SECTION 40 OF THE CRIME AND COURTS ACT 2013

THE CASE FOR IT BEING BROUGHT INTO FORCE IMMEDIATELY

A Submission by Hacked Off

Contents
Introduction ................................................................................................................................... 3
The Reasons for Bringing Section 40 into Force ................................................................. 5
  Summary................................................................................................................................. 5
  (1) Government Policy requires it .................................................................................. 5
  (2) Government ministers have promised to bring costs incentives into force ........ 6
  (3) It is an integral part of the cross-party agreement agreed by all party leaders on 18th
      March 2013 .................................................................................................................. 7
  (4) Section 40 is an essential part of the Royal Charter process ................................ 7
  (5) It will bring substantial benefits for ordinary citizens by providing access to justice.7
  (6) It will offer protection to journalists and investigative journalism.......................... 8
  (7) The incentives in Section 40 have compelling legitimacy ........................................ 8
  (8) In delaying commencement ministers are intervening in the process of independent
      self-regulation of the press. ...................................................................................... 9
(9) The Press Recognition Panel has called for it for good reasons ................................ 9
Reasons for Delay are Flawed and Unconvincing ......................................................... 12
  Summary................................................................................................................................. 12
  (a) ‘The changes under way within the industry’ .......................................................... 12
  (b) ‘The introduction of the new exemplary damages provisions’ ....................... 13
  (c) ‘The pressures on the industry’ .............................................................................. 14
  (d) The potential impact on local and regional news publishers .............................. 14
  (e) Parliament gave the Government a discretion on the commencement of section 40 in
      specific contradistinction to the other sections including those dealing exemplary
      damages ....................................................................................................................... 15
  (f) The Government is merely seeking views on the right time to commence section 40
      ....................................................................................................................................... 16
  (g) Parliament did not envisage a situation where the press had rejected Leveson so
      unanimously. ............................................................................................................... 17
(h) The “carrot” of costs protection inside a recognized regulator could be commenced without the “stick” of costs penalties outside a recognized regulator........................... 17
(i) It is reasonable for new ministers/Government/Prime Minister/Secretary of State* (*delete as applicable) to take time to “get up to speed” before deciding the commencement............................................................ 18

General Points ........................................................................................................................................... 20

First, the process of the Government monitoring IPSO to judge its effectiveness as a regulator is in conflict with press freedom........................................................................................... 20
Second, the history of press self-regulation is threatening to repeat itself...................... 21
Third, the decision by the Government to “deliberate” over implementing the cross-party agreement is likely to be seen as an attempt to gain party advantage............... 21

Conclusion................................................................................................................................................ 23
Introduction

Hacked Off represents victims of press abuse. On 14 June 2012, the former Prime Minister David Cameron said, when giving evidence to the Leveson Inquiry:

“I will never forget meeting with the Dowler family in Downing Street to run through the terms of this Inquiry with them and to hear what they had been through and how it had redoubled, trebled the pain and agony they’d been through over losing Milly. I’ll never forget that, and that’s the test of all this. It’s not: do the politicians or the press feel happy with what we get? It’s: are we really protecting people who have been caught up and absolutely thrown to the wolves by this process. That’s what the test is…

“[The current system] doesn’t work for the Dowlers, or the McCanns, [and] that’s the test…

“We should, as I say again, bear in mind who we’re doing this for, why we’re here in the first place, and that’s the real test. If the families like the Dowlers feel this has really changed the way they would have been treated, we would have done our job properly.”

It was for that reason that Hacked Off, as representatives of the victims, were consulted over the terms of the cross-party agreement which resulted in the enactment of sections 34 to 42 of the Crime and Courts Act 2013 and the setting up of the Press Recognition Panel (“PRP”) under the Royal Charter on Self-Regulation of the Press.

Section 40 of the Crime and Courts Act 2013 is an essential element in this balanced scheme for audited self-regulation of the press. It was recommended by the report of the Leveson Inquiry and endorsed by all political parties in Parliament.

This scheme has the following features:

- A self-regulator set up and run by the press themselves is audited by the PRP, established by Royal Charter.
- The PRP is wholly free from political or proprietor influence. It ensures that ministers have absolutely no role in monitoring press regulation.
- Under this system, critically, ministers retain absolutely no power to sanction or reward the press. This was agreed as essential by all parties without exception in the negotiations.
- Any regulator approved by the PRP must provide access to justice to those who have legal complaints against the press via a low cost arbitration system.
• Publishers who are members of an approved regulator are immune from the risk of paying (proportionate) exemplary damages in the very rare case where the high threshold is met.
• Newspapers which join an approved regulator will be protected from paying the other side’s costs if taken to court (even if they lose).
• Newspapers which choose not to join an approved regulator – and so do not provide access to justice through an approved low cost arbitration scheme – must pay the costs of litigants who bring arguable and honest cases against them.

Like most modern statutes, different sections of the Crime and Courts Act come into force at different times.
• Most provisions in this chapter come into force “on such day as the Secretary of State may by order appoint” (section 61).
• It was generally understood by the signatories to the cross-party agreement and by both Houses that this would happened on or before the same day as sections 34 to 39 (which relate to exemplary damages), that is 3 November 2015.
• In all the ministerial announcements to both Houses the incentives were treated together and never separated.
• In the case of section 40, although it is only effective – by virtue of its drafting – when there is a recognised regulator, there was never any doubt that the section would be commenced by the time a self-regulator came to apply for recognition or was recognised under the Royal Charter. Indeed, it was drafted such that it would be enacted before a regulator became recognized.

On 19 October 2015, in a speech to the Society of Editors, the previous Secretary of State John Whittingdale said that he was not convinced that the time was right for the introduction of these provisions and that he intended to examine the matter further.

For the reasons set out in this submission, we believe that any delay is unjustified and that section 40 should be brought into force at the earliest opportunity.
The Reasons for Bringing Section 40 into Force

Summary

Here are nine reasons for implementing section 40 immediately:

(1) Government policy requires it, moreover not doing so is completely “anti-policy”.

(2) The former Prime Minister and other Government Ministers have promised to do so in unequivocal terms to both Parliament and victims. The current Prime Minister voted for section 40 herself.

(3) It is an integral part of the cross-party agreement agreed by all party leaders on 18th March 2013.

(4) Section 40 is an essential part of the Royal Charter system and process.

(5) It will bring substantial benefits for ordinary citizens by providing access to justice.

(6) It will offer protection to journalists and investigative journalism.

(7) The incentives in section 40 have a compelling legitimacy.

(8) In delaying commencement ministers are intervening in the process of independent self-regulation of the press.

(9) Parliament and the Government required through the terms of the agreed Royal Charter, that the independent “Press Recognition Panel” report to Parliament and the Government after a year’s operation on what is required to deliver the Leveson system. Last week its first report, among other things:

   a. called for s40 to be commenced immediately
   b. stated that without section 40 commencement the Leveson system is not complete and the PRP could not do its job of assessing its success
   c. pointed out that the Secretary of State’s decision not to commence Section 40 last year was an intervention which brought political interference into the system which all sides had agreed was undesirable.

We deal with these in turn.

(1) Government Policy requires it

The previous coalition Government committed itself to the implementation of the Leveson recommendations on the regulation of the press. To this end, it promulgated the Royal Charter establishing the PRP and asked Parliament to enact supporting legislation in the Crime and Courts Act 2013.
Government clearly recognised that costs incentives were an essential element of the new framework, and would be fully implemented. Repeated statements to that effect were made by Conservative ministers within the coalition Government as well as by the Prime Minister. No change in policy has been announced, nor foreshadowed in the Conservative Party 2015 election manifesto.

The Government has reiterated that its policy is for all the significant news publishers to voluntarily join the Royal Charter system. Non-commencement of section 40 rewards those who defy that policy and removes the reward from those who accept the policy. In other words, the delayed commencement of or failure to commence section 40 is contrary to Government policy.

(2) Government ministers have promised to bring costs incentives into force

The Government and Conservative Ministers have repeatedly made it clear that section 40 provided for vital costs incentives.

For example, on 18 March 2013, the former Prime Minister told the House of Commons:

‘We will use the Crime and Courts Bill to table the minimal legislative clauses needed to put in place those incentives, which Lord Justice Leveson regarded as important. They will give all newspapers a strong incentive to participate in the voluntary scheme of self-regulation ...
We will also change the rules on costs in civil claims against publishers so that there is a strong incentive to come inside the regulator, with its independent arbitration system’

On the same occasion Maria Miller MP, the then Secretary of State for Culture Media and Sport, told the House of Commons

‘Every publisher has a choice it can weigh up. Publishers can come inside the self-regulatory process and get the support of the regime for exemplary damages and costs, or they can choose to stay outside. That was absolutely the essence of Lord Justice Leveson’s recommendation not to have compulsion … The new provisions will act as the key incentive for joining the new press regulator’.

Equally categorical commitments were given on other occasions, and by other Conservative ministers including Ed Vaizey MP, Jeremy Wright MP, Oliver
Letwin MP, Lord Gardiner and Lord Younger.

(3) It is an integral part of the cross-party agreement agreed by all party leaders on 18th March 2013

After lengthy negotiation and to mark an explicit agreement (which imposed a requirement on each leader to whip their Parliamentary Parties in support of the agreed clauses in the Crime and Courts Bill), the Prime Minster, the Deputy PM and the Leader of the Opposition put their names to a binding agreement which included the following provisions:

5. That during consideration of the Crime and Courts Bill, amendments NC32, NS6 and NS7 (giving effect to the recognition criteria for the Royal Charter) will not be moved.

6. That during consideration of the Crime and Courts Bill, amendment NC20 will not be moved, and with the permission of the Speaker, the attached manuscript amendment entitled “Awards of Costs” will be tabled to replace NC27 (which will not be moved) and supported by the three main parties.

An essential feature of that agreement was that the agreed amendments would be enacted and be brought into force.

(4) Section 40 is an essential part of the Royal Charter process

As ministers have consistently noted, Section 40 is explicitly intended as an incentive to news publishers to participate in a self-regulatory system that is recognised under the Royal Charter.

Sir Brian Leveson recommended that participation in the new regulatory system he proposed should not be compulsory in the first instance. But he also recommended that there should be both advantages to membership of a recognised self-regulator and disadvantages to non-membership. Parliament explicitly agreed with these recommendations and, with the proposed incentives, and legislated for those incentives.

The Section 40 measures are by far the most important of these incentives and a failure to bring them into force would undermine the whole framework agreed by Parliament and the then three main party leaders – including the Prime Minister.

(5) It will bring substantial benefits for ordinary citizens by providing access to justice.
The costs provisions of Section 40 represent an historic advance in access to justice for the British public.

For the first time, ordinary people who have grounds to believe they have been libelled, or that their right to privacy has been unjustifiably breached by a news publisher, will be entitled to legal remedy at low cost. To date, such access has generally been confined to the rich, while for others the availability of Conditional Fee Agreements in such cases has provided only limited access to justice.

(6) It will offer protection to journalists and investigative journalism.

Section 40 has the potential to strengthen freedom of expression by liberating journalists, and in particular investigative journalists, from the effects of ‘chilling’. As John Whittingdale MP stated in 2010:

‘There is increasing evidence that in recent years investigative journalism is being deterred by the threat and cost of having to defend libel actions. This is a matter of serious concern to all those who believe that a free press is an essential component of a free society’ (23 February 2010).

Publishers who belong to a recognised self-regulator will be providing wealthy and powerful litigants the option of low-cost arbitration if they object to a damaging story. If these individuals insist on going to court, then, under section 40, the court can require them to pay their own costs even if they win. Thus, the threat of bullies trying to intimidate publishers is removed, and protection for public interest investigative journalism is enhanced.

(7) The incentives in Section 40 have compelling legitimacy

The incentives in section 40 derive directly from the recommendations of a public inquiry duly constituted under the Inquiries Act 2005 and chaired by a very senior judge.

They were an important part of a rare and formal cross-party agreement involving the two parties in the then Coalition Government and the Labour opposition. This was negotiated over a period of several months in which the newspaper industry was consulted many times and obtained many concessions.

All Party leaders announced their support for these recommendations and an
intention to bring them into effect.

Section 40 was drafted in its original (similar) form by Conservative Ministers in December 2012 and were “ever present” in the negotiations leading to the cross-party agreement.

Section 40 was approved by the House of Commons on 18 March 2013; and, in a vote taken on the exemplary damages provisions at the point the debate was guillotined, support was overwhelming including the explicit support of every single party ¹. Successive opinion polls continue to demonstrate overwhelming public support for the implementation of Sir Brian’s recommendations.

Section 40 was debated and amended over several hours across two days in the House of Lords, which did not need to divide on it.²

(8) In delaying commencement ministers are intervening in the process of independent self-regulation of the press.

Any delay or uncertainty in commencing section 40 gives ministers discretion to offer sanction or reward to parts of the press. This ongoing power is precisely the sort of political influence over a free press that was rejected by all those who gave evidence to the Leveson Inquiry, by Sir Brian himself and by all parties in the post-Inquiry discussions. It is contrary to the doctrines of a press free from the exercise of executive fiat, and free from any political influence over editorial decision-making.

This also applies to any period of “consultation” over section 40 commencement, which will only be perceived – by editors and the public alike – as an opportunity for press editors and executives to trade favourable coverage for non-commencement.

(9) The Press Recognition Panel has called for it for good reasons

¹ Crime and Courts Bill Commons Third Reading, 18/3/15, Hansard: http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130318/debtext/130318-0004.htm#130318-0004.htm_spnew10

The Press Recognition Panel was the body established by the Royal Charter to be the “gold standard” of independence in press regulation. Its job is to evaluate the independence of press regulators and success of recognition system.

Written into the Royal Charter, as per the cross-party agreement, and as agreed by Parliament, is an obligation to report on an annual basis on whether the system has failed – in which case requiring further legislative action from the Government.

The PRP’s first report of this kind stated that it could not report on the system’s success or failure because as a result of section 40 not having been commenced, the system was not in place.

The PRP – the body established independently to evaluate independence of regulation - has called on s40 to be commenced – and criticised the “sword of Damocles” effect that the Government is now exercising over the press via non-commencement, as a form of political interference in the system which it was carefully designed to avoid.

The Report states:

"Urgent action is required if the post-Leveson system of independent regulation is to be given a chance to succeed. The public interest embodied in the Charter cannot be safeguarded until the recognition system is given an opportunity to function" (para 9 of the executive summary).

• It calls, in the clearest possible terms in para 10, for s40 of the CCA to be commenced:
  “In England and Wales, the measures to incentivise recognition set out in Section 40 of the CCA 2013 should be commenced”

• Without section 40 the Leveson system is not complete and cannot be even assessed, let alone assessed as working (paras 4 and 6 of the executive summary):
  “‘The recognition system’ includes the arrangements put in place by the Charter as well as provisions in the Crime and Courts Act 2013 (CCA 2013). The provisions relating to exemplary damages came into force automatically on 3 November 2015, whereas the cost shifting provisions have not yet been brought into force. This means that in England and Wales, the recognition system is not yet in place as contemplated. ..."
Until the recognition system is fully in place, we cannot judge its success or failure. Success would then be when all or most significant relevant publishers were members of one or more recognised regulators.”

- It considers a failure to commence section 40 to be the introduction of political influence into press regulation (since the Government is wielding a discretion over the press) - page 25 ("The Secretary of State’s Intervention”):
  
  “The shared view from both proponent{s} and {o}pponents 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 focused 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.”

- It says that if section 40 is not commenced then Parliament will need to consider what further legislative steps should be taken to deliver the Leveson approach (page 26 - "Next steps; our view"):
  
  “If the Secretary of State for Culture, Media and Sport decides that Section 40 of the CCA 2013 should not be brought into effect, and the Scottish Government and Northern Ireland Executive do not bring in provisions with a similar effect, Parliament, the Scottish Government and Northern Ireland Executive may wish to consider what further action is required to bring about success as contemplated by the Charter.”
Reasons for Delay are Flawed and Unconvincing

Summary

We have noted the reasons given by the previous Secretary of State for hesitating, both in his speech to the Society of Editors and in his meeting with us on 29 October 2015. In his speech he said:

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

We have also noted further reasons for delay since then.

In total they are:

(a) ‘The changes under way within the industry’
(b) ‘The introduction of the new exemplary damages provisions’
(c) ‘The pressures on the industry’
(d) The potential impact on local and regional news publishers
(e) Parliament gave the Government a discretion on the commencement of section 40 in specific contradistinction to the other sections including those dealing exemplary damages.
(f) Parliament did not envisage a situation where the press had rejected Leveson so unanimously
(g) Parliament did not envisage a situation where the press had rejected Leveson so unanimously
(h) The “carrot” of costs protection inside a recognized regulator could be commenced without the “stick” of costs penalties outside a recognized regulator.
(i) It is reasonable for new ministers/Government/Prime Minister/Secretary of State* (*delete as applicable) to take time to “get up to speed” before deciding the commencement.

These are dealt with below.

(a) ‘The changes under way within the industry’

We take this to refer to the creation of IPSO, which is mentioned elsewhere in Mr Whittingdale’s speech. He said he welcomed the establishment of IPSO and was encouraged that it is consulting on whether to introduce an arbitration scheme and is considering other changes. He called these positive
steps and said they pointed to a continued effort on the part of industry to apply and learn the lessons of recent years.

It appears that the former Secretary of State was taking on the role of judging whether or not a press self-regulator is independent and effective. This is wholly contrary to the policy of the Royal Charter and at odds with the approach urged by the press, and accepted many times by the Government, the previous Government and the Prime Minister.

It was widely recognised that it was toxic to the idea of an independent press for the Government or a minister in any way to sit in judgement over either the content or the regulation of newspapers.

Parliament decided in 2013 that only one body – entirely independent of politicians - should be empowered to judge on the public’s behalf whether a press self-regulator met standards of independence and effectiveness that were sufficient to protect ordinary people from abuse. That body was the PRP, and the relevant standards were set out in the Royal Charter, taken directly from the Leveson recommendations. If IPSO really does represent a change in the industry, it should submit itself for recognition to the PRP. Unless and until the PRP recognises IPSO, it must be seen as failing to provide effective and independent regulation.

If IPSO chooses not to submit itself to genuinely independent scrutiny, then it was the will of Parliament in 2013 that its members should be subject to the costs incentive regime in Section 40.

Any Government Minister who gives evaluative views on any press regulator beyond its status as recognised/non-recognised is acting contrary to the conclusions of the Leveson Inquiry and the Government’s own policy. Both were very clear that it was toxic for the Government to sit in judgement over press regulation.

(b) ‘The introduction of the new exemplary damages provisions’

Mr Whittingdale said in the same speech:

‘We do not yet know precisely what impact this change will have, and it is important that we find out.’

Parliament made no such qualification when Section 40 was approved. If there was a suggestion that we do not know whether those clauses would be
sufficiently “punitive” or sufficiently “deterrent”, that is a misinterpretation: the main impact of those provisions is positive since they represent immunity from an existing risk of exemplary damages for those that join a recognised self-regulator.

Moreover, we have already have ample evidence of its likely impact, which verges on the non-existent. Exemplary damages have been available to judges, under Common law, in libel cases for decades, but they have not been awarded on a single occasion since the year 2000.

This is a consequence of the high threshold (appropriate to comply with Article 10 ECHR) for exemplary damages – which is behaviour which shows an outrageous disregard for the rights of others.

(c) ‘The pressures on the industry’

This appears to be a reference to the industry’s transition to online platforms and there is no doubt that this has caused significant upheaval – although the major publishers appear to be coping well: the five biggest national newspaper companies made combined profits of approximately £800 million in the last year for which figures are available\(^3\).

Crucially, these pressures have not altered significantly since these matters were thoroughly reviewed by the Leveson Inquiry, and since its recommendations – including those on costs incentives – were implemented by Parliament.

But more to the point, there is no evidence that section 40, or indeed any of the Leveson reforms, would make the slightest difference to the financial sustainability of newspapers. In fact, with the costs protections of s40, newspapers would be relieved of paying claimants’ costs in cases they lose and save further funds by using arbitration instead of using the courts.

Costs protection, under s40, for members of a recognised regulator may also encourage journalists and publishers to pursue more investigative and edgy stories.

(d) The potential impact on local and regional news publishers

\(^3\) Figures from Enders Analysis
In his speech to the Society if Editors John Whittingdale also said,
‘I know that it [Section 40] is a matter of particular concern to many small publishers who had absolutely no involvement in the abuses the Leveson Inquiry was set up to tackle.’

He reiterated these concerns when he met with Hacked Off, but they are wholly misconceived.

It is certainly true that these papers were not involved in the worst abuses of recent years, and are rarely to be found in the libel and privacy courts. Closer to their readers, they tend to treat them with more respect. It follows that they have nothing to fear from independent, effective self-regulation, and indeed they stand to gain from access to low-cost arbitration and protection for investigative journalism. Further, any libel insurance premiums are bound to be lower for members of a recognised regulator, making a compelling business case for joining.

Local and regional newspapers have a clear choice given to them by the Government and Parliament. They can join a recognised regulator and receive costs protection or they can stay outside the regulator and be exposed to adverse costs awards under section 40. This is precisely the incentive envisaged by section 40 and cannot be interpreted as an “adverse consequence”.

Even disregarding the propriety of the Government frustrating the will of Parliament and breaching a cross-party agreement, it would be perverse for the Government to seek to remove the sanction from (in effect rewarding) those newspapers which choose to reject Government policy, and removing the benefit from those who accept Government policy.

(e) Parliament gave the Government a discretion on the commencement of section 40 in specific contradistinction to the other sections including those dealing exemplary damages.

The commencement provisions for all clauses were originally drafted in the usual way – as being on a day specified by the Secretary of State. It was never envisaged that such a formulation would be used by the Government to delay commencement of any section.

At a late stage in the negotiations of the cross-party agreement the commencement date was changed for those sections dealing with exemplary
damages to be a year after the establishment of the body established by Royal Charter. This was clearly and explicitly envisaged as a delay in the commencement of those clauses (34-39), as a concession to those elements of the press lobby which were critical of the extension of exemplary damages liability to privacy cases, notwithstanding the potential immunity provided in the sections.

Sections 41 and 42 have exactly the same commencement provisions attached as section 40, but they have not been subject to any delay in commencement or any questioning over whether to commence them at all. It is simply not the case that Parliament, in passing the legislation in the usual format, envisaged any selective commencement of the sections, nor was any such action presaged by ministers during the passage of the legislation.

An analysis of the clauses, proposed by Conservative ministers, which were replaced by the cross-party agreed clauses shows that the agreement implicitly included no delay in commencement. The ministers’ clauses specified on their face that section 40 could not be commenced until after a regulator was recognised. The agreed clauses explicitly removed this delay, and instead made it clear in the wording of section 40 that the provision could not take effect until a regulator was recognised. The intention was that the benefits of joining a recognised regulator would be in effect before recognition.

(f) The Government is merely seeking views on the right time to commence section 40

The Government has not set out any basis on which its decision will be made, so this is an arbitrary process. The former Secretary of State said that he had been urged by the press industry not to commence the section, but he did not set out the terms or circumstances of his meetings with the industry; neither did he seek to meet with those to whom the Government had given commitments, nor with the co-signatories of the cross-party agreement. The periods for consultation and debate were:

1. The Leveson Inquiry, which was judge-led and last 15 months. Representatives from all major newspapers were invited to give evidence (and did so).
2. The period between the publication of the Report and the Royal Charter agreement, which lasted three months during the press industry has set out it had continuous access to Government ministers.
3. The various Parliamentary debates on Leveson and section 40.
These have all passed. People who had been through terrible traumas did not give evidence to a hugely expensive and thorough judge-led Public Inquiry, for the process to be re-run over an unspecified period behind closed doors by Government ministers.

The decision has been made.

(g) Parliament did not envisage a situation where the press had rejected Leveson so unanimously.

This argument has also been put forward. But the reality is that it did – and that’s exactly why incentives were felt to be necessary.

Leveson’s Report could not have left anyone in doubt as to the likelihood that the press would take every inch and exhaust every option to avoid reform:

“The history of concerns about press behaviour, and the press and Government response to those concerns, has demonstrated that the industry has only ever offered what could be described as small incremental improvements to its system of self-regulation, even though its model (as modified) has been shown, time after time, not to be sufficient to address public concerns.”

- Leveson Report, Vol. 4 Part K Chapter 7, para 3.29

This is exactly the situation envisaged and precisely why s40 is so important.

It is unfathomable that Parliament would establish a system of genuinely independent regulation, beyond the control of editors, in the belief that newspapers editors – among the most powerful people in the country – would sign up without any incentive.

(h) The “carrot” of costs protection inside a recognized regulator could be commenced without the “stick” of costs penalties outside a recognized regulator.

This was suggested by the former Secretary of State, John Whittingdale MP, at CMS questions in September.

“Does she share my concern about the continuing loss of both jobs and titles in the national and local press? Does she agree that there may be a case for saying, if there is a recognised regulator, that its members will be given the protection afforded under the Leveson
recommendations, but that to impose the cost penalties would simply result in the loss of yet more newspapers?“

This is misconceived in principle, and wrong in practice, for several reasons:

(i) The clause was agreed as a whole, and will need to be commenced as a whole.
(ii) The “carrot” was devised in the Leveson Report and in the legislation to be made up of the difference between being inside a recognised regulator (with access to costs protection) and being outside (with exposure to costs penalties), not between being inside and the status quo.
(iii) Non-compliance with the Leveson recommendations which is Government policy is supposed to bring a detriment to the publishers.
(iv) The “stick” element of the provision is – in its reciprocal – what gives access to justice (in the form of costs protection) to claimants who are being denied the arbitration Leveson and Parliament required of a recognised regulator.
(v) There is not a shred of evidence that the prospect of being required to pay the court costs of both parties in arguable cases would cause any publisher to cease trading. What has cut profit in the national newspaper industry has been the failure or refusal of those newspapers (Trinity Mirror and NewsCorp UK) being sued for phone-hacking to provide Leveson-style arbitration at a fraction of the cost of the existing litigation.

(i) It is reasonable for new ministers/Government/Prime Minister/Secretary of State* (*delete as applicable) to take time to “get up to speed” before deciding the commencement.

Earl Howe said, during Report Stage of the Investigatory Powers Bill, in response to the Hollins amendment which would replicate the effect of section 40 for phone hacking claims:

“It is not unreasonable for Ministers who are new in post to take time to understand the issues at play. The position
is that, for the time being, Section 40 remains under consideration.”

Earl Howe, Lords Hansard 11/10/16, column 1809

This was a matter recommended after a lengthy public inquiry and then agreed in a long-negotiated cross-party agreement and then in long considered legislation.

It was already overdue for commencement under the previous ministers/Government/Prime Minister/Secretary of State* (*delete as applicable).

There is nothing in respect of weighty matters to consider to justify a month’s delay in commencement, far less two years’ delay.
General Points

There are three more general points we would like to make.

First, the process of the Government monitoring IPSO to judge its effectiveness as a regulator is in conflict with press freedom.

The former Secretary of State gives evidence at Culture, Media and Sport Select Committee, September 9th 2015

Paul Farrelly: Back in 2013, the Prime Minister told The Spectator—excellent publication, that was on Boxing Day—the following, “If the press set up their regulator I hope, in time, they will make that regulator compliant with—will be able then to seek recognition under—the charter recognition body. If that then happens, we will have in place a system that I think will settle this issue”. Do you agree with him?

Mr Whittingdale: I think the press have gone a long way to establish a credible, independent self-regulator in the form of IPSO. Does it deliver the overall objectives of Leveson? It has to prove itself; it is still very early days for us to judge. Does it tick every box of the recommendations within the Leveson report? No, it does not. If it were to apply for recognition in its present form, it would not get it because, quite plainly, it fails to meet some of those requirements.

But it seems to me rather than ticking every individual box that the proper test is whether or not it delivers tough, independent regulation of the press. That is something that we are monitoring to see whether or not it does.

The former Secretary of State for Culture, Media and Sport, Society of Editors’ Conference, October 19th 2015

Another area of on-going change is within the field of industry self-regulators. I welcome the establishment of IPSO and am encouraged that it is consulting on whether to introduce an arbitration scheme – an important area addressed by the Leveson Inquiry and covered by the Royal Charter – and is considering a number of other changes.

I will be watching developments in these areas very carefully. However these are positive steps and point to a continued effort on the part of industry to apply and learn the lessons of recent years. Although it is a matter of concern that there are some publishers who are still outside the self-regulatory system.
The Leveson inquiry was into the culture, practices and ethics of the press, and the industry has shown real progress in tackling the need for change in these areas, while at the same time rising to the challenges I highlighted at the beginning of this speech.

Independence from government was a guiding principle of Sir Brian Leveson’s recommendations. It was for precisely this reason that all three parties agreed to bar serving or former politicians from any role in recognition and self-regulation.

However, the former Secretary of State declared that he was closely observing the performance of IPSO with a view to deciding whether it meets satisfactory standards. In other words, a politician is involving himself directly in the business of press regulation.

Furthermore, no criteria have been set out for this monitoring.

Second, the history of press self-regulation is threatening to repeat itself.

It was a frequent lament of Sir Brian Leveson during the course of his inquiry that his predecessors had all seen their work come to nothing.

The most recent instance was in 1990-93. On that occasion, the government of the day established the Calcutt Inquiry which first recommended the creation of a new press self-regulator, the Press Complaints Commission (PCC). When asked to review the performance of the PCC after 2 years, Sir David Calcutt found it grossly wanting and recommended a statutory tribunal.

However, that recommendation was quietly buried by the government of the day and no alternative action was taken. As a direct result of that inaction, standards of press conduct fell further and persistent law-breaking and manifest contempt for the PCC’s Code of Conduct began.

Third, the decision by the Government to “deliberate” over implementing the cross-party agreement is likely to be seen as an attempt to gain party advantage.

It is worth noting here the quotation with which the executive summary of the Leveson Report concluded. It came from Sir John Major in his testimony to the inquiry:
‘I think in the interests of the best form of journalism, it is important that whatever is recommended is taken seriously by Parliament, and it is infinitely more likely to be enacted if neither of the major parties decides to play partisan short-term party politics with it by seeking to court the favour of an important media baron who may not like what is proposed.’
Conclusion

Parliament decided in 2013 that there was a compelling case for the measures provided for in Section 40, and the then Prime Minister and his ministers (including the current Prime Minister) told Parliament and the public that these measures would be put into effect.

The costs incentives in section 40 are part of a carefully balanced package, recommended by Lord Justice Leveson, supported by all political parties, the public and by Parliament. There have been no material changes in the position since March 2013.

It wholly inappropriate (and inconsistent with the scheme of the Royal Charter) for any Secretary of State to make any decision as to the independence or effectiveness of IPSO. This is a matter for the PRP established to carry out that task independently. Unless and until the PRP recognises IPSO, it must be seen as failing to provide effective and independent regulation.

It is not acceptable to any party in the debate on press regulation, for a Government minister to hold an executive “Sword of Damocles” over the press by virtue of a power and discretion to commence section 40 which would sanction or reward some newspapers.

None of the reasons which the previous Secretary of State Mr Whittingdale advanced for delaying Section 40 stands up to scrutiny.

The new Secretary of State Ms Bradley tells us she is in “listening mode”. We hope the contents of this paper provides her with all the information she needs.

We urge her now to proceed with the prompt commencement of Section 40, as Parliament intended and as his own Government has promised.

16 September 2016
Updated 19th October 2016