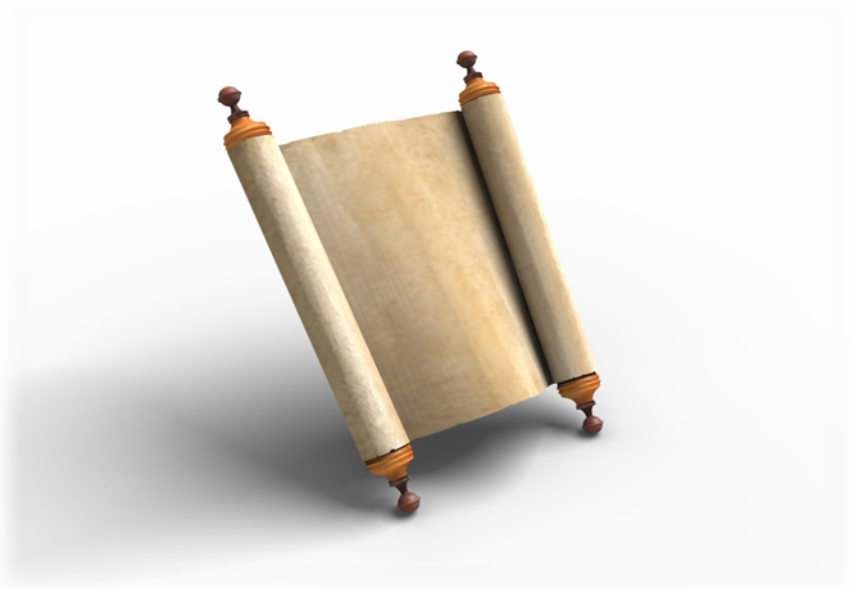
The UK model of Press Regulation:- the Royal Charter and political independence.



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A briefing based on a Media Policy Brief 12, written by Hugh Tomlinson QC, and published by the LSE Media Policy Project[1]

KEY MESSAGES

- The Leveson Report on the Culture, Practices and Ethics of the Press proposed a system under which the independence and effectiveness of a self-regulator set up by the press could be assured through a process of independent "audit" or "recognition".
- The Royal Charter on Self-Regulation of the Press establishes the membership of, and criteria used by, an independent Recognition Panel, on which politicians may not serve. The Recognition Panel decides whether a self-regulator meets Leveson's criteria for regulatory independence and effectiveness. The Recognition Panel is a voluntary auditor, not a regulator.
- The Charter is protected from amendment by politicians (at the behest of the press) by a "double-lock" - the need for unanimous support for a change by the independent Panel and by a statutory requirement that a two-thirds majority of both Houses of Parliament is required to amend it.
- Because recognition is voluntary an attempt by Parliament to tighten the terms of the Charter would fail as self-regulators would leave the system.
- Under the Leveson system the press remains in operational control of its own regulation and politicians are excluded from any role in the process.

"the press is given significant and special rights in this country … With these rights, however, come responsibilities to the public interest: to respect the truth, to obey the law and to uphold the rights and liberties of individuals. In short, to honour the very principles proclaimed and articulated by the industry itself (and to a large degree reflected in the Editors' Code of Practice)".

- Sir Brian Leveson

INTRODUCTION

While the British press has largely been subject to the same laws that govern other publishers, such as the laws governing defamation, contempt of court and "official secrets", it has long been free from regulation by the state and by statute. By the late nineteenth century the previous regimes of licensing and onerous taxation had been removed. Over the next century, the press was not subjected to any form of legally-backed regulation. But public concern about the conduct of the press over the past 60 years led to the establishment of a series of Royal Commissions and other official inquiries. These, in turn, resulted in the establishment of a series of largely ineffective voluntary self-regulatory bodies, most recently the Press Complaints Commission[2] ("PCC").

In July 2011, following a series of revelations about "phone hacking" and other illegal practices at the country's largest circulation newspaper, the *News of the World*, and concern that there had been a cover-up of the extent of wrong-doing involving top press executives, senior police officers and politicians, all political parties agreed to establish an inquiry[3] into the "culture, practices and ethics of the press". This was carried out by a senior judge of the Court of Appeal in England and Wales, Sir Brian Leveson who published his report in November 2012.[4]

On 18 March 2013, the main political parties agreed on the terms of a "Royal Charter on Self-Regulation of the Press"[5] to implement the recommendations contained in the Leveson Report. This was approved by the Privy Council on 30 October 2013[6].

The establishment of a body which plays a role in the self-regulation of the press by a process as obscure and little understood as a Royal Charter, coupled with misleading reporting of it by newspapers politically opposed to the Leveson Report, has given rise to considerable confusion and misunderstanding, particularly among people outside of the UK. The purpose of this brief is to look at the background and to explain how the Charter is designed to operate and, in particular, how it is designed to protect the press against political interference in its regulation.

The system of self-regulation established by the Charter implements two key innovations which were proposed by Sir Brian Leveson. These are a system of "recognition" or audit of the self-regulator (or self-regulators) set up by the press themselves and a series of incentives to membership of the self-regulatory body enshrined in law. This brief will explain how this system is designed to ensure that a self-regulator is independent (of politicians and – in its governance – of the press industry) and effective, and where it contains "double lock" safeguards against government or political interference. It argues that any attempts to replicate the Leveson model in other countries should include the similar strong safeguards against political interference in the self-regulation of the press.

INQUIRING INTO THE PRESS

A History of Failure in Self-Regulation of the British Press

There has been public concern about press standards in the United Kingdom for more than 70 years. The British press has, throughout that period, been dominated by a small number of powerful proprietors – often referred to as the "press barons". Many different civil society elements – including but not limited to journalists, academics and NGOs – have drawn attention to the concentration of media ownership, the exercise of unaccountable political power and the use of the press to attack and abuse individuals. The timeline below shows the major events of this extended struggle over press standards.

Table 1: Timeline of Press Self-Regulation in the UK

1947	A Royal Commission on Press is established to examine the finance, control, management and ownership of the press.
1949	The First Royal Commission on the Press reports, finding that there had been "*a progressive decline in the calibre of editors and in the quality of British journalism".* It recommends the establishment of a system of self-regulation based on a 'General Council of the Press' which would promote best practice and encourage a spirit of responsibility, draw up a code of conduct, and have the power to receive and adjudicate on complaints and to impose appropriate sanctions.
1953	The **General Council of the Press** was finally established, after initial rejection by the press, as a result of the threat of political action to establish statutory regulation. This Council was substantially different from that recommended. It had no code and no lay representation.
1962	The Second Royal Commission on the Press reported. The General Council of the Press was severely criticised, particularly for not including lay members. This Royal Commission proposed statutory regulation unless the performance of the General Council improved. The **Press Council** was formed, including a minority of non-press members.
1974	After continued concerns over privacy invasions and inadequate addressing of complaints, a Third Royal Commission on the Press, was established to "*...inquire into the factors affecting the maintenance of the independence, diversity and editorial standards of newspapers and periodicals and the public freedom of choice of newspapers and periodicals, nationally, regionally and locally."*

1977	The Third Royal Commission report was critical of the Press Council. It commented, '*It is unhappily certain that the council has so far failed to persuade the knowledgeable public that it deals satisfactorily with complaints against newspapers'*, and proposed that it should produce a written Code of Conduct for journalists. It again suggested a statutory solution if the response of the industry and Press Council was insufficient. The Press Council rejected five of the twelve recommendations made and ignored the recommendation for a written code of conduct.
1989	Sir David Calcutt's "Inquiry into Privacy and Related Matters" was established. The Press Council set about reforming itself and issued its first-ever Code of Practice.
June 1990	The Calcutt Inquiry Report concluded that existing self-regulatory arrangements for the press should be revised, and that the Press Council should be abolished and replaced with a new self-regulatory organisation; the **Press Complaints Commission** (PCC). It suggested that the press should be given "*one final chance to prove that voluntary self-regulation can be made to work".* It set out a framework of measures that it regarded as the necessary elements of an effective self-regulatory regime and that the PCC should be given 18 months to demonstrate that non-statutory self-regulation could be made to work effectively. If at the end of that period it was demonstrated that the PCC had failed to work effectively, a statutory tribunal should take over the job of dealing with complaints about the press.
Jan 1991	The PCC was incorporated, and set up a Code of Practice Committee against which editorial practice might be judged.
Jan 1993	A Second Calcutt Report was published. It concluded that self-regulation by the PCC had failed and called for the introduction of a statutory Press Complaints Tribunal. The press rejected these conclusions but did institute some reforms of the PCC.
1995	The Government responded to the second Calcutt Report rejecting his recommendation for statutory regulation.

Sir Brian Leveson reviewed this history in his report and he noted that there was recurring concern about the "*inability of self-regulation' to address the underlying problem sufficiently"*[7] and distinct and enduring resistance to change from within the press.

In the UK there is a long history of attempts to address press behaviour and lack of accountability. Each time the press has responded with a new or revised self-regulator that has proven inadequate.

The Leveson Inquiry's Innovations

In his Report Sir Brian Leveson concluded that

> *"The evidence placed before the Inquiry has demonstrated, beyond any doubt, that there have been far too many occasions over the last decade and more (itself said to have been better than previous decades) when these responsibilities, on which the public so heavily rely, have simply been ignored. There have been too many times when, chasing the story, parts of the press have acted as if its own code, which it wrote, simply did not exist. This has caused real hardship and, on occasion, wreaked havoc with the lives of innocent people whose rights and liberties have been disdained."*[8].

He agreed with the general assessment that the existing self-regulatory mechanisms of the PCC had failed. This body lacked independence from the press industry, the remedies at its disposal were woefully inadequate and it had repeatedly failed to deal with major issues of press misconduct.

Nevertheless, Sir Brian Leveson did not recommend statutory regulation of the press, nor any form of Government involvement. He made it clear that he considered that what was needed was a "*genuinely independent and effective system of self-regulation*"[9]. In this view this remained the best model and of vital importance for ensuring that there could be no government or political interference with press regulation.

He proposed a system of independently-governed self-regulation which, while voluntary, was incentivised, and whose independence (of politicians and - in its governance - from the industry) and effectiveness were independently audited. The nature of the audit body and the incentives which both have a statutory nature means the model is best described as independently-governed self-regulation within a co-regulatory framework.

There were two central issues concerning self-regulation that the Leveson Report had to deal with:

- How to ensure that a new self-regulator was independent and effective and did not suffer from defects of previous self-regulatory bodies.
- How to ensure that all major publishers joined a new self-regulator.

The solution to these problems involved two major innovations in relation to self-regulation of the press. Both these innovations are aimed at striking a balance between effective regulation and press freedom – at ensuring that the press properly arranged independently-governed regulation of itself whilst remaining entirely free from political interference.

The **first innovation** is a system of voluntary "recognition" or audit of any self-regulator (ie a regulator set up by the press themselves). The Report described the process in these terms:

> *In order to meet the public concern that the organisation by the press of its regulation is by a body which is independent of the press, independent of Parliament and independent of the Government, that fulfils the legitimate requirements of such a body and can provide, by way of benefit to its subscribers, recognition of involvement in the maintenance of high standards of journalism, the law must identify those legitimate requirements and provide a mechanism to recognise and certify that a new body meets them"* (Recommendation 27[10])

The purpose of this recognition system is to provide a voluntary audit of whether any new self-regulatory body complies with certain basic requirements which are set out in detail in the Report, and are designed to ensure the independence and effectiveness of the self-regulatory body. The role of the recognition body is to "*recognise and certify that any particular body satisfies"* the recognition requirements. This body should not be involved in regulation of any publisher (Recommendation 28[11]).

Leveson suggested that the recognition body could be the existing statutory independent communications regulator, Ofcom, which regulates broadcasters, fixed line telecoms, mobiles and postal services. But he recognised that this would be controversial (because the chairman and board members of Ofcom are appointed by Government ministers, who also approve the board's appointment of the chief executive). As an alternative, he suggested that there could be a statutory independent "Recognition Commissioner" (Recommendation 31)[12].

The Leveson approach is not entirely new. There are many similarities with the Irish system, which has had statutory recognition of its regulator since 2008. In Ireland[13], statute provides that the "Recognition Commission" is a politician – the Justice Minister. In contrast, in the UK, Leveson proposes a politically independent recognition process. Interestingly, in Ireland all the UK newspaper groups have joined the recognised regulator with its political recognition system.

The recognition body would audit a self-regulator set up by the press on the basis of a number of "recognition criteria" which form Recommendations 1 to 22 and 34 to 47 of the Report[14].

The Report recommends that a new independently-governed self-regulatory body should, among other things:

- promulgate a code of journalistic standards
- require adequate corporate governance in members to seek to prevent code breaches
- hear and adjudicate any complaints against its members regarding alleged breaches of those standards

- order appropriate redress while encouraging individual newspapers to embrace a more rigorous process for dealing with complaints internally
- play an active role in promoting high standards, including having the power to investigate "*serious or systemic breaches*" and impose appropriate sanctions
- provide a fair, quick and inexpensive arbitration service to deal with any civil law claims based upon its members' publications.

The new self-regulatory body would be governed by an independent Board. The Board should comprise a majority of individuals who are independent of the press, although it must include a "*sufficient number of people with experience of the industry who may include former editors and senior or academic journalists*"[15]. It should not include any serving editor, or any member of the House of Commons or of the Government.

The regulator would include a Code Committee tasked with making recommendations on the content of a Code of Standards for the press. This Code Committee could include serving editors; however ultimate responsibility for the content and promulgation of the Code would reside with the Board itself[16].

The Board would have power to hear and decide on complaints about breaches of the standards Code by subscribers to the new body. It would have power to impose appropriate remedial measures, including powers to:

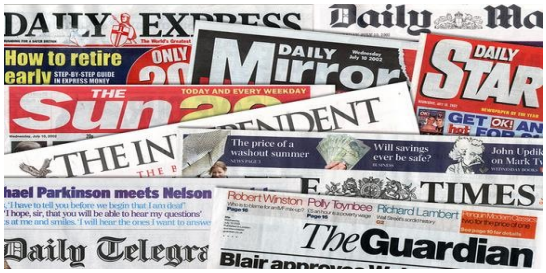
- direct the nature, extent and placement of apologies and corrections;
- impose appropriate and proportionate sanctions (including financial sanctions up to 1% of turnover, with a maximum of £1m) on any member found to be responsible for serious or systemic breaches of the standards code or governance requirements.

Serving editors would not be permitted to sit on any Committee advising the Board on complaints. Any such Committee must have a majority of people who are independent of the press.

The process by which the Chair and members of the self-regulator are appointed must be independent of the press and of politicians. The Report recommends that this should be achieved through the establishment of an independent appointments panel. The appointment panel:

- should be appointed in an independent, fair and open way;
- should contain a substantial majority of members who are demonstrably independent of the press;
- should include at least one person with a current understanding and experience of the press;
- should include no more than one current editor;
- should include no politicians.

The new UK System of Press Self-Regulation



If not recognised, its members remain liable (as now) for exemplary damages in egregious cases and exposed to adverse costs if sued in the courts regardless of outcome

Sets up

Recognised self-regulator provides arbitration service and gives members immunity from exemplary damages and adverse costs awards if sued in the courts

Self-Regulator
(with an independent Appointments Process and an Independent Chair)

Once the press has set up a self-regulator it can apply to the panel for "recognition". Can leave recognition at any point if criteria are tightened

Chooses to apply

Audits every 2-3 years

Panel applies "recognition criteria" based on Leveson recommendations for independence & effectiveness. Panel plays no role in regulation

Chartered Recognition Panel
Appointed Independently
Politicians cannot be members

Amendment needs unanimous agreement of Panel and 2/3 majorities in both Houses

Ministers have no power to amend Charter or interfere in its activities

Parliament

Government

Under the system proposed by Leveson the press still sets up its own self-regulator. The recognition body that he suggested exists to audit – at the voluntary request of the self-regulator- whether any self-regulator meets minimum requirements for independence and effectiveness.

The **second innovation** was to propose that incentives to membership of a recognised independently-governed self-regulatory body should be sufficiently strong and thus enshrined in law. Sir Brian Leveson accepted that membership of an independent self-regulator should remain voluntary but recognised that incentives would be required to ensure that all significant publishers joined a recognised self-regulator.

The need for incentives "*coupled with the equally important imperative of providing an improved route to justice for individuals*"[17], led him to recommend, as an essential component of the system, and a necessary requirement for recognition, an arbitration service for civil legal claims against publishers:

- Participation in the arbitration service would be a condition of membership to the new body.
- The arbitration service should be staffed by retired judges or senior lawyers with specialist knowledge of media law.
- Arbitrations would operate on an inquisitorial model and the process would be free for complainants to use. Frivolous or vexatious claims would be struck out at an early stage.

If a publisher subscribes to the new self-regulator and, as a result, offers free arbitration to claimants, then the courts could award the publisher its costs in any reasonably arguable defence it ran against a claim made in the courts[18] (even if its defence was unsuccessful). It would also be immune from the award of exemplary damages[19] which currently apply in egregious cases of libel (and will be extended to cover egregious cases of breach of privacy). Reciprocally, if a publisher does not subscribe to the new self-regulator and, as a result, does not offer free arbitration to claimants, then the courts would deprive the publisher of its costs in any reasonably arguable legal claim against it[20], even if the publisher is successful in the case.

The idea of statutory incentives for joining a regulator recognised in statute is not novel. Leveson's approach closely matches the model of statutory recognition and costs incentives proposed by the Guardian Newspaper in its submission[21]. There are again key similarities with the Irish system[22], which has a statutory incentive (a stronger defence in defamation actions) for joining the recognised regulator, and which all major UK newspaper groups have joined.

Leveson recommended incentives (made stronger by being set out in statute) be set up to encourage news publishers to participate in recognised self-regulation.

This Policy Brief is centrally concerned with the first of these innovations: Sir Brian Leveson's proposal for a system of "audit or recognition". It is this which led, as a result of events dealt with in the next section, to the establishment of a Recognition Panel set up by a Charter.

THE ROYAL CHARTER FOR THE PRESS

As already discussed, a key innovation of the Leveson proposals for a new system of independently-governed effective press self-regulation was the proposed establishment of a "recognition process", underpinned by a statutory framework setting out "recognition requirements". This required legislation to establish a recognition body, set out how it is appointed and conducts its audits, the "recognition requirements", and to provide the sufficiently strong "incentives" for participation that Sir Brian Leveson had recommended.

Why a Royal Charter?

The form of self-regulation envisaged in the United Kingdom does not depend on there being a Charter. Sir Brian Leveson did not recommend the use of this kind of legal structure but instead proposed statute so that Ofcom, which regulates broadcasters - or a statutory independent Recognition Commissioner - should be the body which "audited" the self-regulator set up by the press. This recommendation was not accepted and, instead of using statute, a Royal Charter was proposed to provide further comfort to the press.

Leveson's recommendations for self-regulation of the press were welcomed by the leaders of all the major political parties in the UK[23] (as well as by victims of press abuse[24], some of the newspapers and the National Union of Journalists[25] (NUJ)). But there were two important caveats.

Firstly, there was an apparent consensus between all three main political party leaders that Ofcom was not an appropriate body to act as the recognition body.

Secondly, the Prime Minister David Cameron MP told Parliament on the day of the publication of the report that he had "*serious concerns and misgivings*"[26] in principle to any statutory involvement in regulation of the press. He said "*It would mean for the first time we have crossed the Rubicon of writing elements of press regulation into law of the land".* This view reflected concerns expressed by Conservative peers, Lords Black and Hunt who were acting as the spokespeople for the press. This view was, however, not shared by the Liberal Democrat and Labour Parties.

Although many commentators pointed out that "elements of press regulation" were already contained in various statutes (such as the Data Protection Act 1998[27]), Conservative ministers suggested an approach in which the recognition body did not have a statutory foundation.

The three parties agreed to seek a cross-party agreement on the way forward such that any solution would be one that would have the support of all the parties, in order to avoid the issue becoming a political football.

The Conservative ministers' proposal was to have a "Royal Charter" on the self-regulation of the press. The inspiration for this was the arrangement relating to the United Kingdom's long established public service broadcaster, the British Broadcasting Corporation ("BBC"), which was set up under a Royal Charter in 1926[28]. This has been regarded by many as having helped to ensure its editorial independence from Government. It was, however, not proposed that any press Royal Charter would need cyclical renewal by the Government, a process which gives the Government some influence over the policies of the BBC.

The use of a Royal Charter to provide the framework for self-regulation of the press was criticised by many supporters of the Leveson Report as an arcane and unjustified departure from the recommendations that had been made.

This approach was however supported by the Conservative Party and by the press. The Liberal Democrat and Labour Parties agreed to the proposition on the basis that it would provide for full cross-party agreement on the implementation of Leveson's scheme, subject to the agreement of the victims of press abuse. For their part, the campaigning group Hacked Off – which represented most of the victims of press abuse - agreed[29] to support a Royal Charter provided that it secured all of the recommendations of the Leveson Report relating to the recognition requirements and the process of recognition. Between December 2012 and February 2013, there were extensive private negotiations between Conservative ministers and the press leading to the publication of a draft Charter on 12 February 2013 which was welcomed by the press as the "fruit of two months of intensive talks"[30] involving the industry.

This draft Charter was criticised by Liberal Democrat and Labour politicians (and by the NUJ and Hacked Off)[31] as containing a significant number of omissions of Leveson's recommendations, and modifications of others, which would mean that a self-regulator which lacked independence and effectiveness could still be recognised. Furthermore, there was no mechanism proposed to protect the Charter criteria from later being further diluted by Government ministers in the Privy Council at the behest of the press.

Further talks between the main political parties did not initially result in agreement. But after it became clear that a majority in both Houses would amend Government bills to provide for the

statutory independent Recognition Commission proposed by Leveson, on 16th March 2013, Conservative ministers agreed a new draft based on a version prepared by Liberal Democrat/Labour parties (after consultations with both Hacked Off and elements of the press). This "Cross Party" draft Charter was agreed by the leaders of all 3 parties and placed before and formally approved by the House of Commons on 18 March 2013. [More detail of the Charter versions that were published and promoted during this period can be found in a detailed analysis by the Media Standards Trust[32]]

The proposed cross-party Royal Charter was supported by two sets of statutory provisions:

- Sections 34 to 42 of the Crime and Courts Act 2013[33] which concern costs and exemplary damages relating to "relevant publishers" (the subject of a complex definition designed to exclude all lone bloggers and small news websites). This meant that relevant publishers who were not members of an approved regulator faced adverse High Court costs awards (whether they won or lost), and, reciprocally, that members of an approved regulator would be immune from adverse High Court costs awards, and exemplary damages. These provisions would only apply if a regulator had been recognised by a body established by Royal Charter.

- Section 96 of the Enterprise and Regulatory Reform Act 2013[34] which deals with the amendment of Royal Charters and which will be considered below.

On 25 April 2013 the Press Standards Board of Finance ("PressBof") on behalf of the industry, which continued to back the idea of a Charter, published its own Charter[35], substantially in the same terms as the draft charter agreed between the press and Conservative ministers in February 2013. This was submitted to the Privy Council on 30 April 2013. There was then a lengthy period of consultation on, and formal consideration of, the Pressbof Charter that was, eventually, rejected on 11th October[36] by a Privy Council Committee as being insufficiently consistent with the Leveson recommendations.

On 11 October 2013, an amended draft of the cross-party Charter was published[37], which contained certain "concessions" to press industry concerns around the arbitration scheme. On 30 October 2013, PressBof unsuccessfully applied for a last minute injunction to restrain the consideration of the cross-party Charter and, on the same day, the Privy Council finally granted the Royal Charter on Self-Regulation of the Press[38].

The use of a Royal Charter was a compromise reached among politicians between the Leveson recommendation for statutory underpinning for a new self-regulator and the Conservatives' insistence that there not be a statutory recognition scheme.

What is a Royal Charter?

It is important to understand the legal nature and effect of a Royal Charter which, despite its name, has only a formal connection to the Queen, who has no decision making power in relation to the granting or operation of such charters.

A Royal Charter is a document that incorporates a body known as a "chartered corporation". It is a way of turning a collection of individuals into a single legal entity. Until 1844 this was the only way of establishing a company in English law and was used for trading corporations. Universities and professional bodies were also granted royal charters. Over 1000 such charters have been granted since the Middle Ages, the oldest being those granted to the Universities of Cambridge (1231) and Oxford (1248).

After the enactment of the Joint Stock Companies Act 1844, ordinary trading companies were established under a statutory mechanism. Royal Charters came to be largely reserved for the incorporation of eminent professional bodies, charities and educational institutions. They are, however, from time to time used for the creation of corporations which are established by the Government but which are independent of it. The BBC is one example of this.

Royal Charters are granted by the Privy Council[39]. This is a body set up under the "Royal Prerogative". It is not a deliberative body. Its meetings are short and formal – lasting only for a few minutes with everyone remaining standing. Its members are the Queen and several hundred distinguished politicians, judges and others - although only three or four members (who are current government ministers) attend meetings, along with the Queen or her representative.

By convention, the "Queen in Council" always follows the advice of her ministers. In other words, the Privy Council is, in substance (although not in form) a sub-committee of the Cabinet. It executes the orders of Government Ministers. Where Charters are promulgated by the Government, the deliberation required in their formulation, is conducted inside the responsible Government department before it reaches the Privy Council.

A Royal Charter is an ancient and uniquely British instrument for creating corporations. It is granted by the Privy Council. By its nature, it is not a model for other national contexts, where normal statutory provisions would be an appropriate alternative.

ENSURING INDEPENDENCE OF THE PRESS

It is unclear whether and to what extent the Privy Council (that is, Government Ministers) is entitled to interfere with the day-to-day operation of a chartered corporation or with the terms of its Charter. There are no clear legal rules governing the position.

For this reason, and bearing in mind the general acceptance that Government Ministers should have no role in the regulation of the press, special provision was made in relation to the Royal Charter on Self-Regulation of the Press to prevent any possibility of political interference.

The opposition of Conservative ministers and some in the press to statutory underpinning for the recognition mechanism recommended by Sir Brian Leveson derived, they claimed, from concern that in the future politicians might seek to amend the statute to place more stringent requirements on press regulation. At first sight, a Charter did not solve this problem because it is granted and controlled by the Privy Council, which is, in substance, a sub-committee of the Cabinet and is under the control of the Government[40]. Indeed, the initial opposition to the proposal for a Royal Charter instead of Parliamentary legislation was that in future Government ministers might, at the behest of the press, amend the Charter to relax the requirements for press regulation. This concern was recognised by those proposing the Charter approach.

Independence of the Recognition Panel

In order to minimise the risk of political interference with the Recognition Panel constituted by the Charter, two protections were put in place.

Firstly, there are provisions written into the Charter itself concerning its amendment. Article 9 provides that the Charter can only be "added to supplemented, varied or omitted" if:

- the proposed change is ratified[41] by a unanimous resolution of all members of the board of the Recognition Panel (so that neither the Government nor Parliament can change the Charter without the approval of the members of the Recognition Panel);
- a draft of the amendment is approved[42] by a resolution of both Houses of Parliament with at least two thirds of members voting in support.

Secondly, as already mentioned, there is Section 96 of the Enterprise and Regulatory Reform Act 2013, which provides that:

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

This gives statutory effect to the restriction on amendment in Article 9 of the Charter and puts in place the "double lock". Although it is expressed in general terms, it in fact applies only to the Royal Charter on Self-Regulation of the Press – this is the only charter establishing a body after 1 March 2013 "with functions relating to the carrying on of an industry".

The provisions of Article 9 of the Charter and section 96 of the Enterprise and Regulatory Reform Act can, of course, be overridden by a new, later, statute – passed by a simple majority of both Houses of Parliament. This is an unavoidable consequence of the United Kingdom's constitutional principle of "sovereignty of Parliament". As a result of this principle, no Parliament can bind itself or its successors.

However, what these provisions mean is that a new statute dealing with amendment of the Charter would have to be proposed. Such a proposition would be, politically, very difficult for any Government. It is most unlikely that any Government would choose to put forward such a statute without both broad political and broad civil society consensus, and it would be near impossible to secure the required majority in both Houses of Parliament.

But, most importantly, such a statute would in any event have no direct impact on the regulation of the press. This is because the Charter does not deal directly with regulation, but only with recognition of a self-regulator, which voluntarily seeks recognition. In the unlikely event that a future Government wanted to restrict the freedom of the press – and had the support of a majority in both Houses of Parliament – then this could be done directly by a new statute. In contrast, amending the recognition process under the Charter would not succeed in restricting the freedom of the press it would simply alter the characteristics that a self-regulator needed to be recognised.

If a Government made the recognition criteria more draconian – by, for example, requiring a recognised self-regulator to have the power of pre-publication censorship, or laying down new requirements for the Standards Code – this would not be effective to restrict press freedom because the Charter audit system is voluntary. This is because any press' self-regulator could simply refuse to comply with the new recognition criteria. This would mean that when its position was reviewed under the Charter (two years after first recognition and then every three years) it would cease to be recognised. The result would be that no new draconian rules would have been imposed on the press. And because there would no longer be any recognised self-regulators, the main incentives for joining a recognised regulator – which rely on there being a recognised regulator – would cease to operate. So in fact an attempt to "tighten the Charter" would actually be counter-productive.

In short, the Charter has an effective mechanism for protecting itself against change by politicians that is not both agreed by the independent Recognition Panel or acceptable to independently-governed press self-regulators.

As indicated above, on 30 April 2013 the Press Standards Board of Finance ("PressBof"), on behalf of the industry, submitted its own Charter to the Privy Council on 30th April 2013. This was rejected on 11th October by a Privy Council Committee as being insufficiently consistent with the Leveson recommendations, and because it contained within it no provisions that would trigger section 96 of the Enterprise and Regulatory Reform Act 2013 which prevents – via the Parliamentary lock - a future Government changing the Charter in the Privy Council (presumably to dilute it at the behest of the press owners).

Changes to the independent Recognition Panel can only be made with its agreement and where it is backed by a two-thirds majority in both Houses of Parliament. This provides significant protection from political influence in the work of the Panel, which could otherwise relax the regulatory criteria at the behest of press owners.

Furthermore, this "double-lock" combined with the voluntary nature of the recognition process, provides total protection from any attempt by politicians to use the Charter scheme to tighten the regulator criteria and thus even indirectly influence the work of recognised independently-governed press self-regulators.

Independence of the Self-Regulator

The operation of the recognised self-regulator is protected not just against interference by politicians but also against interference by the Recognition Panel in its day-to-day regulatory activities.

To recap, the way in which the Leveson Report sought to preserve self-regulation whilst ensuring its independence and effectiveness was by a system of "audit" or "recognition". Sir Brian Leveson recommended that this mechanism be underpinned by statute. However, as a result of press resistance to this use of statute, a concession was made to the press and it was decided that a non-statutory mechanism would be devised, using a Royal Charter (building on the example of the BBC).

The Royal Charter on the Self-Regulation of the Press contains a set of provisions designed to ensure that a self-regulator is both effective and independent from outside interference, whether from the regulated publishers or from politicians.

This guarantee of the independence of the self-regulator is in two stages:

First, the Recognition Panel itself is independently appointed. The Board of the Recognition Panel is appointed not by a Government Minister but by an independent "Appointments Committee" itself appointed by the Commissioner for Public Appointments (an official independent of the Government). The members of the Board of the Recognition Panel must have "*senior level experience in a public, private or voluntary sector organisation"* and an "*understanding of the context within which a Regulator will operate"*[43]. Editors, former editors and current publishers are excluded, as are all current members of the national and devolved legislature and all Government ministers.

In contrast to the UK, the Irish Self-regulator has non-independent statutory recognition by a politician – the Government's justice minster. All the UK newspaper groups have still joined it.

Second, in its auditing of a self-regulator, the Recognition Panel applies a "Scheme of Recognition" which is set out in the Charter. Under this scheme, a self-regulator can only be recognised if it, itself, had an independent board, "*appointed in a genuinely open, transparent and independent way, without any influence from industry or Government*"[44]. The Chair and members of the Board are to be appointed by an independent appointment panel. The Board

should comprise a majority of people who are independent of the press, but no serving editor, national politician or Minister.

Finally, in addition to these "recognition criteria", the Charter lays down a number of other features that a recognised self-regulator must have, including the following:

- a standards code – the responsibility of the board but drawn up by a committee which can include serving editors - that must take into account the importance of freedom of speech, the public interest and the protection of sources and must cover standards of conduct, respect for privacy and accuracy;
- a "whistleblowing hotline" for journalists;
- an adequate and speedy complaints handling mechanism;
- a simple and credible investigations capability with the power to impose appropriate and proportionate sanctions, include financial sanctions limited to 1% of turnover, with a maximum of £1 million;
- the power to require the publication of corrections or apologies and if necessary, specify their size and prominence;
- an arbitral process for civil legal claims against members of a recognised regulator that is free for complainants to use and is, overall, inexpensive.

The Charter also specifies that a recognised self-regulator can not be recognised if it has the power to prevent the publication of anything.

The Charter also makes clear that a self-regulator must be recognised by the independent Recognition Panel if it is deemed to be effective and independent as judged by meeting the criteria laid down in the Charter. Recognition cannot be denied on the basis of any view the Panel may hold of any particular adjudication the regulator has made or failed to make.

The Recognition Panel is independently appointed and has to use clear criteria when deciding whether to recognise a self-regulator, including ones aimed at ensuring its independence from politicians and the press industry.

The recognition decision cannot be based on the outcome of an adjudication by the self-regulator of any particular complaint. Nor can it be based on the views of politicians or of the industry.

INTERNATIONAL COMPARISONS

There is a spectrum of arrangements for press regulation in international settings.

In the view of Article 19, the leading international human rights group (which campaigns for freedom of expression), voluntary self-regulation, co-regulation (including for example a self-regulatory system with statutory recognition and/or statutory incentives) or full statutory regulation can all be consistent with international human rights norms.

> "international human rights standards do not prescribe a specific model of press regulation. Instead, they require that any regulation meet a specific three- part test in order to be compatible with the right to freedom of expression, since regulatory measures for the media could interfere with press freedom"[45]

The case law of the European Court of Human Rights has elaborated that states have a positive obligation to regulate the exercise of freedom of expression in order to ensure the adequate protection of other rights by the law. However, "they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspect misuse of public power" (see, for example, De Haes and Gijsels v. Belgium, judgment of 24 February 1997[46]; Thoma v. Luxembourg, no. 38432/97[47]; and Colombani and Others v.France, no. 51279/99[48])

The three-stage test they describe[49] is

1) **prescribed by law**; This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly

2) **in pursuit of a legitimate aim,** including, inter alia, the rights of others. Importantly, the case law of the European Court of Human Rights (European Court) has elaborated that states have a positive obligation to regulate the exercise of freedom of expression in order to ensure the adequate protection of other rights by the law. However, "they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspect misuse of public power;"

3) **necessary in a democratic society**: unnecessary or undue restrictions are those which don't respond to "pressing social need," which are not proportionate to the interests sought and for which there are not relevant and sufficient reasons. Importantly, if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied. Part of the purpose of the necessity test is to prevent governments from following their 'legislative instinct' and to make sure that the regulation of the media is kept to a minimum.

ARTICLE 19 notes that, “although self-regulation is the preferred model, statutory and co-regulatory systems, as seen in other European countries and elsewhere, may be compatible with European and international human rights standards provided they include strong guarantees for media freedom and the independence of regulatory bodies. This applies to the proposal pertaining to press regulation in the Royal Charter.”

There is little doubt that the proposed UK system is a co-regulatory one under the approach taken above. Other countries with co-regulatory systems include Ireland and Denmark.

The proposed UK approach is clearly “**prescribed by law**” and transparently so. Not only was it the outcome of a 15-month Public Inquiry, headed by a judge, but the final terms of the Charter were confirmed a full 6 months after they were first drafted, and the process has survived a well-funded legal challenge by large newspaper groups.

The “**legitimate aim**” – of protecting the rights of victims of the press has been made clear in the 2,000 pages of the Leveson Report and the well-recognised and widely-reported abuses that have occurred in the UK for decades. There is no evidence that legitimate public interest journalism would be adversely affected by the operation of the scheme and indeed, there are aspects of the system which serve to promote it (including the immunity from court costs and exemplary damages for those in a recognised regulator). This paper demonstrates the elaborate steps that have been taken to fully insulate the newspapers, any recognised self-regulator and the Recognition panel from any political influence.

That a change from pure voluntary self-regulation to a co-regulatory system is “**necessary in a democratic society**” is clear from the history of failure of pure voluntary self-regulation – a diagnosis that was reached by a judge and agreed by all sectors of society including the media and across the political spectrum.

Even a full statutory scheme would have been a **proportionate** response to the history of regulatory failure in the UK and to the detailed accounts of widespread, industrial-scale abuse of innocent citizens by many in the press. Therefore a co-regulatory system, retaining key elements of self-regulation, is patently a proportionate response.

- Ireland’s co-regulatory approach[50] is very similar to that proposed in the UK with an incentivised voluntary recognised self-regulator where the recognition process and the incentives are set out in statute. The major UK newspaper groups have all joined the Irish self-regulator.
- Denmark has a co-regulatory system[51] where membership of the self-regulatory is mandated by statute, and there are criminal sanctions set out in law for editors who breach regulatory laws.

The LSE has published a short discussion paper - Reforming the PCC: Lessons from Abroad; Media Policy 6[52] describing the way other European countries organise their press regulation showing the wide range of models and approaches from statutory, to co-regulatory, to self-regulatory with or without compulsion and with or without state funding and other state involvement. None of these models have been problematic.

Lara Fielden has also produced an analysis of comparative press regulation regimes for the Reuters Institute "Regulating the Press: A Comparative Study of International Press Councils"[53]. This paper also demonstrates that western democracies use a mixture of self-regulatory, co-regulatory and statutory schemes to regulate the press without major problems.

During all the time when the UK has had an entirely voluntary purely self-regulatory system of press regulation it has lagged behind most other western democracies in league tables of press freedom such as that produced by Reporters Sans Frontieres (RSF)[54].

Other European countries with co-regulatory systems, such as Denmark or Ireland, have been ranked consistently higher in the press freedom league tables than the UK.

This is further evidence that doomsday assertions - that a departure from entirely voluntary self-regulation is inconsistent with, or necessarily damaging to, press freedom or to freedom of expression - are groundless.

Post-script:

1. At the time of writing (April 2014), much of the industry is supporting the establishment of a replacement for the PCC, called the Independent Press Standards Organisation (IPSO) which has been judged not to comply with the Leveson requirements[55] either in his report or the slightly milder versions of the requirements set out in the cross-party Royal Charter. The promoters of IPSO have made clear they will not seek recognition under the cross-party Charter, although in the cause of the PressBoF Royal Charter, they are seeking permission to appeal the denial of permission to appeal against the decision of the courts to disallow their attempt, via judicial review, to quash the decision of the Privy Council to grant the cross-Party Royal Charter.

2. The Recognition Panel is being set up and is due to be established in July 2014, and will be able to recognise any suitable self-regulatory applicants such as one mooted by the IMPRESS project[56]

CONCLUSIONS

The Leveson reforms have created a new framework for press accountability and a series of new protections for press independence for the UK. These are designed to ensure independent and effective self-regulation of the press whilst protecting the self-regulator from political interference. Central to this balance is a system of incentivised but voluntary “recognition” or “audit”. Leveson recommended that this be done by the existing broadcasting regulator, Ofcom, under statutory powers. But to meet press concerns about potential political interference and the use of statute instead the recognition body was constituted by Royal Charter. This established a “recognition panel” in which politicians can have no role. The rules governing recognition can only be amended with the agreement of the Panel and two-thirds majorities in each House of Parliament. As a result of this and the fact that recognition is voluntary for self-regulators, the Charter puts in place a system that ensures effective self-regulation whilst fully protecting press freedom.

Leveson’s recommendations came after more than half a century of press self-regulation failing to adequately protect the privacy and reputation of individuals and failing to encourage and promote ethical and responsible journalism. This system of press regulation contains constitutional elements peculiar to the UK and is implemented against a background of established legal protection of freedom of expression (including by Article 10 of the European Convention on Human Rights). The Royal Charter was used specifically to avoid the kind of statutory involvement in the system of press regulation that many British newspaper owners opposed and contains a number of clear and specific safeguards against government or political interference in the press. Any attempts to replicate the Leveson model in other countries should include such strong safeguards against political interference or influence over the self-regulation of the press.

The new UK system of press regulation is designed to ensure that a self-regulator is independent and effective. It also enshrines in law a series of protections to protect the self-regulator from direct or indirect interference from politicians.

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