Non-commencement of Section 40 of the Crime and Courts Act 2013

Introduction

Section 40 of the Crime and Courts Act 2013 was agreed on March 18th 2013 as the crucial piece of the legislation which “underpinned” the Royal Charter and Leveson system.

Section 40 is the crucial “awards of costs” incentive. Like all measures passed by Parliament, it requires the Government of the day – following Royal Assent (the enactment) for the Bill – to issue an executive order formally commencing the measure (making the law “operative”). Such a delay between enactment and commencement is used to make preparation for the operation of the new law (guidance, transitional measures, training of law enforcement, etc). But non-commencement by the Government is not supposed to be used as an alternative to policy change and repeal.

At a meeting of the press industry, the Culture Secretary announced in October 2015 – two years after Royal Assent and out of the blue – that after receiving complaints about it from, and having had secret meetings with the newspapers proprietors - he was considering not commencing section 40. He also said that he – a politician - would judge whether the press’s non-Leveson regulator was independent and effective and whether the press had improved their practice. He did not set how what metrics he would use for this or how he came to his conclusions that they had already greatly improved on the PCC.

Why Section 40 is important to the Leveson system

- **Access to justice:** Through the terms of section 40, those citizens who bring at least arguable cases against newspapers who have chosen not to join an approved regulator, are protected from paying court costs even if they lose (except where dishonesty is found, etc.). Without s40, claimants of modest means are forced to rely on Conditional Fee Arrangements, and need to get insurance, which can be difficult to obtain and represent significant time investment and potential distress for claimants to go through. The result is that they are scared off bringing a claim altogether.

- **Incentives to implement Leveson:** Newspapers which join an approved regulator and offer the low-cost arbitration required under the Charter will be protected in law (by section 40) from paying the other side’s costs if taken to court (even if the newspaper loses). This protects such newspapers from the chilling effect of wealthy litigants who threaten newspapers with the risk of high court costs.

- **Disincentives to rejecting Leveson:** Newspapers which choose not to join an approved regulator – and so do not provide access to justice through approved arbitration - do not get any costs protection when they are taken to court.

Why the Government is wrong to even delay commencement of section 40

1. **Government policy requires it:** It has always been Government policy for newspapers to come forward and voluntarily join a recognised regulator under the incentive regime. The Government still says it wants newspapers to join a Leveson system but will not commence the main incentive for doing so. Non-commencement makes it easy for newspapers to reject Government policy.

2. **Section 40 is an integral part of the agreed Leveson system:** Sections 40-42 of the CCA work with the Royal Charter to make the whole system function properly. It fails without it. It protects citizens from abuse by providing remedy and rewards newspaper who join.
(3) The Government should not unilaterally change a policy that was the product of cross-party and cross-House agreement which involved compromises from their opponents

(4) It is an abuse of Parliament to change policy down the track by non-commencement of legislation, rather than by seeking repeal

(5) It is a breach of the Leveson, and of the cross-party consensus that undermines the role of the press in holding Government to account for the Government to hold the executive power to sanction some newspapers by commencing the section.

(6) The Prime Minister and other Government Ministers have made promises in this area:

- **Commitments** made on oath at the Leveson Inquiry that the system he agreed would work for victims not for politicians and newspapers
- Promises made to the public by the PM that he would “implement the Leveson Report if it was not bonkers”
- A promise made in the signed cross-party agreement to the legislation contained in the agreed package. The signed agreement was required for MPs and peers to agree to withdraw amendments (tabled or already made to 3 Bills) which would have implemented the scheme immediately, and would have passed both Houses. The possibility of non-commencement was not even mentioned during several hours of debate in both Houses.
- Repeated promises have been made by the Government in both Houses that the incentives would operate and be functional as part of the Leveson Royal Charter system.
- The provisions in the CCA 2013, including section 40, were passed overwhelmingly by a vote in the Commons and were clearly the “will of Parliament”. The Lords approved them, after several hours of debate, over 2 days without a division.

**Background**

Leveson recommended that “costs protection” (protection from the risk of being made to pay court costs) be extended to victims of press abuse who sued (for libel or privacy) those newspapers who had chosen not to join a self-regulator independently recognised as independent and effective. This would incentivise newspapers to join the Leveson system (which was voluntary in the first phase) and provide access to justice to those members of the public who were not wealthy.

The Coalition parties and the opposition parties all accepted this recommendation in December 2012 and the Government circulated an early draft of the clause which became section 40 in Jan 2013. As a concession to the press it was agreed that the “recognition system” for press self-regulators would be Royal Charter not “statute”, but still with statutory “underpinning” and statutory incentives (like section 40).

When Conservative ministers and the press served up a Royal Charter which significantly watered down the Leveson criteria, press abuse victims (who the PM had declared must be happy with it) objected. The opposition parties, the Lib Dems, and a number of Conservative “rebels” rejected it, and threatened to defeat the Prime Minister in both Houses with the statutory recognition system that Leveson proposed.

This forced the Prime Minister to negotiate a compromise, agreed with victims, to deliver a Royal Charter that was not “Leveson-lite”. The Royal Charter established the independent Press Recognition Panel, which provides approval (“Recognition”) to newspaper regulators which are sufficiently independent and effective.

The clauses to provide access to justice and to provide incentives for newspapers to set up and join a Recognised, Leveson-compliant regulator (mainly section 40) were agreed on a cross-party basis and form part of the “Cross-Party Agreement”. They were made as amendments to the Crime and Courts Act 2013, and now form Sections 34-42 of the Act. Sections 34-39 - which offer immunity from what is very small risk of Exemplary Damages to newspapers who join a Recognised regulator – have been commenced (automatically on November 3rd 2015). Sections 41 and 42 include definitions and the “underpinning” of the scheme and have been commenced (by commencement order).