant advantage in partial commencement of Section 40(2) now, which would allow publications a valuable opportunity to legal protections to bolster their investigative journalism if they sign up to an approved regulator. This would be a time-limited concession, to enable the press to create a fully Leveson compliant regulator—for instance, by reforming Ipso, if its members decided not to join another body.**

23. If Ipso itself were to fall short of what is expected of it under Leveson, the Committee would support the full commencement of Section 40 in one year's time.
24. If it is indeed the case that acceptance of the Royal Charter is an anathema to significant parts of the press, then the industry might be offered an alternative route to subscribing to a system of low-cost arbitration which may be one that is not provided by a regulator approved under the Royal Charter. The Government should explore how and whether this might be possible in the context of the Arbitration Act 1996.⁹ If the press is successful in establishing such a system, and was also able to reform Ipso to bring it in to line with the recommendations on press regulation in the Leveson Report, the Government could at that time consider repealing part (3) of Section 40.

Strengthening Ipso

Financial independence

25. A positive development since Ipso's creation is the agreement with its funding body of a commitment to a specified budget for a four-year period. We understand this was agreed between Ipso's Chief Executive and the Secretary of the Regulatory Funding Body. To ensure this agreement continues beyond this cycle, it will be essential that this financial negotiation is part of the new contractual arrangement with the industry beyond 2019. **The provision for this financial security needs to be codified in Ipso's Articles of Association. This would ensure Ipso's financial independence.**
26. Ipso has the power to launch standards investigations and to levy fines of up to £1 million. Sir Joseph Pilling did not see it as a failure that Ipso had yet to launch a probe. He thought it would be a mistake to launch an investigation on flimsy grounds. Leveson recommended that the regulator should have the authority to examine issues on its own initiative and have powers to carry out investigations both into suspected serious or systemic breaches of the code and failures to comply with the directions of the Regulator's Board. However, Ipso's Articles of Association require a tougher test in that a breach must be serious and systemic. A concern we have with Ipso's current arrangements, is that it only has £100,000 in its budget to conduct an investigation. Sir Joseph Pilling was unconcerned by

⁹ The provisions of the Arbitration Act 1996 were founded on the following principles: (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by the Act the court should not intervene except as set out in the 1996 Act.

this and understood that the budget would be increased following the imposition of a fine which would be paid into an ‘investigations fund’. However, Leveson himself in considering arrangements for funding investigations, thought that an initial enforcement fund of £100,000 to cover the costs of the investigations and compliance work would be insufficient. **We believe that Ipso should have access to a more substantial fund to enable it to conduct an investigation if necessary, and not be beholden to the Regulatory Funding Body should it need to act swiftly to conduct an inquiry of a substantial nature.**

Appeals against Ipso’s decisions

27. Currently, Ipso’s rulings can be challenged only on process grounds (rather than substance). Pilling recommended that this rule should be changed, meaning that complainants can seek a review of an Ipso ruling because they think it is wrong (as is the case with the Advertising Standards Authority). Ipso has indicated in its response to Pilling that this would be a process it would seek to put to industry in 2019 as part of the next contractual negotiation. **We believe it should be sooner.**

Arbitration

28. We have set out that the need for compulsory arbitration is a fundamental requirement of Leveson. As things stand, Ipso has only introduced a pilot arbitration scheme and has indicated no likelihood that the industry would accept this on a mandatory basis. There have been no claimants so far who have chosen to use the pilot scheme. Claimants must pay £300 plus VAT for a preliminary ruling and a fee of £2,500 plus VAT to continue to a final ruling. Pilling said, should few or no cases proceed to arbitration under the pilot scheme, Ipso should consider lowering the fees. Ipso itself has indicated one reason that there has been a lack of interest in the arbitration scheme is the availability of conditional fee arrangements for defamation and privacy civil proceedings in the courts. Regardless of this, **we believe the costs of the pilot scheme should be reduced to meet the vision of low cost arbitration set out by Leveson, where complainants would face minimal fees for participation in the scheme.**
29. One area of work that Ipso has undertaken is promotion of its existence and powers in relation to dealing with the press. It has undertaken ‘road-shows’ and similar public events to advertise its work. **We believe that this type of activity needs to be expanded so that the general public are familiar with its position as a regulator of the press and the limit of its powers. It will be necessary for Ipso to have access to an appropriate level of funding to ensure its publicity campaign is extensive enough to ensure awareness of its services is sufficiently wide.** For example, the newspaper owners could fund Ipso placing a regular

series of prominent adverts, in their titles, to inform the public about the regulator's work and how to make a complaint.

Leveson part 2

30. The Leveson inquiry was established in response to a widespread perception that the press was not—and perhaps was incapable of—regulating itself. From 2002 onwards, and in part as a result of an investigation by the Information Commissioner, more and more was known about the unethical and sometimes criminal behaviour of individuals and agencies in obtaining personal information on behalf of the press. The Press Complaints Commission failed to investigate what were blatant breaches of the Editors' Code. By the time the then Prime Minister announced an inquiry into the culture, practices and ethics of the press, the police were already pursuing criminal investigations. It was therefore decided that the aspects of the Inquiry dealing with relationships between the press and public officials should be addressed separately, after the criminal trials were finished.
31. Several members of this Committee would like to see Leveson part 2 begin immediately, as the previous Government promised. However, the terms of reference for part 2 were set out by the Prime Minister at the start of the process and therefore take no account of the fact that several areas have already been covered by the first part of the Inquiry, the police investigations and criminal trials.
32. Clearly, there were significant costs associated with carrying out part 1 of Leveson and, indeed, the criminal trials themselves. **We believe it would be wasteful to go again over the ground dealt with by Lord Justice Leveson and the courts. However, given that the behaviour of the press still causes concern, we consider that the Government should continue with part 2 of this inquiry to satisfy the victims that such behaviours by the press, public officials, the police and others is fully understood and not repeated. It is also crucial for such an inquiry to clarify the issue of what constitutes 'the public interest' for both the press and those providing the press with information. We therefore recommend that the Government publish revised terms of reference for completion of this Inquiry.**