

SECTION 40: MYTH BUSTER

SECTION 40 IN 40 SECONDS

Suing a newspaper for libel or invasion of privacy is expensive. “No win, no fee” agreements have helped some of those who couldn’t afford the cost, but now even these agreements are under threat. Equally, most small publishers cannot afford to defend themselves against claims by rich individuals or companies.

The solution is for publishers to join a recognised regulator that offers quick, low-cost arbitration for libel, harassment and privacy claims. This would be both quick and save money on legal costs for everyone whilst providing a fair and just outcome.

But the big newspapers don’t want those they have wronged to have quick and cheap access to justice and are refusing to play ball. That

is where section 40 of the Crime and Courts Act comes in. It is designed to level the playing field, to provide access to justice for the public whilst protecting investigative journalists from the costly legal threats of rich litigants.

It works like this: if a publisher does not join a recognised regulator and its low cost arbitration scheme, it must pay the court costs of anyone who brings an arguable claim against it for libel or invasion of privacy – whether or not the person wins the case. In short, if a publisher refuses to make low cost arbitration available then it has to pay for the claimant’s access to the courts - unless this is deemed unfair by the judge.

Equally, if the publisher does join a recognised regulator then Section 40 provides it with costs protection.

This means that if they’re sued by a rich person or company who attempts to bully them into silence, by refusing to use the low cost arbitration on offer, the publisher is insulated from paying the claimant’s court costs, even if the publisher loses.

Either way, those without the power are protected - which is why the big newspaper groups are fighting tooth and nail to stop Section 40 happening.

The independent Press Recognition Panel – set up to run the “M.O.T. Test” on press regulators to certify that they are independent and effective – told Parliament in October 2016 that “Until [Section 40 is commenced], free speech and the public interest cannot be safeguarded.”

MYTH: It would force newspapers to pay the other side’s legal costs even when they lose

- Not true. Section 40 is designed simply to provide access to justice for ordinary people who may have a valid legal case against a newspaper but cannot afford the potentially ruinous costs of going to court.
- If it were implemented, newspapers would be expected to offer low cost, independent and binding arbitration to anyone who wanted to bring a legal claim for libel or intrusion into privacy.
- If a newspaper refused to offer arbitration and insisted on going to court, s40 would ensure that the newspaper would normally pay for the costs for both sides, whether it wins or loses. This is because it has deliberately chosen to refuse claimants the option of a low cost alternative. Publishers would no longer be able to use their power and wealth to intimidate claimants by threatening them with crippling court costs.

- Even under s40, however, there would be protection for publishers facing potential injustice of their own. Any claim deemed to be trivial or vexatious could be struck out (see below).
- And judges would still have discretion to decide on how costs should be allocated, depending on the particular circumstances of the case and what is “just and equitable”.

MYTH: It would bankrupt local newspapers because of a flood of claims

- Not true. In practice, frivolous or vexatious claims could be thrown out at three separate stages: by the regulator before a case even went to arbitration; by the arbitrator; or by a judge if the case went to court.
- Thus, only genuine or “arguable” cases would end up incurring serious court costs.

- There could only be a ‘flood’ of genuine claims, if local newspapers were routinely libelling members of the public, harassing them and/or intruding into their private lives. In reality, the vast majority of local newspapers are more responsible than national papers because journalists and editors are usually immersed in their local communities.
- Moreover, three quarters of local newspapers are actually owned by large, wealthy corporations who can certainly afford to defend legal claims.
- And if evidence emerges that compulsory arbitration was genuinely damaging to local newspapers, the rules allow them to be exempted.

MYTH: It would have a chilling effect on public interest journalism such as publication of the MPs' expenses scandal

- Not true. In fact, the precise opposite is true. Section 40 would actually incentivise public interest journalism.

- At the moment, rich oligarchs or dodgy politicians can use their financial muscle to bully smaller newspapers into withholding important public interest stories. They do this by threatening lengthy litigation through the courts, which could result in bankruptcy because of excessive court costs.

- S40 means that low cost arbitration will also be available to these wealthy litigants. If they insist on bypassing arbitration and taking publishers to court, they must pay their own costs even if they win.

- Thus, newspapers could be more ambitious and publish MORE public interest revelations. For smaller, more local publishers who may want to expose local corruption or incompetence, this would be an invaluable tool to support proper journalistic scrutiny.

MYTH: It would be state regulation by the back door

- Not true. The Royal Charter on Press Self-Regulation sets up a system of independent self-regulation – not state regulation. The Charter body must be entirely independent of the Government and politicians.

- It allows newspapers to set up their own regulators, but says that those regulators must have an “M.O.T. Test” every couple of years to ensure they are independent from those they are regulating, independent from politicians, and effective for the public.

- Politicians of all parties are keen that the press industry takes advantage of this “last chance” to regulate themselves in a framework where the public can have confidence.

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MYTH: It will force newspapers to be regulated by “Max Mosley’s regulator”

- Not true. Section 40 is designed to incentivise newspaper to join any “recognised self-regulator” – that is, any regulator that has been set up by the press but has also passed the “MOT test” to show it is genuinely independent and effective.

- The big news corporations could easily reform their existing weak complaints body - the “Independent Press Standards Organisation” (IPSO) - into a recognised regulator. They resolutely refuse to do so.

- An alternative self-regulator has been set up - the “Independent Monitor of the Press” (IMPRESS). It receives funding from a charity with the express purpose of promoting high standards of journalism (the IPRT). That charity has itself been funded by a Mosley family charity set up after the death of one of Max Mosley’s sons.

- The IPRT has independent trustees who are bound by legal contract and charity law. Max Mosely has no influence what so ever over how or on whom the IPRT spends its money.

MYTH: This law punishes all of the press for the actions of a tiny minority

- Not true. There were thousands of victims of phone hacking, blagging and other types of illegal conduct by newspapers. This is rarely reported in the mainstream press. So far, we know that four national newspapers were hacking phones, with more facing claims, and that more than twenty broke data protection laws.

- Part One of the Leveson Inquiry concluded that the industry was guilty of a “pattern of cosmetic reform” and should be given one last chance to adopt a system of independent self-regulation.

- Section 40 is a critical part of that system and would deliver both access to justice for the public and valuable free speech protections to investigative journalists.

MYTH: S40 was written deliberately to allow the Government to decide when to implement it

- Not true. Successive Prime Ministers and other Government Ministers have made promises to commence s40.

- They made commitments on oath at the Leveson Inquiry that the system he agreed would work for victims, not for politicians and newspapers.

- Then Prime Minister David Cameron said that he would “implement the Leveson Report if it was not bonkers”.

- Section 40 was promised in the historic cross-party Royal Charter agreement. The possibility of non-commencement was not even mentioned during several hours of debate in both Houses of Parliament.

- The relevant provisions 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.

- 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.