

The Leveson Costs Incentive – Background Briefing

As you will recall, the Leveson settlement set out in the cross party agreement involved the following elements:

1. A Royal Charter which stuck strictly to Leveson's recommendations¹. This included the condition that any self-regulator recognised under the Charter would offer low-cost arbitration for civil claims (libel, privacy, harassment) involving the press, to avoid expensive and often inaccessible court actions.
2. A Royal Charter provision requiring the recognising body (now established as the Press Recognition Panel) to issue a report a year after it opened for applications setting out whether the Leveson system has been effective² so that Parliament can decide what to do.
3. An exemplary damages incentive³, in sections 34 -39 of Crime and Courts Act 2013 (CCA) together with sections 41-42 CCA (definitions and the statutory underpin of recognition, respectively). ss. 34-39 CCA commence automatically a year after the Royal Charter body is established, which will be 3rd Nov 2015; ss. 41- 42, require a commencement order.
4. A **courts costs incentive** (in section 40) which enables access to justice for victims of press abuse (either through arbitration offered by members of a recognised regulator or the enhanced costs protection against news publishers who choose not to be members) and which incentivises news publishers to choose to join a recognised regulator⁴. Section 40 requires a commencement order, promulgated by the government, but even then only actually "operates" once there is a recognised regulator which news publishers can realistically join (this is not due to happen until early next year).

The threshold for exemplary damages under the Common law always was extremely high, and remains so under ss.34-39. It is unlikely there will ever be a possible case. Furthermore exemplary damages must necessarily (to be lawful on article 10 grounds) be proportionate and relate to the ability to pay. For these reasons they are neither draconian nor likely to be much of an incentive.

The costs incentives are far more likely to be effective. They should encourage small publishers who can't afford to pay court costs to access the cost protection provided by a recognised regulator, while also ensuring that those claimants seeking to access justice against large media corporations are able to bring a claim through the cost protection available when suing publishers who are not members of a recognised regulator.

It was always understood that these measures were a package, which all had to be delivered, and this was signified by the cross party agreement signed on the 18th March 2013 by David Cameron, Ed Miliband and Nick Clegg.

¹ with a couple of late concessions to the industry (allowing a small administration fee for people to use the arbitration scheme) and for the arbitration scheme to be reviewed after a year to see if there is evidence that it is damaging the financial position of locals and regionals - in which case they can be exempted).

² Basically, whether all major newspaper publishers are member of a recognised regulator)

³ Whereby in exemplary damages - already available in libel cases, for egregious breaches of rights - are firstly extended to egregious privacy cases and secondly a near-immunity is provided in all cases for news publishers who are members of a recognised regulator.

⁴ News publishers who are member of a recognised regulator are protected (subject to acceptable behaviour in the litigation) from an adverse cost order (paying the other sides costs), even if they lose. And, where a news publisher is not a member of a recognised regulator (and therefore not offering the low cost Leveson arbitration required by the Charter) it is liable to pay the Claimant's court costs in libel and privacy actions, even if the newspaper wins (unless the claimant is vexatious or behaves improperly during the litigation).

As a result of the cross-party agreement the following occurred:

- The motion agreeing the Charter and the legislation bringing in ss. 34- 42 CCA were passed by the House of Commons, overwhelmingly on a division later that day.
- These provisions were also agreed without a vote by the House of Lords (although the House of Lords had indicated overwhelmingly its wish to see the legislation when it amended the 2013 Defamation Bill prior to the cross party agreement).
- The House of Lords also agreed without a division to amend the Enterprise and Regulatory Reform Bill (later becoming the 2013 Act) to remove Privy Council control over the Royal Charter.
- Both Houses agreed to unamend the Defamation Bill (now the 2103 Act) which had been amended in the Lords by a large majority to provide access to justice to press abuse victims during the post-Leveson stalemate.
- The withdrawal or non-moving of cross party amendments (which had majority backing in both Houses) to the Crime and Courts Bill in the Commons and the Enterprise and Regulatory Reform Bill in the Lords, which would have brought in a statutory recognition commission, and brought in the exemplary damages and costs incentives without needing any commencement orders.

With no warning the Culture Secretary said the following at the Society of Editors meeting on 19th October

There is a second matter that needs looking at for the future: the question of when is the right time to introduce the additional incentive identified by the Leveson Inquiry, namely that relating to costs.

The costs provisions in the Crime and Courts Act, when brought into force, will have the effect that publishers who are not members of a recognised self-regulator will normally lose the ability to claim back their own costs in libel and privacy cases – whether they lose or win. This will be a serious and significant change for the industry. I know that it is a matter of particular concern to many small publishers who had absolutely no involvement in the abuses the Leveson Inquiry was set up to tackle.

I have to say that at the moment, I am 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.

My mind is not made up, and I will want to examine the matter further in the coming weeks before taking any decision. But let me be very clear: 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.

Timeline

Nov 30 2012- Leveson recommends independent press self regulation, with the statutory recognition system and damages and costs incentives for newspapers to join. He is explicit that history shows that newspapers will not accept an independent and effective system, without some incentives (and perhaps not even then) and that costs incentives are vital to provide access to justice for victims of press abuse. The Guardian in particular had argued in its evidence that statute should be used to establish the recognition system and to bring in incentives on costs and damages.

Dec 2012- Conservative ministers and the press reject a statutory recognition system. Oliver Letwin and the PM propose a Royal Charter recognition system which is accepted by the press.

Jan 2013- Opposition parties and victim representatives accept Royal Charter compromise on condition that the incentives are made effective by statute, and that the Royal Charter criteria for recognition are not a dilution of Leveson's criteria.

Jan 2013- Secret press industry talks with Conservative ministers, excluding opposition parties and victims representatives on the terms of the Royal Charter.

Feb 2013- Conservative ministers' Royal Charter published and is rejected by Lib Dem and Labour parties and victim representatives because it dilutes many of the Leveson criteria

Feb-March 2013- Negotiations between victim representatives, elements of the press, conservative "rebels", the Liberal Democrats and Labour over the Leveson compliant Charter.

13 March 2013- Cross-party supported amendments to Government bills tabled bringing in a statutory recognition commission with Leveson-compliant criteria, instead of a Royal Charter (the Skidelsky amendment in the Lords) and a series of statutory incentives in the Commons (the Hughes-Bradshaw amendments). These amendments had the backing of all parties other than the Conservatives (and, therefore, a clear majority in both Houses).

14 March 2013 Conservatives re-publish the February Charter (with a few changes) and exemplary damages and costs incentive clauses for the Crime and Courts Bill's final Commons stage scheduled for the 18th March.

15 March 2013- Lab and Lib Dem publish a Leveson-compliant Royal Charter

16 & 17 March 2013- Negotiations between party leaders bring an agreed Royal Charter (based mainly on the Leveson compliant version) and exemplary damages and costs clauses founded mainly on the Conservative's proposals, but with amendments that would strengthen the exemplary damages immunity and also "sharpen" the costs incentive.

18 March 2013- Party leaders sign cross-party agreement on the agreed package, and ensure the withdrawal of the Hughes-Bradshaw amendments in the Commons and the Skidelsky Amendments in the Lords.

18 March 2013 Commons overwhelmingly endorses the agreed Royal Charter and the exemplary damages and costs provisions as they are added to the Crime and Courts Bill

April 2013- House of Lords agrees the costs and exemplary damages incentives without a division after minor agreed amendments

25 April 2013- Crime and Courts Act 2013 receives Royal assent

May 2013 - Press industry submits its own Royal Charter (with criteria similar to the February 2013 version but with the press industry as the recognition body) which the Government feels it needs to consult on to avoid delays caused by a judicial Review application.

Oct 2013 - Industry Royal Charter proposal rejected by the Government (with opposition support) and the cross party Charter approved and sealed.

Dec 2013 – Govt commences the Royal Charter body independent appointments process by writing to the Commissioner of Public Appointments.

Nov 2014- Press Recognition Panel (PRP) established under the Royal Charter after a 10 month appointments process.

March 2015- Government officials tell Deputy Prime Minister office that costs incentives orders will be commenced in time for 3 November 2015 when the exemplary damage sections take effect.

May 2015 General Election No party suggests it will resile from the cross-party agreement. The Conservative manifesto says

We will continue to defend hard-won liberties and the operation of a free press. But alongside the media's rights comes a clear responsibility, which is why we set up the public, judge-led Leveson Inquiry in response to the phone-hacking scandal, created a new watchdog by Royal Charter and legislated to toughen media libel laws.

Sept 2015- At Culture Select Committee, the Culture Secretary does not answer question about when he intends to commence ss. 40, 41 and 42 of the Crime and Courts Act, 2013

Sept 2015: Press Recognition Panel "opens for business" after consulting on its recognition process and criteria.

Oct 2015- The Independent Monitor for the Press (IMPRESS) announces that it will seek recognition from the Press Recognition Panel and anticipates attracting members who wish to take advantage of the costs protection available from their arbitration scheme.

19 Oct 2015- Culture Secretary announces that he is minded not to commence the costs provisions of the Crime and Courts Act 2013.