

# Response to the Government Consultation on the Leveson Inquiry and its Implementation

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## Executive Summary

1. We believe that the Government should commence section 40 of the Crime and Courts Act 2013 in full because:
  - Non-commencement by the Government of all or part of s40 is likely to be unlawful.
  - A decision by the Government to keep all or part of s40 'under review' would expose the Government to a conflict of interests and would compromise the freedom of the press from direct political oversight.
  - IMPRESS and the publishers which have joined IMPRESS had a legitimate expectation that s40 would be commenced in full.
  - Non-commencement or repeal of s40 would be a betrayal of the victims of press abuse and intrusion, who also had a legitimate expectation that the post-Leveson framework would be brought into full effect by the Government.
  - S40 was designed by Parliament as an integral part of the post-Leveson framework for independent and effective regulation of the press and this entire framework is compromised in the absence of s40.
  - The PRP may be jeopardised by the non-commencement or repeal of s40, which in turn may jeopardise the continuing ability of IMPRESS to function as a recognised regulator.
  - So the non-commencement or repeal of s40 may leave IPSO as the only option for publishers, journalists and the public.
  - This would not provide the public with a satisfactory standard of independent and effective press regulation.
  - Nor would it provide the public with access to justice, as IPSO's pilot arbitration scheme is optional and allows publishers to cherry-pick cases.
  - Non-commencement of s40 would also deprive the public of access to justice through the courts, because of the high cost of litigation.
  - In the absence of competition from IMPRESS, IPSO will be under no pressure to make any meaningful reforms to its governance or operations.
  - We cannot judge s40 or the wider post-Leveson framework until this framework is fully operational.
  - Any industry will inevitably lobby against independent and effective regulation. The Government should not be swayed by this lobbying but should commission an independent longitudinal evaluation of the post-Leveson framework when it is fully operational.
2. We believe that any concerns about s40 are misplaced and that these costs-shifting provisions strike an appropriate balance between the rights of claimants, the rights of publishers and the public interest generally. In particular, we note that s40 has the potential to:

- Incentivise independent and effective press regulation.
  - Alleviate the chilling effect of libel threats on investigative journalism.
  - Enhance access to justice for both claimants and defendants in relevant media law cases.
- 3.** We believe that whilst s40 is well-designed to serve its purpose as an incentive for publishers to subscribe to independent and effective regulation, it should not be judged on this basis alone, but should also be judged on the basis of its ability to alleviate the chilling effect of libel threats on investigative journalism and on its ability to enhance access to justice for claimants and defendants in relevant media law claims. It will only be possible to form a valid assessment of s40's strengths in these respects after the post-Leveson framework has been fully operational for some time. Therefore, we encourage the Government to commence s40 in full and put in place arrangements for an independent and longitudinal evaluation of the post-Leveson framework.

## The commencement of section 40

4. Question 1 of the Consultation reads as follows:

*Which of the following statements do you agree with: (a) Government should not commence any of section 40 now, but keep it under review and on the statute book; (b) Government should fully commence section 40 now; (c) Government should ask Parliament to repeal all of section 40 now; (d) If Government does not fully commence section 40 now, Government should partially commence section 40, and keep under review those elements that apply to publishers outside a recognised regulator; (e) If Government does not fully commence section 40 now, Government should partially commence section 40, and ask Parliament to repeal those elements that apply to publishers outside a recognised regulator.*

5. In this section, we assess the merits of each of these options in turn.

### **Option (a): Government should not commence any of section 40 now, but keep it under review and on the statute book**

6. Like other measures in the Crime and Courts Act 2013 ('the Act'), section 40 ('s40') requires delegated legislation to be proposed by a minister using powers under s.61(2) of the Act before it comes into force. Ministers have a certain discretion over *when* to use such powers to introduce delegated legislation of this kind, but not *whether* to introduce the legislation.<sup>1</sup> Any delay in introducing delegated legislation must be for a legally sound reason that does not undermine Parliament's intention in passing the primary legislation.
7. It may therefore be unlawful for the Government to take an executive decision not to commence section 40 now but instead to keep it 'under review', as this would clearly undermine Parliament's intention in passing the primary legislation.
8. Furthermore, a continuing 'review' by the Government of press regulation would constitute an unwarranted interference with press freedom and would expose the Government to the risk of a real or perceived conflict of interests in its dealings with the press. For instance, the Government might be thought to receive positive coverage in return for continuing non-commencement of s40; or might be thought to be threatened with negative coverage in return for its commencement. The lack of clarity in this Consultation about the nature of the proposed 'review' process only compounds this risk.

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<sup>1</sup> See *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others* [1995] 2 A.C. 513 ('*Fire Brigades Union*').

9. A continuing review of s40 would create profound regulatory uncertainty, which would negatively affect self-regulatory bodies for the press, relevant news publishers and the public in general.
10. Any self-regulatory body which has been recognised as independent and effective under the Royal Charter on Self-Regulation of the Press ('the Charter') would be particularly seriously affected. A body such as IMPRESS was established and sought recognition with the legitimate expectation that s40 would be commenced in full.
11. Likewise, any publishers which chose to subscribe to such a body would also be seriously affected. They, too, had a legitimate expectation that s40 would be commenced in full at such time as IMPRESS achieved recognition under the Charter, and made a financial and contractual commitment to IMPRESS on this basis.

#### **Option (b): Government should fully commence section 40 now**

12. Parliament anticipated that the provisions set out in s40 would form part of a coherent regulatory framework alongside related provisions in the Charter and section 96 of the Enterprise and Regulatory Reform Act 2013. Together, these provisions constitute the post-Leveson framework for independent self-regulation of the press, which was designed by the Government in dialogue with the Opposition, the newspaper industry and other stakeholders, in response to the Leveson recommendations (See Appendix A, below). The Government is still formally committed to this framework, and has not included any questions about other elements of the framework in this consultation.
13. In a speech to the Society of Editors on 19 October 2015, the then Secretary of State for Culture, Media and Sport, Rt. Hon John Whittingdale MP, confirmed that he wanted to see the press comply with the form of regulation recommended by Lord Justice Leveson, as distilled in the Charter and overseen by the Press Recognition Panel (PRP):

*'I would like to see the press bring themselves within the Royal Charter's scheme of recognition. What is key is that we should have a regulator that is tough, independent, fully subscribed and that commands confidence.'*<sup>2</sup>

14. As recommended by Lord Justice Leveson, there are legal incentives for news publishers to join any self-regulatory body ('a regulator') which is recognised

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<sup>2</sup> See <https://www.gov.uk/government/speeches/culture-secretary-keynote-to-society-of-editors>, retrieved 25 November 2016.

under the Charter. These incentives are designed to ensure that, in the words of the Secretary of State, we have ‘a regulator that is tough, independent, fully subscribed and that commands confidence.’ Of course, it is impossible for any incentive to *guarantee* that a regulator is fully subscribed. That would only be possible under a scheme of mandatory regulation. Instead, the incentives are designed to *encourage* relevant news publishers, as defined in s41 of the Act, to subscribe to a recognised regulator.

**15.** The incentives relating to exemplary damages, set out in ss34-39 of the Act, came into force on 3 November 2015. The incentives relating to costs-shifting, set out in s40, are subject to a commencement order by the Secretary of State.

**16.** John Whittingdale told the Society of Editors on 19 October 2015 that he was ‘not convinced the time is right for the introduction of these costs provisions.’

*‘Given the changes under way within the industry, the introduction of the new exemplary damages provisions, and the pressures on the industry, I question whether this additional step, now, will be positive and will lead to the changes I want to see’.*

**17.** In response to an invitation from John Whittingdale, IMPRESS made a submission to the Department for Culture, Media and Sport on 11 December 2015, which addressed his concerns in relation to the costs provisions set out in s40 of the Act.

**18.** However, the Secretary of State continued to defer the commencement of s40. On 1 November 2016, his successor in office, Rt. Hon Karen Bradley MP, published a consultation on the Leveson Inquiry and its implementation (‘the Consultation’), which sets out a number of questions relating to s40 and Part Two of the Leveson Inquiry.

**19.** We have written to the Secretary of State to ask for sight of the ‘representations’ made to the Government which are cited in the Consultation paper. This request has not been met, which has hampered our ability in this submission to address any points raised in those representations which may bear on the Secretary of State’s decision-making process.

**20.** In this Consultation, the Government appears to suggest, as the former Secretary of State did in his speech to the Society of Editors, that the post-Leveson framework can survive in the absence of meaningful incentives for membership.

**21.** However, the oversight process embodied by the Charter and the incentives set out in the Act are interdependent and mutually reinforcing. The two aspects of

the post-Leveson framework – oversight by the PRP and incentives in relation to costs-shifting and exemplary damages – cannot be uncoupled without risking the coherence of the entire scheme.

- 22.** It is therefore impossible to assess the effectiveness of this framework unless and until these incentives have been commenced in full and given some time to take effect. Whilst it may be appropriate for the Government to keep the situation under review *post-commencement*, it makes no sense for the Government to keep the situation under review *pre-commencement*. In the absence of the complete post-Leveson framework, little has changed in relation to press regulation and access to justice in relation to media litigation – the two issues which s40 was designed to address (see below: ‘The purpose of section 40’).
- 23.** Any industry which has set its face against independent and effective regulation will inevitably lobby against incentives which are designed to strengthen that regulatory framework. However, in the absence of hard evidence one way or the other, it is impossible to assess the value of the press industry’s contribution to this debate. Only by commencing s40 in full can we discover whether any concerns about its negative impact on the press industry (see below: ‘The impact of section 40’) are justified, ideally through an independent longitudinal study. If it transpires, after such an independent review, that s40 does not achieve its desired objectives in relation to independent and effective regulation and access to justice, then the Government will be able to take appropriate action.
- 24.** We note that the Press Recognition Panel (PRP), an independent public body which was established precisely in order to separate questions of press regulation from political decision-making, has called publicly for the full commencement of s40:

*‘In England and Wales, the measures to incentivise recognition set out in Section 40 of the CCA 2013 should be commenced, and the Scottish Government and Northern Ireland Executive should consider what further action is required to bring about success as contemplated by the Charter.’<sup>3</sup>*

- 25.** The PRP has also stated that should s40 not be fully commenced, for whatever reason, then the Government must consider how else to deliver the objectives which underlie s40. We concur wholeheartedly with this recommendation and note with some surprise that in its consultation paper the Government did not refer to the PRP’s considered views.

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<sup>3</sup> See Press Recognition Panel, ‘Annual Report on the Recognition System’ (London: 2016), available at: <http://pressrecognitionpanel.org.uk/wp-content/uploads/2016/10/PRP-Annual-Report-on-the-Recognition-System-1.pdf>, retrieved 6 December 2016.

**26.** If the Government does commit to the commencement of s40 in full, we believe it would be reasonable to set a clear timetable for commencement. Some publishers, knowing that s40 is imminent, may wish to apply to join IMPRESS, to reform IPSO such that it becomes capable of recognition, or to form another regulator which is capable of recognition under the Charter, and may reasonably require a period of time to take the appropriate steps.

**Option (c): Government should ask Parliament to repeal all of section 40 now**

**27.** Whilst Parliament is sovereign, and of course free at any time to repeal all or part of s40, we do not believe that this option would serve the public interest as there is no prospect that the objectives underlying s40 (see below: 'The purpose of section 40') would be achieved if s40 were repealed.

**28.** The repeal of s40 would mark a sorry end to the process of reform which began with sincere commitments to change on the part of politicians and news publishers. It would mark, in particular, a betrayal of promises which were made at the time of the Leveson Inquiry by the Prime Minister and other ministers in the current Government to the victims of press abuse and intrusion. Such a retreat would exacerbate public mistrust in Government promises, which cannot contribute to a healthy democracy.

**29.** The repeal of s40 would remove any prospect of independent and effective press regulation. It would leave the dominant publishers free to oversee IPSO, the regulator they ultimately control, entirely as they see fit and would replicate the system of regulation which failed so dramatically in the past. This is not the fault of any of the staff or Board members of IPSO, but a reflection, based on overwhelming historical evidence, of the fundamental flaws of any system of regulation which is ultimately controlled by the industry being regulated, where that industry has no market-based incentive for high standards.

**30.** One practical effect of repeal would be to jeopardise the PRP's security of funding. In this way, repeal of s40 would clearly undermine the wider framework which the Government has put in place to ensure independent and effective regulation of the press. This may be desired by some, but it is not the subject of the present consultation and is clearly not in the public interest, for reasons which were exhaustively rehearsed in the course of the Leveson Inquiry, and which were the subject of consensus thereafter.

**31.** IMPRESS has been established in order to meet the public need and demand for independent and effective press regulation. It is fundamental for this to succeed that IMPRESS should be held accountable to transparent standards by

an independent and impartial body such as the PRP. In the absence of any such oversight mechanism, IMPRESS's purpose would be significantly undermined.

- 32.** Such an existential threat to IMPRESS would threaten IPSO's principal competitor and potentially remove choice from the regulatory market. The development of IMPRESS since 2013 has clearly led to some reforms on the part of IPSO, such as the decision to launch a pilot arbitration scheme; to introduce terms of appointment to the Editors' Code of Practice Committee; to appoint a reviewer of IPSO's operations; and to launch a consultation on the Editors' Code of Practice. It is reasonable to believe that these reforms would not have taken place had IPSO not faced regulatory competition from IMPRESS. Therefore, the repeal of s40 would have a chain of consequences across the entire landscape which run quite contrary to the Government's stated commitment to independent and effective press regulation and access to justice for the victims of press abuse.
- 33.** Repeal of s40 would leave victims of abuse by news publishers which subscribe to IPSO with no other option than to use IPSO's complaints-handling procedures or to risk the cost of litigation. IPSO's arbitration scheme is entirely voluntary for publishers and there is no reason to believe that a publisher would adopt it in the event that a claimant has a credible claim. Rational economic behaviour, in the form of so-called 'cherry picking' of suitable cases, suggests that most large publishers would rather expose claimants to the cost and uncertainty of litigation through the courts – where their comparative wealth gives them the upper hand – than arbitrate – where the playing field is levelled.
- 34.** There has been some suggestion that IPSO's pilot arbitration scheme may be 'approved' in some way other than through the formal recognition process set out in the Royal Charter. It is impossible at present to have any confidence in such an arrangement. It is not for Parliament or the Government to assess the details of any regulator's arbitration scheme. The process for this assessment is set out clearly in the Charter and has been followed scrupulously by the PRP. No other body exists which is constituted or equipped to perform this role.
- 35.** Furthermore, there is no reason to have any confidence that IPSO's arbitration scheme is likely to be reformed in the interests of claimants. In the period immediately following the publication of the Leveson Report, Lord Black stated confidently that Leveson's recommendations in relation to arbitration were being implemented: 'We are also taking forward urgently the recommendations from Lord Justice Leveson on the provision of an arbitral arm to the new regulator.'<sup>4</sup>

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<sup>4</sup> Guy Black, 13 December 2012. It later became clear that, in fact, the Independent Press Standards Organisation (IPSO), which was formed by Lord Black, Lord Hunt and other senior figures within the newspaper industry, did not in fact meet Leveson's

- 36.** However, this commitment to arbitration has not been fulfilled. Participation in IPSO's pilot arbitration scheme is entirely optional for publishers, and the scheme is geared against prospective claimants, who are exposed to a significant costs risk. There is no reason to have any confidence that this scheme would achieve the objectives of the post-Leveson framework. Furthermore, the recalcitrance of certain dominant newspaper publishers gives no reason to have any confidence that IPSO is likely to amend this scheme so as to achieve these objectives.
- 37.** The Regulatory Funding Company (RFC), which funds and oversees IPSO, has entirely rejected the post-Leveson framework. The RFC will prevent IPSO from seeking recognition under the Charter and will thereby prevent IPSO from being held properly accountable. If IPSO were the only press regulator, the aim of Government and Parliament to see independent and effective regulation would remain unfulfilled.
- 38.** Currently, only IMPRESS gives news publishers and the public the prospect of enjoying the benefits of independent self-regulation. However, in the absence of incentives for publishers to subscribe to a recognised regulator, or for claimants to pursue arbitration rather than litigation, the post-Leveson framework is incomplete, and – arguably – fatally flawed. News publishers will continue to be chilled by legal threats. And individual claimants will suffer from a lack of access to justice. Repeal of s40 would take us back where we started.

**Option (d): Government should partially commence section 40, and keep under review those elements that apply to publishers outside a recognised regulator**

- 39.** As with option (a) (above), option (d) would involve the Government in an executive decision not to commence a substantive part of primary legislation. It would also give the Government a continuing oversight role in relation to the press and its regulation which – for the reasons outlined above – is unlikely to serve the public interest.
- 40.** This option would create continued uncertainty which would undermine the Government's stated objectives in relation to press regulation.
- 41.** Whilst partial commencement might allow an approved regulator such as IMPRESS to attract publishers who seek legal protections under s40, this is

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recommendations in this respect. The contract between IPSO and its member publishers states in black and white that publishers 'will not be obliged to participate in the Arbitration Service.'

unlikely to affect the position of some of the largest publishers, who have turned their backs on independent and effective regulation. It would thereby repeat the problems set out in relation to option (c) above.

42. Furthermore, partial commencement would do nothing to meet the needs of victims of press abuse who seek access to justice, or the need of the public for journalism produced according to transparent and independently regulated standards.

**Option (e): Government should partially commence section 40, and ask Parliament to repeal those elements that apply to publishers outside a recognised regulator**

43. This option suffers from similar problems to option (d) above, although it at least removes the uncertainty which characterises that option. However, in removing uncertainty it also removes any prospect of implementing the post-Leveson framework. Like option (c), it would essentially leave us back where we started.

44. This option would fail to achieve the full purpose of s40, and would thereby compromise the wider post-Leveson framework. It would leave no provision for claimants against publishers who do not subscribe to independent and effective regulation under the Charter.

45. If the Government does wish to pursue this option it should as a matter of urgency set out proposals to enhance access to justice in relation to relevant media cases.

**46. In conclusion, we support option (b) because:**

- **Non-commencement by the Government of all or part of s40 is likely to be unlawful.**
- **A decision by the Government to keep all or part of s40 ‘under review’ would expose the Government to a conflict of interests and would compromise the freedom of the press from direct political oversight.**
- **IMPRESS and the publishers which have joined IMPRESS had a legitimate expectation that s40 would be commenced in full.**
- **Non-commencement or repeal of s40 would be a betrayal of the victims of press abuse and intrusion, who also had a legitimate expectation that the post-Leveson framework would be brought into full effect by the Government.**
- **S40 was designed by Parliament as an integral part of the post-Leveson framework for independent and effective regulation of the press and this entire framework is compromised in the absence of s40.**

- **The PRP may be jeopardised by the non-commencement or repeal of s40, which in turn may jeopardise the continuing ability of IMPRESS to function as a recognised regulator.**
- **So the non-commencement or repeal of s40 may leave IPSO as the only option for publishers, journalists and the public.**
- **This would not provide the public with a satisfactory standard of independent and effective press regulation.**
- **Nor would it provide the public with access to justice, as IPSO's pilot arbitration scheme is optional and allows publishers to cherry-pick cases.**
- **Non-commencement of s40 would also deprive the public of access to justice through the courts because of the high cost of litigation.**
- **In the absence of competition from IMPRESS, IPSO will be under no pressure to make any meaningful reforms to its governance or operations.**
- **We cannot judge s40 or the wider post-Leveson framework until this framework is fully operational.**
- **Any industry will inevitably lobby against independent and effective regulation. The Government should not be swayed by this lobbying but should commission an independent longitudinal evaluation of the post-Leveson framework when it is fully operational.**

## The impact of section 40

48. Question 2 of the Consultation reads as follows:

*Do you have evidence in support of your view, particularly in terms of the impacts on the press industry and claimants? If so, please provide evidence. (We are particularly interested in hearing from legal professionals – using their experience of litigation – in respect of the financial impacts on publishers outside a recognised self-regulator should government fully commence section 40, and specifically on (a) the likely change in volume of cases brought; and (b) the extent of average legal costs associated with bringing or defending individual cases).*

49. In this section, we consider the impact of s40 firstly on the press industry and secondly on claimants. We consider both sets of stakeholders by reference to the wider public interest in investigative journalism, independent and effective press regulation, and access to justice.

### The impact of section 40 on the press industry

50. The primary impact of s40 on the press industry is positive. For many years, representatives of the press have expressed concerns about the impact of legal threats – in particular, the threat of a libel action – on newspapers. It has been shown that such threats may have a ‘chilling effect’ on legitimate reporting.

51. News publishers – particularly smaller publishers without in-house legal resources – struggle to defend libel or privacy claims because of the cost, complexity and uncertainty of litigation. In the absence of access to justice, publishers are compelled to remove content which may be legally justifiable. The Libel Reform Campaign’s 2009 report, ‘Free Speech is Not for Sale’, highlighted the ‘prohibitive’ nature of libel costs for many publishers.<sup>5</sup>

52. The University of Oxford’s Centre for Socio-Legal Studies has calculated that defending a libel action in England and Wales is ‘around 140 times more costly than the average’ across a number of comparable European jurisdictions.<sup>6</sup>

53. The Joint Committee on the Draft Defamation Bill raised similar issues in its report, highlighting the twin principles of reducing costs and improving the accessibility of defamation law:

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<sup>5</sup> Libel Reform Campaign, ‘Free Speech is not for Sale: the impact of libel law on freedom of expression’ (London: English PEN and Index on Censorship, 2009), p. 10.

<sup>6</sup> *A comparative study of defamation proceedings across Europe* (Oxford: Centre for Socio-Legal Studies, 2008), p. 3.

*‘The reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen. Early resolution of disputes is not only key to achieving this, but is desirable in its own right – in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort.’<sup>7</sup>*

- 54.** This well-documented chilling effect has a particularly negative impact on smaller news publishers local and so-called ‘hyperlocal’ newspapers and websites. Hyperlocals are publishers which operate at a community level. They may be run as commercial enterprises or on a non-profit basis. They may operate in print or online, or both. Hyperlocals play an increasingly important part in the news ecosystem, alongside older local newspapers. In fact, they often operate in areas where traditional local newspapers, owned by large national or international corporations, have closed or been reduced in scale.
- 55.** The Centre for Community Journalism at Cardiff University has published detailed research which shows that there are more than 400 active hyperlocals in the UK, of which almost half have run investigative news reports and 72% have supported a local campaign.<sup>8</sup> Journalism of this kind may be of considerable public interest. It is also, by its nature, controversial, and likely to attract libel or privacy claims.
- 56.** Hyperlocal news publishers clearly meet the definition of relevant publishers in the Act and are not excluded from this definition by virtue of Schedule 15(8), because, notwithstanding their comparatively low financial turnover, they do not publish news-related material on a merely incidental basis or in the form of a blog. They therefore stand to benefit from the costs incentives in the Act and indeed a number of such publishers have already seen the opportunity to protect themselves against the chilling effect by signing up to be regulated by IMPRESS, with the legitimate expectation that they would thereby benefit from the positive incentives set out in s40.
- 57.** In his speech to the Society of Editors on 19 October 2015, the Secretary of State underscored the importance of protecting the local press, stating that:

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<sup>7</sup> *Report of the Parliamentary Joint Committee on the Draft Defamation Bill* (12 October 2011), ‘Conclusions and recommendations’.

<sup>8</sup> Damian Radcliff, ‘Where are we Now?: UK hyperlocal media and community journalism in 2015’ (Cardiff: Centre for Community Journalism, 2015), pp. 4-5.

*'local papers are the bread and butter of journalism. Without them the news food chain dries up. Some of the greatest national reporters started on their local rag. These papers are part of the communities they serve, and people rely on and respect them'.*

**58.** The commencement of section 40 would help to alleviate the chilling effect on small and local news publishers which is caused by the cost, complexity and uncertainty of libel and privacy litigation. This would, in turn, help to build a sustainable future for the press of the twenty-first century, by supporting publishers who wish to pursue hard-hitting, investigative journalism yet fear the financial repercussions of being sued in libel or privacy, and who do not have the financial resources to risk the exorbitant cost of legal action. A number of publishers have already acknowledged the benefits of regulation which can protect them against these risks by choosing to sign up to IMPRESS.

**59.** In order to be recognised under the Charter, a regulator must provide an arbitration scheme for civil legal claims in defamation, privacy and harassment against its subscribers which is fair, quick, inquisitorial and inexpensive.<sup>9</sup>

**60.** The IMPRESS arbitration scheme, developed in partnership with the Chartered Institute of Arbitrators, has been recognised by the PRP as meeting the criteria set out in the Charter.

**61.** The IMPRESS/CI Arb scheme has the following characteristics:

- It requires publishers to commit to low-cost arbitration as the preferred means of resolving legal disputes between individual claimants and publishers.
- It provides a low-cost, flexible scheme which empowers arbitrators to resolve disputes as efficiently and economically as possible.
- It discourages publishers and claimants from escalating disputes into lengthy and costly legal battles.
- It provides greater affordability and accessibility than the courts.
- It reduces the financial risks to publishers in the event that a claim is successful by capping costs.

**62.** A comparison between the IMPRESS/CI Arb scheme (which has been recognised under the Charter and would therefore protect publishers from the costs-shifting provisions set out in s40) and the IPSO pilot scheme (which has

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<sup>9</sup> Royal Charter on Self-Regulation of the Press, Schedule 3(22).

not been recognised and would not therefore offer any such protection) reveals that the IPSO scheme actually exposes publishers to a higher costs risk. This weakens the claim that a Charter-recognised arbitration scheme would expose publishers to an excessive costs risk.

- 63.** The IMPRESS scheme carries a maximum cost risk to publishers of £6,500 if they lose a claim that goes to a final ruling, whereas the IPSO scheme carries a maximum cost risk to publishers of £26,300 if they lose a claim that goes to a final ruling.
- 64.** The IMPRESS scheme carries a maximum cost risk to publishers of £3,500, plus any legal costs they incur in defending a claim, if they win a claim that goes to a final ruling. There is no provision for a publisher's legal costs to be paid by a losing claimant. By contrast, the IPSO scheme carries a maximum cost risk to publishers of £6,300 if they win a claim that goes to a final ruling.
- 65.** In return for subscribing to a recognised regulator which provides such an arbitration scheme, news publishers are protected, under s40, against the risk of an adverse costs award in a relevant action, even where their defence fails. In a context where the cost of defending a libel action may run into hundreds of thousands of pounds, this has the benefit of alleviating the chilling effect of libel threats on news publishers, particularly on small publishers.
- 66.** The summary of the IMPRESS/CIArb arbitration scheme, above, shows that there are significant savings to be made for publishers which are prepared to commit to arbitration under a recognised regulator.
- 67.** Concerns about the negative impact of s40 on the press industry have been expressed by newspaper editors and industry bodies. The News Media Association has asserted that newspaper publishers – the publishers, in particular, of local newspapers – which join a recognised regulator will be exposed to the risk of a high volume of claims in defamation or breach of privacy because of the availability of low-cost arbitration. They have asserted that this will encourage claims farming, which will expose newspaper publishers to high legal costs, even where claims have no merit.
- 68.** A number of publishers have run an unprecedentedly widespread and vocal campaign against s40 in the pages of national and local newspapers. This campaign has strayed far beyond the questions posed in the Consultation and has included extensive abuse of the motives and characters of representatives of IMPRESS, the Independent Press Regulation Trust and the Alexander Mosley Charitable Trust.

- 69.** The newspapers involved in this campaign have encouraged their readers to make submissions to the Consultation and will no doubt make submissions of their own. We assume that the Government will take note of this campaign of distortion and intimidation when considering any such submissions to this Consultation.
- 70.** We assume also that the Government will remember that the same newspapers which now argue vehemently against s40 and the entire post-Leveson framework were closely involved in the development of that framework and did not argue against the principle of regulation underpinned by Royal Charter until they lost a legal battle to assert their own preferred Charter in favour of the draft Charter derived from the Leveson recommendations (see Appendix A, below).
- 71.** The newspapers behind this campaign of intimidation and distortion have a self-evident commercial perspective on press regulation which should not be confused with the interests of the public at large, or with expert analysis of the subject.
- 72.** In any case, we believe that concerns expressed by the press industry about claims farming are misplaced. The claims farming industry has shown no interest whatsoever in the law relating to defamation, malicious falsehood, breach of confidence, misuse of private information or harassment, which are the only areas covered by s40. These areas of law are complex and unpredictable compared to personal injury law, which tends to attract claims farming on an industrial scale.
- 73.** The volume of cases which might go to arbitration under the scheme offered by a recognised press regulator would be far too low to attract claims farmers, who concentrate on areas of law which generate hundreds of thousands of claims annually. The average annual number of legal claims in libel or privacy are miniscule by comparison. An analysis of IPSO adjudications suggests that only 10% of adjudications (14 of 138 over a two-year period) might meet even the minimum criteria for a legal claim.
- 74.** Furthermore, the financial rewards available through arbitration will be far too low to attract claims farmers. The IMPRESS/CIArb arbitration scheme has been approved by the PRP as meeting the Charter requirements. Under this scheme, recoverable costs are capped at £3,000. In many cases, costs are likely to be much lower, because of the capacity for claims to be struck out at an early stage (see below).
- 75.** The IMPRESS/CIArb scheme allows for claims to be subject to an administrative test to ensure that they fall within the scope of the scheme. This test allows

IMPRESS to consider, among other things, whether a claim would be more appropriately handled as a complaint under the standards code.

- 76.** Claims which progress beyond this stage will be considered by a professional arbitrator. Under the IMPRESS/CIArb scheme, the arbitrator will be able to strike out unmeritorious claims at this stage.
- 77.** IMPRESS also proposes to underwrite the costs of arbitration for publishers with turnover below £1m and is considering whether to extend this subsidy to larger publishers.
- 78.** Therefore, we expect little more than a handful of cases each year to go to arbitration. At IMPRESS, we have set aside an arbitration fund of £50,000 to help subsidise the cost of arbitration for smaller publishers. An industry worth £5.3bn should easily be able to create an appropriately-sized fund to cover the costs of every news publisher in the United Kingdom.
- 79.** The recognition criteria in the Charter allow for a scheme such as ours, which contains numerous checks and balances to mitigate any risk of claims farming, to reduce the cost burden on publishers and to ensure that only claims with merit make any progress through the scheme.
- 80.** Newspaper industry representatives have also asserted that publishers which choose not to join a recognised regulator will be exposed to the risk of a high volume of court cases, because of the encouragement which s40 may give claimants to litigate.
- 81.** We believe that these concerns are also misplaced. Just as there is no realistic risk of claims farming in relation to a recognised arbitration scheme, so there is little risk of this in relation to litigation. Even if s40 were to be applied against a news publisher which chose not to join a recognised regulator, the full costs of litigation are never recovered. Thus, claimants would still be exposed to some risk and would be obliged to think very carefully before issuing proceedings.
- 82.** In any case, s40 gives the courts clear discretion to apply the costs provisions however is most just and equitable. Thus, the court may choose to disapply the provisions if they would have a perverse consequence.
- 83.** We assume that the industry does not object to the possibility that claimants who have suffered harm in relation to an area of law covered by s40 should enjoy redress, in the form of damages, as a result of either arbitration or litigation.
- 84.** We also remember that these provisions are designed to meet the needs of members of the public as well as news publishers. To the extent that a news

publisher has deprived a member of the public of the opportunity of quick and low-cost arbitration, it is reasonable that the publisher should take some responsibility for facilitating a means of access to justice.

- 85.** Further, these provisions are intended to form meaningful incentives for publishers to join a recognised regulator. If the incentives were too soft, they would be no real incentive.

### **The impact of section 40 on claimants**

- 86.** The costs incentives in section 40 serve to enhance access to justice for both defendants and claimants in relevant media law actions. If a publisher which subscribes to a recognised regulator is subject to a relevant claim, the claimant will be able to make use of the regulator's arbitration scheme. If a publisher which does *not* subscribe to a recognised regulator is subject to such a claim, the claimant will be able to turn to the courts, in the reasonable confidence that their costs will be met by the publisher. One way or the other, s40 ensures access to justice for claimants and relevant publishers.

- 87.** Successive reports from Parliamentary committees, independent inquiries and civil society groups have called for reforms along these lines to reduce the impact of costs on claimants, as well as defendants.

- 88.** The Government's recent consultation on costs protection in defamation and privacy claims recognised the 'substantial' costs involved in bringing or defending defamation proceedings.<sup>10</sup>

- 89.** Lord Justice Jackson's 2009 report into civil litigation costs called on the Government to address issues around access to justice in civil litigation in general, and defamation in particular. The Jackson review recommended qualified one-way costs shifting (analogous to the measures provided by section 40) in areas of law where there is an 'asymmetric relationship' between two parties to a civil action.<sup>11</sup> This asymmetry applies equally to cases where a wealthy claimant sues a small publication as to cases where an individual claimant without significant resources is unable to take legal action against a well-resourced publisher. Lord Justice Leveson introduced his recommendations in relation to qualified one-way costs shifting by reference to Lord Justice Jackson's related recommendations.

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<sup>10</sup> See [https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/supporting\\_documents/Costsprotectionindefamationandprivacyclaimsconsultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/supporting_documents/Costsprotectionindefamationandprivacyclaimsconsultationpaper.pdf), retrieved 9 December 2015.

<sup>11</sup> Review of Civil Litigation Costs (December 2009) p. 89.

**90.** The legal charity JUSTICE has also recently drawn attention to the acute need for a more cost-effective system of civil litigation:

*'Our justice system is in crisis. Ongoing state retrenchment has resulted in an advice deficit that is making it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented.'*<sup>12</sup>

**91.** The Alternative Libel Project, run by English PEN and Index on Censorship, drew on research showing that mediation and arbitration are highly successful in resolving libel claims in a timely and efficient manner and called for costs reforms in defamation actions in order to encourage greater use of such forms of Alternative Dispute Resolution (ADR).<sup>13</sup>

**92.** The House of Commons Select Committee on Culture, Media and Sport's Second Report into Press Standards also highlighted the harm caused to the rights of both claimants and defendants by the existing costs regime:

*'The cost of litigation has a direct bearing both on the freedom of expression enjoyed by the press and on the standards of the press. We are aware that there are cases where people wronged by the media are deterred from seeking legal remedy by the combination of cost and risk. We have also heard evidence that journalists and editors sometimes refrain from publishing information for fear of legal action, even where they are sure of their facts, because the costs and risks are too high.'*<sup>14</sup>

**93.** In light of this overwhelming body of evidence, it is clear that the current costs regime in defamation is profoundly dysfunctional. Numerous stakeholders have called for greater use of ADR. However, the asymmetrical nature of many libel and privacy actions makes the use of ADR extremely unlikely. The better-resourced party to any such action has the capacity to use the exorbitant cost of court proceedings to persuade the less-well-resourced party to settle out of court. In the absence of incentives to mediate or arbitrate, there is no reason for

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<sup>12</sup> 'Delivering Justice in an Age of Austerity'. See:

<http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>, [p. 8] retrieved 9 December 2015.

<sup>13</sup> *Alternative Libel Project Report: a final report on the problems created by defamation procedure with recommendations for change* (London: English PEN and Index on Censorship, 2012), p. 21.

<sup>14</sup> The House of Commons Select Committee on Culture, Media and Sport's Second report into Press Standards, Privacy and Libel, 2009-2010, vol. I, [237].

the better-resourced party to do so, with the effect that the relative wealth of the parties determines the outcome of the case, rather than the relative merits of the claim and the defence.

- 94.** The commencement of s40 would enable the less-well-resourced party in any defamation or privacy action to encourage the other party to arbitrate.
- 95.** Publishers who join IMPRESS are contractually bound to resolve legal disputes through its arbitration scheme, where IMPRESS decides that the claim falls within the administrative scope of the scheme. IPSO publishers, by contrast, are free to decide on a case by case basis which claims they will resolve through arbitration. This makes the IPSO scheme amenable to ‘cherry-picking’ of cases which publishers believe they can win.
- 96.** The IMPRESS scheme is free to access for claimants, although an administrative fee of £75 is proposed, subject to approval by the PRP. Claimants are not expected to pay the legal costs of a publisher, even if they lose their claim. Claimants risk paying their own legal costs if they lose their claim. Claimants also pay any legal costs that exceed £3,000 if they win their claim.
- 97.** Under the IPSO scheme, claimants must pay a minimum of £300 to secure a preliminary ruling, which rises to £2,800 if the matter is resolved after a final ruling. Claimants also risk paying a publisher’s legal costs of up to £20,000, plus their own legal costs if they lose their claim. If a claim is won, however, a claimant may receive an award of up to £20,000 to cover any legal costs they incur in making their claim. It is highly unlikely that this scheme would meet the Charter criterion for arbitration to be ‘inexpensive’ for all parties.
- 98.** The provision of arbitration by a recognised regulator will have a beneficial impact on the dysfunctional costs regime in media law, and thereby on access to justice. Those claimants who are deprived of access to such a scheme by a publisher which refuses to subscribe to independent and effective regulation should be enabled to take their case to court.
- 99.** **In conclusion, we believe that any concerns about s40 are misplaced and that these costs-shifting provisions strike an appropriate balance between the rights of claimants, the rights of publishers and the public interest generally. In particular, we note that s40 has the potential to:**
- **Incentivise independent and effective press regulation.**
  - **Alleviate the chilling effect of libel threats on investigative journalism.**
  - **Enhance access to justice for both claimants and defendants in relevant media law cases.**

## The purpose of section 40

100. Question 3 of the Consultation reads as follows:

*To what extent will full commencement incentivise publishers to join a recognised self-regulator? Please supply evidence.*

101. Whilst addressing this question below, we note first and foremost that s40 is not *solely* designed to incentivise publishers to join a recognised self-regulator. In fact, s40 has three interlocking objectives, as noted above:

- incentivising independent and effective press regulation
- alleviating the chilling effect of libel threats on investigative journalism; and
- enhancing access to justice.

102. Furthermore, the purpose of s40 is not to *compel* news publishers to sign up to a recognised self-regulatory body such as IMPRESS and its impact cannot be evaluated on this basis alone. Publishers may choose whether or not to subscribe to a particular self-regulatory body for a variety of reasons.

103. With these caveats in mind, we consider here the extent to which full commencement of s40 may incentivise independent and effective press regulation, in addition to the other provisions in the Act which relate to exemplary damages.

104. In his speech to the Society of Editors on 19 October 2015, the then Secretary of State for Culture, Media and Sport, Rt. Hon John Whittingdale MP, suggested that the exemplary damages provisions alone might provide ‘a real incentive to encourage publishers to sign up to a recognised self-regulator.’ He noted that we ‘do not yet know precisely what impact this change will have’ and that ‘it is important that we find out.’

105. At present, IMPRESS is the only recognised regulator. The Independent Press Standards Organisation (IPSO) has made it clear that it will not be seeking recognition and there is no other self-regulatory body in existence or in prospect.

106. IMPRESS is therefore in a unique position to comment on the potential impact of the incentives in the Act. Since the launch of the IMPRESS Project in November 2013, representatives of IMPRESS have been in discussions with news publishers, ranging from national newspapers to hyperlocals, which reveal the impact of the Act on publishers’ decision-making regarding regulation.

**107.** If the exemplary damages provisions in the Act were indeed encouraging publishers to sign up to a recognised regulator, we would expect to see a significant majority of news publishers seeking to subscribe to a recognised regulator or a regulator with the capacity and intent to become recognised. This is evidently not the case. The provisions may only have come into effect on 3 November 2015, but it was known for some time that they would commence on that date. And in the year since commencement, they have not been sufficient to encourage publishers to sign up to such a regulator.

**108.** The exemplary damages provisions, in isolation, are unlikely to incentivise independent and effective regulation, because the legal threshold for the award of exemplary damages under the Act is extremely high. Exemplary damages are to be awarded only where:

- *the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights,*
- *the conduct is such that the court should punish the defendant for it, and*
- *other remedies would not be adequate to punish that conduct.*<sup>15</sup>

**109.** With these conditions in place, awards of exemplary damages will remain vanishingly rare.

**110.** In any case, there have been few defamation actions since the enactment of the Defamation Act 2013. A recent study by Thomson Reuters showed that libel claims – in particular, claims by corporations – have in fact significantly fallen since the introduction of the Act.<sup>16</sup> The paucity of successful libel claims indicates very strongly that the exemplary damages provisions alone will not serve to incentivise independent and effective press regulation.

**111.** It is clear, therefore, that the exemplary damages provisions alone are insufficient to incentivise news publishers to subscribe to independent and effective regulation. So we need to ask whether the costs-shifting provisions set out in s40 are necessary to create a stronger incentive.

**112.** The arguments against s40 which have been run by the NMA and certain publishers have rested on the assumption that they would not choose to subscribe to independent and effective regulation, as set out in the Charter; that they would therefore be exposed to the risk of costs-shifting in relevant litigation; and that this would be unfair.

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<sup>15</sup> Crime and Courts Act 2013, section 34(6).

<sup>16</sup> See, [http://www.theguardian.com/media/2015/nov/14/facebook-twitter-libel-actions-defamation-cases?CMP=share\\_btn\\_link](http://www.theguardian.com/media/2015/nov/14/facebook-twitter-libel-actions-defamation-cases?CMP=share_btn_link), retrieved 9 December 2015.

- 113.** The NMA and its members rarely if ever acknowledge that these sanctions can be easily avoided by joining or forming a recognised regulator. In response to such arguments, they have tended to characterise independent and effective regulation as set out in the Charter as equivalent to ‘state regulation’ or to launch ad hominem attacks on IMPRESS.
- 114.** Events of recent years have shown how the NMA and its members are prepared to rewrite history to suit their preferred narrative, for instance by promulgating a Royal Charter and then turning against Charters ‘on principle’; and to act inconsistently, for instance by submitting to a regulator with statutory underpinning in Ireland whilst opposing a comparable form of underpinning in the UK ‘on principle’.
- 115.** It is very difficult, therefore, to predict what any particular news publisher will do when s40 is commenced. We might reasonably expect some initial shouts of outrage. However, as the evidence mounts to confirm the effectiveness and efficiency of arbitration and the associated reduction in legal costs, we might expect these objections to dissolve. At this time, some publishers will undoubtedly reconsider their position, and might be expected to explore the potential to sign up to IMPRESS or to form another self-regulatory body capable of achieving recognition under the Charter.
- 116.** There has been widespread agreement that access to low-cost arbitration for the resolution of defamation claims should be an outcome of the current reform agenda. Implementation of s40, even if it did not result in publishers all rapidly joining a recognised regulator, would have a significant effect in spurring the development of and access to low-cost arbitration. Since no one has yet tried to introduce a low-cost arbitration scheme for media disputes apart from IMPRESS, there is little evidence to go on. In due course the evidence will mount – from IMPRESS and elsewhere – of its benefits for all parties.
- 117.** One of the key features of a proper arbitration scheme is to put both parties on a level playing field so that there can be rapid concentration on the merits of the dispute, unaffected by questions of affordability. It has hitherto been assumed that the major publishers, with access to almost unlimited litigation budgets, have enjoyed the power to face down claimants with meritorious claims. But businesses soon adapt to reality, and their lawyers will be quick to advise them. Publishers currently opposed to the arbitration requirements as part of the recognition criteria may begin to see its benefits as it works in practice. The rhetoric currently deployed to denounce arbitration can be turned off as quickly as it has been turned on.
- 118.** It should be remembered that Lord Justice Leveson contemplated the possibility that the costs-shifting incentives might be insufficient to encourage all

significant news publishers to subscribe to independent and effective regulation. In such a scenario, he recommended that Ofcom should be given the additional responsibility for press regulation.

**119. In conclusion, we believe that whilst s40 is well-designed to serve its purpose as an incentive for publishers to subscribe to independent and effective regulation, it should not be judged on this basis alone, but should also be judged on the basis of its ability to alleviate the chilling effect of libel threats on investigative journalism and on its ability to enhance access to justice for claimants and defendants in relevant media law claims. It will only be possible to form a valid assessment of s40's strengths in these respects after the post-Leveson framework has been fully operational for some time. Therefore, we encourage the Government to commence s40 in full and put in place arrangements for an independent and longitudinal evaluation of the post-Leveson framework.**

## Part 2 of the Leveson Inquiry

121. Question 4 of the Consultation reads as follows:

*Do you believe that the terms of reference of Part 2 of the Leveson Inquiry have already been covered by Part 1 and the criminal investigations? If not which terms do you think still require further investigation?*

122. We do not believe that the terms of reference of Part 2 of the Leveson Inquiry have already been covered by Part 1 and the criminal investigations.

123. Question 5 of the Consultation reads as follows:

*Do you have evidence in support of your view? If so, please provide your evidence.*

124. The terms of reference of Parts 1 and 2 of the Inquiry are different. Criminal investigations do not take the same form as a public inquiry. Many issues which are relevant to Part 2 the Leveson Inquiry have not been the subject of criminal investigations. Core Participants in Part 1 of the Inquiry were assured that numerous relevant issues would be considered in the course of Part 2 of the Inquiry. These assurances led them to make certain decisions in relation to Part 1 of the Inquiry which they would not otherwise have made.

125. Question 6 of the Consultation reads as follows:

*Which of the two options set out below best represents your views? • Continue the Inquiry with either the original or amended terms of reference • Terminate the Inquiry*

126. For the reasons given above, we believe that the Government should continue the Inquiry with the original terms of reference.

## Appendix A: The post-Leveson framework

- 128.** The Leveson Inquiry into the Culture, Practices and Ethics of the Press (‘the Leveson Inquiry’) was established by the Government in response to the failure of the Press Complaints Commission (PCC) to address widespread breaches of legal and ethical standards of journalism, most notably in the form of so-called ‘phone hacking’.<sup>17</sup> In the course of a seventeen-month-long Inquiry, Lord Justice Leveson took evidence from numerous witnesses, including newspaper editors and executives, who argued that the PCC must be replaced with a new and more effective body. Leveson agreed. He concluded that the PCC’s weaknesses were not the fault of any individual, but of a regime in which the regulator was effectively controlled by the industry being regulated.
- 129.** In his report, published on 29 November 2012, Leveson set out detailed recommendations for a future regulatory regime. He expressed a preference for the establishment of a single regulatory body, but accepted that separate sections of the press might choose to establish separate bodies.<sup>18</sup> He recommended that any such regulator, or regulators, should be approved by an independent body against the criteria set out in his report. He suggested that the Office for Communications (Ofcom) should take on this oversight role, alongside its statutory duties in relation to broadcast and telecommunications regulation.<sup>19</sup>
- 130.** Leveson rejected mandatory regulation in his recommendations, but noted that a mandatory ‘backstop’ option might be necessary in the event that newspaper publishers failed to sign up to an approved self-regulatory body.
- 131.** Leveson recognised that news publishers might need encouragement to join a regulator which would robustly uphold an acceptable standards code such as the Editors’ Code of Practice (the code developed since 1990 by editors of publications regulated by the PCC).
- 132.** Therefore, he recommended that those publishers which joined an approved, or ‘recognised’, regulator should enjoy protections against paying the other side’s costs in any legal actions for libel, privacy and harassment.<sup>20</sup> Those publishers which did not join such a regulator should be exposed to the risk of paying the other side’s costs. Leveson concluded that a degree of statutory intervention would be necessary to underpin the process of recognition, so that

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<sup>17</sup> See the statement made by the Prime Minister, Rt Hon David Cameron MP, to the House of Commons on 13 July 2011, cited in Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (2012), Part A, Chapter 1, paragraph 1.1.

<sup>18</sup> *Ibid*, Part K, Chapter 7, 6.37.

<sup>19</sup> *Ibid*, Part K, Chapter 7, 6.23.

<sup>20</sup> *Ibid*, Part K, Chapter 7, 5.5.

the courts, when following this new presumption in relation to costs, could be confident that the regulator in question was indeed compliant with the Leveson criteria for independent and effective regulation. He was adamant that any statute should include an explicit guarantee of press freedom.<sup>21</sup>

- 133.** Leveson described this model, whereby a self-regulator is overseen by an independent recognition body, as ‘independent self-regulation’. In its essentials, the framework resembles the model of regulation to which many British news publishers submit their publications in Ireland, where the regulator – the Irish Press Council – is recognised by the Justice Minister in accordance with the recognition criteria set out in schedule 2 of the Defamation Act 2009. Publishers which subscribe to the Irish Press Council are enabled to mount a defence of ‘fair and reasonable publication’ against libel suits.
- 134.** Lord Justice Leveson worked on the understandable assumption that the major newspaper publishers, which had engaged closely with his Inquiry, would play their part in implementing his proportionate and necessary recommendations, which take a similar form to the Irish model of independent self-regulation, with a combination of independent oversight and incentives for membership of a formally recognised, or audited, self-regulatory body.
- 135.** During the Leveson Inquiry and in its immediate aftermath, senior representatives of the newspaper industry acknowledged the need for wholesale reform of press regulation. They called in particular for parliamentary intervention to encourage news publishers to subscribe to a future regulator, and for arbitration to form part of a future regulatory framework.
- 136.** Lord (Guy) Black gave evidence to the Inquiry as chair of the Press Board of Finance (Pressbof), the industry body which coordinated funding for the PCC, and Lord (David) Hunt gave evidence as chair of the PCC. Lords Black and Hunt assured Leveson that moves were underway to establish a new and more robust self-regulatory body. They and other witnesses contemplated the potential role of Parliament in creating statutory provisions relating to the role of the regulator.
- 137.** Lord Black acknowledged that the Leveson Inquiry had highlighted a number of areas of legitimate public concern:

*‘that the PCC was only a conciliator and not a regulator; that it lacked effective powers of sanction; that it was not independent enough; and that it was not proactive enough. Self-regulation, based only on conciliation of disputes as operated through the PCC, is no longer sustainable.’<sup>22</sup>*

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<sup>21</sup> *Ibid*, Part K, Chapter 7, 6.41.

<sup>22</sup> Guy Black, Executive Editor of the Telegraph and former Chair of Pressbof, 7 June 2012.

**138.** In a similar vein, Lord Hunt set out three ‘crucially important questions’ which the Inquiry should, in his view, address: making all news publishers subject to regulation, protecting the public and arbitration. He stated that ‘arguably all three can ultimately be resolved only with the support of some combination of judicial and parliamentary authority.’<sup>23</sup>

**139.** Paul Dacre, Editor-in-Chief of the *Mail* publications, gave a strong message in favour of some form of statutory underpinning in a speech to the Inquiry on 12 October 2011:

*‘While I abhor statutory controls, there’s one area where Parliament can help the press. Some way must be found to compel all newspaper owners to fund and participate in self-regulation. God knows the industry fought hard enough to prevent it, but the Express group’s decision to leave the PCC was a body blow to the commission. How can you have self-regulation when a major newspaper group unilaterally withdraws from it?’*

**140.** Lord Hunt also set out the need for the regulatory solution to embrace arbitration, for the purpose of resolving civil legal claims in relation to defamation and privacy:

*‘I hope the opportunity will be taken to create a new, fast-track system for privacy and defamation claims, taking the lawyers and other prohibitive costs out of the system, so far as possible, creating equitable and speedy access to justice – and, in particular, to financial remedy when appropriate.’<sup>24</sup>*

**141.** The constructive evidence given by industry executives might have led Leveson to conclude that his recommendations for a new form of independent self-regulation, with statutory underpinning to encourage membership and arbitration, would be welcomed by the newspaper industry.

**142.** Indeed, there was extensive dialogue between the Government and the dominant newspaper publishers in the months following the publication of the Leveson Report. In the first two months of 2013, senior newspaper executives met Oliver Letwin, Minister for Government Policy, on at least 20 occasions and Maria Miller, Secretary of State for Culture, Media and Sport, on at least 17 occasions, to ‘discuss Leveson implementation’.<sup>25</sup>

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<sup>23</sup> David Hunt, submission to Leveson Inquiry, 8 June 2012.

<sup>24</sup> Lord Hunt, 11 November 2012.

<sup>25</sup> See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212380/CABINET\\_OFFICE\\_JANUARY - MARCH 2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212380/CABINET_OFFICE_JANUARY_-_MARCH_2013.pdf) and

**143.** These meetings culminated in Government proposals to implement Leveson's recommendations, albeit in a modified form, in response to concerns expressed by the industry in relation to a statutory recognition body. In place of Ofcom, a new body would be created to assess whether a regulator or regulators met the Leveson criteria. In place of statute, the Government proposed to incorporate this body through Royal Charter, a mechanism which is normally used to establish independently-run bodies with public functions such as universities and professional associations. Leveson's proposal for a statutory guarantee of press freedom was ditched along with his proposed statute.

**144.** On 13 February 2013, the trade magazine *Press Gazette* reported that newspaper and magazine publishers 'broadly welcomed' Government plans to underpin press regulation through the Charter mechanism.<sup>26</sup> Paul Vickers, chair of an 'Industry Implementation Group', was reported as saying: 'We welcome this very constructive announcement, the fruit of two months of intensive talks involving the newspaper and magazine industry and all three main political parties. All the framework of the new regulatory body is already in place; today's publication of the proposed Royal Charter and Recognition Criteria is a vital development which means the work of setting it up can begin as soon as the Royal Charter is established.'<sup>27</sup> An editorial in the *Daily Mail* newspaper also welcomed the proposal to establish the recognition body by Charter, comparing it favourably with attempts to amend the Defamation Bill then going through Parliament to establish a recognition body by statute.<sup>28</sup>

**145.** Unlike normal Charters, which can be amended unilaterally by the executive, the Royal Charter on Self-Regulation of the Press can only be amended or repealed by a two-thirds majority in both Houses of Parliament and, where relevant, the Scottish Parliament and with the unanimous agreement of the Board of the recognition body. These provisions, contained within the Charter

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212717/1\\_Jan\\_to\\_31\\_Mar\\_2013\\_Ministerial\\_Meetings\\_Hospitality\\_Overseas\\_travel.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212717/1_Jan_to_31_Mar_2013_Ministerial_Meetings_Hospitality_Overseas_travel.pdf), cited by Martin Moore, 'How the British Press Distorted Reporting of ... the British Press', Free Speech Debate (3 November 2014), available at <http://freespeechdebate.com/en/discuss/how-the-british-press-distorted-reporting-of-the-british-press/>, all retrieved 25 November 2016.

<sup>26</sup> 'Press Owners Welcome Tory Plan for Independent Regulator Underpinned by Royal Charter', *Press Gazette* (13 February 2013), available at <http://www.pressgazette.co.uk/press-owners-welcome-tory-plan-independent-regulator-underpinned-royal-charter>, retrieved 25 November 2016.

<sup>27</sup> *Ibid.*

<sup>28</sup> 'A Man of Principle and Political Pygmies', *Daily Mail*, 12 February 2013 (<http://www.dailymail.co.uk/debate/article-2277788/A-man-principle-political-pygmies.html>), retrieved 25 November 2016.

itself, were reinforced by section 96 of the Enterprise and Regulatory Reform Act 2013, which stipulates that:

*'Where a body is established by Royal Charter after 1 March 2013 with functions relating to the carrying on of an industry, no recommendation may be made to Her Majesty in Council to amend the body's Charter or dissolve the body unless any requirements included in the Charter on the date it is granted for Parliament to approve the amendment or dissolution have been met.'*<sup>29</sup>

**146.** This is designed to put an additional lock on the risk of future political interference in press regulation. It is also possible for any self-regulatory body to withdraw from the scheme of recognition at any time, further mitigating the risk of political interference.

**147.** Despite these explicit safeguards for press freedom, members of the industry group rejected the all-party Charter – not because they spurned the use of a Charter as a mechanism, but because they objected to certain elements of this particular Charter. In an apparent attempt to negotiate with the Government, Pressbof, the body chaired by Lord Black, petitioned the Privy Council to adopt an alternative Charter.<sup>30</sup>

**148.** There are several significant differences between the all-party Charter and the Pressbof Charter.<sup>31</sup> The Pressbof Charter gave Pressbof itself responsibility for initiating and funding the recognition process.<sup>32</sup> Whereas the all-party Charter kept politicians at arm's length from the business of press regulation, the Pressbof Charter allowed politically-active members of the House of Lords to sit on the board of the recognition body and the regulator.<sup>33</sup> Whereas the all-party Charter could only be amended or dissolved with the consent of a two-thirds majority in both Houses of Parliament, the Pressbof alternative gave the industry funding body a veto on any changes.<sup>34</sup> It did not require the regulator's approach to investigations to be 'simple and credible'.<sup>35</sup> And it watered down the

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<sup>29</sup> Available at <http://www.legislation.gov.uk/ukpga/2013/24/section/96/enacted>, retrieved 25 November 2016.

<sup>30</sup> Available at <http://privycouncil.independent.gov.uk/wp-content/uploads/2013/05/Press-Standards-Board-of-Finance-Ltd-Petition-and-Draft-Charter.pdf>, retrieved 25 November 2016.

<sup>31</sup> See 'The Cross-Party Royal Charter vs the Pressbof Royal Charter: A comparison' (London: Media Standards Trust, 2013), available at <http://mediastandardstrust.org/wp-content/uploads/downloads/2013/06/Charter-vs-Charter-23-05-13-PDF.pdf>, retrieved 25 November 2016, for a detailed comparison of the two Charters.

<sup>32</sup> *Ibid.*, p. [5].

<sup>33</sup> *Ibid.*, p. [4].

<sup>34</sup> *Ibid.*, p. [5].

<sup>35</sup> *Ibid.*, p. [6].

requirement on the regulator to provide an arbitration scheme.<sup>36</sup> These changes did not seem likely to deliver a more independent or effective system of regulation, and the Pressbof petition was accordingly rejected by the Privy Council on 9 October.

**149.** Pressbof sought leave to apply for judicial review of the Government's rejection of its Charter, and for an injunction of the all-party Charter. It argued that the Government's rejection of its Charter was unfair, as it had not been given any criteria against which its Charter would be judged.<sup>37</sup> These applications were rejected at an emergency hearing on 30 October 2013, when the Administrative Court ruled that Pressbof had been given an adequate opportunity to understand what was required, both in the course of the Leveson Inquiry and during its aftermath.<sup>38</sup> A final version of the all-party Charter was sealed later the same day.<sup>39</sup>

**150.** Newspaper coverage has tended to be negative about the use of a Royal Charter to establish the recognition body – despite the industry's own attempted use of a Charter mechanism. Of 1,421 articles on this subject published by national newspapers in the year following Leveson's report, 60.7% portrayed Leveson and the all-party Charter as a threat to press freedom.<sup>40</sup>

**151.** Having lost the legal battle to assert the Pressbof Charter over the all-party Charter, senior figures in the industry have effectively rewritten history to erase their own contribution to the Charter process. Peter Wright, Editor Emeritus of Associated Newspapers, has stated that the all-party Charter was 'agreed by

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<sup>36</sup> *Ibid.*, p. [5].

<sup>37</sup> Press Standards Board of Finance Ltd, R (On the Application Of) v The Secretary of State for Culture, Media And Sport [2013] EWHC 3824 (Admin) (30 October 2013), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2013/3824.html>, retrieved 25 November 2016, paragraph 7.

<sup>38</sup> *Ibid.*, paragraph 19. Pressbof sought leave to appeal but their application was rejected on 1 May 2014. At that point, the *Guardian* newspaper reported that Pressbof was considering whether to pursue a direct challenge to the all-party Charter. See 'Press Regulation: Newspapers lose court of appeal battle over rival royal charter' (1 May 2014), available at <http://www.theguardian.com/media/2014/may/01/press-regulation-newspaper-court-appeal-royal-charter>. No such challenge was made.

<sup>39</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254116/Final\\_Royal\\_Charter\\_25\\_October\\_2013\\_clean\\_Final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean_Final_.pdf).

<sup>40</sup> See Gordon Ramsay, 'How Newspapers Covered Press Regulation After Leveson' (London: Media Standards Trust, 2014), available at <http://mediastandardstrust.org/wp-content/uploads/2014/09/Final-Draft-v1-040914.pdf>.

politicians and the Hacked Off lobby group without input from news publishers.<sup>41</sup> Likewise, the News Media Association has claimed that its predecessor bodies, the Newspaper Society and the Newspaper Publishers' Association, 'supported the legal proceedings brought by the industry against the Privy Council, marking the industry's rejection of the Royal Charter for Press Self regulation, including the role and remit of the Press Recognition Panel.'<sup>42</sup>

**152.** These statements do not quite capture the nature of those legal proceedings, which – as described above – did not mark 'the industry's rejection of the Royal Charter' so much as the industry's desire to assert an alternative Charter. In fact, as the record of ministerial meetings and public statements shows, news publishers had considerable input into the post-Leveson framework.

**153.** Independent experts do not share the industry's negative view of the post-Leveson framework. The free speech NGO Article 19, for example, released a statement in the wake of the Inquiry confirming that 'in order to improve the existing (and inadequate) self-regulation system, a new framework for press regulation in the country might be necessary.'<sup>43</sup> Article 19 confirmed that the post-Leveson framework represented a legitimate attempt to create 'a self-regulatory scheme that is independent from governmental interference'; and that the Royal Charter 'provides effective safeguards against political interference.'<sup>44</sup>

**154.** Another leading free speech NGO, Reporters Without Borders, issued a cautious welcome for the post-Leveson framework:

*'Journalists and other citizens must respect the law insofar as it protects freedom of information. Where ethics are concerned, self-regulation by the media is the preferred option. We believe that the illegal activities noted by Lord Justice Leveson's inquiry should not undermine that fundamental principle. The creation of a statutory regulatory body, if it goes ahead, should only be done under strict*

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<sup>41</sup> Associated Newspapers, 'Response to Press Recognition Panel Consultation on Proposals for Recognition of Press Self-Regulators', available at <http://pressrecognitionpanel.org.uk/wp-content/uploads/2015/09/Associated-Newspapers-Response-to-Press-Recognition-Panel-30-7-15-2.pdf>.

<sup>42</sup> 'News Media Association Response to Press Recognition Panel Consultation', p. 1, available at <http://pressrecognitionpanel.org.uk/wp-content/uploads/2015/09/NMA-PRP-Response.pdf>.

<sup>43</sup> See *UK: Final Draft Royal Charter on Self-Regulation of the Press* (London: Article 19, 2013), p. 10, available at <https://www.article19.org/data/files/medialibrary/37316/13-10-24-LA-uk.pdf>, retrieved 25 November 2016.

<sup>44</sup> *Ibid*, p. 9; Thomas Hughes, 'British Press Freedom is Under International Scrutiny – and with Good Reason', *The Guardian* 15 January 2014, available at <https://www.theguardian.com/commentisfree/2014/jan/15/british-press-freedom-international-scrutiny-guardian-snowden-leaks>, retrieved 25 November 2016.

*conditions of independence and pluralism. If the United Kingdom chooses such a system, the utmost care must be taken to prevent potential abuse that could lead to state control of the media. We shall judge the composition and powers of the new institution, and how its members are appointed, in the light of its ability to avoid this risk.*<sup>45</sup>

**155.** Academic experts also welcomed the opportunity to protect the public from harmful practices in journalism, such as those which were exposed before and during the Leveson Inquiry. In the words of Gavin Phillipson, co-author of the standard textbook on media freedom and human rights:

*'The essence of the argument for effective press regulation is [...] twofold: first, recognition of the fact that the press has inflicted enormous damage on vulnerable individuals, and that some means of cheap and speedy redress is needed for those who are unable or unwilling to use the slow and often extremely costly process of litigation in defamation or privacy. [...] The second key argument is the hope that regulation, far from diminishing the value of the press by making it subject to "political control", will actually render it a more ethical, accurate and respected contributor to political debate, principally through providing an effective means of correcting those serious and 'reckless' inaccuracies that Leveson found to be rife in newspaper reporting.'*<sup>46</sup>

**156.** It is clear that the newspaper industry's analysis of the threat posed to press freedom by the post-Leveson framework is not shared by a number of distinguished independent experts in this field.

**157.** Despite their initial support for statutory intervention to support membership of a regulator and the use of arbitration to resolve civil legal disputes, and the industry's participation in a comparable scheme in Ireland, senior representatives of the newspaper industry now choose to represent both mechanisms as a threat to press freedom. Some have suggested (inaccurately) that the post-Leveson framework was designed without their involvement or support.

**158.** The recognition body envisaged by Leveson was ultimately established, in the form of the Press Recognition Panel (PRP), on 3 November 2014. Its Chair and board were appointed by a panel which was itself selected by the Commissioner

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<sup>45</sup> 'Independence and Pluralism Must Remain Central to Media Regulation', Available at <https://rsf.org/en/news/independence-and-pluralism-must-remain-central-media-regulation>, retrieved 25 November 2016.

<sup>46</sup> Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom', *Journal of Media Law* 5:2 (2013), 220-240, p. 230. Professor Phillipson has subsequently been appointed to the IMPRESS Code Committee.

for Public Appointments. The Secretary of State for Culture, Media and Sport initiated this process, but had no involvement in the selection of either the appointment panel or the board.<sup>47</sup> The PRP's chair is Dr David Wolfe QC. The body is funded initially by the Treasury, but is expected to become sustainable in the longer term from fees to be paid by regulators.<sup>48</sup>

**159.** The Royal Charter on Self-Regulation of the Press ('the Charter') gives the PRP the functions of:

- determining applications for recognition from Regulators;
- reviewing whether a Regulator which has been granted recognition shall continue to be recognised;
- withdrawing recognition from a Regulator where the Recognition Panel is satisfied that the Regulator ceases to be entitled to recognition; and
- reporting on any success or failure of the recognition system.<sup>49</sup>

**160.** Schedule 3 of the Charter contains criteria, numbered 1-23, against which the PRP is empowered to approve a regulator. These criteria are almost identical to those numbered 1-24 in the Leveson Report.<sup>50</sup> They describe – for the most part in general terms – the arrangements for appointing a Chair and board to the regulator (criteria 1-5); settling the regulator's funding (criterion 6); settling the regulator's standards code (criteria 7-8); imposing internal governance requirements on publishers (criteria 9-10); handling complaints (criteria 11-17); investigating and sanctioning serious or systemic breaches of the standards code (criteria 18-19); recording and publishing compliance data (criteria 20-21); providing an arbitration scheme (criterion 22); and settling non-discriminatory terms for membership (criterion 23).

**161.** Under Schedule 2 of the Charter, the recognition body is also required to take into account, when considering a regulator's application for recognition against these criteria, 'the concepts of effectiveness, fairness and objectivity of standards, independence and transparency of enforcement and compliance, credible powers and remedies, reliable funding and effective accountability, as articulated in the Leveson Report, Part K, Chapter 7, Section 4.'<sup>51</sup>

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<sup>47</sup> See <http://pressrecognitionpanel.org.uk/panel-creation/> for details of this process.

<sup>48</sup> Royal Charter on Self-Regulation of the Press, 11.2.

<sup>49</sup> *Ibid*, 4.1.

<sup>50</sup> One of Leveson's recommendations (numbered 23 in his report) related not to the specifics of any regulator but to the wider system in which it operated: 'A new system of regulation should not be considered sufficiently effective if it does not cover all significant news publishers.' This does not constitute a recognition criterion for an individual regulator.

<sup>51</sup> Royal Charter on Self-Regulation of the Press, Schedule 2, 1.

- 162.** The PRP can perform its functions through an initial review of a new or previously unrecognised regulator, or through an ad hoc or cyclical review of an established regulator. The PRP is not a press regulator, but an auditor of press regulators. Its scope is tightly defined by the Charter. It has no mandate, for instance, to regulate the editorial output or governance arrangements of a news publisher. And it does not allow for any political involvement in its decision-making.
- 163.** The recognition process has two important consequences. Firstly, it gives journalists and members of the public confidence that news publishers are being independently and effectively regulated, in line with Leveson's recommendations. Secondly, it enables the courts to apply the costs and damages provisions set out in sections 34-42 of the Crime and Courts Act 2013 ('the Act').
- 164.** The incentives set out in the Act expose publishers to the risk of exemplary damages if they do not belong to a recognised regulator, are found liable for defamation or another 'relevant claim' related to the publication of 'news-related material' and have shown 'a deliberate or reckless disregard of an outrageous nature for the claimant's rights.'<sup>52</sup> The Act also exposes publishers who do not belong to a recognised regulator to the risk of paying the claimant's costs, even if they win the case. Conversely, publishers who belong to a recognised regulator are protected against exemplary damages and will not pay the claimant's costs even if they lose the case. The Act gives the courts discretion to disapply the costs provisions where it is 'just and equitable' to do so.
- 165.** A 'relevant claim' means a civil claim made in respect of (a) libel; (b) slander; (c) breach of confidence; (d) misuse of private information; (e) malicious falsehood; or (f) harassment.<sup>53</sup> 'News-related material' means news or information about current affairs, opinion about matters relating to the news or current affairs, or gossip about celebrities, other public figures or other persons in the news.<sup>54</sup>
- 166.** A 'relevant publisher' for the purposes of the Act is a person who, in the course of a business (whether commercial or non-profit), publishes news-related material which is written by different authors and to any extent subject to editorial

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<sup>52</sup> Crime and Courts Act 2013, section 34(6)(a).

<sup>53</sup> *Ibid.*, section 42(4).

<sup>54</sup> *Ibid.*, section 42(7).

control.<sup>55</sup> A website operator is not to be taken as having editorial control if they did not post the material on the site, even if they moderated the material.<sup>56</sup>

**167.** A number of publishers are specifically exempted from the definition of relevant publisher by virtue of Schedule 15 to the Act, which lists broadcasters, special interest titles, scientific or academic journals, public bodies and charities, company news publications, so-called 'micro-businesses' (with turnover of less than £2m and fewer than ten employees and which publish news-related material either in the form of a multi-author blog or on an incidental basis) and book publishers. Micro-businesses may benefit from the positive provisions under the Act (the 'carrots') if they choose to join a recognised regulator, but they will not suffer from the negative provisions (the 'sticks') if they do not.<sup>57</sup>

**168.** In conclusion, we can see that the recognition process does not constitute political interference with the press or with press regulation. It simply ensures that any self-regulatory body is properly independent from news publishers, politicians and any other vested interests, and that it is effective.

**169.** Therefore, arguments against s40 which are based on the industry's rejection of the recognition process on the basis of a purportedly 'principled' objection to 'political interference' are groundless.

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<sup>55</sup> *Ibid.*, section 41(1-2).

<sup>56</sup> *Ibid.*, section 41(3).

<sup>57</sup> *Ibid.*, section 41(7).