Consultation on the Leveson Inquiry and its Implementation

Hacked Off Submission

INTRODUCTORY COMMENTS

1. In this consultation the Government seeks guidance from the public on the courses of action to be taken on two matters: the commencement of Section 40 of the Crime and Courts Act 2013 and the initiation of Part 2 of the Leveson Inquiry. Since the chief role of Government in a democracy is to protect and promote the interests of the public, it follows that the proper courses of action here are those which further those aims. In other words, how are the interests of the public best served? Those interests are engaged in three ways.

2. The first is in the upholding of the civil and criminal law. Both have been breached in the recent past by employees of newspapers, not occasionally but on many occasions, not by just a few but by many, and not only by lowly figures but also by senior ones – and institutionally. Thousands of people have suffered in consequence, many of them without remedy, while others have been wronged but remain unaware to this day of the injustice done to them. In pursuance of the interests of the public it must be the first obligation of the Government to do all it reasonably can to ensure that such illegal conduct does not happen again, and where it does to ensure that adequate remedies are available.

3. Secondly, the public’s interests are also engaged through their need to have access to reliable information on public affairs, in this case through the medium of newspapers and other news publishers outside the realm of broadcast – in short, the press. Government has an obligation to protect the freedom of the press to perform this function, and equally an obligation not to interfere with that freedom itself.

4. The third way in which the public’s interests are engaged relates to the standards of conduct of the press industry. The press industry accepts the principle that in addition to the law there must be common, basic standards of conduct, and it has done so ever since it produced its first code. Painful experience has taught us that the public suffers injustices as a result of failures to meet these standards, even where the law is not breached. Such failures may relate to the ways in which news is gathered and to the ways in which it is written and published. Inaccurate information, for example, can cause grave harm to ordinary citizens without being defamatory.

5. Across all three of these one is paramount: the interests of the public. The interests of the press industry can only count in the considerations of government insofar as they serve the interests of the public. Press freedom and the wider freedom of expression are acknowledged in law to be qualified freedoms – other rights and freedoms sometimes come into conflict with them, and sometimes properly override them. Similarly the interests of the press industry, that is to say the array of corporations and companies that publish our newspapers, can and do on occasion conflict with the interests of the public. None of this is to suggest that freedom of expression is anything less than vital and important, merely that its importance derives from the ways in which it benefits and protects the public.

6. With the exception of some rhetorical flourishes this vital emphasis on the interests of the public is absent from the consultation document. In particular the questions posed in the document relegate views and evidence relating to impacts
upon the public to at best a secondary position. A conspicuous priority is given instead to views and evidence relating to impacts upon the commercial press industry, an approach which, morally and historically, cannot be justified.

7. This response to the consultation seeks to answer the questions that are posed while giving priority, as the Government must in its decision-making, to the public interest. Where the questions fail to address those interests we have nevertheless identified them. This is notwithstanding the fact that we believe the answers are the same, even when considered from the perspective of journalism and the press.

8. The corporate press has campaigned on these matters. In considering all the responses to the consultation, ministers should bear in mind that public discussion during the consultation period has been warped by the abuse of press power. Newspapers have presented arguments that serve their interests and reflect their prejudices to the exclusion of all other views. Requests by Hacked Off and others to correct inaccuracies and present alternative perspectives have been consistently brushed off. This is a clear breach of the obligation of the press to provide the public with reliable information. This is obvious on even a superficial reading of the press and is confirmed by researchers. Much of the press industry’s case has been so hysterical as to be beyond argument, but where the consultation document has repeated arguments put forward by the corporate the press we have rebutted them.

9. This consultation is unnecessary and inappropriate. One thing which all parties agreed on during the Leveson Inquiry – including victims, the press industry and politicians – was that there should be no Government involvement in press regulation. This was to avoid the risk of the press and the Government seeking to appease or threaten each other to influence press regulation policy or press coverage of the Government.

10. The Leveson Inquiry showed how the public interest was significantly damaged by such relationships between the press and the Government, and by the perception of such a relationship.

11. For this reason, a cross-party agreement was signed to deliver a Royal Charter that was extremely difficult to amend (and is not amendable at all by the Government) and why legislation to underpin it with protections from political interference, and to incentivise its use, was part of the cross-party agreement.

12. The decision of the Government to delay commencing section 40, and now in the consultation to consider only partially commencing it or repealing it, and to consider cancelling or reducing the scope of Leveson Part 2 is exactly the political interference in press regulation policy that all parties to the Leveson Inquiry and to the cross-party agreement agreed was inappropriate.

13. In short, a consultation by the Government on a new policy after the post-Leveson settlement was agreed is itself an attack on the freedom of the press from political interference and is damaging to the public interest.

14. The nature of section 40 and the need for and scope of Leveson 2 are matters which have been settled for some time. The incentive delivered by section 40 was recommended by Lord Justice Leveson after his 15-month Public Inquiry. The Government has no legitimate reason to interfere in the agreed scheme for press regulation in this way. The need for Leveson Part 2 to take place has not been diminished by anything that has occurred since it was established with clear terms.
of reference. On the contrary, subsequent revelations about misconduct by the press have increased the need for this inquiry.

15. It would appear that the Government has bowed to pressure from the large and powerful press corporations, like other governments before it. The response to the Consultation is provided without prejudice to the basic and fundamental point that it should not be taking place at all.
QUESTION 1: 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.

16. Answer: Option (b) Government should fully commence section 40 now. Option (b) is what Leveson recommended and is what Parliament agreed. See question 2 for more information about why this the best and only option.

THE PROBLEMS WITH THE OTHER OPTIONS

17. Option (a) (Government should not commence any of section 40 now, but keep it under review and on the statute book). This is unacceptable. As the Press Recognition Panel set out in its Annual Report on the recognition system (October 2016), this option allows the Government to continue to interfere in press regulation and damage the public interest, by keeping elements of section 40 “under review”.

18. Option (c) (Government should ask Parliament to repeal all of section 40 now). This is unacceptable. It would involve the Government reversing its position in response to the lobbying power of the big newspaper corporations. Section 40 is beneficial for newspapers that sign up to an independent regulator as it gives them free speech protections, it is also beneficial for access to justice for the public who would get cost protection when taking on unregulated newspapers.

19. Option (d) (Government does not fully commence section 40 now, partially commences section 40, and keep under review those elements that apply to publishers outside a recognised regulator). This is unacceptable.
(1) This has all the same problems as Option (a), in particular continuing ongoing political interference in press regulation.
(2) It undermines the effectiveness of section 40 by removing the penalty element and so reduces the pressure on newspapers to join a regulator recognised by the PRP (which does not have to be IMPRESS). This reduction of pressure has four detrimental effects.
   • By reducing the likelihood of newspapers joining a recognised regulator, it damages the public interest, identified by Sir Brian Leveson, in the UK having a press which is effectively and independently regulated, with the benefits to the standing and trust in newspaper journalism that would flow from that.
   • It reduces the commercial advantages attained by those news publishers who do join a recognised regulator, since the costs protections they would obtain from such membership would stand only in comparison to the normal costs rules and not against the penalty elements of section 40
   • It removes the benefits of access to justice for the members of the public who are civil claimants against unregulated newspapers as they would no longer get cost protection in the courts
   • It removes the benefits for the public, as newspapers readers who would wish to be able to complain to an independent and effective
regulator about breaches in the Standards Code, as newspapers will no longer be incentivised to be members of an independently audited self-regulator.

20. **Option (e)** *(Government does not fully commence section 40 now, partially commences section 40, and asks Parliament to repeal those elements that apply to publishers outside a recognised regulator).* This is unacceptable. It undermines the effectiveness of section 40 by removing the penalty element. This has the same four detrimental effects as in Option (d) set out above.

**Problems with the Consultation: Unjustified and Damaging**

21. The delay in full commencement thus far, and any further delay, is unjustified because it constitutes:
   - (A) a direct contravention by this Government of the will of Parliament
   - (B) a misuse of the commencement procedure
   - (C) a breach of the cross-party principle established in all matters relating to Leveson
   - (D) an infringement upon freedom of expression and the freedom of the press
   - (E) a breach of promises made to victims by Government, and by Conservative ministers.

   The evidence is as follows.

**Contravention of the will of Parliament**

22. Section 40 of the Crime and Courts Act 2013 was a measure enacted as a result of the acceptance by the three main political parties in Parliament of the recommendations of a public inquiry under the Inquiries Act 2005 in response to a grave crisis affecting the press, political parties and the police.

23. The inquiry had been conducted by a senior judge over a period of a year and heard the views of every interested party including, in particular, the press. Its recommendations and supporting arguments were then considered over four months by a committee of senior figures from the three main political parties, in government and opposition, and the result was a formal cross-party agreement signed in March 2013 by the leaders of the three main parties in Parliament (parties which between them accounted for 95 per cent of MPs). This agreement was the basis for the Royal Charter on press self-regulation, for Section 96 of the Enterprise and Regulatory Reform Act 2013 and for Section 40 of the Crime and Courts Act 2013. All of these were endorsed by every single party in the House of Commons and overwhelmingly by the House of Lords.

24. Few Parliamentary measures in modern times can claim greater legislative authority and legitimacy and the threshold for interrupting or interfering with the processes then set in motion must be extremely high.

25. Aware that there might come times when the question would arise whether this high threshold had been reached, and conscious that these were matters not properly left in the hands of politicians and governments (given their potential for improper interference with the press and their known susceptibility to improper press influence), Parliament made explicit provision for a safe, proper and independent means of judging. Through the Royal Charter it gave that responsibility to the Press Recognition Panel (PRP), the uniquely independent public body charged with protecting the interests of the public in matters of press regulation. Paragraph 4.1.d. of the Royal Charter gives the PRP the task of ‘reporting on any success or failure of the recognition system’, and paragraph
10(b) of Schedule 2 requires it to report to Parliament on this matter. The PRP laid its first state of recognition report, which itself had been the subject of a public call for information, before Parliament in October 2016. It stated:

‘Urgent action needs to be taken if the recommendations of the Leveson Report are to be given a chance to succeed. Section 40 should be commenced in England and Wales, and the Scottish Government and the Northern Ireland Executive should consider what further action is required to bring about success as contemplated by the Charter. Until this happens, free speech and the public interest cannot be safeguarded.’

26. The will of Parliament in 2013, and the exceptional care taken to act by consensus and with respect for press freedom, cannot be doubted. The various measures adopted have special authority derived from their basis in an independent public inquiry, in cross-party agreement and in their overwhelming endorsement by Parliament.

27. Nothing in those 2013 measures, or in the debates surrounding them, foreshadowed the actions of ministers in delaying commencement. To the contrary, on no fewer than 29 occasions over the past three years statements have been made in Parliament that the incentives envisaged in March 2013 would enter into force.

28. The failure to commence Section 40 self-evidently runs contrary to the determination of Parliament, enshrined in the various measures (see below), to remove politicians so far as possible from influence over the framework of press regulation that was set out. They also run contrary to the recent and unequivocal recommendations of the PRP, the body tasked at Parliament’s behest with monitoring press regulation. On all these counts the Government is contravening the will of Parliament.

Misuse of the commencement procedure

29. There is no evidence in the records of public and parliamentary discussions of these matters in 2012-13 to suggest that it was the intention or expectation of the three party leaders or of Parliament that a power of commencement might be used by ministers to delay or prevent the operation of Section 40. The terms of the cross-party agreement and the alternatives that were rejected in favour of the statute that was enacted makes clear that in fact no delay in commencement was anticipated, far less any decision not to commence.

30. Such an intervention breaches the spirit of the reforms as it amounts to political interference in the freedom of the press, the terms of the cross-party agreement, and it departs from the principle established in 2011-13 that all such matters require cross-party consensus. (This point is dealt with below.)

31. The Act itself gives clear guidance as to when those who passed it expected that Section 40 should enter into operation. Section 40(6) states:

‘This section does not apply until such time as a body is first recognised as an approved regulator.’

32. This reflects the unequivocal understanding at the time that,

(1) the Act was passed that, by the time a body was first recognised as an approved regulator, section 40 would be in force.

(2) Delayed commencement (which had been proposed in alternative versions of the statute and rejected) was not necessary or desirable
33. Impress became the first body to be recognised as an approved regulator on 25 October 2016. There can be no doubt that the legislators of 2013, including a Conservative Prime Minister and a Conservative Culture Secretary, expected Section 40 to have been commenced by that date. The Government’s refusal to commence is patently not the proper exercise of a power conferred upon it by Parliament, but is instead an abuse of the commencement power in order to frustrate the purpose of the relevant statutory provisions.

**Breach of the cross-party principle**

34. The political response to the crisis of 2011, spanning nearly two years from the decision to hold an inquiry to the decision to approve Section 40, was explicitly and by design cross-party. The Leveson Inquiry itself, and its terms of reference, were the results of cross-party agreement. Announcing them on 13 July 2011, David Cameron **stressed the point:**

> ‘As the Leader of the Opposition said, we had an excellent meeting last night. We discussed the nature of the inquiry that needs to take place. We discussed the terms of reference. I sent those terms of reference to his office this morning. We have had some amendments. We are happy to accept those amendments.’

35. On the publication of his Report Sir Brian Leveson **urged that** [pdf] the same approach should be adopted in relation to his recommendations:

> ‘I hope that my recommendations will be treated in exactly the same cross-party spirit which led to the setting up of the Inquiry in the first place and will lead to a cross-party response.’

36. Cross-party negotiations duly followed in which the three main parties were represented at very senior level: the Conservatives by the Secretary of State for Culture, Media and Sport and the Minister for Government Policy, the Liberal Democrats by their deputy leader in the Lords and Advocate-General for Scotland, and the Labour Party by its Deputy Leader and shadow Culture Secretary. This negotiation concluded with the cross-party agreement of March 2013.

37. There were two reasons for this unprecedented approach. First, given the history of political partisanship in relation to the press (a factor which the Inquiry found had contributed to the crisis of 2011), the public could not be asked to have confidence in measures undertaken by one party alone. Second, it is self-evidently unhealthy for a democracy when any one party, even a majority party, makes decisions on its own relating to the regulation of the press.

38. The commitment to cross-party principle can be seen in the careful arrangements for amendment to the Royal Charter. Royal Charters can usually be amended by the Government with no recourse to Parliament. In this case, not only must the PRP give unanimous approval, but any change also requires assent by two-thirds majorities in both Houses (Royal Charter [pdf], par 4.1 (d)) and the Scottish Parliament – a requirement that Parliament enshrined in law through section 96 of the Enterprise and Regulatory Reform Act 2013. Since no one party has won more than two-thirds of the seats in the Commons since 1931, and no one party can achieve a two-thirds majority in the Upper House, it can hardly be doubted that Parliament’s intention was that any change would entail cross-party agreement.

39. Despite this background, no cross-party process was involved in the decision announced in October 2015 to consider the non-commencement of Section 40, and on the evidence of the consultation document none is envisaged in the
decision-making that is to follow the completion of the consultation. Indeed, the second, third and fourth largest parties in Parliament have registered disapproval with the Government’s position; as have a majority of those who sit on the crossbenches in the House of Lords.

**Infringement upon freedoms**

40. The Government’s decision to delay the implementation of Section 40 places it in a position of influence over the form of press regulation. This is not compatible with freedom of expression or with press freedom.

41. Politicians should never have such power, which is precisely why Parliament in 2011 asked a senior judge to review the matter and make recommendations, why once his recommendations were made they were handled on a cross-party basis and why those recommendations were so punctilious in excluding politicians from future involvement in press regulation. So long as the government holds the power of commencement, it is acting as a censor or potential censor, which is why Options (a) and (d) in Question 1, explicitly holding out the possibility of long-term ‘review’ by politicians, must be unacceptable.

42. This was a point made clearly by the independent Press Recognition Panel in its [report of October 2016](#) when it said…

*On 19 October 2015, the then Secretary of State, John Whittingdale, said that he was not yet minded to make the order which would commence Section 40. At the same time, he urged relevant publishers to move within the recognition system.

*In making this statement, he moved away from the recognition system in England and Wales as contemplated by the Charter and the CCA 2013 apparently to see whether relevant publishers would nonetheless create and/or join an approved regulator as contemplated by the Charter. The majority of relevant publishers have not taken this opportunity.

*The shared view from both proponents and opponents of the recognition system (and implicit in the Charter itself) is that press regulation should be free from political interference. Full implementation of the recognition system would achieve that. Some opponents of the recognition system have focussed on discouraging the Secretary of State from commencing Section 40 arguing that its cost shifting measures amount to an attack on free speech. The decision to delay commencing Section 40 has paradoxically kept a political presence in place, something which its commencement would remove.*

43. Editors and journalists will be conscious that the government on whose activities it is their business to report has the power at any time, by executive action alone, to alter the terms of their industry’s regulation. Government thus assumes a power at the very least to ‘chill’ reporting and also potentially to trade favours with the press in a corrupt manner.

**Breach of promises to victims**

44. In 2011-13 politicians of all parties, including the then Prime Minister, made it clear to the public on numerous occasions that the views of victims of press abuses were of central importance. From the many examples, here are statements by David Cameron to Parliament on 13 July 2011:

– ‘*We must at all times keep the real victims at the front and centre of this debate.*’
– ‘*This has to be about the public and the victims.*’
– ‘None of us can imagine what they [the victims] have gone through, but I do know that they, like everyone else in this country, want their politicians to bring this ugly chapter to a close and ensure that nothing like it can ever happen again.’

45. Here are statements he made to Parliament on 29 November 2012:
– ‘What matters most about this is putting in place a regulatory system that can make the victims proud.’
– ‘What is absolutely vital is that we put in place a regulatory system that they [the victims] can see has got real teeth.’
– ‘I think that they, as all victims do, deserve a really tough, independent regulatory system that can really hold the press to account, that can fine those editors, that can call them to account, that can insist on proper apologies and that can take up complainants’ cases and deal with them properly.’

46. The Culture Secretary, Karen Bradley, in remarks in the Commons, has suggested that she honoured this commitment by meeting a group of victims, once. This was at a time when the possibility of a consultation had never been publicly aired and she did not on that occasion mention the subject to the victims. Victims were never asked their views either on the principle of consultation or its form.

47. This disregard for the views of victims is also evident in the terms of the document itself, which consistently gives priority to the interests of, and the possible impacts upon, the press industry, and invites views or evidence relating to impacts upon victims or potential victims exclusively in relation to their possible status as legal claimants. Nowhere are respondents asked to comment, for example, upon the possible impact of the various options on press standards and ethics, or on the number of code breaches likely to take place in various scenarios, or on the number of regulatory investigations, fines and front-page corrections that are likely to occur. These are matters of direct concern to victims, whose views represent those of future potential victims and of the public generally.

THE FALSEHOOD THAT “MUCH HAS CHANGED”

Introduction

48. The idea that ‘much has changed’ is employed in the consultation document to justify the Government’s interference in the Leveson/Royal Charter reform process approved by Parliament. Because ‘much has changed’, it is implied, circumstances now prevail that those responsible for the measures of 2012-13 could not have foreseen, and ministers are therefore free to take matters in their own hands. The consultation document presents the public with a number of examples of supposed change, which include in brief:
(A) That after more than three years, most of the industry still refuses to participate in recognised regulation.
(B) That incentives associated with exemplary damages have come into force.
(C) That the industry is under pressure.
(D) That the 2013 measures were adopted without proper consultation with the press industry.

(A) Limited industry ‘buy-in’

49. The consultation document states that ‘the system does not have buy-in from the industry, which is crucial for a voluntary self-regulatory system’. As an argument to
alter or depart from the measures agreed by Parliament in 2013 this is wholly without merit, for four reasons.

50. **First,** lack of ‘buy in’ was recognised as a possibility from the outset. It was foreseen in the Leveson Report, the cross-party agreement and the measures approved by Parliament in 2013. This is evident, for example, from the testimony of the then Culture Secretary, Maria Miller, to the CMS select committee on 16 April 2013:

   Q: 'You would accept that so far the reaction of the press, at almost every level, has been wholly negative? There is not much sign at the moment that they think these are very attractive incentives that will persuade them to join up.'

   A: 'Look, obviously it is early days. We are still in the process of putting in place the incentives that we need. We believe that the approach that we have taken is strong. It is the right way forward. It is very much in the spirit of what Lord Justice Leveson is proposing and we do think that it will provide a material improvement in the self-regulation of this country. It is something that we are actively working on now and looking to implement.' (Q367).

51. It is clear from this exchange that a ‘wholly negative’ press response was not unexpected and also that incentives were recognised as integral to success. There is abundant evidence that this was the accepted view, indeed the ‘wholly negative’ attitude of national newspapers was a matter of public record at the time the minister spoke. In explaining that the purpose of the incentives was to change this view she expressed Government policy, founded on cross-party agreement.

52. Well before April 2013 the possibility that the corporate press might respond to the reforms in a variety of ways, including a ‘wholly negative’ one, was recognised and fully addressed. The Leveson Report discusses this at length (Report, Part K, Chapter 8). And as explained above, under the cross-party agreement the extent of industry buy-in was seen as sufficiently important that the chartered body, the PRP, was specifically tasked to monitor it and report to Parliament.

53. A lack of industry participation is stronger reason to bring forward incentives or increase their potency, not a reason for removing or weakening them. The argument that extent of “buy-in” should determine whether the incentives should be brought into force is premised on the view that the continuation of the press situation where the press refuses to join an approved regulator Leveson regulation is satisfactory. This is not the case: Leveson, and the Government’s policy has been that all significant publishers must sign up to independent Leveson-style regulation; if that does not happen of the press’ own volition then incentives must be deployed. If they are unsatisfactory then further steps are required. That is the Leveson proposition which the then Government supported in 2013.

54. No case can be made, therefore, that the possibility of limited industry buy-in to recognised regulation in the absence of the Section 40 incentives was not foreseen in 2013.

55. **Second,** the failure of many news publishers to join a recognised regulator demonstrates the need for the incentives in Section 40. In the absence of those incentives most of the press industry, without rational justification (see below), has refused to do what Parliament and the country asked of it. The ‘strong approach’ promised in 2013 is overdue.
Further, the Leveson Report and the cross-party agreement clearly envisaged the possibility that there might come a time, if the incentives had been tried and proved insufficient to induce news publishers to join recognised regulators, when matters would have to be reviewed and it would fall to Parliament once again to take action for the protection of citizens from abuse resulting from low ethical standards in the press. As the Leveson Report and the PRP state of recognition report make clear, that time could only be considered to have arrived when the incentives in Section 40 are seen to have been tried and to have failed.

Third, the lapse of time since March 2013 cannot be used as an argument in favour of departing from Parliament's decision, as it is in the consultation document. It was inevitable that the necessarily complex appointments processes for the PRP (which are integral to its independence) would take time. The same is true of the process of recognition itself. What Parliament could not have foreseen were the delays deliberately caused by the corporate newspapers. Their actions in 2013 (which included an attempt to secure a Royal Charter of their own and to judicially review the rejection of that) delayed the sealing of the Royal Charter by six months. More recently, their repeated interventions at the PRP, threatening judicial review, resulted in the recognition of Impress being delayed by a number of months. In other words, the point where Section 40 was supposed to take effect would have arrived at least a year earlier but for the activities of the press themselves. To suggest that this delay justifies abandoning or altering Section 40 is to surrender to cynical delaying tactics.

Fourth, any suggestion that limited ‘buy-in’ justifies or even helps to justify altering or abandoning changes approved by Parliament equates to an acceptance that the corporate press has a right of veto. Nowhere is there any record in the deliberations of 2011-2013 that such an extraordinary notion was entertained by anyone outside the corporate press itself. This is not surprising. That the same companies which, in the words of the Leveson Report, ‘wreaked havoc with the lives of innocent people’ might enjoy the power to veto reforms recommended by the inquiry and endorsed by all parties in Parliament is unconscionable.

(B) Exemplary damages

The suggestion was made in speech by the previous Culture Secretary, and is repeated in the consultation document, that the provisions of the Crime and Courts Act relating to exemplary damages alone might prove sufficient incentive to news publishers to join a recognised regulator, and it would be right to wait and see their effects before commencing Section 40. This is manifestly incorrect.

While it was recognised in 2012-13 that giving members of recognised regulators effective immunity from the risk of exemplary damages (and exposing unregulated news publishers to a new risk of exemplary damages in privacy actions where they did not already operate) might provide an additional incentive, it should have been obvious to all that this would have at most a marginal effect. This is because awards of exemplary damages in media cases have been exceptionally rare – they have not been awarded on a single occasion since 1993. There are no grounds to believe that the courts will change their views on this, not least because the Crime and Courts Act itself set the bar for such awards extremely high. Under Section 34 (6) a judge must be satisfied not only that a news publisher has shown a ‘deliberate or reckless regard’ for a claimant’s rights, but also that that disregard must be ‘of an outrageous nature’. It follows that such awards, if they ever occur in the future, will never be more than exceptional occurrences.
61. Where a penalty is never or very rarely imposed, immunity from it (or a new exposure to the risk of it) will have very limited impact as an incentive. No serious claim can therefore be made that the entry into force of the exemplary damages provisions constitutes a significant change, let alone one capable of justifying overriding Parliament’s will as expressed in 2013.

(C) ‘Pressures on the industry’

62. The consultation document notes that one of the reasons given by the previous Secretary of State in 2015 for his failure to commence Section 40 was ‘pressures on the industry’. He gave no explanation of what these pressures were, though he referred to two factors which could be construed as such.

63. The first was the continued publication of some local council newspapers in competition with the commercial press. This, as he explained, was being addressed. Either way, it has no connection to matters of regulation. The second was social media and the online distribution of news, referred to briefly.

64. There can be no doubt that the advance of online news distribution represents a substantial long-term challenge to traditional newspaper businesses, but this matter and its implications cannot be said to have arisen since 2013. They were thoroughly aired before Sir Brian Leveson, who noted in his report: ‘The Inquiry has been told by a large number of witnesses that the economic environment in which newspapers operate is challenging’ (Part F, Chapter 7, 2:6) (our emphasis). Social media were also familiar by 2013. Neither, therefore, represents a new ‘pressure on the industry’, both were familiar to Parliament in 2013, and so neither could be said to constitute a ‘change’ necessitating the overturning of Parliament’s will.

65. Further, the then Secretary of State cannot have been referring to pressures affecting the general financial health of the industry, for as he himself noted in the same speech in late 2015:

   ‘I was glad to hear that those who have written the obituary of print media have been proved wrong. Although declining circulation and migrating advertising have led to closures and job losses, Enders recently reported that the industry is still profitable, innovation and online growth are helping to stabilise the top line, and new enterprises are emerging.’

66. The picture remains one of general profitability. In mid-2016, according to Enders Analysis (the same source cited in the speech), the latest combined yearly operating profits of the nine leading newspaper groups stood at £380m.

67. It is important to note here the scale and range of support that the newspaper companies receive from the public purse, above and beyond the ‘significant and special rights’ which, as the Leveson Report noted, they also enjoy (Exec Summary, para 6). Among the financial benefits are:

   • A statutory duty on local councils to place notices in the local paper on planning, licensing, and traffic orders, calculated in 2015 to be worth at least £40-45m per year to the industry.
   • A two-year business rate cut in the 2016 Budget, specifically designed to help the local press.
   • In 2015-16 the Government placed advertising worth £5.5m in the leading national papers alone.
   • The Government recently brokered an arrangement under which the BBC will spend £8m annually commissioning reporting from local news providers.
68. On a far bigger scale, newspapers remain zero-rated for VAT – a subsidy calculated by the Reuters Institute in 2011 to be worth £594m to the industry annually. That is considerably more than the combined profits of the leading industry companies. Government, Parliament and the taxpayers are already very generous in their support for the newspaper industry, and no case to the contrary can be made.

69. Finally in this context, a clear distinction must be made between profits and standards. Even if it were the case that newspaper publishers had fallen on hard times, that could never be a justification for government action which helped or enabled them to operate with low standards. (By analogy, if the food industry was in difficulty no responsible government would assist it by allowing hygiene standards to fall, since that would be to put the interests of the industry before those of the public.) As Sir Brian Leveson found, it is overwhelmingly ordinary citizens who suffer the consequences of low journalistic standards. The state has no business facilitating such suffering.

(D) ‘Little consultation’

70. The consultation document states that ‘some parts of the press . . . argue that there was little discussion with publishers when the self-regulatory framework and associated incentives were created’. This is untrue, and given the industry’s knowledge of what occurred it can only be a deliberate untruth.

71. At the Leveson Inquiry, where all of the evidence was heard that led to the creation of the new regulatory framework, the views of the press and of journalists were heard exhaustively, and in public. A generous majority of the 337 witnesses who testified were journalists, former journalists, employees or representatives of press companies or of the Press Complaints Commission (PCC). Further, all of the leading press companies enjoyed the privileged status of ‘core participants’ and so were in a strong position to support their witnesses. They were each represented by counsel and solicitors at the Inquiry.

72. Not only individuals, but newspapers, newspaper companies and newspaper industry groups also made substantial written submissions, while several distinguished former journalists acted as advisers to the judge (all of them endorsing all of the recommendations). Throughout the proceedings, moreover, newspapers asserted their views in print and online with the manifest intention of influencing public opinion and policy, and they continued to enjoy access to government ministers.

73. After the publication of the Leveson Report, and in the period of cross-party discussion, the press were fully consulted. As the then Culture Secretary told the Culture, Media and Sport select committee in April 2013, the Royal Charter was (our emphasis)

‘the result of nearly four months of discussion with victims’ representatives, expert advice, discussion with the industry and negotiation between the three main political parties’.

74. At the same committee session, the then Minister for Government Policy, Oliver Letwin, explained that the contacts with the industry during this period had been so intensive they attracted criticism:

‘Perhaps it would help if I were to explain that throughout this process there have been all sorts of people who have complained vigorously that the Secretary of State and I spent an enormous amount of time both
directly and with our officials talking to the press, collectively through their representatives and bilaterally and multilaterally. We were accused of various terrible malfeasances as a result of our intensive discussions with the press. Why did we have those discussions with the press? Precisely because we wanted to set up a system under which it would be possible for the press to seek recognition but that at the same time achieves the thrust of what Lord Justice Leveson was trying to achieve.’ (Q401).

75. Most strikingly, the leading press negotiator of the time, Paul Vickers, spoke in February 2013 of ‘intensive talks involving the newspaper and magazine industry and all three main political parties’. There can be no doubt that any assertion of a lack of consultation with the press in 2012-13 is false.

76. The press have often complained in particular that they were not invited to a meeting on the evening of Sunday March 17, 2013 in the office of the Leader of the Opposition. There was no reason why they should have been, as Mr Letwin and Ms Miller confirmed to the CMS select committee. The terms of the cross-party agreement had already been settled before this meeting took place, so it was no longer open to negotiation. The purpose of the meeting was rather to honour commitments given under oath at the Leveson Inquiry by all three party leaders that they would consult victims of press abuse before taking action. Hacked Off was invited to represent those victims, with their full consent, and it expressed approval for the cross-party agreement. A press presence at such a meeting would have been superfluous, and would have changed nothing.

77. In any event, at the meeting, Mr Letwin made representations on behalf of the press in relation to a request that the commencement date of the exemplary damages provisions be set as later (in fact to be one year after the Recognition Panel was established) than the anticipated commencement of the costs provisions. This was agreed at that meeting.

78. That the claim of exclusion from this meeting continues to be repeated is proof of the dishonesty of those who make it.

**The State of Press Regulation**

**Introduction**

79. Under the rubric of ‘much has changed’ since 2013, the consultation document states: ‘We have seen arguably the most significant changes to press self-regulation in decades’. This cannot be disputed insofar as it relates to changes resulting directly from Parliament’s cross-party actions in 2013: the PRP has been established and has begun work – a historic step – and Impress has been established and has been recognised by the PRP as meeting the standards of independence and effectiveness set out in the Leveson Report and the Royal Charter as necessary for the protection of the public and for the safeguarding of freedom of expression. Given the unfortunate history of press regulation in this country, these can rightly be described as most significant changes.

80. They do not, however, constitute changes of a kind that could justify abandonment of the course chosen by Parliament under the all-party agreement in 2013, nor could they justify interference by Government in the processes envisaged and set in motion at that time. As explained above, the threshold for any such action must be exceptionally high.

81. The document makes the following statements in relation to press regulation:
A) The government ‘remains steadfastly committed to ensuring that the inexcusable practices that led to the Leveson Inquiry being established can never happen again’.

B) ‘It is important that the public know that should they have a complaint about the press, their concerns will be handled competently, fairly and swiftly.’

‘The government is also fully supportive of a system of voluntary self-regulation by the press that is free from government interference and which enables all sectors of the industry to thrive.’

82. Point C describes recognised self-regulation under Royal Charter, as offered for example by Impress. In relation to A and B, the Leveson Report made 38 recommendations relating to press self-regulators and these were accepted and adopted under the cross-party agreement and endorsed by all parties in Parliament as the recognition criteria in the Royal Charter. That is to say, they represent the formal, impartial public test – independent of political influence – of whether a press self-regulator is sufficiently independent and effective to provide the public with confidence that their complaints will be dealt with competently, fairly and swiftly and that the regulator is in a position to do everything possible to prevent a repeat of inexcusable practices.

83. Sir Brian Leveson made clear in his report that effective, independent self-regulation of the press in line with his recommendations is the best way of underpinning standards and so the best way of protecting the public against abuses of all kinds, including those proscribed by law. He noted in particular the difficulty of detecting crimes such as voicemail interception and data theft, where victims are usually unaware that they have occurred. This means that the criminal law is sometimes weak protection for ordinary citizens. More effective is the sustained maintenance of ethical standards in the industry.

84. The consultation document states that “the press has undergone significant changes” including that “the majority of the press are regulated by IPSO, a new self-regulator” (para 64).

85. The Inquiry examined in great detail the proposals for a new regulatory arrangement put forward by Lords Hunt and Black on behalf of the leading newspaper groups (Part K, Chapter 2). The Leveson Report set out a very detailed account of the serious shortcomings of this scheme (Part K, Chapter 3), the spirit of which was captured in the Executive Summary:

‘The proposed model does not go anything like far enough to demonstrate sufficient independence from the industry (and, in particular, serving editors) or sufficient security of high and unalienable standards for the public . . .’ (para 53).

86. Elsewhere the judge remarked [pdf]:

‘It is still the industry marking its own homework. Nor is the model proposed stable or robust for the longer-term future.’

87. The Hunt-Black scheme none the less was adopted as the blueprint for IPSO, and where alteration was made to the original scheme it was rarely to address the shortcomings identified in the Leveson Report.

88. This is confirmed by the close study of IPSO’s founding documentation [pdf] undertaken by the Media Standards Trust in November 2013:

‘According to this analysis, of these 38 Leveson recommendations, IPSO satisfies 12, and fails to satisfy 20. It is unclear, given the information provided to date, whether IPSO satisfies the other 6.'
‘Of the 12 recommendations that IPSO satisfies, some should substantially improve the current [PCC] system, especially with regard to internal complaints and compliance, and protection for whistleblowing journalists. ‘However, of the 20 recommendations that IPSO fails, many are key elements of the Leveson system, including independence from industry, access to justice, and complaints.’ (p.3)

89. These findings have never been faulted and the chair of IPSO, Sir Alan Moses, has acknowledged that they are accurate. IPSO’s principal shortcomings – the main reasons (among many) why it cannot properly serve the public interest – are glaring and substantive:

1. IPSO is not independent of the industry, but rather is dependent upon it as represented by the Regulatory Funding Company, which is dominated by the national corporate newspaper groups and which exercises control and influence through influence on appointments, control of regulations, an effective veto of investigations, writing the guidance that underpins the level of sanctions, deciding whether to use arbitration and the sole control of the IPSO constitution and terms of the contracts with newspapers.

2. IPSO’s complaints process, very similar to the PCC’s, is predicated on mediation and not adjudication, meaning that the priority is not upholding the code in general, or even on achieving just outcomes, but on palliation. This is not an effective way to uphold standards.

3. IPSO’s arbitration scheme is under the control of the industry, can be ended at any moment by the industry, is not low-cost for members of the public (and is therefore not accessible), is subject to a much lower limit on awards of compensation than would be obtained in the courts and allows defendant newspapers to ‘cherry-pick’ the cases they will allow to go to arbitration.

90. IPSO’s arrangements for investigations and sanctions, though they have been the subject of considerable industry boasting, are powerfully weighted in favour of news publishers if they happen at all. It is no surprise that IPSO, in a period when press standards of accuracy have been manifestly low and widely criticised, has yet to launch a single investigation much less to impose a single fine.

91. IPSO claims to have undergone reform since its launch but any changes are not remotely substantive. Of the 20 shortfalls identified by the MST just one, relating to security of funding, was tackled. Other shortfalls were made worse (such as the initiation of investigations). Nineteen breaches therefore remain. By its own admission IPSO does not meet the Charter recognition criteria and it has stated it will not seek recognition. Until it does so and is successful it cannot be said to meet the standards found by public inquiry and agreed by Parliament to be necessary to protect the public. Nor would it be right for any politician to attempt to make his or her own judgement in this matter: that would breach the central Leveson principle, accepted in the cross-party agreement, that politicians must not be the arbiters in matters of press regulation.

92. Any appraisal of IPSO (and this consultation is itself an implicit endorsement to some extent) by the Government is totally inappropriate, as the Government has neither the independence nor the authority to make such a judgment. Only the PRP is able to give an informed and independent view on press regulators. Indeed, passing judgment on IPSO is to give the Government an explicit role in press regulation, and therefore totally unacceptable to the Leveson framework and the ends of a press free from Government interference.
History of self-regulation

93. The most cursory assessment of the history of press self-regulation in this country over the past half-century leaves no doubt that the industry alone cannot be trusted to do the job in the interests of the general public.

94. The Leveson Report noted two recurrent themes: a ‘pattern of cosmetic reform’ of regulation by the industry when things went wrong, and persistent failures by government to act effectively in the public interest (see Part D, and Part J, Chap 4) The PCC came into being because of the Calcutt Report of 1990, which recommended that the press be given ‘one final chance to prove that voluntary self-regulation can be made to work’. In his follow-up report two years later Sir David Calcutt concluded: ‘The Press Complaints Commission is not, in my view, an effective regulator of the press.’

95. The failure of government to act effectively at that time, combined with the unwillingness of the press industry to operate effective self-regulation, may fairly be said to have made possible the collapse of standards at some national titles which in turn made the Leveson Inquiry necessary. Many ordinary citizens, as the consultation document acknowledges, suffered in consequence. Further failure by this Government to interrupt the ‘pattern of cosmetic reform’ is certain to cause further suffering by innocent citizens. Such a failure, in the teeth of such clear historical evidence, would amount to a dereliction by the Government of its duty to the people.

96. IPSO, as explained above, is the latest manifestation of the pattern of cosmetic reform. The Royal Charter, supported by Section 40, was the means by which Parliament decided to break the pattern in 2013. A failure to commence Section 40 and an acceptance, however tacit, of IPSO or any other regulator that fails short of the standards of independence and effectiveness required under Royal Charter, and fails even to undergo the test, would be a betrayal by the Government of all those whom it is its duty to protect.

Industry advocacy

97. Ministers should be extremely cautious about accepting any opinion on IPSO that is expressed by leaders of the press industry since the record demonstrates beyond doubt that these opinions may not be relied upon. Lord Guy Black, mentioned above, is a former director of the PCC and now a senior executive at Telegraph newspapers. In 2009, after the Motorman scandal and the McCann affair, and two full years into the phone-hacking cover-up, Lord Black was chair of PressBof (predecessor to the RFC), whose written submission to the CMS select committee made these assertions, under the heading ‘The success story of self-regulation’:

‘The industry is fully committed to effective self-regulation through the editors’ Code of Practice and the jurisdiction of the independent PCC.’
‘Standards of reporting have been raised markedly. . .’
‘The PCC itself has proved itself to be an efficient and accessible regulator.’ (Report, Vol 2, Ev 109)

98. Paul Dacre, editor-in-chief of Associated Newspapers and chair of the Editors’ Code Committee, told the same committee in 2009:

‘What gets my goat a little bit is the refusal of a, to be fair decreasing, minority to accept that standards have not improved very considerably in the press since the start of the Commission. I have been in this business forty years; the journalistic landscape has changed dramatically since the
80s: journalists are much better behaved. There is an argument that the Code and the Commission has toughened things up so much that, vis-a-vis the earlier conversation, it is blunting the ability of some of the red top papers and the red top Sunday market to sell newspapers.’ (23 March 2009, Q588).

99. In 2011 Mr Dacre told Sir Brian Leveson:
‘The PCC has changed the very culture of Fleet Street. The editors’ code of conduct imubes every decision made by news desks and back benches.’ (Leveson seminar November 2011)

100. In other words the two most senior industry figures associated with regulation at its highest levels were blind or to the faults of the PCC, or deliberately ignored them, even in the depths of its failure. One finding of the Leveson Inquiry in 2012 puts this in perspective:
‘The failings which have fatally undermined the PCC and caused policy makers and the public to lose trust in the self-regulatory system are not new. They have been consistently identified by external scrutiny for at least a decade. The twin failure of both the self-regulatory system and the industry to address these problems is itself evidence that there has been no real appetite for an effective and adequate system of regulation from within the industry, in spite of a professed openness to reform and self-criticism. It is difficult to avoid the conclusion that the self-regulatory system was run for the benefit of the press not of the public.” (Part J, Chap 4, 8.12).

Numbers

101. Nor can the number of members of IPSO be taken as evidence of its ability to perform the roles identified in A, B and C satisfactorily in the public interest, as the consultation document might be inferred as suggesting. Up to the time of its abolition the PCC actually had more members than IPSO does now, but that did not prevent Sir Brian Leveson from concluding that it was ‘run for the benefit of the press not of the public’ (Part J, Chap 4, 8.12) or David Cameron from stating that it was ‘not set up in the right way, and has not worked’ (Col 319).

Trust

102. Point B above refers to the importance of public trust in regulation. A YouGov opinion poll in November 2016 [pdf] asked respondents: ‘Which of the following would you most trust to regulate news publications?’ It suggested: a regulator set up by the Government, a regulator set up by newspaper publishers and a regulator that is independent of Government and newspaper publishers. The first option found favour with 8 per cent, the second with just 3 per cent and the third with 73 per cent. IPSO corresponds precisely to the least popular form of regulation, favoured by only a tiny minority, while almost three-quarters of people support a regulator such as Impress. This has been the consistent view of the public, as expressed in opinion polls, since before the conclusion of the Leveson Inquiry.

103. Further questions were asked by YouGov (see appendix 5 for more details) on 5-6 January 2017, after a 2-month campaign by the press industry to promote IPSO and oppose the Leveson system of incentives (section 40) and recognised regulation. The results are remarkable in the strength of the public opinion on these matters, but they also reflect a consistent pattern of opinion polling over
Public's View of Press Behaviour
- Nearly three quarters of the public believe that press behaviour has either got worse (40%) or not changed (33%) since the Leveson Inquiry reported. Only 14% felt it had got better.
- The public view of press behaviour has become more critical since the creation of IPSO, because an identical poll question in April 2015 (when IPSO had just been set up) in a YouGov poll when 24% said press behaviour had got worse, 33% felt it had not changed, and 23% felt it had got better.

Public's view of the need for "tougher" press regulation
- Almost three in five respondents favour tougher press regulation than we currently have (57%), and just 17% believe the status quo is adequate.
- Only 5% think the current system is too tough
- Despite press claims about their new regulator IPSO being the "toughest in the western world", these figures are almost identical to 18 months ago when the same question was asked by YouGov.

Public's view of unrecognised press self-regulation
- Fewer than one in ten (9%) support self-regulation of the press without independent scrutiny. Of those expressing a preference, 63% believe that press regulators should be subject to independent scrutiny as Leveson recommended.

Public confidence in IPSO
- Six in ten (59%) have little or no confidence in IPSO, the regulator set up by newspapers, the same proportion it has been since IPSO was founded (YouGov poll April 2015).
- Confidence in IPSO has declined from 21% to 15% since the question was last asked in April 2015 by YouGov shortly after IPSO was set up.

Sustainability

104. Integral to the arrangements agreed in 2013 was provision for the long-term maintenance of standards in press regulation. Paragraphs 5-12 of the Scheme of Recognition in the Royal Charter provide not only for routine ‘cyclical’ reviews of recognised bodies, in the first instance after two years and thereafter every three years, but also for ‘ad hoc’ reviews in cases where the PRP considers them necessary. This flowed directly from the Leveson Report (Part K, Chap 7, 6.9, 6.10) and the objective is obvious: to prevent slippage or departure from the standards set out in the recognition criteria. IPSO not only fails to meet those recognition criteria now, but there is also nothing in the IPSO framework that ensures that it will continue to meet even its existing standards in terms of the rules and processes of IPSO which the industry, through the RFC, can change at any time. And beyond the term of the current five-year member contracts in 2019, everything else will then be up for renegotiation, and if the process of creation of IPSO is any guide it will not be a negotiation in which victims or the public have any part, but instead will aim to serve the interests of the press industry and no others. Should the Government fail to fully commence Section 40 and give recognised regulation the best chance of success, it will carry responsibility for the damage done to ordinary citizens as news publishers continue to ‘mark their own homework’.

The Pilling review
Finally in this context the consultation document states:

‘IPSO recently commissioned Sir Joseph Pilling to conduct a review into its independence and effectiveness which reported on 12 October 2016. The Pilling Report stated that its recommendations were ‘intended to help a new regulator, which demonstrates early achievement, promise and commitment, to develop into a trusted, experienced regulator’.’

This ‘review’ had no standing other than any conferred upon it by IPSO. It had none of the legitimacy of the Charter process – or of the PRP with its rigorously independent and open appointments arrangements and its transparent processes. How Sir Joseph was chosen and the terms of his employment remain undisclosed. His method of gathering information would satisfy few objective observers: he gave in his report a list of 63 witnesses to whom he spoke (p.45) and of these 21 were employees of IPSO, including its chair, 24 were employees of regulated publications, one was a member of the Editors’ Code Committee and another of IPSO’s owners, the RFC. In short, 75 per cent of his witnesses had a strong vested interest in IPSO. Of the remainder, six were journalists or representatives of newspapers and two were representatives of Hacked Off whose only engagement was to explain to Sir Joseph why his review had no legitimacy. The sum total of Sir Joseph’s engagement with the public – the most important stakeholders in the issue of effective press regulation – appears to have been meetings with two peers and one academic. He interviewed no complainants – that is, no one who had used IPSO.

In evaluating the Pilling review, history is once again helpful. In 2004 the PCC, concerned to shore up failing credibility, appointed a ‘Charter Commissioner’ (coincidentally, also a former Permanent Secretary in the Northern Ireland Office), and established a ‘Charter Compliance Panel’. These consistently gave the PCC a clean bill of health right up to 2009, by which time the organisation’s public reputation was in shreds and its failure had caused great damage. Sir Joseph Pilling’s review has similar status: no reliance can be placed upon it.

It is inappropriate and unjustified for the Government to refer to this review at all – what relevance is a non-compliant regulator’s PR exercises to the question of Government policy? It has always been Government policy, as called for by free expression organizations, to reduce any analysis of regulators to whether they are recognized or not. No greater detail is necessary, and indeed, it is harmful to the framework of independent regulation of the press for the Government to indulge in any further observations.

Conclusion

So far as the structures, institutions and performance of press regulation are concerned, the one essential, impartial and independent view, as provided for by Parliament in 2013 on the basis of the cross-party agreement and the Leveson Report, is that of the Press Recognition Panel. The PRP, by design, speaks and acts exclusively in the public interest. It delivered its first report on the progress of press recognition in October 2016 and, as has been noted above, it called for the immediate commencement of Section 40 in full.

Press Freedom and Charter Regulation

Introduction
110. The consultation document rightly makes reference to the freedom of the press and its importance to democracy. As explained above, these were matters of which the Leveson Inquiry, the cross-party negotiators and Parliament itself were fully apprised in 2011-13. They consequently took great care to ensure that membership of a recognised regulator implies no loss of freedom of expression for a news publisher. It follows that no news publisher can credibly claim it is unable to join a recognised regulator on the grounds that its freedom to publish will be curtailed by state influence. It is worth developing this point, with evidence.

111. The Leveson Inquiry was explicitly required in clause 2 of its terms of reference: ‘To make recommendations: (a) for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government . . .’

112. No one has suggested that the Report or its recommendations breached those terms. The cross-party agreement and Parliament itself were specifically concerned in 2012-13 not to give government or politicians any influence over press regulation and by that route over press content. Proof of their determination can be found, for example, in:

- The decision to create a new recognition body (the PRP) rather than give the responsibility to Ofcom, which was deemed insufficiently independent from government, notably on the grounds that the Secretary of State for Culture, Media and Sport appoints the Chairman and directors of OfCom.
- The decision to establish the PRP under Royal Charter rather than by statute, a choice promoted by the then Conservative Prime Minister, in response to requests from the press, on the (albeit questionable) grounds that a dedicated Act of Parliament would ‘cross a Rubicon’ in the relationship between the press and the state.

113. The same determination can be seen in the terms of the Royal Charter itself, notably but not exclusively in:

- The explicit exclusion of working politicians from the boards and staffs of the PRP and of a recognised self-regulator, and from the appointments committees to both (Schedule 1, par 3.3.c, Schedule 3, par 5, e). No such exclusion applies in IPSO.
- The explicit exclusion of politicians even from the process of appointing the appointments panel of the PRP, in that respect making the PRP appointed under a more independent process than the judges.
- The arrangements for Charter amendment or dissolution, which require the unanimous agreement of the PRP plus two-thirds majorities in both Houses and the Scottish Parliament.
- The requirement that a regulatory code of practice ‘must take into account the importance of freedom of speech’ and also ‘the need for journalists to protect confidential sources of information’ (Schedule 3, par 8).
- Recognition criterion 17, which states: ‘The Board [of a recognised regulator] should not have the power to prevent publication of any material, by anyone, at any time . . .’

114. As Sir Brian Leveson observed upon the publication of his report, no one could call these arrangements “state” or “statutory” regulation. The Conservative Prime Minister of the time moved the motion in the Commons welcoming the cross-party agreement and left no doubt of his confidence that essential press freedoms were secure under its terms. He said:
'Let me be clear. This is not by any stretch statutory regulation of the press, and nor is it statutory recognition of either the self-regulatory body or the recognition body.' (Col 364).

115. As recently as October 2015 the then Secretary of State, John Whittingdale, also a Conservative, stated: 'Let me be very clear: I would like to see the press bring themselves within the Royal Charter’s scheme of recognition.'

116. Since in the same speech Mr Whittingdale spoke of ‘the fundamental truth that a free press is one of the pillars of a free society’ we may infer that he too was fully satisfied that the Royal Charter scheme he was commending gave complete protection to essential press liberties. In the consultation document itself the PRP is explicitly acknowledged to be a ‘new independent body’ (para 5) and ‘wholly independent of the government’ (Box 2).

Principle

117. Newspaper companies have asserted that they reject ‘on principle’ any regulator that has a connection with the state, and in their recent campaigning they have described recognised regulation as ‘state-backed’, ‘state-recognised’ or ‘state-approved’.

118. For purposes of public policy and the protection of the interests of the public the test of whether news publishers should be expected to participate in recognised regulation cannot be mere prejudice or opinion: news publishers must justify their choice on the basis of evidence. The evidence above shows that there is no substance to the claim that freedom of expression is compromised in recognised regulation. Here we present evidence demonstrating that the notion that a ‘principle’ is at stake is not sustainable.

119. The state, by virtue of a public inquiry, cross-party agreement and the enactment of a statute, was indisputably involved in the creation of the framework for regulatory reform in 2011-13. This was not, however, a gratuitous intervention by unscrupulous politicians seeking to gag public interest journalism. On the contrary, it was a very reluctant engagement that was prompted by the long-term failure of the press industry to regulate itself. This failure had permitted the collapse of standards manifested in phone hacking, the treatment of the McCann family and Christopher Jefferies, the bribing of public officials, wholesale data theft and much other wrongdoing and cruelty besides. Such damage to ordinary citizens could not be ignored by any responsible government or Parliament. The state was thus obliged to involve itself because the public had to be protected, and as explained above it did everything possible to ensure that the involvement was limited and would not have to be repeated. Newspaper companies that bear the responsibility, through their own failures and wrongdoing, for making state action unavoidable cannot with credibility suggest that they reject state action ‘on principle’.

120. Nor can a case be made that participation in recognised regulation would entail departing from international norms – the contrary would be closer to the truth. A number of European countries have regulatory regimes that, in contrast to Britain, can fairly be described as statutory. Several, including Belgium and Germany, have statutory rights of reply. Finland has a law on the ‘exercise of freedom of expression in the mass media’ which makes ‘responsible editors’ liable for content, and also gives a right of reply. Denmark has a statutory press council. In none of these countries have such arrangements been found to be in contravention of the freedom of expression requirements of the European Convention on Human
Rights, and every one of these countries ranks above the United Kingdom in the World Press Freedom Index.

121. No less relevant to the matter of ‘principle’ is the Press Council of Ireland, which is a “recognised regulator” where the recognition body is not independent like the PRP but is formally recognised by the Minister for Justice under the terms of the Irish Defamation Act 2009. This procedure is clearly less scrupulously independent of political involvement than the Charter system and yet several UK news publishers, including the publishers of the Sun, Express, Mirror and Mail, are full participating members. No principle stood in their way.

122. Furthermore, countless laws apply to newspapers and the practice of journalism in this country: libel, privacy, harassment, malicious falsehood, data protection law, and so on. These all have a positive effect on how the press conducts itself. The distinction between illegality at newspapers and regulatory matters is important, but where that distinction is drawn is not the press argument: it is that legislation affects press conduct at all. But it is an obvious broader point that areas of law affect how the press conducts itself already. If there is a Rubicon for laws affecting how the press operates, it is crossed every day.

123. If the press had a genuine principled objection to involvement of the state in how they operate, they would not allow politicians to sit on their regulator (IPSO)’s board, like IMPRESS does and Leveson recommended. Would they also stop paying annual taxes, because the commercial environment was affecting what they could print? The point of principle is unsustainable.

124. In fact, only the Leveson system can guarantee no state or political involvement in the press regulator. This is the only way to constitutionally protect regulators from politicians getting involved. IPSO or any outside body can never have those constitutional protections because their rules are not subject to any PRP audit – they can change them at the will of the publishers. Conversely, any recognized regulator which tried to allow political backdoor influence would be de-recognised by the PRP and lose its section 40 protections.

125. It is impossible to avoid the conclusion that any claim by parts of the press industry that they cannot participate in recognised regulation as a matter of principle is neither credible nor sustainable. No credible principle stands on their way, they readily denounce the principle itself when it presents itself, and an abundance of genuine principles, including fair access to justice, the right of citizens not to suffer from unethical journalism and respect for the will of Parliament and the country, should guide them towards full and early participation.

The ‘slippery slope’

126. Newspaper companies have warned against a ‘slippery slope’ – the idea that the introduction of the Royal Charter gives politicians the opportunity to tinker progressively with its mechanisms in ways that could ultimately introduce state influence. This is incorrect: the terms of the Charter can only be amended on the very demanding terms set out above, which means that in practice any government seeking to tinker would require the agreement of the entire PRP and cross-party support in both Houses. Alternatively it would have to repeal section 96 of the Enterprise and Regulatory Reform Act 2013 – an action that is equivalent to passing new legislation, and new legislation is an option open to any government at any time.
127. Even then, amendment to the Charter would not be an effective to introduce state influence because any regulator recognised under the Charter could withdraw from the system.

128. Governments have long had at their disposal far more administratively convenient ways of asserting power over the press (for example by ending the zero-rating of newspapers for VAT, or amending libel laws). With this in mind it can be stated, first, that if there is a slippery slope whereby politicians can take steps to restrict press freedom we have been on it ever since we had a sovereign Parliament, and second, that the Royal Charter, with its demanding amendment arrangements, stands out as a relatively solid feature in that landscape – in fact, as a bulwark against state interference.

129. Finally, despite the alarms raised by the corporate press, there is no evidence in modern times of any desire by any government to assert control of press regulation for the purpose of censorship. Sir Brian Leveson made the following comment in his Report:

‘If the history of the past 50 years on press regulation tells us anything it tells us that Parliament wants nothing less than to pass legislation to regulate the press. There may have been the occasional siren voice expressing a contrary view but, in truth, Parliament has managed to avoid many opportunities to do so, despite real (and repeated) public concern about press behaviour and the consequences of failing to deal with it’ (Part K, Chap 7, 6.38).

Conclusion

130. Given that the Charter system of recognition has been established with Parliament’s approval with a view to improving the means of upholding press standards through effective and rigorously independent self-regulation after decades of damaging regulatory failure, and given that the principal beneficiaries of this will be the public, who stand to enjoy enhanced protection from press abuses, it follows that news publishers require compelling and well-founded reasons for refusing to play their part. In their search for such reasons, corporate news publishers have claimed that participation in recognised regulation would curtail their freedom of expression. As the above shows, these claims have no foundation. The structures are as airtight against political interference as our constitution permits (and are more so than IPSO’s); regimes involving more state or legislative engagement exist in numerous countries that rank above the UK in the World Press Freedom Index; no sensible objection on principle can be made; and fears of a ‘slippery slope’ do not correspond to reality.

QUESTION 2
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)

The impact on members of the public

131. Because of the biased nature of the consultation, and the questions asked, this group has been ignored, despite it being one of the main focuses of the Leveson
Inquiry.

132. In the absence of implementation of section 40 it will be less likely that publishers will join an independent and effective regulator. As a result, members of the public who seek to complain about breaches of any of the many standards which newspapers claim they abide will be severely disadvantaged. Independent and effective regulation of the majority of the press will not take place.

133. The evidence at the Leveson Inquiry demonstrated, and the Report concluded, that the public cannot depend on, will not be well served by, and should not have faith in, a regulator established by the industry that is not independently audited as compliant with all of Leveson’s recommendations for independence and effectiveness.

134. There is no good evidence that press standards have improved since the Leveson Report was published. Such evidence and analysis which does exist strongly suggests that standards have not improved and abuses continue.

135. There is no good evidence that complainants can obtain an effective remedy from IPSO which continues to operate a “pro-press service”. The press have not been ordered to publish corrections with equal prominence to inaccurate stories. Despite consistent inaccurate press reporting (for example in relation to migration issues), IPSO has not carried out any standards investigations. IPSO has not (and is designed to ensure that it does not) carried out any regulation for the benefit of the public.

136. When considering the impact on the public and on the public interest, it is necessary to consider the opinion of the public on these matters. This was carefully examined by YouGov on 5-6 January 2017 (after a 2-month campaign by newspapers to attack section 40 by a series of falsehoods, misrepresentations, distortions and exaggerations.

137. The poll results were remarkable in the support they showed for section 40 and the Leveson system of regulation (or something stronger) and their support for Leveson Part 2. But the poll results also reflect a consistent pattern of opinion polling over many years, despite the attempts of the press to persuade their readers otherwise.

The public’s view on compulsion, incentives and wholly voluntary membership of a Leveson regulator

- When asked how newspapers should be regulated the most popular answer 43% (61% of those who expressed a preference) believed that newspapers should be required by law to join an independent regulator.
- Only 7% (10% of those who expressed a preference) believed that newspapers should be entirely free to choose while 19% (27% of those who expressed a preference) preferred some combination of financial penalties and/or benefits in legal cases to encourage them
- When compulsion to join an independent regulator was removed as not an option, and the public are asked to choose between the status quo or various choices of costs penalties and/or costs benefits, those among the 61% who expressed a second preference split
58% for a "penalties only" form of incentive (a "penalties only" version of section 40); Because of the biased nature of the consultation questions, this option was available. But it is clear that the numbers can be added to option (b) which is closest in effect.

20% for a combination of penalties and benefits (the “full commencement" form of section 40") and

6% for a benefits only form of incentive (the "partial commencement" form of section 40)

- Just one in ten (10%) believe that the section 40 system of cost incentives should not be implemented or should be repealed
- From the above results, it can clearly be seen that the public opinion is overwhelming against repeal, non-commencement and partial commencement, and overwhelmingly in favour of full commencement

The impact on those subject to libels or privacy invasion by the press

138. Those who are subject to libels or privacy invasions will not have the choice contemplated by the Leveson recommendations,
   (a) Low cost arbitration against publishers who join a recognised regulator;
   (b) Arguable claims against refusing publishers can be brought without costs risk.

139. As a result, access to justice will continue to be poor, and unlawful conduct by large news publishers will continue.

140. Section 40, once commenced, will deliver to the general public a historic new right of access to affordable justice in libel and privacy cases. The consultation document presents this merely as the ‘view’ of ‘some victims of press abuse and their representatives’, but it is an incontrovertible fact because the terms of Section 40 are unequivocal.

141. Everyone with a reasonably arguable case against a news publisher that is a member of a recognised regulator will have access to arbitration at the price of a modest administration fee. Those with a reasonably arguable case against a news publisher which, by refusing to participate in recognised regulation and thus refusing to offer low-cost arbitration, denies this right of access to justice, can sue in the normal way in the knowledge that, providing the judge deems it fair and equitable in all the circumstances, the news publisher will have to meet all costs, win or lose.

142. This is designed to provide news publishers with an incentive to join a recognised regulator offering arbitration – a step to which (see above) they can make no reasoned objection. Section 40 will thus bring to an end the longstanding scandal that only the rich and the fortunate in this country have been able to uphold their rights against the press.

143. The consultation document includes the ministerial declaration: ‘This is a government that works for everyone and not just the privileged few.’ Here is a measure that clearly benefits everyone rather than the privileged few. Indeed, the continuing denial of this measure specifically benefits the privileged few and runs contrary to the interests of everyone else.
Impacts on the press industry: Chilling

144. Under any other option than full commencement most newspapers will remain outside the scope of a recognised regulator and most of the requirements for effective and independent regulation set out by Sir Brian Leveson will not be satisfied. This will mean a continuation of the unethical and abusive conduct seen in the decades prior to the Leveson report and a repeat of scandals and cover-ups seen previously. The reputation of the UK press will continue to be at rock bottom.

145. Just as Section 40 inevitably transforms access to justice, it also brings to an end the ability of wealthy individuals to bully news publishers, providing they are members of a recognised regulator. This ability of wealthy individuals and institutions to 'chill' or stifle public interest journalism by exploiting the expense and complexity of legal proceedings has been a subject of complaint from newspapers at least since the time of Robert Maxwell. At the Leveson Inquiry the editor of the Financial Times, Lionel Barber, said of chilling: ‘In terms of libel, this is the one area that concerns me most.’ The then editor of the Guardian, Alan Rusbridger, remarked in evidence: ‘You’ve heard us whingeing endlessly about the cost of libel and the chilling effect that libel [exposes us] to (our emphasis). In evidence to the CMS select committee in 2009 the then president of the Crime Reporters' Association, Jeffrey Edwards, said: ‘We do not mess with Abramovich. He is too powerful. He is too litigious.’ (para 237)

146. These concerns are answered by Section 40, fully in line with the intentions expressed in the Leveson Report (Part Part J, Chap 3, 6.7). Journalists working for a news publisher which is a member of a recognised regulator will have complete protection from chilling so far as libel and privacy are concerned. Editors will be able to insist that any potential claimant attempting to obstruct reporting by chilling must proceed to low-cost arbitration. If the potential claimant insists on court proceedings the news publisher will know that its costs exposure is limited and much less than in court proceedings. This is a very substantial boost for the freedom of the press and for investigative journalism at all levels of the industry. So long as Section 40 is not commenced this freedom is being denied to the industry, with adverse consequences for the quality of journalism available to the public.

147. The consultation document repeats a concern expressed by some news publishers refusing to participate in recognised regulation: that they may be subject to chilling of a new kind. They say they will be subject to legal action from people wishing to suppress stories that are in the public interest and who rely on the presumption that they would have their legal costs paid regardless of whether they won or lost.

148. There are two points to be made in answer to this. First, any adverse consequences can be avoided by news publishers choosing to set up or join a recognised regulator. Section 40 was designed to provide that choice with an incentive.

149. Second, for those publishers that have chosen to expose themselves to the prospect of penalties, a distinction must still be made between meritorious and unmeritorious claims. An increase in meritorious claims is in the public interest: it involves people properly vindicating their rights and newspapers which invade those rights being held to account. No reasonable person can do anything other than welcome such a prospect. As for unmeritorious claims, the possibility that these might arise was fully foreseen and guarded against in 2013. All potential
claimants, and all news publishers, will know or will be advised that, under Section 40(2)(b), the courts will not award costs against a news publisher unless they are satisfied that ‘it is just and equitable in all the circumstances of the case’. This important point is acknowledged in the consultation document, which notes: ‘The court retains a general discretion as to the award of costs in all cases . . .’ (para 37). In his Report Sir Brian Leveson expressed his confidence in the ability of the courts to dispense with unmeritorious cases. Referring to a court awarding costs against successful defendants, he wrote: ‘I recognise that this would not be the case if the court was dealing with vexatious or utterly misconceived litigation.’ (Part J, Chap 3, 6.8).

The local press

150. Concern about chilling is raised in the document with particular reference to local newspaper titles. A small-town weekly paper, it is implied, does not have the resources to contest a libel claim and could be ruined if it did. This is at best misguided. In practice the risk of ruin for any publication that has not committed a gross breach of rights is close to nil.

151. Most of our press, including our local press, is owned by large corporations. More than 80 per cent of local titles are owned by a handful of groups [pdf]. The nine biggest newspaper groups, national and regional, are all profit-making, once one-off costs are set aside. As cited above, their latest combined operating profits were £380m. The local papers often carry insurance against legal claims. If the insurance is inadequate, the corporations which own these papers are able to meet the costs. In short, local newspapers, though they are often small operations, are not in practice any more exposed to ruin in the libel courts than national papers.

152. The assertion that having to pay both sides’ costs is likely to bankrupt newspapers is not supported historically. For decades the courts have had the power to award both sides’ costs against a publication that loses a libel action, so it follows that, if the corporate press is correct, for decades publications have been continually at risk of being bankrupted as a result of legal action, albeit only when they were defeated. In the past quarter-century, however, not one local, regional or national newspaper has been driven out of business by court costs. (Only two small-circulation publications are believed to have suffered that fate and neither was corporately owned. One was Scallywag, a small gossip magazine sued by Sir John Major in 1993, and the other was LM Magazine, which closed in 2000 as a result of libel action by ITN.)

153. Let us say, as an extreme example and purely for the purpose of argument, that Section 40 doubled the likelihood that newspapers would suffer adverse costs orders: on the basis of recent history the number of cases of insolvency likely to result would remain negligible at most. Set against this the fact that since 2005 almost 200 local and regional newspapers have been closed by their owners, usually on financial grounds, and it is clear that Section 40 is the least of their worries.

154. The evidence of Foot Anstey to the Culture Committee (see below) is revealing. They say they represent 40-50% of regional papers (I think they mean local and regional). In evidence given in January 2009 they said
“we have represented 17 clients since 2004 to whom Protocol letters were sent by the three or four prominent claimant solicitors. Two complaints were the subject of proceedings, and the remaining fifteen were settled without proceedings being issued. Of the 15 complaints which were settled, five were considered by us to be legitimate. The other 10 were thus considered to be unjustified and/or defendable from a purely legal perspective, but were nevertheless settled because of concerns by our publishing clients of the financial consequences of defending the claims. They knew that they would be significantly out of pocket, even if their defences were successful, and that they could be severely damaged financially if the defences were unsuccessful”.

In other words, in the 5 years from 2004-2009 there were two actions against local newspapers and 15 claims were settled. Assuming that the number of claims and actions were the same for the 50% to 60% not represented by Foot Anstey, this suggests that there were, at most, 8 claims a year against the local press and one court action.

155. A study of this table which collects judgements given in media cases over the last 6 years (and is the most complete that we can find) shows that there are no libel or privacy actions against local papers which have gone to trial in that period, and in fact it hard to identify any cases where proceedings were joined.

Impact on claimants: Chilling

156. It is not only journalists and news publishers that can be chilled. Claimants can be chilled too. Wealthy news publishers are in a position to intimidate potential claimants in various ways. One is by personal attack in their publications, which can have the dual effect of giving the relevant claimant grounds to fear for his or her reputation and of causing other potential claimants to hesitate. It should be noted that if Section 40 is fully commenced news publishers joining a recognised regulator receive protection from chilling but claimants will remain exposed to this form of bullying. Wealthy news publishers have also been known to chill claimants by showing that they are prepared to use their wealth to take claimants through lengthy legal processes even where the courts are consistently against them. Unless Section 40 is commenced, this practice will continue.

Impacts on the press industry and claimants: volume of cases

157. The consultation document states that the government is particularly interested in views relating to whether full implementation of section 40 would increase or decrease the volume of cases brought against publishers outside a recognised self-regulator. It repeats the suggestion that ‘commencement of Section 40 will increase the volume of cases brought, as the presumption is that claimants will be protected from paying legal costs for cases against publishers who are not members of a recognised self-regulator’.

158. Unless this consultation is concerning itself exclusively with the commercial interests of newspaper companies to the exclusion of the interests of the public and of justice, there can be no merit in addressing this ‘particular interest’. Even if it could be assumed that there would be an increase, and even if it were possible to predict on credible grounds what such an increase might be (and neither point is accepted here) a simple number of possible additional cases would prove nothing of value.

159. This returns us to the matter of meritorious and unmeritorious cases. Since no one could object where citizens proven to have been wronged have been able to
obtain justice, it would be necessary to subtract from any putative total of additional claims the number that are likely to be won by the claimant. Any other course would amount to an endorsement of injustice. Equally, since the courts have always had and continue to have powers and means to strike out claims which are without merit, or to make cost awards that penalise abusive claimants irrespective of section 40, that number would have to be excluded. They would not proceed, so they cannot be counted. If they did proceed the costs penalty would be reversed. This leaves only those cases which have sufficient merit to go before the courts, but in which the claimants are ultimately unsuccessful. These too can hardly be included, since by definition the claims are sufficiently strong to go before the courts and it is therefore right that they should do so. Even the briefest discussion of these matters demonstrates the absurdity of the exercise of calculation contemplated in the question.

160. A case has been made in the past that Section 40 costs provisions might encourage some people who would otherwise have sought remedy through complaint to the regulator to ‘upgrade’ their cases to legal ones. All the above applies in such cases. If their case is good and they win, or if it is good enough to get to court but they lose, justice is done as it should be. If the case has no merit it will not proceed.

161. The main problem with that suggestion is that the industry has not been able to identify from its records any cases of complaints which were settled by a complaints process, with no compensation, which could have been brought as a legal claim instead and would only be brought as a legal case under the Leveson system.

162. Once again, no consideration of these matters by government will be complete if it does not take account of the effects of the Defamation Act 2013, which, by design and with effect from 2014, has given news publishers significant new protections against successful prosecution for libel (notably the ‘serious harm’ test). This represents an important gain for freedom of expression while also pushing the bar for claimants higher. Any calculation of potential changes in the number of cases being brought against news publishers as a consequence of Section 40 would therefore have to weigh in the balance the probable reduction in the volume of cases brought (albeit one that by nature is just as difficult to measure) in consequence of the 2013 Act.

Impacts on claimants and the press industry: Effect of costs

163. According to the consultation document the government is also particularly interested in views relating to the extent of legal costs associated with bringing and defending individual cases. To have a fuller understanding of likely impact it wants to know the average costs of cases and the range of costs by type of case.

164. From the point of view of claimants, and by extension of the general public, this is where Section 40 counts most: the higher the costs, the stronger the case for carrying through the changes agreed by all parties in Parliament in 2013. For claimants costs have long been prohibitive to all but the few and the fortunate, and so ordinary people have very often been denied access to justice. Recently there has been a significant increase in the court fee in civil cases like libel and privacy. These fees often have to be paid by the claimant up-front and can easily range up to £10,000 for a libel action. This is scandalous, and must be recognised as such by a government ‘that works for everyone and not just the privileged few’. For the
The costs have been a matter of complaint for many years, as was made plain at the Leveson Inquiry.

Both complainants and news publishers therefore stand to gain substantially from low-cost arbitration, which has been introduced successfully in other walks of life. Justice can be delivered cheaply and quickly, and this benefits not just both parties in the case but also the state, since the state carries costs in all cases that go through the courts.

Again, where potential costs to the industry are concerned, any consideration must also take into account the effects of the Defamation Act 2013. Since January 2014 news publishers have enjoyed the financial benefits of reduced exposure to libel actions in consequence of the Act.

Conditional Fee Agreements

Conditional Fee Arrangements (CFAs) are referred to briefly and without context in the consultation document. Their many shortcomings are almost universally recognised, including by Government. No claim can be made that they provide satisfactory access to justice for the general public in relation to libel and privacy, nor can it be asserted that they operate in a manner that conforms to the interests of the press. They are a bare essential for access to justice, but hardly the complete solution.

While it is sometimes asserted that CFAs enable claimants to litigate at no cost and no risk, this gives a false impression. In practice the threshold for access to CFAs is very high because solicitors are risk-averse and accept only those claims with strong chances of success. This tends to exclude many potential claimants whose cases have merit and deserve a hearing. As for the press industry, it has complained vociferously for years about the costs implications of recoverable success fees and ATE insurance premiums which are a necessary part of a viable CFA system in media cases.

The CFA regime was recognised as unsustainable by 2013, when the proposal was made to replace it with the Qualified One-way Cost Shifting (QOCS) system. Ultimately, however, this too was rejected. Among its demonstrable shortcomings was that, by eliminating ‘recoverable success fees’ it would make solicitors even more reluctant to take on cases and so would restrict access to justice for the general public even further. Again, it was also opposed by the press industry.

It is little wonder that Sir Brian Leveson, in addressing the problem of access to justice for ordinary people, chose a very different path. Equally, it is not surprising that Parliament agreed that low-cost arbitration was the appropriate alternative to high-cost litigation, and that it endorsed Section 40 as the means to make this possible. For members of the public making claims, the cost of access to arbitration through Impress is free. The cost of defending a case need be no more than a few thousand pounds, typically less, and IMPRESS has set aside a fund to support smaller newspapers facing claims. A low-cost insurance scheme is available too. Compared with the cost of litigation (both court fees and legal fees) in the High Court these are trifling sums. The continuing delay in the commencement of Section 40 is denying both news publishers and the general public access to these benefits. Of course, IPSO has a pilot arbitration scheme of its own, but it should not be mistaken for being anywhere near Leveson-compliant: it is nearly twice as expensive as IMPRESS’ for publishers, costs the public £2,800 for a final ruling, and gives the press the option to offer arbitration or not.
Conclusion in relation to impacts on the press industry and claimants

171. All of the matters in the preceding paragraphs have this in common: nothing (with the exception of the Defamation Act 2013) has changed in the period since the Leveson Inquiry considered them, since the cross-party agreement agreed what actions were necessary and since all parties in Parliament approved those actions by the passage of Section 40. There has been no substantive increase in court costs in cases of libel and privacy, while there has been a reduction in libel cost risks arising from the effect of the new Defamation Act.

172. Insofar as anyone might be able to calculate a change in the number of libel and privacy cases that might result from commencement of Section 40, the calculation can be no different now from what it would have been when Parliament considered these matters in 2013 and gave its overwhelming support to Section 40. Nor would it be different from when Sir Brian Leveson made his recommendations.

173. In short, we are where we were in 2013, and no grounds exist for overriding Parliament’s will. In the meantime, and for as long as the commencement of Section 40 is delayed, ordinary citizens are being denied access to justice.

The impact on the public interest

174. Because of the biased nature of the consultation and the questions asked, this has been ignored, despite it being one of the main focuses of the Leveson Inquiry.

175. The Leveson Report was clear that the public interest would be harmed by a failure of press regulation to be independently audited as meeting the criteria he set out for independence and effectiveness.

“I also think it reasonable and proportionate to require the press, which enjoys many benefits in the public interest, to accept the obligations of the sort of public interest standards, over and above the minimum requirements of the law, which they have already described to some extent in their past codes, and which they purport to take seriously and live up to.”

“In my judgment, this provides the least burdensome method of ensuring some form of adequate independent regulatory oversight of press standards for the future. Possibly for the first time in our history, it provides real incentives for the press to organise and thus deliver genuine effective independent regulation in the public interest.”

176. Lord Justice Leveson went further, and stressed the public interest required his system of press regulation to be adopted.

“If, however, the industry were unwilling, or unable, to come forward with a credible proposal for independent regulation then it would have demonstrated sufficient disregard for the public interest to have established that self-organised regulation simply is not an effective option.”

177. The Leveson Report was also clear that the public interest would be damaged by actual or perceived Government interference in press regulation by the pursuit of any option other than Option (b). The reasons for this are obvious – the real danger of the press industry and the Government seeking to appease or threaten each other in order to affect the Government’s press regulation policy or the press coverage of the Government. The non-commencement of section 40 and the Government’s announcement of potential new policy as evidenced by this consultation is evidence that has happened once again.
Any decision to choose any option except full commencement, will constitute:
(i) A misuse by the executive of the commencement procedure to frustrate the clear will of Parliament to put in place the incentives recommended by the Leveson Report as part of a complete reform package.
(ii) A breach of the cross-party principle established in all matters relating to Leveson
(iii) An infringement upon the freedom of the press by virtue of exercise of executive discretion in press regulation matters
(iv) A breach of promises made to victims by Government, and by Conservative ministers to Parliament.
(v) A failure to provide access to justice to those abused by the press.
(vi) A failure to tackle the continued threat of libel chill of small publishers by wealthy litigants.

**QUESTION 3**
*To what extent will full commencement incentivise publishers to join a recognised self-regulator? Please supply evidence.*

**Introduction**

Section 40 was designed as an incentive – to provide costs benefits to those who join a recognised regulator and to make those who do not pay the legal costs of claimants they have deprived of the benefit of low cost arbitration which is provided by a recognised regulator. The implementation of section 40 is opposed by news publishers precisely because it prevents them from frightening off claimants with expensive lawyers, and places them under financial pressure to join a recognised self-regulator – something they do not wish to do because they prefer to control their own regulator, rather than comply with independent and effective regulation.

It is plain and obvious that a requirement that a winning defendant pays the costs is an adverse consequence and will encourage publishers to join a regulator which provides them with costs protection. The costs protection provided by section 40 to members of a recognised self-regulator is benefit for the press and therefore an incentive to join a recognised self-regulator.

The extent to which section 40 will, of itself, incentivise news publishers to join a recognised regulator cannot be known until it has been brought into force and operated for a significant period. If the incentive fails to work, then as Sir Brian Leveson made clear, the public interest must be safeguarded by Parliament legislating to ensure independent and effective press regulation. If it succeeds, then the problem of sham or ineffective regulation of the press will be resolved.

**Nothing has changed since section 40 was enacted**

No case can be made that the incentive role of Section 40 falls under a heading of ‘much has changed’. It has been clear throughout that, while this measure addresses the related problem of access to justice, it was also intended to provide incentives to encourage news publishers to participate in recognised regulation. Recommendation 73 of the Leveson Report, relating to court costs, stated:

> ‘The purpose of this recommendation is to provide an important incentive for every publisher to join the new system . . .’

In commending the cross-party agreement to the Commons, David Cameron said:

> ‘We will also change the rules on costs in civil claims against publishers so
Further, no one engaged in the process in 2011-13 felt a need to quantify the potential effectiveness of these incentives. Sir Brian Leveson did not do so, nor did the party leaders who signed the cross-party agreement, nor did Parliament.

When Conservative ministers were asked about effectiveness by the CMS select committee on 16 April 2013 they were content to reply that the incentives were ‘strong’ and that they were ‘optimistic’ they would have the desired effect. From this may be deduced two things. First, that politicians were satisfied, in the circumstances, to rely on the judgement of Sir Brian Leveson, an impartial figure who had immersed himself thoroughly in the issues. And second, that they considered speculation on the matter pointless or unwise.

A new test

The implication of Question 3 is that although Parliament decided in 2013 that the measures in Section 40 were appropriate, the Government is now introducing, or considering introducing, a test of likely effectiveness before deciding whether to commence. This is another unacceptable departure from the Leveson recommendations and from the cross-party agreement, as well as a contravention of the will of Parliament.

Not clear from the consultation document is how such a test might be applied. Since governments and Parliament, when contemplating measures of any kind, usually wish them to be effective, we should probably assume that in asking Question 3 the Government is seeking reassurance that Section 40 will be effective in terms of encouraging news publishers to participate in recognised regulation.

The best measure of the likely effectiveness of Section 40 as an incentive is the response of the corporate press. It is in the nature of an incentive, when it is operating as a ‘stick’ rather than, or – as in this case – as well as, a ‘carrot’, that those towards whom it is directed should find the prospect of the “stick” unwelcome. Section 40 was designed, in part, to operate in this way and news publishers have had ample time to evaluate the likely effects of the penalty element on them should they elect to expose themselves to it. As the consultation document generously records and their recent conduct demonstrates, they find it very unwelcome. This indicates that the incentives are likely to be effective.

Proportionality

Just as governments usually intend their measures to be effective, those seeking to resist such measures are likely to argue that they are excessive. They have little choice. They can hardly argue that the measures are insufficiently effective since that would be to invite something tougher. And if they say the measures are just tough enough it is equivalent to approving them. So their only recourse is to assert that they are disproportionately and damagingly effective. That is precisely the position of the corporate newspapers.

In this context the consultation document presents only one argument directly addressing the point of effectiveness, as follows:

‘One of the key issues raised by some members of the press is that the potential financial impact on publishers who are not members of a recognised regulator if section 40 is commenced would be significant and
could put publishers, particularly small, local newspapers, out of business unless they join a recognised self-regulator. They believe this goes beyond an incentive to comply voluntarily with the new system.’

191. This is a proportionality argument, suggesting that the effects of Section 40 will damage the press industry, and with it the ability of the press to provide the public with reliable, necessary information, to a degree that outweighs any benefit sought by those who drafted it and passed it into law. This argument has no merit. The reasons have fully been explained above but are repeated in summary here.

1. Detriment to a paper could only occur if that paper had decided to deny a claimant access to affordable justice and only then if a judge felt an adverse costs award was fair in all the circumstances.
2. Any such risk must be set against the certainty that ordinary people are currently exposed to serious injustice with little hope of remedy, and that absent Section 40 many more will experience that in future.
3. To avoid any risk of adverse court costs a news publisher need only join a recognised regulator, something to which they can have no reasonable objection and which implies no loss of freedom.
4. The public interest is best served by news publishers joining a recognised regulator, as ministers have stated.

192. It follows that the costs provisions of Section 40 cannot be said to ‘go beyond an incentive to comply voluntarily with the new system’. They are an incentive, but a manifestly just and reasonable one that operates in the interests of everyone, and not just those of the privileged few.

The current picture

193. The consultation document identifies two incentives already in force. The first is this:

‘... exemplary damages provisions in sections 34-39 of the Crime and Courts Act 2013, that came into force on 3 November 2015, mean that publishers who are members of a recognised regulator will, in principle, be exempt from paying exemplary damages in relevant media-related court cases.’

194. It is worth noting that in his discussion of this exemption in his report, Sir Brian Leveson did not refer to it as an incentive to membership. Instead he saw it as a matter of justice. Since the commercial benefit of publishing material in breach of someone’s rights was likely to outweigh basic damages, he said, it was appropriate that a court should have exemplary damages at its disposal in cases of outrageous wrongdoing, but ‘the court should be entitled to consider membership of a regulatory body as being relevant to the willingness to comply with standards ...’ (Part J, Chap 3. 5.11).

195. As explained above, the courts have very rarely awarded exemplary damages in libel cases, and since the bar is set exceptionally high in Section 34 there is every reason to believe that position will continue. This means that, in practice, news publishers have no reason to fear exemplary damages and therefore no reason to seek shelter from it. The exemption now in operation therefore can have only the most marginal effectiveness as an incentive to join a recognised regulator.

196. The other incentive mentioned in the consultation document as already active is this:

‘... current IMPRESS members have cited the reputational benefits of being regulated by a recognised self-regulator rather than IPSO ...’
197. We endorse the view that such benefits exist, but in the current climate they cannot at present be described as a meaningful incentive. The campaign waged against Impress in the national press [examples here] – a campaign founded on distortion and falsehood – has been so fierce, and the Government’s support for the principle and practice of recognised regulation has been so feeble, that joining Impress requires an act of bravery from news publishers.

198. One example (among many) of bigotry and abuse of power by the corporate press and its supporters was the forced removal of Impress as sponsor of the ‘local hero’ category in the 2016 Press Gazette awards. Another is the experience of Byline, a journalism website, which has been subjected to sustained abuse online and in print for its decision to become an Impress member. Therefore, while in principle adherence to a recognised regulator enhances a publication’s reputation in the eyes of informed members of the public, in practice the benefit is currently outweighed by the damage resulting from improper use of press power.

199. In summary, no incentive mechanism can be said to exist at present that is likely to bring pressure to bear on news publishers to join a recognised regulator.

Conclusion

200. Section 40 is a fair and appropriate incentive and as such should be given the opportunity to operate. Its legitimacy and authority are beyond question and no grounds exist for introducing a new test of effectiveness before commencement.

201. In practice we believe, as the above demonstrates, that the impact of Section 40 will be neither sudden nor dramatic, as the press industry suggests. The evidence shows that news publishers are unlikely to be driven out of business by adverse costs orders when they have won cases (and if that were to happen it could only be because they had denied a member of the public access to affordable justice). Our view, and we assume it to have been the view of Parliament when it endorsed Section 40, is that the ‘stick’ of the costs provisions is a modest incentive, intended to apply over time in combination with the ‘carrots’ of lower legal costs in arbitration and of freedom from chilling. If the press industry is rational, it will recognise over time the benefits of the carrots and it will see that there are no reasonable grounds for risking the stick.

202. Parliament clearly felt in 2013 that this proposition should be put to the test and it charged the PRP with the task of monitoring the results and reporting to Parliament. The PRP has now called for Section 40 to be commenced as a matter of urgency.

203. It is worth recalling here why Parliament adopted this course. It was not, as has been suggested, a knee-jerk response to the public outrage over phone hacking. Nor was it a cynical political manoeuvre to gag public interest journalism. It was a very cautious and measured response to a public crisis that was demonstrably long in the building and highly damaging to citizens whose wellbeing is Parliament’s concern. As the Leveson Report found, there had been years of lawbreaking (and it has not ceased). There had been decades of willful regulatory failure, compounded by the deceit of that ‘pattern of cosmetic reform’. All of this had been covered up and denied – by an industry upon which society relies for the exposure of failure and wrongdoing, and for the penetration of cover-ups. Further, as senior politicians admitted before the Inquiry, it had been made easier by the willingness of politicians to overlook it.
204. In this context, many thought the Leveson Report and the cross-party agreement restrained in their response. There is no statutory compulsion on news publishers to conform to the standards of self-regulation found necessary to offer sufficient protection to the public. Instead there are modest incentives, as set out in Section 40. There is no restriction on freedom of expression, nor were any restrictions ever contemplated. But there is a hope that news publishers will behave rationally and responsibly, not only in the interests of the general public but also in their own interests, and that, seeing the advantages of participation in recognised regulation, they will embrace it.

205. Parliament’s view in 2013, and the view of the PRP today, is that the incentives in Section 40 must be tried. Hacked off, and the victims and others for whom it speaks, share that view. If, over time, the PRP judges that they have failed, that will be the moment for Parliament to take the matter up again. We hope that, in the interests of democracy and of freedom of expression, if that moment comes politicians will act, as they acted in 2011-13, on the basis of cross-party consensus.

**QUESTION 4**

*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?*

206. No

**If not which terms do you think still require further investigation?**

207. All the matters covered by the terms of reference of Part 2 require full investigation.

This is not a question on which “belief” is relevant. Examination of the Terms of Reference shows clearly and objectively that none of the Terms of Reference for Part 2 have yet been addressed or resolved.

208. This is a public inquiry that was:

1. Promised to victims of police and press corruption by the Prime Minister and
2. Set up to include, within its terms of reference, to inquire into “the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International”

The Government now appears to be seeking to cancel a public inquiry into potential corruption among public servants and politicians.

**INTRODUCTION**

**Contrary to the will of Parliament**

209. As with the first part of the consultation, it is contrary to the will of Parliament for the Government to seek to abort or alter the terms of reference of the Leveson Inquiry at the halfway point. Part 2 was explicitly promised by the Conservative Prime Minister in 2011 and the form and terms of reference of the inquiry were warmly endorsed by both Houses. His promise, echoed by other ministers, was made not only to the House of Commons but also to the public and, face to face, to victims of press abuse including the family of Milly Dowler.
210. The record leaves no doubt that when Parliament lent its support to the Leveson Inquiry in 2011 it was fully aware:
(a) that it would occur in two parts,
(b) that large-scale police investigations were already under way and
(c) that Part 2 would not begin until after those investigations were concluded, which might be a matter of years.

211. It follows that the circumstances of today, as the investigations and consequent criminal proceedings come to an end, are precisely those envisaged by Parliament in 2011 for the start of Leveson Part 2. On that basis, ministers should step aside and allow Part 2 to begin as planned and promised. The evidence is as follows.

212. On 6 July 2011, more than a week before the terms of reference were fixed and in one of the earliest parliamentary discussions of a possible inquiry, David Cameron told the Commons (Hansard, Col 1502):

'It seems to me that there are two vital issues that we need to look into. The first is the original police inquiry and why that did not get to the bottom of what has happened, and the second is the behaviour of individual people and individual media organisations and, as the right hon. Gentleman says, a wider look into media practices and ethics in this country. Clearly, as he says, we cannot start that sort of inquiry immediately because we must not jeopardise the police investigation, but it may be possible to start some of that work earlier’ (our emphasis).

213. Contrary to the impression given in the consultation document (par 51), Operation Weeting, the principal police investigation, had been under way for six months by 6 July 2011. Operations Tuleta and Elvedon were also at work. Parliament was fully aware of the scale of police action. As the then Prime Minister said (Col 1507): ‘As it stands today, it is one of the largest police investigations going on anywhere in our country.’

214. And on the same day, Chris Bryant MP told the Commons (Col 1537):

‘I consider it vital for the police investigation to be supplemented by a public inquiry.’

215. And the then Attorney-General, Dominic Grieve, said (Col 1541):

‘It is precisely because of the gravity of the allegations now being made that the Prime Minister announced only a short time ago that there would be a fully independent public inquiry, or set of inquiries, into these matters, but that must not jeopardise any criminal investigation. It is therefore likely that much of the work of the inquiry will be able to start only once the police investigation and any prosecutions that might result from it are concluded. I say that while being mindful of the comments that have been made in the debate that it may be possible to move forward in some areas but not in others. Nevertheless, the burning desire of many people to see finality in this matter and truth to be revealed may take some time because of that, as I am sure the House will appreciate’ (our emphasis).

216. On 13 July 2011 David Cameron told the Commons:

‘Let me now turn to the action that the Government are taking. Last week in the House I set out our intention to establish an independent public inquiry into phone hacking and other illegal practices in the British press. We have looked carefully at what the nature of the inquiry should be. We want it to be one that is as robust as possible—one that can get to the truth fastest and also get to work the quickest, and, vitally, one that
commands the full confidence of the public. Clearly there are two pieces of work that have to be done. First, we need a full investigation into wrongdoing in the press and the police, including the failure of the first police investigation. Secondly, we need a review of regulation of the press. We would like to get on with both those elements as quickly as possible, while being mindful of the ongoing criminal investigations. So, after listening carefully, we have decided that the best way to proceed is with one inquiry, but in two parts.

‘Starting as soon as possible, Lord Justice Leveson, assisted by a panel of senior independent figures with relevant expertise in media, broadcasting, regulation and government will inquire into the culture, practices and ethics of the press; its relationship with the police; the failure of the current system of regulation; the contacts made, and discussions had, between national newspapers and politicians; why previous warnings about press misconduct were not heeded; and the issue of cross-media ownership. He will make recommendations for a new, more effective way of regulating the press—one that supports its freedom, plurality and independence from Government, but which also demands the highest ethical and professional standards. He will also make recommendations about the future conduct of relations between politicians and the press. That part of the inquiry we hope will report within 12 months.

‘The second part of the inquiry will examine the extent of unlawful or improper conduct at the News of the World and other newspapers, and the way in which management failures may have allowed it to happen. That part of the inquiry will also look into the original police investigation and the issue of corrupt payments to police officers, and will consider the implications for the relationships between newspapers and the police. Lord Justice Leveson has agreed to these draft terms of reference. I am placing them in the Library today, and we will send them to the devolved Administrations. No one should be in any doubt of our intention to get to the bottom of the truth and learn the lessons for the future.’

217. David Cameron said again of Operation Weeting: ‘This is one of the biggest police investigations currently ongoing in Britain.’ (Col 332)

218. Hansard also records this exchange (Col 338):

‘—Duncan Hames (Chippenham) (LD): Media regulation, like the inquiry, goes well beyond simple law-breaking. How can we be sure that it can act in a timely fashion on known wrongdoing where that is sufficient, without waiting for the conclusion of numerous criminal investigations and the prosecutions that follow them?
‘—The Prime Minister: The hon. Gentleman makes a good point. The part of the inquiry which is, for instance, investigating allegations of police corruption or investigating the hacking at the News of the World, must wait for the police investigations to be carried out, for prosecutions to be carried out and, as I understand it, for any appeals to be lodged. That is one for the reasons for having one inquiry with two parts, rather than two inquiries, otherwise the one doing that part would take a very long time indeed before it got going.’

219. It is clear from this that Parliament knew exactly what it was doing and also that there is no justification for the assertion in the consultation document that:

‘In 2011 the decision was taken by Sir Brian Leveson that Part 2 of the Inquiry should not begin until all relevant police investigations and
prosecutions, including appeals, had concluded in order to avoid any prejudice to criminal proceedings.’

220. That decision was not made by Sir Brian Leveson. It had been taken by the Government, following discussions with the Leader of the Opposition and with the full knowledge and approval of Parliament, in July 2011, three months before the Inquiry held its first sessions.

Breach of cross-party principle

221. As with Section 40, there can be no doubt that in 2011 the principle was accepted and established that matters relating to press conduct, particularly where police and politicians may be involved, are properly dealt with on cross-party terms. It is a matter of record that all three main party leaders met victims of press abuse in the days before the terms of reference were settled and it is equally a matter of record that they took care to consult one another on those terms. Announcing them on 13 July 2011, David Cameron stressed the point:

‘As the Leader of the Opposition said, we had an excellent meeting last night. We discussed the nature of the inquiry that needs to take place. We discussed the terms of reference. I sent those terms of reference to his office this morning. We have had some amendments. We are happy to accept those amendments.’

222. The reasons why this was deemed appropriate and necessary are explained fully above. In the interests of democracy, commanding public confidence and freedom of expression, if the Government plans any initiative of any kind in relation to Leveson Part 2 it should act exclusively on the basis of cross-party consensus. No cross-party discussion has taken place on this consultation and it appears that none is contemplated.

Interference in press freedom

223. As demonstrated above with reference to Section 40, it was the intention of Parliament in 2011-13 that political engagement with press matters should be kept to a minimum, in the interests of freedom of expression. Where politicians have or assert a power over the press, the public interest may be jeopardised. Parliament wisely chose in 2011-13 to entrust such powers and decisions to independent bodies, including the judiciary. For the Secretaries of State now to seek to determine the shape or scale of a public inquiry that is wholly or largely into the press is to hold an improper influence over the press. This may have the effect of ‘chilling’ reporting, or it may open ministers to the possibility, or the perceived possibility, of improper trading in favours with press corporations.

Bias

224. As is does in respect of Section 40, so with Leveson Part 2 the consultation documents shows bias and a tendency to seek to lead respondents rather than seek opinions in a fair manner. One example among many will suffice. In paragraph 63 it is stated as fact:

‘Given it appears that many elements of the terms of reference have already been covered by the criminal investigations and Part 1 of the Inquiry . . .’

225. Just a few lines later we reach question 4, which is quoted next.
QUESTION 4: 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?

226. The terms of reference of Part 2 of the Leveson Inquiry have NOT already been covered by Part 1 and the criminal investigations. This is not a matter of ‘belief’ but a question of fact: examination of the terms of reference of Part 2 (set out below) shows beyond any possible doubt that they have not been ‘covered’ by either Part 1 or the criminal investigations.

If not, which terms do you think still require further investigation?

227. All of the terms of reference for Part 2 require further investigation. This is not a question on which “belief” is relevant. Examination of the Terms of Reference shows clearly and objectively that none of the Terms of Reference for Part 2 have yet been addressed or resolved.

228. This is a public inquiry that was:
1. Promised to victims of police and press corruption by the Prime Minister and
2. Set up to include, within its terms of reference, to inquire into “the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International”

229. The Government now appears to be seeking to cancel a public inquiry into potential corruption among public servants and politicians.

QUESTION 5: Do you have evidence in support of your view? If so, please provide your evidence.

230. The evidence is plain from the terms of reference and the fact that none of these matters have yet been investigated.

231. The Terms of Reference for Part 2, and the areas that require further investigation under each clause, are as follows. We review each of the terms of reference in turn.

‘3. To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.’

News International

232. With respect to News International, now News UK, the extent of improper and unlawful conduct has not been established, nor has anyone outside the company besides the Inquiry had the remit to do so.

233. The police inquiries were not general but specific, and they had no interest in improper conduct that was not illegal. Proof of this came with the recent conviction of the senior News UK reporter Mazher Mahmoud and his driver Alan Smith for conspiracy to pervert the course of justice. Their offences were committed after Part 1 of the Leveson Inquiry and while the three police operations identified in the consultation document were still under way, but they were uncovered as a result of entirely separate inquiries. This demonstrates that those three investigations did not have the capacity to unearth all improper or criminal activity, not least because, unlike Leveson Part 2, they had no remit to do so.
234. Nor can any reliance be placed on the word of the company, which insisted for years that phone hacking had been the work of ‘one rogue reporter’ and was ultimately forced to admit a cover-up. The company’s CEO, Rebekah Brooks, told the court at her trial that when exposure of hacking was threatened she took the view that:

‘The best policy to protect the company was confidential settlements.’ [See Peter Jukes, Beyond Contempt (Canbury, 2014) p 143]

235. In other words, she did not regard open and honest acknowledgement of the facts of criminality in her company as a priority or indeed as appropriate. Ms Brooks, who also insisted in court that she had been totally unaware of the long-term industrial-scale criminality in the company she ran, is once again in charge at News UK and has neither taken public responsibility for nor expressed remorse for her past conduct and failures. It is noteworthy, further, that two of her former senior executives at the company, Colin Myler, a former editor, and Tom Crone, a former head of legal affairs, were recently found to have lied in evidence to Parliament. There are no grounds to believe that News UK today or in the future, under its present ownership and management, would spontaneously and honestly reveal improper or criminal activity in its ranks.

236. New evidence has come to light – since the police investigations were closed down – of extensive phone hacking by journalists at the Sun newspaper. The Sun is the country’s biggest-selling daily newspaper and it has always denied involvement in phone hacking. The allegations have been held by the courts to be sufficiently evidenced to allow civil claims to proceed.

237. Also at the Sun, it is known that there was a widespread and sustained culture and practice of paying public officials for information held by virtue of their office. It must be a matter of concern that, while more than two dozen police and public officials were convicted of taking bribes, of those who paid them only one journalist was convicted.

238. Nor did police investigations uncover who at the company bore responsibility for this bribery. At the trial, senior journalists claimed to have no knowledge of the practice (even though Ms Brooks had admitted to the CMS select committee in 2004 that the company’s journalists bribed police, and even though Rupert Murdoch told journalists he regarded the practice as traditional. Junior staff, meanwhile, alleged in separate trials that the responsibility lay with executives for authorising the bribes. In court, moreover, it was repeatedly alleged that executives were being protected by selective release of documents by the company. The evidence of the different witnesses, given in different courtrooms, was contradictory and it would be an important task of Leveson Part 2 to seek the truth.

239. There have been admissions in court cases of widespread unlawful data blagging by News UK, but there have been no prosecutions of those engaged in the practice.

240. It follows from all of this that it cannot properly be asserted or assumed that all unlawful and improper activities in News UK had been brought into the open.

The Murdoch press and Sky

241. Given the proposed acquisition of Sky by 21st Century Fox, this element of the Terms of Reference becomes more important. This is because under section 3(3) of both the Broadcasting Act 1990 and the Broadcasting Act 1996, Ofcom has a
continuing duty to be satisfied that Sky is a “fit and proper” holder of a Broadcasting licence.

242. Ofcom reported on this issue in 2012 [pdf]. In that report the conduct of Mr James Murdoch was severely criticised on a number of grounds, though not to the extent of making Sky not ‘fit and proper’. The report makes clear that this was due – at least in part – to the facts that

- James Murdoch was only a non-executive director of BskyB at the time.
- James Murdoch was also only a director of News Corp.
- News Corp owned only 39% of BskyB.

243. The position has changed substantially in that,

- James Murdoch is Chairman of Sky,
- James Murdoch is CEO of 21st Century Fox
- 21st Century Fox seeks to own 100% of Sky.

244. The ‘fit and proper’ assessment will need to be repeated and the findings and disclosure of Leveson Part 2 in relation to the ‘extent of unlawful or improper conduct within News International’ under this term of reference will be essential for a thorough examination.

Other newspaper organisations

245. New evidence emerged at or since Part 1 of the Leveson Inquiry about a range of improper and criminal conduct by the press more generally. This has not been the subject of any dedicated investigation. Examples include

- The practice of paying public officials for information extended to the Mirror Group and Express Group titles.
- There were admissions in September 2014 of widespread phone-hacking and unlawful data blagging at all three national newspaper titles owned by Trinity Mirror over more than a decade. No criminal prosecution was brought, and there has been no investigation into who was responsible for authorising these practices.
- No investigation has been conducted since 2006 into the practice of data theft by journalists or by agents acting on their behalf. While it is true that the Information Commissioner told part 1 that he had no evidence the practice continued, these crimes had been conducted on such a vast scale, and without any consequences for newspaper companies, that a new investigation is certainly in order.
- There has been a finding by a High Court judge in May 2015 (Gulati v. MGN Ltd) that executives from Trinity Mirror actively misled the first part of the Leveson Inquiry on oath, telling the judge ‘wrong, not just disingenuous things’.
- Allegations were made at Part 1 of the Inquiry that Associated Newspapers had published stories which were the result of phone-hacking, but these could not be fully investigated in Part 1 of the Inquiry since they fell in the remit of Part 2.
- There has been evidence from whistle-blowers that other witnesses to the Inquiry gave false or wrong evidence.

A general problem

246. It is worth recalling the fortuitous manner in which much press criminality has come to light. Phone hacking had been practised for years before a chance sequence of events aroused the suspicions of Buckingham Palace, which was in a unique position to ensure that the matter was properly investigated. Even then,
the police were content to let the matter drop after just two convictions.

247. The scale of data theft by national newspapers and their agents only came to light thanks to a raid by police on the office of a private investigator at the instigation of the Information Commissioner’s Office.

248. Details of bribery only surfaced because of spontaneous but limited revelations to the authorities by News International, made for reasons of their own.

249. In each of these cases, as in others, there was and remains every reason to assume that the glimpses afforded by these chance events were partial, that is to say that there was more that was not uncovered. And as explained above, the industry’s record shows that its instinct is to cover up, rather than to expose criminality in its own ranks.

250. Further, Sir Brian Leveson, in the report of the first part of the inquiry, noted (Part J, Chap 2) that crimes of this kind are less likely than most others to come to the attention of the authorities both because of their covert character and because, very often, the victims are not even aware that the crimes have been committed. Where no complaint is made, an investigation is unlikely to follow. Sir Brian continued:

‘Equally, however, the absence of complaint is little better than neutral and does not mean that steps should not be taken by newspaper organisations to put into place a regime that provides positive reassurance that the law is not being breached (save only in relation to data protection offences where the public interest justifies it). I am perfectly prepared to accept the evidence, for example, from Associated Newspapers Ltd, that as a result of a specific instruction from the editor-in-chief, no private detective has been engaged by the company since the publication of What Price Privacy Now, but this assertion to the Inquiry cannot take the place of a regular and verifiable audit.’ (J, 2.15)

251. No such verifiable regime or audit has been introduced at any national newspaper to date. What is more, on the evidence presented at Leveson Part 1, internal quality assurance at these corporations is unusually weak.

‘Other organisations within the media’

252. It is explicit in the terms of reference that where criminality and improper conduct are concerned the inquiry was tasked in 2011 to look beyond the newspaper industry. That this cannot be passed off as an accident or the result of loose wording is demonstrated in remarks by the Prime Minister of the time to the Commons on 20 July 2011 (Leveson Report, A, 1, 1.2):

‘We have also made it clear that the inquiry should look not just at the press, but at other media organisations, including broadcasters and social media if there is any evidence that they have been involved in criminal activities.’

253. No claim can be made that any other investigations of any kind have covered this territory, so this work remains to be done. Such an investigation, moreover, would answer complaints by the press industry that it has been unfairly singled out for scrutiny in the Leveson Inquiry process, and that the Inquiry paid insufficient attention to online media.

4. To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with
Despite the claims in the consultation document, this was not fully investigated by Part 1 of the Inquiry as it did not fall within the terms of reference. None of the core participants were of the view that it could be properly investigated in Part 1 for this reason and core participants' counsel were not instructed to the extent necessary to carry out this inquiry.

Elements of this matter which have not been fully investigated and determined include:
- The police failure to go further than the "one rogue reporter" line being peddled by News International in 2006.
- Surrey Police’s failure to investigate the hacking of Milly Dowler’s phone when this was notified to them by News International.
- The failure by the police to re-open investigations years later.
- The alleged involvement of News of the World in the cover up of the Daniel Morgan murder and the alleged role of corrupt police officers in the murder and its cover-up.
- The relationship between the police (and the CPS) and both the News of the World, and the Sun on Sunday, in relation to the activities of Mazher Mahmood and his associates.
- The allegation that the police failed to inform Part 1 of the Leveson Inquiry that they were aware that Mazher Mahmood had lied to the Inquiry (for example when he denied using private detectives to blag or hack).
- The appropriateness of investigations and prosecutions based on Mahmood’s evidence.
- The extent to which the illegal commissioning and receipt of personal data by national newspaper corporations was adequately investigated and why it was never prosecuted.

5. To inquire into the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation and how this was allowed to happen.

Corruption and possible corruption of police officers must be a matter of the highest concern both for Government and for the general public. No government could possibly afford to take a relaxed view of the matter.

The consultation document asserts baldly:
‘The extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing proper investigation, and how this was allowed to happen, has emerged from the investigations.’

This is incorrect. As explained above, thanks to a short period in which News International disclosed information about criminality – a period that ended while Part 1 of the Leveson Inquiry was still proceeding, as the Metropolitan Police testified – we know that there was a culture of bribery at the Sun, and some prosecutions followed. Outside what was voluntarily revealed in that short period, no additional evidence emerged.

We have learned that bribery was practised at the Mirror and Express titles, but again the evidence is very limited. Newspaper denials on the matter have to be seen in the context of the many past such denials of wrongdoing that have been found to be invalid. They are also called into question by the assertions made in
court by some defendants that the bribing of police officers was a matter of course, or of tradition, and indeed that it is justified. As mentioned above, Rupert Murdoch himself remarked to Sun reporters as recently as 2013:

‘We’re talking about payments for news tips from cops; that’s been going on a hundred years, absolutely. You didn’t instigate it.’

260. Roy Greenslade wrote last year in the Guardian newspaper (26 February 2016), commenting on Operation Elveden:

‘... I couldn’t overlook the fact that, as a 1980s Sun executive, I had authorised such payments. Having also worked on several other pop papers, I was aware that the Sun’s payment culture was anything but unique. An even closer look at some of the evidence, including conversations with accused Sun journalists, revealed the unfairness of the charges against them. They had acted with the blessing, express or implied, of the paper’s editorial and management executives, plus the in-house legal team. They had operated within a culture that had existed for decades.’

261. Although this problem is widespread and cultural, no general investigation has taken place such as could command the full confidence of the public, and it is explicit that just such an investigation was deemed necessary by Parliament in 2011.

262. The consultation document asserts, in effect, that the problem of the corruption of police officers by journalists has been solved:

‘The prosecutions and convictions [resulting from Operation Elveden] sent a clear message to all police officers and public officials that receiving payments for confidential information would not be tolerated and would be robustly dealt with.’

263. This is untrue. Those who were convicted were aware long before Elveden that what they were doing was wrong and that if caught they could face punishment: that is why they went to great lengths to conceal their actions and why it took freak circumstances to bring about their exposure. It may be that the convictions and the publicity have had some deterrent effect in the short term, but they might equally have convinced wrongdoers to hide their activity more effectively. Investigation is required to determine which is the case.

264. Nor can it be said that a clear message has been sent to journalists or their employers on this matter. Nine police officers were convicted as a result of Elveden but only one journalist, and he pleaded guilty. The response of the Sun and other newspapers was to mount a sustained campaign to misrepresent the nature and effect of the offences, seeking to claim that no illegality took place. Worse, the police and CPS have been strongly and unfairly attacked by the press over the investigations and prosecutions which took place. It is clear that those running these newspapers do not believe that what happened was wrong and that far from being deterred themselves, they seek to deter the law enforcement authorities from investigating these matters in the future. Again, this in itself justifies investigation in Part 2.

265. A longstanding culture of bribery of police officers by journalists will not be ended by mere reminders that it is illegal or by prosecutions from which those who paid bribes emerged unpunished, and it is naive or disingenuous of the Government, through the consultation document, to suggest that it will. Very wealthy organisations are involved, and it is clear that a number of them, if not all of them, have been engaged in corrupting those on whom our society relies to uphold the
law. As the Government and Parliament recognised in 2011, there is a significant public interest in establishing the truth about the nature and extent of these practices and in resolving clearly, for all to see, how they must be dealt with by the prosecuting authorities. Only a government that was complacent about police corruption could wish to prevent this proper and necessary investigation by the Leveson Inquiry.

6. To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International.

266. There has been no investigation whatever into the extent and nature of corporate governance and management failures at any newspaper. The potential public impact of these failures is immense – as is demonstrated by the large scale illegality revealed by the phone hacking cases.

267. The importance of this issue is underscored by the fact that many of the leading executives who were in post during the period of intensive criminality that has been exposed to the public are still in post, or have returned to their posts or retain key roles in the industry. These include the Chief Executive of News UK, the Editor-in-Chief of Associated Newspapers and the Director of Legal affairs at the Telegraph (who had the equivalent post at Trinity Mirror in the period of phone hacking and cover-up).

268. To look at the matter from another perspective, since 2007 not a single senior executive at any national newspaper company has taken personal responsibility for the many illegal activities and abuses of citizens known to have occurred. Nor, so far as the public record shows, has a single senior executive been disciplined. Indeed the response of this rank of personnel to the crisis in their industry has been one of defiance. And yet it is impossible to argue, in the 21st century, that criminal and abusive conduct by companies is not evidence of the failure of corporate governance and management.

269. If these companies will not take responsibility or investigate their own governance and management failures – and they have made plain that they will not – then there can be no possible justification in abandoning the external investigation decided upon by Parliament in 2011.

270. The general point of corporate governance and management failure aside, specific questions which need to be addressed include:

- How it came to be that phone hacking and unlawful blagging of personal data persisted on such an industrial scale at certain titles for so long; in the case of News UK and Trinity Mirror for at least 10 years, and for several years after journalists at both companies were first questioned by the police in Operation Glade in early 2004.

- How and why phone-hacking and unlawful blagging of personal data was covered up at some of the largest newspapers, in the face of emerging evidence that executives knew about the practice.

- Whether newspaper executives lied or gave wrong information to Part 1 of the Leveson Inquiry as suggested, for example, by the findings by Mann J in Gulati v MGN Ltd that the Leveson inquiry Part 1 was told “wrong (not just disingenuous information)” by Trinity Mirror executives.

- Whether and to what extent the corporate governance and management failures have been addressed in any way and whether any systems have been put in place to ensure that past wrongdoing cannot be repeated.
271. Again, given the proposed acquisition of Sky by 21st Century Fox, the Ofcom ‘fit and proper’ assessment in relation to James Murdoch will have to be repeated and the findings of Leveson Part 2 in relation to ‘the extent of corporate governance and management failures at News International’ will have to be taken into account. As already mentioned, the 2012 Ofcom report covered only a small number of the unethical matters for which James Murdoch, Rupert Murdoch and the company they owned and ran, News International, were found to be directly or indirectly culpable.

272. Since 2012 there have been further allegations of failures of corporate governance all of which fall to be properly investigated only under this Term of Reference (and the first one above) of Leveson Part 2. These include allegations relating to knowledge of the making of corrupt payments and other wrongdoing and involvement in the deliberate destruction of email evidence.

273. The failures of corporate governance were illustrated by the decision to reappoint Rebekah Brooks as CEO of News UK despite the fact that she admitted being responsible by failing to prevent, identify or investigate widespread criminal wrongdoing at News International which has cost the company hundreds of millions of pounds.

274. The press, as the consultation document points out, is an industry of vital importance to our democracy. Parliament in 2011 rightly regarded the independent, public investigation of possible corporate governance and management failure in this industry as essential for the protection of the interests of the public. If the management of these companies have nothing to hide they should welcome the opportunity to restore the public's trust through a fair, public judicial inquiry. If they have something to hide, the public should be told. Either way a failure to investigate this matter, as is contemplated in the consultation document, would be dereliction of the government's duties to the public and would also amount to the condoning of standards of management and corporate governance which permitted large-scale criminality.

7. In the light of these inquiries, to consider the implications for the relationships between newspaper organisations and the police, prosecuting authorities, and relevant regulatory bodies - and to recommend what actions, if any, should be taken.

275. These vitally important matters flow naturally from the above necessary investigations. Since no case can be made that the matters above have been properly investigated, it is obvious that the necessary lessons cannot have been learned.

QUESTION 6: 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

276. The Inquiry should continue, with unchanged terms of reference.

277. Any restrictions to the existing Terms of Reference would be wrong and would break the promises made to victims of press abuse who gave evidence to the Leveson Inquiry on the basis of a promise that the full extent of press wrongdoing and political and police collusion in it would be investigated once the criminal
prosecutions had concluded. The Government must honour this commitment which was made to victims – and to the public.

278. In any event, just as the terms of reference for the original inquiry were agreed upon with victims of press abuse, any proposed changes to these terms of reference must also – as a bare minimum – be discussed and agreed with those and subsequent press abuse victims.

279. One addition to the terms of reference which would be justified would be a review of the implementation of and impact of the recommendations of Part 1. This should exclude those aspects of press regulation which fall under the remit of the Press Recognition Panel, but it should range over all the other recommendations that are addressed inaccurately and tendentiously in the consultation document. It cannot be right that a Government whose responsibilities include the implementation of the recommendations of Part 1 should take on itself the role of auditor of its own performance in this regard. Is it true, as the consultation document asserts, that a majority of the recommendations have been implemented? Let the chair of Leveson Part 2 be the judge of that. Equally, he or she could investigate how many have not been implemented and why not.

280. It is a curious thing to ask for public responses on whether a judicial inquiry should proceed. If this is an attempt to gauge public opinion on the matter, then it cannot succeed because it is well-known that responses to consultations are not a representative sample of public opinion.

281. In the absence of the Government conducting an opinion poll as is normal during a serious consultation exercise where the yes/no view of the public is claimed to be sought, we asked YouGov to conduct such an opinion poll using as close to the same questions as the consultation document. See appendix 5.

282. This was carefully examined by YouGov on 5 to 6 January 2017 (after a 2-month campaign by newspapers to attack the validity of Leveson Part 2 by a series of falsehoods, misrepresentations, distortions and exaggerations).

283. The results show very strong support for Leveson Part 2. 80% of those who expressed an opinion believe that the need for the second phase of the Leveson Inquiry (Leveson Part 2) has stayed the same (42%) or increased (38%) since the hacking scandal broke. Only 7% felt the need for Leveson 2 had diminished, while 11% never saw the need for it in the first place. When asked directly, as in the consultation, whether Leveson Part Two should go ahead, 82% of those who expressed a preference said it should. Just 18% said it should not.

CONCLUDING REMARKS TO OUR RESPONSE

284. In choosing to intervene in the processes of press reform inaugurated in 2011-13 the Government has taken upon itself a heavy responsibility, for the decisions it makes now will have grave consequences for many people, including some of the most vulnerable in our society.

285. One fundamental choice will underpin all of the others contemplated in the consultation document: will the Government act in the interests of the public or of the press industry? The history shows (and the Leveson Report summarises it clearly) that where standards of journalistic conduct are concerned, the positions advanced by press companies are usually at odds with those of the public. They
are often at odds with working journalists too. This is seen notably in the consistent failure of the industry over 60 years to regulate itself in a way that prevents unjustified harm to innocent citizens. That the industry should now be refusing to participate voluntarily in recognised self-regulation is further proof of this – that is, after all, the benchmark set by an impartial public inquiry and approved by all parties in Parliament. Not only does this pose a threat to the public now, but history shows that standards only decline with time, and as things stand there is nothing to stop the industry retreating even further from the principle of self-regulation. The principal victims are and will continue to be ordinary citizens who have done nothing wrong.

286. The harm associated with any failure to carry through the will of Parliament expressed in 2011-13 does not stop there. We know, sadly, that there has been crime on a shocking scale, yet we can see that the industry has not taken responsibility, has not reformed and indeed is not sorry. We as a society and they as an industry need fully to understand what has gone wrong, who was responsible and how best we can act to prevent it happening again. These are matters that were reserved for Leveson Part 2. That the problems extend to the corruption of our police service only underlines the need for Part 2 to begin.

287. It follows that the public is doubly at risk, first from a continuing failure to maintain ethical standards and second from our inability to prevent, recognise and punish crime and the industry’s refusal to engage in measures to address this.

288. It may be unusual in 21st century Britain to discuss a whole industry in the context of crime and wrongdoing, but our press is unusual. This is a small group of substantial companies dominated by an even smaller number of extremely wealthy individuals, often running media empires on a dynastic basis. The companies are tightly grouped so that for many purposes it can be said that more than 90 per cent of the industry acts as a single organism. Breaking ranks, as the Guardian did over phone hacking, is extremely rare – and the Guardian were punished for it with the industry acting together and using the PCC to attempt to discredit and silence the paper’s initial scoops on hacking. Many serious crimes have been committed inside these corporations but they have conspicuously failed to react to this in a way that we expect responsible institutions to react. Instead they have denied responsibility and sought, by every possible means including the wholesale misuse of press power, to avoid any consequences for their failures.

289. The public not only deserves better but for its own wellbeing and for the health of our democracy it requires better. Doing what is right for the public – that is, fully commencing Section 40 and starting Leveson part 2 – compromises in no way those aspects of the interests of the press which actually coincide with the interests of the public. The freedom of journalists to report in the public interest is not curtailed by Section 40; it is protected and even enhanced. The Prime Minister, Theresa May, the Home Secretary, Amber Rudd, and the Secretary of State for Culture, Media and Sport, Karen Bradley, all acknowledged this when they voted for it in 2013. On the other hand, doing what is right for the public will challenge these close-knit corporations to change, and that needs to happen. Higher standards and increased accountability for our press industry are not only in the interests of the public, they are also in the true interests of journalism. Journalists will be free from chilling inside recognised self-regulation, and thus better placed to speak truth to power. They will also be better equipped to reverse the calamitous decline in trust in what they do.
Against all of this, the public and the Government has been presented by the press industry with an array of arguments that require them to believe the unbelievable and accept the unacceptable. Investigative journalism will not be killed by Section 40 and nor will the local press. Phone hacking was not a minor offence nor were the majority of victims “celebrities”. The people running the industry are not exempt from responsibility for what the industry has done. The PRP is not a puppet of government. Max Mosley does not control Impress. IPSO is not substantially different from the PCC. British politicians do not harbour a longing to control press regulation, still less did Sir Brian Leveson grant them such power. The hysterical dishonesty of this press industry campaign, and the corrupt refusal of newspaper editors to correct misinformation, serve as confirmation, if it were needed, that they do not deserve the public’s trust.

‘This is a government,’ the consultation document declares, ‘that works for everyone and not just the privileged few.’ The choice ministers must make is a simple one, and if those words are sincerely meant it will be an easy one. On that choice depends the wellbeing of many of our fellow-citizens over many years to come. Ministers should immediately commence Section 40 and start Part 2 of the Leveson Inquiry.

Hacked Off

10 January 2017