Why regulate the press and media at all?

Richard Shillito | 25 June 2012

The US has no press regulator. Yet one is often struck by the careful attention to detail of the US broadsheets. Perhaps because they face less competition than their UK counterparts, they have more freedom to strive for fairness and accuracy. However, it is said that there are extremes such as Fox News and the National Enquirer, which may pose the same questions about whether or not to regulate as in the UK.

The US’s attitude towards the net is also broadly libertarian. Internet service providers are by and large exempt from claims for libel and a safe harbour/notice and take down policy is adopted in the case of copyright claims. A proposal for a Stop Online Piracy Act has been vigorously opposed by Wikipedia and Google amongst others and has not yet found fertile ground in Congress.

Competition for circulation is surely what marks out the more aggressive behaviour of British newspapers, which in turn has created more pressure for regulation here. There has been a circulation ‘war’ between the Sun/NotW and the Mirror/People for many years, leading both publishers to search for ever more titillating scandal. All the tabloids have had to emulate the specialist celebrity magazine titles (Hello, OK, Heat, Closer et al) in order to include more celebrity news. Recent disclosures (in the Leveson and Parliamentary Select Committee inquiries) have shown how much news about celebrities (Hugh Grant, Sienna Miller) and those who are in the public eye (the McCanns, Milly Dowler, Christopher Jefferies) drives the tabloids and how far tabloid journalists will go to obtain a scoop. It is easy to guess the professional and commercial pressures on them to do so. (I am not suggesting that the tabloids do not have serious political and other news content, but they do have an interest in the purely sensational which the broadsheets do not share.)

But the other conclusion to be drawn from Leveson is that all or virtually all the egregious behaviour which has given rise to calls for better press regulation is either actionable or contrary to the criminal law. Breach of privacy, copyright, confidence, harassment, data theft, forgery, hacking of computers and phones, contempt of court/Parliament – these are all covered by existing law. (I pass over for the time being the blurring of fact and comment discussed between Leveson and Tony Blair on 28 May 2012.)

The findings of Operation Motorman, of the Information Commissioner in two reports (“What Price Privacy/Now”), of Eady J in Mosley v NGN, of several Parliamentary committees and the convictions of Goodman and Mulcaire have been known for some time. The Met’s John Yates has apologized for not following up those convictions and evidence arising from them and it may well be asked – if he had done so, if prosecutions had been brought against newspapers illegally obtaining information from the Police National Computer etc, would the scandal which later arose over phone hacking have had quite the same impact and would there have been the same calls for better regulation.

So, one argument against change would be that the remedies are already there – they simply need to be used - and furthermore the penalties are severe and a considerable deterrent against misconduct.

There is undoubtedly a gulf, in terms of circulation figures and financial performance, between newspapers which serve the public’s insatiable appetite for gossip and scandal and those with a more serious news agenda. This division between broadsheet and tabloid is also significant in terms of whether and how to regulate and on whom the cost should fall. But although it is a feature of the current UK media scene, how long will it continue?

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1 as observed by John Lloyd at a recent RSA conference. At the same event Hugh Tomlinson QC pointed out that it has a different news culture
2 because of the Communications Decency Act 1996 – ironically an act introduced in an attempt to regulate pornography on the internet
3 Online Copyright Infringement Liability Limitation Act 1997. If it doesn’t know it is storing infringing material and takes it down when notified, an online service provider will escape liability
4 D Telegraph 18.1.12
The changing press landscape

Nick Davies’ book Flat Earth News shows how, once the print unions were defeated, newspaper proprietors went on striving to cut costs and increase profits, cutting regional and overseas correspondents, increasing reporters’ story-counts, utilizing a dwindling number of agencies, using or recycling more material from public relations sources and, until the advent of the internet, making reasonable to large profits while at the same time slimming down traditional newspapers.

Now a number of changes, mostly technological, are coming at once and will have a considerable additional impact on the press and media. They need to be factored in when considering the issue of press regulation. In summary we have seen and are watching:

1. Competition from the internet, with most print publishers having been unable to turn their web-based publishing efforts to good account financially. Those that have succeeded or at least done better in this regard are by and large niche players, with unique selling points others cannot easily emulate. The FT has done moderately well, with its audience of financial professionals. The Daily Mail’s success may be the exception which proves the rule. The financial consequences for the regional press may be severe.

2. Downsizing of print media operations, due to cost cutting and the public’s preference for online news over traditional print media, together with a proliferation of internet sites on which traditional news media advertising can be accessed quickly and cheaply.

Addressing the Leveson inquiry on 26 April 2012, Rupert Murdoch said:

“Every newspaper has had a very good run…It’s coming to an end as a result of these disruptive technologies…I think we will have both [web and print news] for quite a while, certainly 10 years, some people say five. I’d be more inclined to say 20……so when it comes to regulation, I just beg for some care. A varied press guarantees democracy…”. 5

3. Huge interest in ‘social media’ such as Twitter and Facebook, which now “has the social contacts, messages, wallposts and photos of more than 750 million people”6. Before Leveson (on 28.5.12), Tony Blair described the way in which 24 hour news programmes and social media caused issues to take on a momentum of their own with the consequence that government had to take much earlier action to avoid being swept away by a ‘tsunami’ of opinion.

4. Purely technological changes to the way in which we can communicate and receive information and pictures, on ever more compact smartphones, which bring all aspects of the internet to a small handset, but by the same token probably cut against the more mature, leisured approach to news represented by, say, a broadsheet newspaper.

If we trust Rupert Murdoch’s long experience of the industry, we have to envisage a world in which, conservatively, in 5-10 years’ time there will be no more print media. So, regulation of the conventional press and media must be looked at in the round, taking in the internet as it is and the press as it will be then.

What then are the problems of regulating the internet?

Absent a global regulator or global authority to police the internet, enforcement of local law and norms depends on local enforcers, with the co-operation (if they can get it) of foreign governments and rule-making bodies. But there are few commonly agreed norms of behaviour online, there are substantial differences between for example US and UK defamation law, and at least two strongly conflicting currents of opinion on whether and how to regulate in the future.

In the first place, there are those, in particular the big internet giants such as Google, who have risen to prominence because the internet is free and mostly unregulated and are quick to point out the benefits accruing to the public as a result. Their preference is for regulation to be directed at individual offenders, rather than the ISPs which simply convey information to the public.

5 The Guardian 27.4.12
6 The Guardian 23.4.12
There have been two decisions in their favour by the English courts. Rulings in *Metropolitan International Schools v Google and others*<sup>7</sup> and *Tamiz v Google*<sup>8</sup> suggest an ever looser judicial view of ISP liability in libel. In the latter case, Google accepted responsibility for notifying bloggers of a complaint, but not that it should investigate every complaint received. Eady J held that Google was not a publisher at common law of postings on Blogger.com and had a purely passive role as platform provider/host. Nor did notification of defamatory material on its site turn it from passive provider to publisher. In any event it would have defences under Reg 19 of the EC directive and s1 Defamation Act 1996. (Further protection for website operators is envisaged in s5 of the draft Defamation Bill.)

Of course these decisions concern an internet giant, leaving some unanswered questions about smaller providers including mainstream media’s online publishing efforts. There are however also indications that the court regards some defamatory online postings as different in kind from ordinary libels and is sceptical about actionability. In two cases [*Smith v ADVFN*<sup>9</sup> and *Clift v Clarke*<sup>10</sup>] Claimants have been told that the remarks complained of, posted on bulletin boards, were ‘heat of the moment’ stuff or no more than ‘pub talk’.

The threat posed by the internet to enforcement of judicial rulings was illustrated by the Ryan Giggs affair<sup>11</sup>, when an English court ordered that the parties to some privacy litigation should remain anonymous, but 70-80,000 users of social media including Twitter defied the order such that the parties’ identities became widely known anyway and the Attorney General, while protesting about it, plainly decided that it would be impractical to take action against any individual user for contempt. Richard Spearman QC<sup>12</sup> said:

“Twitter was part of it, but because of foreign newspapers and foreign media organizations, and website operators abroad ignoring the injunction, his identity was readily available, even if you had access to Twitter at all, and it was a tide of exposure that really could not eventually be suppressed”.

There have been other occasions when in high profile criminal proceedings (eg the Kweku Adoboli case) domestic reporting restrictions, affecting how much (or little) of committal or other proceedings may be reported without risk of prejudice to the fair trial of an accused, have been interpreted more loosely by foreign based media reporting the case. Such restrictions are not easily enforced against foreign media and can make local reports look silly.

The prime example of internet lawlessness is Wikileaks, which has posted hundreds of confidential and secret diplomatic cables, leading to questions<sup>13</sup> whether for example an Iranian (Majid Jamali Fashi) executed for allegedly murdering a nuclear scientist was identified via a redacted Wikileaks cable (or whether the cable was used as a pretext). Bradley Manning is on trial for his part in allegedly leaking state secrets to Wikileaks and its founder Julian Assange is fighting extradition to Sweden, from where he fears he may be sent to the US to face trial too.

Some say, then, that the solution is to tackle the ISPs, when such behaviour occurs. At present, in the West at least, there is a reluctance to do this (as evidenced by the two Google decisions, above, and by the outcry in the US against a proposed anti-piracy act).

However, on 1 May 2012 it was reported that Arnold J had ordered major ISPs in this country to block access to The Pirate Bay, a site allowing illegal, pirated downloads.

There has been at least one English case in which the court continued an injunction despite widespread publicity on the internet, on the basis that suppressing publication in the mainstream national media was still of value in terms of protection of privacy<sup>14</sup>.

The UK government’s DCMS was to publish a communications Green Paper covering amongst other things, internet piracy<sup>15</sup>.

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<sup>7</sup> [2009 EWHC 1765]
<sup>8</sup> [2012 EWHC 449 QB]
<sup>9</sup> 2008 EWCA 518
<sup>10</sup> 2011 EWHC 1164 QB
<sup>11</sup> CTB v News Group 2011 EWHC 3099 QB
<sup>12</sup> quoted in Media Lawyer issue 99
<sup>13</sup> The Times 16.5.12
<sup>14</sup> The Ryan Giggs case, supra
<sup>15</sup> The Guardian 18.5.12
As content providers assume larger significance online, what they do to control content will also assume greater significance. What are sometimes called the ‘walled-garden’ internet access providers such as Facebook control some content on a voluntary basis. They may moderate their user generated content, in order to restrain posts deemed unlawful (or even against good taste - but here presumably in order to protect their brand as much as anything). It is interesting that one uses one’s real identity on Facebook – which would please internet censors in China, where use of real identities is compulsory.

There are undoubtedly parts of the internet which resemble the Wild West, and yet what one might call mainstream internet publishers do not resist all external interference, nor do the big search engines and there may well be increasing pressure on them all to submit to greater control in the future. It seems reasonable to expect greater international cooperation in this sphere in future, even if an internationally agreed system of regulation does not seem likely at all.

**Domestic regulation**

Regulation in the UK has grown up piecemeal and for largely historical reasons. The main shift came with the advent of radio and TV. We now have: a regulator, Ofcom, for the main terrestrial radio and TV stations; the BBC Trust, enforcing BBC guidelines for its broadcast output; AVTOD, regulating audio/visual material such as video on demand (its remit may or may not cover video content on websites); the Advertising Standards Authority (funded by a levy on publications); and the Press Complaints Commission (which may not deserve the title ‘regulator’ at all but does consider both print and online material).

The main reason why an extra layer of regulation was considered necessary for radio and TV was the scarcity of available frequencies, which in turn made entry to the market much harder, and the corresponding need to enforce rules of impartiality and decency on the few channels initially available and to protect children. Now, even a simple Freeview box gives you access to over a hundred channels, but perhaps more significantly the internet gives access to online news, pictures and video content, making the borderline between mainstream TV and the internet fuzzier. Some would say that there is no reason why all these various news outlets should not be subject to a single regulator. [An Australian inquiry, in February 2012 recommended a single regulator, a News Media Council, an independent statutory body free from government influence through an independent appointments procedure, but funded via government](#).

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The idea of insisting that all newspapers adopt BBC style guidelines on impartiality would surely be abhorrent, because in a democracy there should be space for partisan news reporting, provided it is knowingly bought and sold by the public on that basis.

More difficult is the demarcation of responsibility for regulation between different types of media when they are changing all the time. What for instance is the practical difference between the BBC’s website and that of say the Guardian or the Telegraph, and should they at least have a common system of regulation, whatever that may be?

Lara Fielden, in a paper for the Reuters Institute for the Study of Journalism, has described the public’s conflicting expectations regarding press and media, especially with regard to impartiality, and has come up with proposals for reform to the current, illogical system comprising: ‘transition to a tiered regulatory framework across media platforms; comprehensive regulation for distinct cross-platform public service provision; voluntary, transparent standards for ethical private media’, with incentives to adopt them, as a selling point; ‘slim, basic regulation for baseline private media; a consumer confidence levy to ensure transparent messaging and support consumer expectations in standards across media; an inclusive and coherent regulatory framework, able to adapt to emerging electronic media’.

It seems to me that, even if one were to adopt Fielden’s tiered system, one comes back to the problem of what to do about the all-important second tier in which she would (I assume – I have not read her paper) place most of our current, privately owned media. These are knotty problems worthy of substantial research and discussion and I am going to make some a priori assumptions in order to try to move the debate forward. They are that:

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16 see Dr Gordon Ramsay’s 5.3.12 blog on the Media Standards Trust website
17 ‘Regulating for Trust in Journalism’ November 2011
1. A public service, publicly funded presence in the media will be with us for some time and we shall continue to expect that in terms of news reporting it will be constrained by rules regarding impartiality and decency, i.e., the kind of rules that currently bind the BBC.

2. We do not expect or want privately owned newspapers to be bound by the same rules (rather, we want a partisan press but bound in some way to common professional standards such as the PCC Code);

3. The real choice is not between absence of regulation per se, including sweeping away the PCC altogether on one hand, and enhanced regulation on the other hand, but between forms of a PCC mark 2.

4. The case for enhanced regulation, as opposed to a more vigorous application of existing law coupled with some sort of voluntary code of behaviour, is that there is an observable gap between the two - most noticeable in cases such as involving the McCanns. In such cases, people become temporarily notorious (for good or bad reasons) and the press so oversteps the mark (in terms of intruding into privacy, harassment and even libel) that to expect individuals to enforce their rights through the law alone is unrealistic and unfair and fails to address a public perception of the press being out of control. It is also unrealistic in these circumstances to expect people to be content with a voluntary code with no teeth. Inevitably, the law usually reacts to, while a regulator could in theory anticipate bad behaviour. But even if the regulator’s reach is only after the event, looking at repeat examples of breaches of the code and law over time, it could in theory lead to a policy change at the news outlet concerned.

5. As a theoretical objective, the new regulator would be able to intervene on behalf of the public or on its own initiative to uphold press standards prospectively as well as reactively (for example to instruct the press to desist from harassing someone or staking out their houses on pain of a fine, and to allow investigators to consider whether repeated breaches of privacy stemmed from hacking, blagging or the like and to desist, and so on. I am not however suggesting that a regulator should have power to injunct the press.)

6. The objective must not, in my view, be to prevent or indeed to place any additional obstacle in the way of the press when reporting on matters of public interest and concern.

7. Legislation is a blunt instrument, not always effective to deal with what seemed like the issue of the moment, still blunter in the media law field where disputes arise in all kinds of different circumstances, and should be crafted so as to reduce disputes in this area, and not so as to increase litigation and costs. There is another dangerous thing about legislation: once in place politicians are more easily tempted to turn to it to remedy situations never contemplated when the act was first passed, what’s known in other fields as ‘mission creep’.

8. So, even if there is an arguable case for enhanced regulation, we must be aware of the limits to legislation and indeed to effective regulation and not hold unrealistic expectations about what it might achieve. We must also be aware of potential adverse side-effects, in terms of additional disincentives to publication and additional claims and costs falling on the press. If the risk of collateral damage is too great, it may mean that reform should tempered accordingly or even not attempted at all.

I said earlier that there was a division between tabloid and broadsheet in this country, so another legitimate question is, not so much whether they should both be subject to the same kind of regulation (since presumably they both aspire to the same values), but whether the cost of regulation should fall equally on both. Put another way, why should the Newbury Weekly News bear the cost of serious, repeated breaches of the Code by the well-heeled proprietors of the former News of the World? Could (or should) payment be by levy on all press and media, or on the ‘polluter pays’ principle, or some hybrid arrangement?

What to do about the PCC

The PCC, whilst it fell down badly over the phone hacking issue (unfairly criticizing the Guardian and failing to make an effective enquiry into the NotW’s conduct), is still held in high esteem for its Code and by and large for the way in which it mediates and adjudicates on disputes arising from it. I don’t think anyone is seriously suggesting that even that level of press ‘regulation’ should be removed. The question is rather, how should it be upgraded.

A related issue is whether it can be done without statutory backing, since the prospect of any state control of the press and media is frowned upon. It has been anxious to show Leveson LJ that it is putting its house in order before being asked or ordered to do so. What I shall refer to as the Hunt proposals seek to address some perceived deficiencies
while at the same time avoiding calling on the state either to enforce or to pay for the new system. As far as possible then, the Hunt proposals seek self-regulation, devised, enforced and paid for by the press itself.

Meanwhile a great variety of other ideas and proposals have been tabled for reform of libel law.

For example, English PEN and Index on Censorship’s March 2012 Alternative Libel Project report contains renewed emphasis on ADR together with some bold proposals for greater use of early neutral evaluation by the courts, including ‘a new court procedure to determine meaning, independent of full defamation proceedings’ [and potentially before service of a Defence]. It would do this by changes to procedural rules (especially CPR Pt 8), coupled with penalties for those avoiding these short cuts and greater judicial intervention in case management.

We also have a draft Defamation Bill and far-reaching proposals by Jackson LJ for reform of the civil justice costs system and especially the CFA regime18 enacted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which received the royal assent on 1.5.12.

Digressing for a minute, it is salutary to recall that in the last Defamation Act 1996 is a provision designed to cut costs and bring ‘small’ defamation cases to an end, precisely the call that is widely being made again now. A Judge could declare that a statement was false and defamatory of the C, order publication of an apology or summary of the judgement and payment of up to £10k damages. Yet, apart from Mahfouz v Ehrenfeld19 (where the D boycotted the proceedings, so not a good example), I can’t think of a case in which the provisions in ss 8-10 have been used. Does this suggest that legislation should be better stress tested before implementation? It would be interesting to see how some of the latest proposals would have affected some of the major recent cases.

For all the emphasis on sorting out the issue of meaning at an early stage, Flood v Times20 was a case which went all the way to the Supreme Court without that issue being fully resolved. The Court recognized that the parties differed on whether it was a Chase level 2 or 3 case, but since they agreed that that was the spectrum of meaning it was not a bar to considering the Reynolds defence. Thornton v Telegraph21 was essentially a case on malice, in which meaning played a peripheral role. Dell’Olio v Associated Newspapers22 was a robust decision by Tugendhat J on meaning but in Church v MGN23 the same judge declined to deal with MGN’s request for a ruling on paper, in part to save costs, saying that the C was entitled to an oral hearing on the issue of meaning.

As to press regulation, Lord Justice Leveson himself has said that a degree of statutory regulation might be necessary to ensure effective reforms of press regulation; and that if the new system involved an ombudsman, a statute would be needed to make the ombudsman’s view “relevant in civil proceedings”24. It seems pretty clear from this and other obiter remarks that Leveson LJ wishes to see a regulator with teeth, backed by statute and covering both print and online publishers.

The following elements emerged from Leveson LJ’s comments during the inquiry’s proceedings on 28 May25:

A regulator must be wholly independent, of Parlt, Govt, state and the press, but with journalistic expertise available to it. It would allow group complaints. There would be some system of prior notification of subjects of articles (it seems this is confined to privacy, but it might clash with the ECHR's decision in Mosley26, unless it could get round the objections identified by the European Ct). He would consider if there was a need for an ombudsman to advise editors before publication, advice that could be used in mitigation in any ensuing legal action (eg as part of a Reynolds defence). A new inquisitorial regime, without lawyers, allowing members of the public to challenge newspapers and get swift resolution of privacy and small libel type issues. A mechanism (sc fines) to make sure that sanctions worked. And he would seek to deal with the internet (this was apropos internet sites of Ofcom and PCC regulated publishers and the mismatch in regulation, given the content was much the same).

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18 Review of Civil Litigation Costs, Dec 2009
19 2005 EWHC 1156 QB
20 2012 UKSC 11
21 2011 EWHC 159
22 2011 EWHC 3272 QB
23 2012 EWHC 693 QB
24 The Guardian 24.5.12
25 The Guardian 29.5.12
26 Mosley v UK Appln No 48009/08
The proposals put forward by Hugh Tomlinson QC appear to try to bridge the legal/regulatory gap, resulting in a sort of litigation-lite process coupled with a more muscular state-sponsored regulator. He too has ideas for how the costs can be confined.

Hunt and Tomlinson have both had to address the problem of how to compel or at least to cajole co-operation by all elements of the press. Currently (although this may change) Express Newspapers are outside the PCC’s remit and, for example, Private Eye has never been in it. The Huffington Post recently joined. But regulation of those media outlets only that submit to regulation is unsatisfactory, leaving an obvious gap, weakening the authority of the regulator and inciting people to leave when things go against them. To ensure maximum coverage either the press must buy into a regulatory system, because they want the approval it brings and the enhancement of their public image as a quality product, or they must be compelled in some way to do so. But in the latter event the compulsion must stop short of state influence or censorship.

Hunt proposals – main elements

Lord Hunt envisages a new regulatory body with two arms: one dealing with complaints and mediation (much like the current PCC, but it is envisaged that the new complaints arm would have limited power to award compensation); and a Standards/Compliance arm, one that audits and if necessary enforces compliance with the Editors’ Code. A Management Board/Board of Trustees, with a lay majority but senior industry involvement, will deal with all administrative aspects and an Independent Chairman will oversee the two arms of the new body.

Lord Hunt would bring in an Independent Assessor, who would have power to consider and refer back adjudications to the complaints and mediation arm’s adjudicating panel (which will also have a lay majority). This institutes a sort of limited appeal process in what looks very much like the existing PCC system.

His Standards/Compliance Arm “would be activated when there was evidence of a serious or systemic breakdown in standards”. There would be a panel of experts on which the body could call to carry out an investigation, paid as used, and if a publisher was found not to have complied with the requisite standards of self-regulation “it would have to pay for the work of the investigating panel on a ‘polluter pays’ basis and could be made to pay a proportionate fine, operating through the funding system”.

The intention is that the ceiling on those fines would be up to one per cent of turnover or £1m (but one should remember that there will be costs on top).

Key to the new set-up would be that each participating publisher would appoint an internal individual responsible for overseeing standards and would be subject to an annual audit showing how the Code is being followed and standards maintained.

The new system would be ‘legally underpinned through a system of enforceable commercial contracts’ between publisher and regulator, enforceable via the civil law and enabling the regulator to sue for contractual breaches. Contracts would cover:

An agreed funding formula
Undertakings to abide by the Code and relevant laws
Responding to complaints handled by the complaints arm
Supporting defined compliance and standards mechanisms, which could be audited by the regulator
Accepting ‘proportionate financial sanctions via the funding formula should serious standards breaches be found’.

The reach of this new model “could also be extended encouraging exclusively on-line publications to sign up to aspects of the system, using a “badging” system to incentivise this”.

27 Such a person should surely be separate from the main editorial and legal teams and communications with him/her, eg over intended publication of material which could infringe privacy, should be through formal channels, with some documentation to show for it afterwards. A company-wide responsibility would be preferable, but to what extent would all this be affordable by small to medium publishers?
Analysis of Hunt

Left unsaid is precisely what reason or incentive publishers would have for joining, unless like the online publishers they would find a badge or kitemark of approval by the new regulator sufficient incentive. It seems the press neither would nor could be compelled to sign up. When he addressed the Leveson Inquiry on the subject on 31.1.12 Lord Hunt gave the impression that if they did not, or signed up and withdrew unilaterally, the sanction would be “statutory underpinning”, ie state intervention. This may or may not frighten the press into compliance with PCC Mark 2. If it does not, will it have been worth it or will Hunt be accused of having fudged the issue now?

Brian Cathcart of Kingston University, who is sceptical of Hunt’s warning about the bogey-man of state control (and claims Lord Leveson is too) says that “all three party leaders have publicly ruled out any form of statute which impinges on freedom of expression, though they are not against a statute facilitating effective independent regulation….no figure of any significance in either house of Parlt has suggested legislation which would give politicians influence over newspaper content…”.

We should bear in mind however that this Govt is pressing for legislation to enable secret trials (albeit they recently moderated their proposals) and monitoring of email content and that the last Govt pressed for a 90 day period of detention without trial. We are also subjected to an unprecedented degree of surveillance in public places and ever more muscular control of public demonstrations. In my view, the scepticism should be directed in the other direction altogether. Lord Hunt is right to warn about state control, which once instituted would be likely to grow28.

It remains I believe to be clarified in the Hunt proposals how a contract without statutory underpinning would provide effectively for fines to be imposed on errant publishers. There are similarities with a member’s club, but under ordinary contract law a fine is not normally enforceable and one wonders, would a club ‘member’ want to remain in the ‘club’ if fined. The Hunt proposals envisage fines being paid into an enforcement fund, to meet costs and expenses of the regulator in bringing enforcement action or investigations against a regulated entity. Meanwhile, it is being suggested that Express Newspapers have said they will not participate in such a scheme.

This is currently the great, perhaps even fatal flaw in Hunt’s proposals - that there is no mechanism for compelling a large publisher like Express Newspapers to join in the regulatory scheme. The kitemark idea is not convincing.

Also not clear29 is how the great and good of the new Management Board (which clearly would need to have an upper hand in relation to press members) would be appointed and how it could be ensured that whilst having the necessary expertise they would not be subject to outside control or influence, either industry or government influence.

The cost of instituting PCC mark 2 would be substantial, given the need for so many separate functions ie:

- Standards Unit – education & training
- Audit Unit – audits and reports, specifically & generally
- Investigations Unit – investigates, reports and presents cases
- Independent Panel – adjudicates on the award of damage, imposition of fines and other controls (e.g. public apology, additional safeguards)
- One Tier Appeal from Independent Panel
- Code Committee charged with reviewing Code and making amends

Even if some of these units would ‘sit’ on an ad hoc basis and even if investigation costs were loaded onto errant publishers only, it looks like an expensive upgrading of the PCC which already costs about £2m a year according to Tomlinson. Hard pressed and loss making publishers would pay along with the rest.

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28 legal and practical arguments against state regulation are cogently set out at paras 7 & 8 of the first, Feb 2012 Tomlinson proposals
29 Tomlinson by contrast has mooted the involvement of the Judicial Appointments Commission
Tomlinson proposals – main elements

Hugh Tomlinson QC has drafted proposals which pull together the ideas of a round table of academics, journalists, lawyers and others, convened by the Reuters Institute and Media Standards Trust. However, the draft proposals put forward in February 2012 have been quite substantially modified in the “final proposal” dated 7 June 2012. It seems that there has been some dissent around the Round Table.

There would be a Media Standards Authority (MSA), established by statute but independent of Govt and media, comprising “a substantial minority of former editors and also of journalists and others with experience of all forms of media publication”. It would draw up a Code of Media Ethics and Responsibility. The enabling statute would provide for incentives for participation, but this would be voluntary. Participants could be anyone outside the statutory system of broadcast regulation, ie anyone in the second tier envisaged by Lara Fielden (above) including online publishers or bloggers, even if based offshore, as long as they subscribed to the Code.

Tomlinson proposes commercial and legal incentives. Commercial ones, which he recognizes would be insufficient on their own, could include:

An MSA kitemark, said to be of benefit to smaller publishers and of value to consumers.

Journalistic accreditation – covering eg court reporting including live text reporting and access to confidential official briefings

Membership in collective commercial partnerships such as participation in industry standards

Exemption from audio-visual content regulation by AVTOD (the MSA would take this over).

In their first submission the Round Table proposed VAT exemption for participating newspapers, but this proposal has been dropped because “unlikely to be compatible with EU law”. This is a significant change, because imposing VAT on non-participants would have been a serious financial incentive and the idea of including it made Tomlinson mark 1 look pretty muscular. As it is now the Tomlinson model requires publishers to look upon the cheap dispute resolution procedures as sufficient incentive, coupled with the legal disadvantages faced by non-participants.

Legal incentives of four types are proposed – dispute resolution mechanisms; enhanced defences in legal proceedings; additional damages payable in the courts by non-participants; and new legal rights and remedies available to the public against non-participants.

In more detail, “the MSA would seek to resolve all complaints and claims without recourse to the Courts through using three methods of dispute resolution, depending on the nature and scale of the complaint”: a mediation process (like the current PCC); an adjudication process (analogous to that used in the construction industry); and an arbitral process, involving binding resolution of the claim by a new Dispute Resolution Tribunal.

A complainant objecting to a Code breach would complain to the MSA. It would send it to mediation, not normally involving hearings or lawyers and designed to achieve a resolution eg by publication of a correction or the MSA’s ruling. Mediation could also include payment of compensation (unlike the PCC’s current processes). “It would not be necessary for compensation to be as substantial as common law damages”.

The MSA could initiate an investigation into an apparent Code breach, without need for a ‘victim’. It would have power to appoint an investigator and participants would be contractually obliged to cooperate in that investigation including providing documents and oral evidence if necessary.

C would have the option of referring the matter to a Dispute Resolution Tribunal (one lawyer plus two MSA Council members including one lay member) in a form of arbitration, if his dispute could not be solved amicably in a short time frame. Originally, it was proposed that C would be obliged to use this MSA system, ie mediation first then arbitration, to deal with violation of the Code.

However in the latest version, C may go from mediation to adjudication or to the Tribunal (see para 21), but the schematic (page 9) does not give adjudication as an option so far as Code breaches are concerned – only in relation to complaint of a legal wrong.
The Tribunal would not deal only with Code breaches. It would deal with libel, privacy and confidentiality claims where C and P agreed to resolution by the Tribunal. Its award would be final, subject to limited review by the High Court: the Tribunal could award compensation for breaches of the Code, order publication of a correction/summary ‘and give directions as to the future actions of the participants’.

Originally it was suggested that P would be obliged to go to the Tribunal if C wanted it (participants “would be obliged to use the MSA arbitration scheme to determine legal claims if a C wished to have a claim determined in that way”), but this obligation seems to have been dropped from the latest version which stresses the voluntary nature of the claims process whilst stressing the cost saving benefits.

Any participant in the MSA would enjoy a new defence of ‘regulated publication’. So, if he had published a suitable and prompt correction and sufficient apology and paid compensation and given other redress as ordered by the MSA, he would have a complete defence in proceedings for libel unless the material was published maliciously. It seems that this applies to orders by the MSA following mediation, not to orders or recommendations by an adjudicator.

Tomlinson proposes a new public interest defence (statutory, but reflected in the Code as well) aimed at privacy cases but said to relate to “any civil proceedings”. It would be conditional on authorization (sc by the P) under “appropriate internal procedures”. The MSA Code would count as an appropriate procedure. Prior notification should be the norm in ‘potentially intrusive publications’. P would be obliged to show he had followed appropriate processes for determining whether the public interest was engaged. Proposals are made for an advice service, such that both C and participating publishers could consult the MSA in advance of publication for confidential advice on whether particular private information was in the public interest, with sanctions if such advice was ignored or the publisher lied about his intentions. It could be taken into account by the court in subsequent proceedings and would be ‘of persuasive effect’, but would not bind a court, or adjudicator.

[Here, one wonders whether a newspaper seriously intending a public interest privacy ‘breach’ would consult the MSA rather than say a QC, to what extent the MSA would be better placed than such a QC and to what extent a court would take into account guidance from the MSA which might be hypothetical and would have to be subject to caveats. For P to have to disclose his intentions to C would conflict with the ECtHR’s decision in Mosley v UK, but Tomlinson would seem to have anticipated that, since part of the reason for that decision was lack of a clear definition of public interest vs privacy and the chilling effect of a prior notification requirement without it, a deficiency he seeks to remedy.]

Non-participants could be required to pay statutory ‘additional damages’ if they published defamatory allegations or private information in breach of the Code or by disregarding a desist notice issued by the MSA (which damages could be limited by statute).

Against non-participating newspapers there would be a statutory right of reply or correction, and provision for conditional fee agreements of up to 75% with qualified one-way costs shifting in order to give Cs access to justice against non-participants.

A third limb of the disputes process would involve a statutory adjudication scheme – leading to a “speedy non-binding decision”. Any media/legal claim (libel, privacy, confidence) could be referred to MSA adjudication by C and any participant could apply to stay court proceedings and require C to use the MSA adjudication system (though C would still have a right to go to court afterwards if dissatisfied with the adjudicator’s decision).

Adjudicators could deal with complaints/claims on paper without a hearing; or after oral hearing; could award compensation or an injunction or publication of a correction/summary; and could award costs against the publisher – but his award would not be final or binding. Publishers could not ordinarily recover costs from C. Either side could still go to court if dissatisfied.

This aspect has plainly caused a lot of internal debate because the final submissions of the Round Table have elaborated upon the original idea quite considerably. Hence: the MSA “would operate a stringent filter system to prevent vexatious or hopeless claims being brought”; the adjudicator having identified the key issues would rule on them within 28 days; he/she would be paid by the MSA but these fees would ordinarily be recovered from P who might be ordered to pay C’s costs but would not ‘ordinarily’ be able to recover costs from C. The ruling would not be final or binding and would be open to challenge within 28 days.

Provisions are made for audit of internal compliance, similar to Hunt’s. Like Hunt, the Tomlinson proposals envisage the MSA having power to appoint an investigator to look at Code breaches and participants would be obliged to
cooperate. In the event of a dispute about the findings, the MSA could refer the matter to its Tribunal, require the payment of enhanced subscriptions or impose ‘fines’, this power deriving from the contract of participation. Tomlinson is silent on investigation costs and where they would fall: presumably on the errant fine-paying publisher.

There are extensive recommendations regarding internal procedures to be instituted by compliance with the Code and so on.

Most of the requisite funding would come from participants’ subscriptions (graded so that smaller publishers pay less). Complainants and respondents would be charged a handling fee ‘in appropriate cases’, but an element of state funding would be needed. However, it is said that use of adjudication would save publishers money.\(^\text{31}\)

### Analysis of Tomlinson

I asked Hugh Tomlinson about fining newspapers via contracts and he replied - “I am not aware of a problem with someone agreeing that, in the event that a body of which he is a member makes a determination he will pay a sum of money. This is what happens, for example, with private clubs and more generally with, say, the FA or the Jockey Club. But I suspect that the statute should provide that there will be a contract of membership which may contain terms to the following effect – with a list set out – and that the contract will then be enforceable.”

Any initiative which cuts through expensive legal processes and delivers a fair and affordable outcome is to be welcomed. This is a process which is hard to stress test, but let us try.

C complains about an inaccuracy which he says is misleading and a Code breach. Since he is or may be entitled to claim compensation, he does so. His complaint is mediated by the MSA which agrees that the newspaper’s offer to correct is adequate. C is not satisfied. He elects for arbitration by the Tribunal. (I assume that it is not suggested that P must agree, since the clear words of the first draft are dropped from the final version, so presumably P could simply refuse to cooperate with the Tribunal.)

If C combined a code breach with some sort of arguable legal claim, the MSA will suggest adjudication, after or instead of mediation. Here, as I understand it P is not obliged to take part but is likely to want to do so if he regards it as a cheaper and quicker alternative to court action. (It would be absurd if P declined to take part, C then issued proceedings and P applied to stay them pending adjudication.) This may be a disproportionate way of dealing with modest complaints, but presumably P would want to let adjudication take its course.

In the case of more serious legal claims, resulting in the MSA pointing both parties towards an adjudication, C will realise that a favourable outcome is good and an unfavourable one not wholly bad because not binding. P may welcome the opportunity for a dispassionate view of the case. Or P may find itself in an invidious position, because it must cooperate in a process which will entail preparatory work, reveal its hand and will not result in a binding decision. How far will it want to go in adding evidence and arguments designed to head off an unfavourable ruling, given the cost involved? What ceiling if any will be placed on adjudicator’s powers to award compensation? If P decides that it would rather pay the C off than engage in a dispute, how will it put C at risk as to costs and will this incentivise Ps to pay off undeserving Cs?

Let us suppose the adjudicator finds against C. Thus far the process has cost him nothing (save possibly a handling fee), but has cost the publisher time and irrecoverable cost (though he does not have to pay the adjudicator directly). C has the option to issue High Court proceedings.

\(^\text{31}\) HT outlined 7 options for reform of regulation before proposing an eighth (since updated and issued as the round table view). In his outline he canvasses the various advantages and disadvantages of the available options, taking into account the sensitivity over anything that smacks of state control. He rejects ‘co-regulation’ (of the kind suggested by Lionel Barber) by an independent media standards commission, voluntary but with a statutory backdrop rather like the ASA and the Office of Fair Trading and with incentives to join such as possibly a tax on advertising revenues for non-members. HT considers that this fails to address the ‘Desmond problem’ and ‘Internet Wild West problem’ and that statutory powers would be unpopular with the press which would campaign against them.

In his option 8 (but not in the round table version) he proposed a statutory Media Regulation Tribunal, enforcing a Code and with members appointed by the Judicial Appointments Commission.
Or, the adjudicator finds against P. If P wishes to challenge this ruling, he gives notice within 28 days and C must then issue proceedings. P will then find that his defence must be consistent with what has gone before, binding or not. Hence, there will some front loading of costs into the adjudication process.

To these objections, round table member Alastair Brett answers that the filter system will prevent vexatious claims; that it is unlikely C will want to go on to Court after a speedy ruling by a qualified adjudicator, when he risks having to pay legal and court costs; and that complex, document-heavy cases will go to court anyway since not intended for what is designed as a fast track process. Complex factual disputes only arise “in a tiny minority of cases”, he says.

Overall, I fear that this will increase complaints and increase Ps’ costs. That must be true of any system which offers a free ride to complainants. I have doubts about a filter system, since as the courts have shown the burden on someone seeking to shut out a complainant from pursuing a claim or complaint is a high one. Alastair Brett has given a short analysis of some cases which made use of the Times’ fast track arbitration service. Three involved disputes on meaning, one whether an apology having been published the claim was worth anything and the last whether, the facts being agreed, a defamatory word in the article was fact or comment. It may be significant that his cases were all arbitrations, so the result was binding, and mostly involved meaning.

The big question is whether this new system would be effective for small to medium claims in a situation where the parties are not selecting it as an appropriate medium for their claim but are directed into it, and whether overall it will deliver costs savings. It would not work in complex cases, where, one assumes, a sensible adjudicator would decline to get involved and say the matter must go to arbitration (if the parties agree) or Court. For example, it is hard to imagine one of the big Reynolds cases going to adjudication. It may not do justice to the complexity and variety of libel claims or to issues arising in the privacy field. There is also a risk that some Cs will use adjudication within 28 to 42 days to find out the P’s defence and/or, having achieved an award which he regards as too low, to press on the Court to obtain more.

On the other hand, the ability to stop a C in his tracks, to force him to go to adjudication, possibly after fruitless correspondence, before issuing proceedings, with the result that either C backs off or P comes up with proposals for settlement, would seem to be a very valuable means of resolving at least some complaints and claims.

Neither Hunt nor Tomlinson give much attention to: press and photo agencies; foreign and freelance journalists and photographers operating in the UK; and social media sites. Both would like website publishers to join their scheme voluntarily. Tomlinson says that any person, including foreign newspapers, foreign based online publishers, bloggers etc publishing news and information in England and Wales could become a participant.

Overall, Tomlinson suffers from the lack of a mechanism to compel participation. If the only real incentive is that a P gets to use the fast track resolution scheme, P must be satisfied that this will reduce not increase costs, otherwise he will not join and the whole concept of voluntary self- or independent regulation fails. Equally, a cynical P must be satisfied that reducing costs via adjudication etc is going to be more advantageous even if P runs the risk of being fined by the MSA for serious Code breaches than having nothing to do with the adjudication system and avoiding fines altogether. If Tomlinson shares Hunt’s view about maximum fine levels, I think I know which way Express Newspapers would decide its interests lay.

Other ideas for reform

The Co-ordinating Committee for Media Reform (CCMR) has proposed replacing the PCC by a New Publishing Commission. All publications including online ones could join and be represented by the Commission and if registered would enjoy exemption from VAT (if not VAT-able, membership would be free). There would be a PCC Code style Code of Ethical Practice, a news Ombudsman (with powers to order rights of reply and in serious cases a correction) and News Tribunals to resolve disputes (analogous to Employment Tribunals) with a presumption that the courts would only be used as a last resort. Funding would be by turnover based levy with some additional public funding. Non-members would not have access to the protections offered by the Ombudsman and Tribunals. These proposals have something in common with others and are superficially attractive, but once fleshed out would be likely to run into the same kind of problems as encountered by Hunt and Tomlinson. The VAT issue looks like a potentially fatal flaw too.

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32 see www.mediareform.org.uk
33 Media Lawyer Issue 99
Summary

Having tentatively established that there is a case for an enhanced media regulator, let us look back at the root causes of the demand for such a regulator. Would the bodies put forward by Hunt, Leveson or others have made a difference? Do we imagine that the new PCC or MSA would have instituted an effective inquiry into phone hacking at News Group? Would it have intervened to prevent or censure or sanction publication of a stream of tendentious stories about the McCanns, including breaches of their privacy rights? Would it have been effective (including against foreign news organizations and freelance photographers) to put a stop to media harassment of Hugh Grant, the McCanns and many other celebrities? Or would its power have been limited to after the event investigation and sanctions against errant news organizations and the salutary effect that that could have achieved so far as further Code breaches in the future.

I take the latter view. I doubt that the new regulator would have been able to say to the NotW post Goodman – we wish to investigate whether he really was a rogue reporter or not and, unlike the PCC, we intend to send a team of investigators to your paper who will expect to be given full disclosure, to be shown all internal current and archived emails over a period of years, and to interview your staff, and possibly ex-staff and editors. This seems to me to be a huge enterprise. (Both Hunt and Tomlinson would apparently claim power to fine an errant newspaper and make it pay for the cost however long the investigation takes. But under Hunt, the regulator bears the cost if it yields nothing.)

Even if such a task is accepted as beyond the reach of even an enhanced regulator (it might, at an appropriate stage simply call in the Police, whose job this surely is), it seems to me that there could be a lot of work for the regulator to do in terms of policing the conduct of the tabloid press and an almost open-ended remit if it must react to outside complaints but also intervene proactively. One has to imagine a substantial outfit, with a large caseload, staff and costs to match. This is a fortiori if the system is set up so that an investigation can be triggered by a C, at no cost to himself, all paid for by the newspaper (or regulator) whatever the outcome.

In my view, even if a celebrity, for example, called on the new regulator to take action to rein in the press in particular cases this would often arise before the issues had become clear, or at least before they had become clear enough to be resolved by an adjudicator within 42 days – it is all too easy with hindsight to say that the PCC should have intervened in the case of the McCanns, Milly Dowler. In practice, I suspect that a regulator might urge caution or issue warnings but as its main weapon would want to wait and use the threat of a future investigation and fine to operate as a deterrent. In that event, I would expect the regulator to take an overview of past breaches and draw them together in such a way as to try to alter policy at the paper concerned, separately from the legal remedies available toCs after the event.

It is true that this could over time have a deterrent effect. It is also not hard to see how this new system could be ‘gamed’ by astute Cs, who already invoke the Code and the Nicholls checklist to delay or stymie press exposure. There is a risk that C would seek to invoke the regulator’s powers, to investigate and to fine, against a responsible newspaper which for example has amassed material, some of it confidential, on the activities of, say, a powerful businessman or corporation, including confidential witness evidence, evidence concerning financial transactions on and offshore, and wishes to verify and if appropriate publish allegations, possibly defamatory allegations about the person’s conduct and possibly his/her private affairs. The law and the Code already constitute a substantial barrier to publication. The regulator would have to stand aloof in such circumstances.

These audit powers are separate from the litigation-lite powers which Tomlinson would give to the MSA, none of which would directly deal with issues highlighted before Leveson such as phone hacking and press intrusion. Their benefit, so far as Cs are concerned, would really be that they seek to bring small to medium complaints and claims against the media into a reasonable cost framework – an entirely laudable objective, but one that may not cut a lot of ice so far as the big issues are concerned.

The issue that Leveson debated with Tony Blair, namely whether the press was sufficiently observant of the Code requirement to separate fact and comment seems to me a difficult one for any regulator. As Blair conceded, it is more of a cultural thing. Certainly, it seems to me, it is not only a tabloid failing. But I struggle to imagine a regulator for example wrestling with a report from the Syrian or Libyan front by a war reporter (let alone a reporter in Israel) and seeking to enforce the code in an industry-acceptable way.
As mentioned above, in relation to the dispute resolution powers to be invested in the MSA, I have fears about encouraging complaints and claims, rather than reducing litigation, and about an increase in cost for already hard-pressed newspapers. Any new set of rules with power to impose financial penalties also bears the risk of legal challenges, via judicial review and so on, to its processes.

This has been a largely negative appraisal of the two main proposals for regulatory reform. Plainly more work needs to be done and Leveson LJ will want to consider the position carefully, taking into account that bad legislation is probably worse than no legislation at all.

If you would like further information on anything covered in this briefing please contact Richard Shillito (richard.shillito@farrer.co.uk), or your usual contact at the firm on 020 3375 7000.

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