Index Policy Note

Leveson: The way ahead for a free press in the UK

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Introduction

The Leveson debate has been polarised and cast simply as a battle between those who "accept" the judge's recommendations and those who "reject" them.

Index welcomed the establishment of the Inquiry, and took an active part in it. There is, as we have pointed out, much to praise in Lord Justice Leveson's findings and recommendations. This includes:

- Arbitration;
- A more balanced press council, reflecting society and not just publishers, and
- Clear guidelines on public interest, ethics and standards, which are all for the benefit of the press.

But all that is good in the report can be achieved **without** statutory regulation and political interference in the form of new laws on the press. Index believes that:

- A law specifically affecting the press, no matter how "light touch", damages the freedom of the press. David Cameron appears to understand this, and Index welcomes the government's stance in not reaching for new laws to fix problems that are not actually matters of law.
- There are already many laws which apply to the abuses carried out by the press --- libel, contempt, privacy, and more. While some of these laws are problematic, and Index has sought to reform them, properly applied they should achieve the correct balance between a free press and other civil rights, without the need for additional statutes.
- More press laws would be bad for free speech in the UK and set a bad example for the rest of the world. A tough but voluntary regulator is the best way to ensure a free press and a fair society.

Background

The Leveson report on the culture, standards and ethics of the press has sparked debate in several areas, the most prominent being over "statutory underpinning" of a new press regulator. Other issues including the nature of dispute resolution under a new regulator, whistleblowing and sources, and government guarantees of a free press have also come under scrutiny.

The Inquiry revealed some shocking practices in British journalism. There is no doubt that people suffered unduly due to the practices of the press, and access to redress for people who have been wronged by the press is essential.

There have been some serious lapses in standards detailed in the Leveson report, and any new regulator must take a strong line on standards. Editors and journalists should be fully aware of their duty to report in the public interest.

It has become clear that the Press Complaints Commission was not the appropriate system for regulating the press. Index has called for a stronger, sharper-toothed regulator. But a strong regulator must protect the free press.

Since the publication of the Leveson report, various positions have been taken. The Conservative Party has stated its preference for voluntary regulation, though it is now examining avenues other than statute by which a regulator could be "verified".

The Labour party published a "Press Freedom Bill" which advocates the establishment of a statutory underpinning for a "Press Standards Council", answerable to the Lord Chief Justice. The Liberal Democrat leader Nick Clegg in his Commons response to the report also broadly backed the idea of statutory underpinning, citing the Irish model of regulation.

Editors of the major newspapers subsequently met the Prime Minister, and have stated individually that they will support almost all of Lord Justice Leveson's main recommendations but crucially without the need for statute. The government has made it clear that it expects the newspapers to act quickly and prove they have responded positively to Leveson's recommendations. Lord Hunt of the PCC has said he believes a new model could be in place in "early 2013".

Index's response to Leveson's recommendations

Statutory underpinning

Since the beginning of Lord Justice Leveson's inquiry, Index's position has been clear: we believe that a statute created for the press is contradictory to the principle of a free press. Laws affecting the press alone will always be open to abuse. There are serious questions over giving politicians powers to make press laws. As Index has pointed out:

"The media has a vital role to play — as Leveson himself indicated — in monitoring and reporting the political scene, challenging and criticising and holding to account those in power; if journalists cannot do this robustly and without fear of interference or other political consequences, press freedom is constrained. Beyond this, even "light" statutory regulation could easily be revisited, toughened and potentially abused once the principle of no government control of the press is breached."

It is clear that the old Press Complaints Commission model failed. Index supports an independent regulator involving a broad range of representatives from within and outside the industry. As we wrote in our submission to the Inquiry last July:

"Any new system of self-regulation must have sufficient teeth to deal effectively with unwarranted breaches of privacy, false allegations and other issues including poor and inadequate standards and unethical behaviour. A new regulatory body, set up on a self-regulating basis, must push for a high standard of corporate governance and accountability. And

it must have a wide-ranging remit to monitor and address issues of journalistic standards including ethical standards. It must offer a straightforward, effective and fair approach for dealing with individual complainants."

Crucially, membership of this body must be voluntary. Incentives can be offered for joining, such as access to Alternative Dispute Resolution (which Index supports), but there must not be sanctions for lack of participation (such as potential Ofcom "backstop" regulation).

Index is also seriously concerned by the apparent "Catch 22" in Lord Justice Leveson's recommendations for regulatory body membership, which it is claimed, would be voluntary, while the report simultaneously suggests that any regulator that did not have the membership of all major news gathering organisations would be classed as a failure – and at that point compulsion might come in.

The suggested "statutory backstop" or the idea that all major news organisations must join a regulator in order for it to function, effectively removes "voluntary" status.

The risks of establishing a regulator by statute

"Statutory underpinning" or statutory regulation involves a new law being created for the press. Advocates of statutory underpinning suggest that a law would simply be required in order to create the regulator and define its characteristics. But this would mean MPs would have to debate and vote on that law. Even the lightest of definitions opens the door to the status of the regulator becoming a political football, allowing politicians scope to define a regulator to their own ends.

In his recommendations, Lord Justice Leveson suggests 24 paragraphs describing the characteristics a regulator should have. Among them is a "recognition body" to assess and "certify" that the regulator fulfilled these criteria, with broadcast regulator Ofcom being suggested as the most appropriate. This would mean politicians defining in some detail the terms by which the press is regulated. The potential for manipulation is huge, as the legitimacy of the regulator would essentially lie in parliament.

Politicians will always try to influence the press to their own ends, either by promoting their agenda or attempting to silence critical reporting. Privacy and libel litigation threats were used by MPs attempting to shut down journalistic investigation of expense claims.

In the lead up to the publication of the Leveson report, Spectator magazine editor Fraser Nelson reported:

"The chilling effect has already started – at least in terms of emboldening MPs. In the last few weeks, I have had an MP and a government minister call asking me to (respectively) discipline a Spectator *writer who had annoyed him on Twitter and take down a blog that was 'over-the-top'."*

Since the Leveson findings were published, Culture Secretary Maria Miller's adviser is reported to have tried to warn the Telegraph off publishing a story about the secretary's expenses by "reminding" the paper's journalists that Miller was responsible for the implementation of a new regulation system.

Allowing MPs to vote on and ultimately hold power over a press regulatory system is all too clearly dangerous.

It has also been reported that the government is examining the possibility of a Royal Charter to establish a regulator. This would not require new statute, but it does create its own problems. Royal Charters are overseen by the Privy Council and subject to review by ministers, giving the government a great deal of power over the regulator, and, indirectly, the newspapers. It is this possibility of power leading to an interest in, and motivation for, interference that Index opposes: this is why politicians have an interest in controlling the press, as it chimes with their interest in positive media coverage that can help them retain power. We continue to uphold a voluntary, self-regulatory body with improved powers as a model for the future.

There is much in Lord Justice Leveson's main recommendations that Index would support: transparent governance in press companies, a strong ethics code and an arbitration system within the new regulator are all things that Index has endorsed since the beginning of this process.

Editors at a meeting with the Prime Minister also indicated that they would agree to a large number of Lord Justice Leveson's proposals.

The "Irish model"

There has been much comparison of the Leveson recommendations with the Irish model of press regulation. It is worth explaining in brief what that model is.

While the Irish Press Council is recognised in statute, it was not established by statute. The Council came into being in 2008 after several years of negotiation between papers, journalists' representatives and the government, and was recognised in the 2009 Defamation Act.

The council is made up of representatives of the public interest, publishers and journalists, with the majority of the council consisting of non-industry representatives.

The council appoints an Ombudsman, who is the first port of call for complaints. Complainants and defendants can appeal his decisions to the council.

The advantage in membership is that organisations can access a type of "responsible behaviour" defence in defamation cases, which could lead to reduced costs and damages in such cases. To date, no organisation has attempted to activate this defence.

Membership of the Press Council of Ireland is entirely voluntary and open to all. Some organisations, such as the hugely successful journal.ie, have not, as yet, signed up.

Index does have two major concerns over the Irish regulation model. As we have previously stated, we believe that a statute establishing press regulation is contradictory to the basic principle of a free press. Moreover, Schedule 2 of the Defamation Act 2009 essentially gives the Minister for Justice the power to decide who is or is not fit to sit on the council**.**

Alternative Dispute Resolution

Index and English PEN, jointly, as the Alternative Libel Project, submitted evidence to the Leveson Inquiry on the concept of Alternative Dispute Resolution. We believe that a voluntary system of alternative dispute resolution --- either mediation or 'Early Neutral Evaluation' --- should be one key element of a new regulator, offering inexpensive, efficient and trustworthy redress to people who feel they have been wronged by the press.

This does not require statutory recognition but, to complement ADR, we recommend changes to costs rules, including cost capping and stronger cost budgeting. This provides a serious incentive for press buy-in.

The Leveson report made a similar recommendation, saying the regulator should “provide a fair, quick and inexpensive arbitration service to deal with any civil law claims based upon its members’ publications.”

Leveson also envisages such an arbitrator will act as an incentive to join the new regulator. Index supports this.

There is though one worrying aspect to Leveson's recommendations on arbitration. Lord Justice Leveson suggests in his report that a non-member publisher could be liable for the “costs of litigation in privacy, defamation and other cases, even if it had been successful”. This is similar to the qualified one-way cost shifting proposed in Lord Justice Jackson’s review of Civil Litigation Costs. This is problematic: firstly, it ignores the resources of both parties (a Russian oligarch suing a British national newspaper would be protected from paying any costs); secondly, costs need to be applied in a coherent way that does not merely single out individual newspapers.

Sources and whistleblowing

One of the issues at the heart of the hacking scandal that led to the establishment of the Inquiry was the too-cosy relationship between police officers and members of the press.

Lord Justice Leveson’s report makes several recommendations on making the relationships between police and press more transparent. In particular, Lord Justice Leveson suggests setting up a whistleblowing system within the police, thereby avoiding the need for confidential briefings to journalists on internal police issues, saying:

"...I have made a series of recommendations, as signposts to a series of pragmatic solutions which, subject to consultation with a range of interested bodies, including ACPO [Association of Chief Police Officers], the Independent Police Complaints Commission and the newly-elected Police and Crime Commissioners, would amongst other things accord an enhanced role to a designated one of the Inspectors within HM Inspectorate Constabulary (who must have served at Chief Officer level) as being the first port of call for 'whistleblowing' in relation to the conduct of senior officers within the police service."

Index believes the recommendations would spell serious trouble for journalists and whistleblowers.

As Index told the Guardian:

"The Leveson report's comments on police whistleblowers and contact with the press could prove very damaging for journalism and for transparency. As with members of any organisation, police officers should be able to voice their concerns on or off the record to the press. Media scrutiny is crucial in keeping check on the police."

Index is also concerned by Lord Justice Leveson's suggestion that paragraph 2 (b) of schedule 1 the Police and Criminal Evidence Act 1984 be repealed. This law effectively means that police should only request journalistic materials as a last resort. Its repeal would mean police would feel confident in demanding journalistic materials from reporters. This could endanger reporters, particularly those who work on crime or terror stories. In the case of Northern Irish reporter Suzanne Breen, who was pursued by the PSNI for her sources for reports on paramilitaries, a Belfast court ruled that the police would actually put her life in danger if they forced her to hand over materials.

Source protection is crucial for journalists and whistleblowers, and this move would seriously undermine that principle. Journalists who were required to hand materials to the police would quickly be perceived as an arm of the law rather than neutral reporters, and sources would no longer feel confident in dealing with the press.

Data Protection

Proposals to changes in the Data Protection Act could also chill investigative journalism. Lord Justice Leveson suggests introducing custodial sentences for data protection breaches (a power available under the Communications Act 2008), while placing a high threshold on defences for breaches, i.e. that processing of data is necessary for publication as opposed to being done with a view to publication. This could severely hinder a complex investigation. Could a journalist make that distinction while not in possession of the data?

Press and politicians

Leveson is right to address the public concern that the relationship between the press and political parties had become "too close...in a way which has not been in the public interest." He notes that it has given "rise to legitimate perceptions and concerns that politicians and the press

have traded power and influence in ways which are contrary to the public interest and out of public sight." Index shares this view.

Leveson calls for steps to address "a genuine and legitimate problem of public perception, and hence of trust and confidence," recommending periodic disclosure of information such as the "frequency or density of other communications".

While Index applauds calls for greater transparency, we feel that there are also principles at stake: the measure would seriously undermine the ability of people who work in politics to blow the whistle on dubious practices. It would also make it difficult for political reporters to protect their sources and could well diminish sources' confidence in coming forward.

Furthermore, practical problems could arise with a requirement to record any relevant meeting. Would these recommendations extend to researchers, bloggers, or online-only journalists? Which details would need recording? In addition, to give "some indication of when matters of media policy are discussed" is a vague recommendation that might limit the extent to which journalists feel they can raise media-related issues with politicians in their routine meetings with them. Individuals on both sides need to be able to discuss these topics freely and safely.

It is also important that, in pushing for transparency, a distinction is made between corporate lobbying and journalistic endeavour that respects the necessity of some conversations rightly remaining confidential. In the case of top executives lobbying on media policy as business, however, we would expect those to be recorded in a transparent manner.

Public interest

Debates about the "public interest" have been paramount in the discussions around the Leveson Inquiry and the report.

Lord Justice Leveson suggests:

"I encourage the new independent self-regulatory body to issue guidance on interpretation of the public interest in the context of the code and to be clear that it would expect to see an assessment of the public interest, where relevant, being recorded as decisions are made. I also suggest that it considers offering a purely voluntary pre-publication advice service to editors who want support on how the public interest might be interpreted in a specific case before a decision is reached on publication without notice to the subject of the story."

The PCC's editors' code does provide useful guidelines on what might constitute a story in the public interest:

1. *The public interest includes, but is not confined to:*
    - *i) Detecting or exposing crime or serious impropriety.*
    - *ii) Protecting public health and safety.*
    - *iii) Preventing the public from being misled by an action or statement of an individual or organisation.*

2. There is a public interest in freedom of expression itself.

Lord Justice Leveson commends the Crown Prosecution Service guidelines on determining public interest in cases involving journalists, which place a high premium on free expression as a right that is in the public interest in and of itself

While guidelines are useful, it is difficult, and indeed undesirable, to enshrine a definition of public interest. The public interest of a story must be balanced against another important right, privacy. As Index wrote in its policy note last July, a balance "should not be tipped against the fundamental right to free expression when there is a clear public interest in privacy breaches."

Every story has a different set of circumstances, and hard and fast rules on, for example, breaches of privacy may not be appropriate in every case. It is not always possible to know where a story will finish when one begins it, and the public interest angle may change.

For this reason, Index believes a public interest defence should be available in all of the laws that could affect the practice of journalism, including the Computer Misuse Act, The Official Secrets Act and the Regulation of Investigatory Powers Act (RIPA).

Lord Justice Leveson and the Labour party have both suggested a "public interest panel" to which editors could turn to adjudicate on whether a story is in the public interest before publication.

But this is anathema to how journalism works. Ultimately, an editor is responsible for what appears in the pages of a newspaper. It is the editor who must "publish and be damned" Furthermore, journalists with a scoop are unlikely to send it to a third party (apart from, if they have them, their publication's own trusted lawyers) to get an opinion on the story.

Freedom of the press

The UK has a responsibility to protect free expression. Speaking to the Financial Times, Thorbjørn Jagland, secretary-general of the Council of Europe, expressed his scepticism about press regulation backed by statute, saying:

"I'm very cautious about controlling the media because it always leads to something bad – it always leads to misuse of power."

Lord Justice Leveson has suggested that a statute be put in place which would make it the duty of the government to "protect" freedom of the press.

"I recommend that, in passing legislation to identify the legitimate requirements to be met by an independent regulator organised by the press, and to provide for a process of recognition and review of whether those requirements are and continue to be met, the law should also place an explicit duty on the Government to uphold and protect the freedom of the press."

This has been presented in some quarters as a “first amendment” style law. But Index is concerned that there is in this law in fact a danger of politicians setting the parameters of what a “free press” is. The First Amendment is not a law protecting a free press. Rather it is a law prohibiting any law to be made regarding the press. This is a far greater protection, one that cannot be provided by a law charging the government with upholding press freedom.

Conclusion

Index maintains that the merits of the Leveson report can and must be feasibly achieved **without** statutory regulation. As Index CEO Kirsty Hughes has written, the “politicisation of press control would be a major breach of the principles of freedom of expression and a free press.”

We also feel greater consideration should be paid to worrying elements of the report that could have severe consequences for journalistic endeavour, source protection and whistleblowing. Suggested changes to the Data Protection Act, the Police and Criminal Evidence Act and recommendations to log contact between the press and politicians or the police all risk chilling investigative journalism.

We do, however, welcome Leveson’s proposal for a cheap, effective arbitration service, which can benefit both complainants and publishers in ensuring complaints can be dealt with swiftly and inexpensively. This, combined with a stronger standards arm and greater independence of a new regulator, can work to improve ethical practices. Equally important is a more effective application of existing laws that apply to the media.

Put together, these factors can create a framework that ensures improved standards, better governance, and greater access to redress for those wronged by the press. A tough, voluntary regulator is the best way to guarantee a free press and a fair society.