HACKEDOFF
THE CAMPAIGN FOR A FREE + ACCOUNTABLE PRESS

SECTION 40 OF THE CRIME AND COURTS ACT 2013

THE CASE FOR IT BEING BROUGHT INTO FORCE IMMEDIATELY

A Submission by Hacked Off

INTRODUCTION

Hacked Off represents victims of press abuse. On 14 June 2012, the Prime Minister 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 announcement 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.

On 19 October 2015, in a speech to the Society of Editors, the Secretary of State 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 the Secretary of State should bring section 40 into force at the earliest opportunity.

THE REASONS FOR BRINGING SECTION 40 INTO FORCE

Summary

Here are eight reasons for implementing section 40 immediately:

(1) Government policy requires it, moreover not doing so is completely "anti-policy".
(2) The Prime Minister and other Government Ministers have promised to do so in unequivocal terms to, both Parliament and victims.
(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.

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 Prime Minister and other Conservative Ministers have repeatedly made it clear that section 40 provided for vital costs incentives.

For example, on 18 March 2013, the 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 – in line with the aspirations of the Justice Secretary set out on 22 June 2015.

For the first time, ordinary people who have grounds to believe they have been libeled, 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.

REASONS FOR DELAY ARE FLAWED AND UNCONVINCING

We have noted the reasons given by the 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.'*

(1) 'The changes under way within the industry'

We take this to refer to the creation of IPSO, which is mentioned elsewhere in the Secretary of State'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

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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

2 Crime and Courts Bill Lords "Ping Pong", 25/3/15, Hansard: http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130325-0002.htm

continued effort on the part of industry to apply and learn the lessons of recent years.

It appears that the Secretary of State is 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.

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.

(2) 'The introduction of the new exemplary damages provisions'

The Secretary of State said in his 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 the Secretary of State was suggesting 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 ample evidence of its likely impact, which verges on the non-existent. Exemplary damages have been available to judges in libel cases for decades, but they have not been awarded on a single occasion since the year 2000.

3) ‘The pressures on the industry’

This appears to be a reference to the industry’s transition to the online world 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.

4) The potential impact on local and regional news publishers

In his speech the Secretary of State 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

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3 *Figures from Enders Analysis*

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.

5) 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, 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.

6) 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 Secretary of State said that he had been urged by the press industry not to commence the section, but has 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.

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.

Secretary of State gives evidence at Culture, Media and Sport Select Committee, September 9th 2015[4]

> ***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.*

Secretary of State for Culture Media and Sport, Society of Editors' Conference, October 19th 2015[5]

> *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.*

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4 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/priorities-of-the-secretary-of-state/oral/21537.pdf

5 https://www.gov.uk/government/speeches/culture-secretary-keynote-to-society-of-editors

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.

Now, however, the Secretary of State has declared that he is 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 Secretary of State's position 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 Prime Minister and his ministers 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 the Secretary of State to make any decision as to the independence or effectiveness of IPSO. This is a matter for the PRP.

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 Secretary of State advanced for delaying Section 40 stands up to scrutiny. He told us that his mind was not made up; we urge him now to proceed with the prompt commencement of Section 40, as Parliament intended and as his own Prime Minister promised.

12 January 2016