

Index on Censorship response to the IMPRESS consultation

November 2014

As a UK-based organisation dedicated to the promotion of free speech and elimination of censorship worldwide, Index on Censorship is pleased to have the opportunity to provide feedback on the documents that proposed press regulator IMPRESS has drawn up ahead of its formal launch. Index also made written and oral representations to The Leveson Inquiry on the culture, practice and ethics of the press.

IMPRESS asked specific questions, to which Index has responded below. Our comments should be in no way seen as an endorsement - or indeed - a rejection of IMPRESS.

1. Do these documents meet the criteria set out in the Leveson Report, as distilled in the Royal Charter on Self-Regulation of the Press, for an independent and effective regulator? How might they be improved in this respect?

These documents reflect in large part the criteria set out in the Leveson Report and even more closely the requirements outlined in the Royal Charter on Self-Regulation of the Press, particularly on the important question of redress through swift and transparent complaints and arbitration procedures.

However, Index remains concerned that the independence and efficacy of a regulator will not be guaranteed by seeking recognition from an oversight body established by Royal Charter. A Royal Charter - though arcane - remains a political instrument. Royal Charters are established by Her Majesty's Most Honourable Privy Council, the bulk of whom are politicians, including serving members of government. Though we accept that the Recognition Panel is conceived in a way that is intended to demonstrate absolute independence from government control, the establishment of an oversight body through such an obscure piece of political machinery is not a mechanism likely to inspire the public trust and confidence required by the public. The whiff of undemocratic, non-transparent political involvement in the creation of the regulatory body has tainted it from the outset.

As the Privy Council says on its own website: "...once incorporated by Royal Charter a body surrenders significant aspects of the control of its internal affairs to the Privy Council. Amendments to charters can be made only with the agreement of the Queen in Council, and amendments to the body's by-laws require the approval of the Council (though not normally of Her Majesty). *This effectively means a significant degree of Government regulation of the affairs of the body*, and the Privy Council will therefore wish to be satisfied that such regulation accords with public policy." (our italics)

There is little clear evidence that the Recognition Panel, as currently conceived, would restore public trust in the British press, or indeed behave in a way that would hold a regulator successfully to account, as scandals involving the oversight of other independent regulators, such as the Care Quality Commission, have shown. A study by the Media Standards Trust has shown that more than 70% of the public believe that it

is important that a new system of press self-regulation is periodically reviewed by an independent commission, but it is by far from clear that the public believes that this should be a Recognition Panel established by Royal Charter. An opinion poll conducted by Survation in April 2013 found that 67% of those surveyed concurred with a statement that any regulatory system should be set up ‘in a way that does not give politicians the final say if and when changes need to be made’.

In addition, Index remains concerned that, aside from the Royal Charter, other elements of legislation introduced in the wake of the Leveson Report represent a threat to media freedom. One of the most worrying of these is section 42 (3) of the Crime and Courts Act 2013, which sets out that an organisation which does not join a recognised regulator but falls under its remit (through being considered a “relevant publisher”) will potentially become subject to exemplary damages should they end up in court, and could also be forced to pay the costs of their opponents.

There are two principles here that threaten a free press. Firstly, that in effect joining a regulator becomes less than voluntary if you have the threat of punitive damages hanging over your head. Secondly, that those who do not join and therefore feel under threat of exemplary damages will skirt away from controversial subjects and investigative journalism, and opt instead for “safe” stories.

Such measures could be especially punitive for small publishers and news organisations with limited financial means. This has a damaging effect on free expression.

Supporters of this aspect of the act argue that exemplary damages would only apply to “reckless” action by journalists, but it is possible that a court could find that a breach of Article 8 rights to privacy and reputation was by definition “reckless” even when a journalist was pursuing an investigative news story in the public interest.

2. Do these documents (in particular the ‘sunset clause’ in the Mem & Arts) serve to protect the regulator’s independence from potential interference by politicians or civil servants? How might they be improved in this respect?

The memorandum and articles skirt around the issue of whether IMPRESS would seek recognition under the charter although it is made clear in other documents that IMPRESS would seek recognition. For the reasons outlined above, Index believes that IMPRESS should not seek recognition under the Royal Charter and that a robust ethics code, financial independence, and demonstrations of efficacy (i.e. participants shown to be held to account; swift and cheap arbitration) are the only ways in which the independence of the regulator will be truly demonstrated.

3. Do these documents serve to protect the regulator’s independence from potential interference by subscribing publishers? How might they be improved in this respect?

It is unclear from the documents supplied by IMPRESS what precisely the relationship would be between the funding mechanisms for IMPRESS and the regulator itself. The implication of the documents is that the regulator would be funded by participants (as with IPSO) but (unlike IPSO as currently envisaged) these participants would have no further role in setting the agenda for IMPRESS or carrying out its duties.

Complete transparency over the regulator’s funding is vital for its success. The agreement between participants and regulators should state explicitly that the funders can have no role whatsoever in the operations of IMPRESS or in its decision-making. Clear and total separation between the funding of the regulator and the regulator itself is vital to ensure press freedom.

The IMPRESS website identifies a number of current funders of IMPRESS but no details are given outlining the expected cost of running the regulator or the regulator’s financial plans. This raises the question of how the body can ensure it will be adequately funded – and therefore its long-term sustainability – should participants decide, for whatever reason, that they are no longer happy with the decisions being taken by IMPRESS. This should be clarified, along with greater detail on the projected cost of the regulator and its intended sources of income.

One mechanism that could help improve public confidence in the industry as a whole might be to make subscription open to individual journalists. This would mean the public could be assured that the body represents the press as a whole and would help IMPRESS to cover a fuller range of publishers who might be covered by the Crime and Courts Act.

4. At the same time, do these documents serve to give subscribing publishers confidence in the regulator’s operations? How might they be improved in this respect, without compromising the regulator’s independence from the news industry?

It is unclear from the documents provided by IMPRESS whom it considers to be a likely member. The Crime and Courts Act sets out four cumulative criteria which must be met by a publisher to satisfy the definition of relevant. A publisher must:

- Publish “news-related material” (see below)
- Publish “in the course of a business” (whether or not carried on with a view to profit)
- [Produce material] “written by different authors”, and
- [which is] “subject to editorial control” (over the content of material, presentation and the decision to publish).

Schedule 15 of the Act exempts publishers including broadcasters, public bodies, charities, micro businesses, and those who publish special interest titles, scientific and academic journals, company news publications, and books. But as English PEN has shown (‘Who joins the regulator: A report on the Crime and Courts Act on publishers’), a number of small publishers may nevertheless be caught in the net and there remains a “dangerous” level of uncertainty about the definition of “relevant”. Index has serious concerns that the implication of this, as detailed above, is a restriction on investigative and challenging journalism.

5. Do these documents provide clarity about the regulator’s procedures? How might they be improved in this respect?

More clarity in the Procedures document regarding; the internal ombudsman; the complaints handling procedure; and conditions of joining, would be welcome. In its prospectus, IMPRESS states: “The regulator will not receive complaints directly unless

or until the internal complaints system has been engaged without the complaint being resolved in an appropriate time.”

6. Do the IMPRESS/CI Arb Arbitration Rules serve to give potential litigants in a relevant action confidence in the scheme’s capacity to provide access to justice? How might they be improved in this respect?

Index would suggest that IMPRESS consider the Alternative Dispute Resolution mechanisms outlined in the submission by the Alternative Libel Project, a collaboration between Index on Censorship and English PEN, which include suggestions on Early Neutral Evaluation. Details can be found at:
<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Alternative-Libel-Project-English-PEN-and-Index-on-Censorship.pdf>

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In conclusion, Index welcomes attempts by all the sides of the press to better self-regulate in ways that both protect the independence of the media and the free speech rights of the broader public. However, we remain opposed to the Recognition Panel as established by Royal Charter as the mechanism through which oversight of any regulator should be achieved, and deeply concerned that punitive measures such as exemplary damages negate any notion of a recognised regulator being voluntary.