

Additional Material for Chapter 2: Press regulation

Section numbers from the book are used when relevant. Its content provides fuller explanations and context.

2.1.1 Fragmentation of press regulation

A deep concern among the 'mainstream' press organisations and many journalists was that Leveson's proposed regulatory system included an overseeing 'recognition body', to be created by statute (and therefore in a form decided by politicians). Leveson's aim was that this body would decide whether to approve ('recognise') any regulator funded by the press, and therefore how the regulator would operate. The idea was that - if recognition was granted - there would be periodic reviews of the regulator's effectiveness, in terms of promoting standards in journalism, to check if its recognised status remained merited. Leveson did not recommend that such recognition should be compulsory for any regulator the press established. But, as explained below, he designed a legal framework which could financially penalise press organisations – potentially very heavily - if they did not sign up to a 'recognised' regulator.

Critics of the recognition concept say it offers potential for future governments to interfere with press freedom, by exercising influence through the role of, or powers granted to, the recognition body—for example, by giving it powers to insist that a regulator, to retain recognition, impose tighter rules on the press, with harsh penalties for breaching them. Supporters say that such 'recognition' oversight can help ensure that a recognised regulator is completely independent, in its decisions on complaints against the press, of any press group funding it.

In late 2013 the Government, with cross-party support in the House of Commons, put in place a Royal Charter creating a legal framework for a model of regulation close to that proposed by Leveson. This led to the formation in 2014 of the Press Recognition Panel to serve as the type of body which Leveson wanted. For more details of the Panel and its role - see Useful Websites, below.

The Charter sets out criteria - see Useful Websites, below - which the Panel must consider when deciding if a regulator deserves recognition for how it will handle or is handling complaints against the press organisations in its membership. For example, the Panel must consider whether the regulator is effective, fair, has objectivity of standards, independence and transparency of enforcement and compliance, and has credible powers and remedies, reliable funding and effective accountability.

But the Royal Charter model and therefore its recognition process continue to be shunned by all major newspaper and magazine publishers. They see that process as a step closer to state-run statutory regulation, which they argue could interfere with press freedom. As ch. 2 of *McNae's* explains, after the Press Complaints Commission was discredited, most major newspaper and magazine groups - including the vast majority of the regional and local press - agreed to establish, fund and be bound by the decisions of the Independent Press Standards Organisation (Ipsos). Since 2014 Ipsos has operated in the self-regulatory system created by these press groups to adjudicate on complaints against their journalism or journalistic activity. Ipsos has no connection to the

Charter model, and therefore is not recognised by the Press Recognition Panel. But Ipso has some of the features Leveson wanted a regulator to have.

As stated in 2.1.1 of *McNae's*, even among major press organisations regulation is now fragmented because five national newspapers—the *Financial Times*, *The Guardian*, *The Observer*, the *Independent* and the *Independent on Sunday*—and the *London Standard* are owned by groups which have so far decided against joining the Ipso system.

In 2016 the Panel recognised (approved) the Independent Monitor for the Press – known as Impress - to be a regulator under the Charter model. By mid-2018 Impress had recruited more than 40 publishers as members, involving more than 100 titles, and had issued adjudications on complaints made against a few of them. Its members are in general small organisations, including 'hyperlocal' news sites. As indicated above, Impress has no power to adjudicate on complaints against any of the UK's major press organisations as they have either joined Ipso or decided to run their own complaints systems. See 2.5 in *McNae's* and Useful Websites, below, for more detail about Impress.

In 2017 the News Media Organisation (NMA), which represents major press groups, failed in an attempt to challenge in law the Panel's decision to recognise Impress. The NMA brought the challenge by applying for the High Court to conduct a judicial review of the decision. One of the NMA's main arguments was that the Panel's decision was flawed because Impress did not meet all the criteria for recognition laid down in the Royal Charter. The NMA argued in court that some members of the Impress board cannot be seen as impartial in their regulation role because of critical views they have expressed about some major press organisations and because of their 'connections' – for example, board member Martin Hickman has written a book with a senior, Labour politician which was critical of News International, a major press group. The NMA argued too that Impress is not independent because it is funded almost entirely, via two trusts, by one wealthy individual. This is businessman Max Mosley, who has campaigned for tougher privacy law after he won a privacy lawsuit against a newspaper - that case is outlined in 27.6.3 in *McNae's* and see too pp. xxiii-xxiv of the book's Late News section. The NMA pointed out that no major publishers have signed up to Impress.

But the High Court said that the Charter did not require any 'recognised' regulator to have more than one publisher in membership; that the Panel, when granting recognition to Impress, had scrupulously considered the robustness of its structures and been satisfied they did not permit Mr Mosley to exert influence on it; and that the 'impartiality' issue raised by the NMA did not have merit because it was not the Panel's function to approve who is on Impress's board but to be satisfied it had a competent appointment panel for the board, a test which had been met, and because Mr Hickman would not be involved in consideration of any complaint against News International because that company had 'disavowed' joining Impress and because he could 'detach' himself from consideration of such a complaint were the company to join (*R (on the application of the News Media Association) v Press Recognition Panel* [2017] EWHC 2527 (Admin)).

The High Court judgment was a major blow for the NMA, because the Panel's recognition of Impress had potentially triggered the coming into force of law which could make many press organisations liable to pay all the legal costs of any defamation, privacy and harassment case brought against them, regardless of whether they won or lost the case in court. That law arose from Leveson's plan to drive all the press into joining a 'recognised' regulation system. The NMA has appealed against the High Court's ruling.

Law created to drive the press into 'recognised' regulation

Section 34 of the Crime and Courts Act 2013 created the position that any press organisation not signed up to a Panel-recognised regulation system was, from November 2015, exposed—to some extent—to a greater likelihood of having to pay 'exemplary' (punitive) damages in cases it might lose in the courts because of news-related publication. These could be, for example, privacy or and defamation cases – see *McNae's* chs. 20-23 and 27 for general explanation of these fields of law.

Also, section 40 of the Act could have led to a press organisation which wins such a case—for example, in a defamation case successfully defending in court a truthful exposure of a major criminal—being deprived of the right to recover its costs from the losing party (in the example, the criminal), unless that press organisation is in such a 'recognised' system. As explained in 20.3.4 in *McNae's*, costs in defamation cases can be huge – for example, more than £1 million.

When the Parliament created these sections to have these effects, the (Leveson-inspired) rationale was that they would help drive the press into 'recognised' arbitration schemes – that is, ongoing participation in such a scheme would be integral to being a member of a 'recognised' regulation system - offering financial compensation for people with valid complaints against the press. Leveson favoured such arbitration as it is cheaper for claimants than seeking redress in the courts. But much of the press has feared that the comparative cheapness of arbitration will encourage spurious complaints which are time-consuming to deal with, or will encourage people with valid complaints to seek the financial redress which arbitration can provide, rather than be satisfied by adjudications and/or published corrections and/or apologies.

In 2018 Ipso introduced an arbitration scheme which it has made compulsory for national press organisations in its membership, see below. But the other organisations in Ipso – for example, those in the regional press – do not have to offer arbitration to complainants.

The 'costs' provisions in section 40 of the 2013 Act – which, as explained above, are adverse to any press organisation not in a 'recognised' system of regulation - will only come into force if the Secretary of State for Culture, Media and Sport activates this law. Also, the Act was worded so that section 40 can only be put into force after the Press Recognition Panel has recognised at least one regulator – because until then there would be no such recognised system for any press organisation to join. This is why the Panel's recognition of Impress in 2017, see above, potentially brought section 40 closer to being in force.

However, when in March 2018 the Government announced it was abandoning the plan for the

Leveson Inquiry to re-open for a Part 2 of its investigations – for the Government's reasons, see *McNae's Late News*, p. xxv – it said too it would repeal the 'costs' provisions in section 40 of the 2013 Act. This reflected the fact that most of the press had continued to lobby against section 40. A press group hit financially by these 'cost' provisions—through refusal to join a 'recognised' regulator - could have decided to argue in the UK courts, and possibly in the European Court of Human Rights, that such financial discrimination breaches the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. Despite the Government's pledge to repeal section 40, the underlying issue remains 'live' because there remains some support in Parliament, and outside it, for there being such law designed to drive the mainstream press into Panel-recognised regulation. The fact that Ipso has now set up an arbitration scheme which is compulsory for national newspapers in its membership may count in favour of any such press group should there be any future 'Article 10' battle in the courts over law which discriminates - between press groups in a 'recognised' system and those which are not- in how costs are awarded in cases of alleged defamation, breach of privacy, etc

2.2 The Independent Press Standards Organisation

Further detail about the Ipso system

As chapter 2 of *McNae's* explains, Ipso has replaced the Press Complaints Commission. In some respects it operates in a similar way to the PCC as regards considering and deciding on complaints. Also, the Regulatory Funding Company – the company run by press industry representatives which provides the levy mechanism whereby Ipso is funded by the industry, and which sets Ipso's annual budget – operates in a similar way to PressBoF, the body through which the industry funded the PCC. The Editors' Code of Practice Committee, which reviews the terms of the Code, and can propose changes, was a sub-committee of Pressbof and under the new system is convened by the Regulatory Funding Company rather than by Ipso.

The structure and powers within the Ipso system are set out in Articles of Association for Ipso and those of the Regulatory Funding Company, and in Ipso's regulations. See Useful Websites below. Under its Articles the Company's directors can only approve changes to or replacement of the Code - and therefore changes to the ethical rules it enshrines - if they reasonably believe there is a consensus for this among the press groups which, through the Company, fund (and are members of) the Ipso system.

Critics of the Ipso system – which include the Hacked Off group, whose website address is below - say this structure fails to meet Leveson's criteria for a regulator independent of the industry – and, since Ipso started work in autumn of 2014, have slated it as being nothing more than a PCC Mark II.

In terms of the powers granted by major press organisations to their system of self-regulation, Ipso's launch marked a new era, because of the differences between it and the old PCC system.

Ipso has the power – because of the contracts press groups sign to be part of its system – to 'fine' these groups up to £1 million for serious or systemic breach of the Editors' Code, whereas the PCC could not impose financial sanctions. Ipso had not seen cause to use this power by September 2018.

Ipsos's contract with publishers makes clear that it places more specific responsibility than the PCC did on publishers having internal governance practices to ensure that editors and journalists comply with the Editors' Code of Practice. Publishers are required to provide Ipsos with annual statements so their 'standards and compliance' can be regularly monitored. These can be read on the Ipsos website.

Apart from considering individual complaints, Ipsos's contract also gives it powers to conduct more sweeping 'standards investigations' in various circumstances, including if it suspects – for example, from 'hotline' information, see below, or the annual statements – that there might have been serious and systemic breaches of the Editors' Code by one or more of these publishers, or if 'substantial legal issues' are raised about their conduct. This means Ipsos has specific powers to be more proactive than the PCC was to delve into suspicions of press misconduct, even when there has been no complaint from the public about a particular issue or case. Ipsos's regulations say that it can pursue a 'standards investigation' by means of an 'investigation panel' with the power to oblige publishers to provide documents and powers to question editors and journalists in taped interviews. It had not initiated a standards investigation by September 2018.

Other differences:

- the Editors' Code Committee includes Ipsos's chair and director, and three other 'lay' people – who are not from the press – as well as 10 editors, whereas under the old PCC system all the committee members were editors.
- Ipsos offers an arbitration process as an alternative means of resolving a complaint against a member organisation, with the possibility of financial compensation for the complainant, whereas the PCC did not do this. But the Ipsos system does not oblige most of its members to agree to arbitration being the means of resolving a complaint – see below.
- Ipsos's 12-member board does not include people who are currently editors, and neither does its complaints committee, whereas serving editors constituted a minority of the PCC board (which decided on complaints). This change means that Ipsos, though its board may include former editors or former editorial executives among its five 'industry' members, can claim to be constitutionally more independent of the press industry than the PCC board was.

As was the case with the PCC board, the chair of and majority on Ipsos's board are 'lay' people who do not have press backgrounds.

Ipsos provides a 'confidential whistleblowing hotline' so journalists who believe they have been requested by, or on behalf of an editor, to do something in breach of the Code can raise the alarm.

Sir Alan Moses became Ipsos's first chair in May 2014, after retiring as a Court of Appeal judge. Ipsos started work in September 2014.

Arbitration

The Leveson Report recommended that any regulation scheme created by the press should offer the option of arbitration for complainants. Leveson wanted arbitration schemes because most people

cannot afford the 'upfront' costs (for example, lawyers' fees) of suing a press organisation in court for defamation, breach of privacy or some other tort, or risk what could be financial calamity if they lost such a case in a court trial, which would usually leave them liable to pay most of the press organisation's costs.

Arbitration is a system designed to be cheaper and quicker to resolve disputes than using the courts. Various industries use arbitration.

In August 2018 Ipso launched a revamped arbitration scheme. It said that participation in this scheme is compulsory for the seven national daily newspapers and eight national Sunday newspapers in its membership – that is, if the complainant wants arbitration. The scheme can be used by a complainant who wants financial redress for alleged defamation, alleged breach of privacy or of data protection rights, or alleged harassment. A complaint made against a publisher through Ipso's arbitration scheme will therefore be termed 'a claim'. An expert media law barrister – the arbitrator - will impartially rule on it, and decide the level of damages if it is upheld.

The fee for a complainant to use Ipso's arbitration scheme is low (£100), and he, she or it (for example, a company) could win damages of up to £60,000 against a national newspaper, and recover costs of up to £25,000. If the complainant loses the arbitration case, costs will not be awarded against the complainant unless the arbitrator ruled that the claim was frivolous or vexatious, and any such award of costs against the complainant is capped at £10,000 or, if he or she represented himself or herself rather than having a lawyer, £1,000.

Ipso does not compel other types of publisher in its membership to offer arbitration, but they can if they wish. In this voluntary part of the revamped scheme, the maximum amount of damages is £50,000. Only two publishers had joined the voluntary part of the scheme by September 2018 – the Condé Nast magazine group and the Press Association national news agency. In reality, these publishers will only agree to resolve a complaint through arbitration if they think that otherwise the complainant might sue in court.

If a complainant chooses arbitration, he/she/it cannot normally thereafter sue in court for the same matter. Ipso's regional press membership continues to be adverse to offering arbitration. For full details of Ipso's arbitration scheme see Useful Websites, below.

It should be remembered that Ipso's complaints process is free to use, that all media organisations who are Ipso members are contractually required to co-operate with that process, and that this – rather than arbitration - will continue to be the route used by most complainants. No complainant opted to use previous versions of Ipso's arbitration system. The scheme it launched in August 2018 was designed to be more attractive to complainants. The level of demand for it remained unclear after a month (when this account of it was finalised).

Impress too offers arbitration. There is no fee to use its scheme, which is compulsory for all its members – that is, if a complainant wants arbitration, the complained-about member must agree to

this to retain Impress membership. Under this scheme no costs are awarded against a complainant, whatever the outcome. Impress has made the point that its scheme is 'Leveson-compliant'. By September 2018 the scheme had made two awards for damages, one for £900 and one for £2,500, both for defamation. For full details of Impress's scheme see Useful Websites, below.

Under the Royal Charter model, the Press Recognition Panel's criteria for 'recognition' of a regulator include that it must offer an arbitration scheme to complainants and cannot charge a fee for this. See Useful Websites, below. But the Panel has a power to 'disapply' the arbitration requirement in the case of local and regional publishers, so a recognised regulator could be created which does not make participation in arbitration compulsory for them.

2.4.2. Accuracy and opportunity to reply

Case study: Ipso ruled in 2016 that *The Sun* had had breached clause 1 of the Editors' Code of Practice by publishing an article which stated that in the previous year '4 in 5 jobs' in the UK had gone to 'foreign workers'. The Office of National Statistics, whose data had been used by *The Sun*, had specified that it was not possible to estimate what proportion of new jobs had gone to foreign-born workers. This meant, Ipso said, that the article gave a 'significantly misleading impression' and represented 'a failure to take care not to publish inaccurate information' (*InFacts v The Sun*, 14 October 2016)

Case study: Ipso ruled in 2015 that the *Ayrshire Post* breached clause 1 in an article about a secure psychiatric unit. The article covered a report by Healthcare Improvement Scotland about its inspection visit to Ayr Clinic. Ipso said that while the article included some accurate details, its description of the inspection report as a 'shocker' and the article's claim that the clinic had been 'rapped on the knuckles' went beyond legitimate interpretation. The inspection report was positive, finding the clinic to be 'very good' in all areas, and the only recommendations it made were minor issues. The newspaper had failed to take care not to publish distorted information, Ipso said (*Partnerships in Care v Ayrshire Post*, 27 July 2015).

For another adjudication by Ipso involving clause 1, see 4.13 in the Additional Material for ch. 4 on www.mcnaes.com for a case study on the *Daily Star's* error in publishing a photo of a child in a front page article which suggested she was missing, possibly dead, after the 2017 terrorist atrocity at Manchester Arena. In fact the pictured child was not missing, having been home at the time of the atrocity.

Sufficient care taken to be accurate?

Ipso's adjudications show what it considers to be sufficient 'care' to avoid publishing an inaccuracy.

Getting comment

Clause 1 of the Editors' Code does not oblige a publisher to seek comment from a person or organisation before publishing material about them (*Wadhams v The Times*, 11 September 2015, not upheld; *A man v Daily Star Sunday*, 21 June 2017, clause 1 complaint not upheld). But failure to do

this may mean that Ipso rules that the clause was breached because insufficient care was taken to avoid inaccuracy (*Brighton and Hove Council v The Argus*, 22 May 2017; *Highland Council v Express.co.uk*, 13 April 2017). Ipso has ruled that it is acceptable in some circumstances when seeking comment to make clear the general nature of the allegations which may be published, rather than providing 'an exhaustive list' of them (*Prevent Watch v The Sunday Telegraph*, not upheld, 15 July 2016). In the event of a complaint that sufficient care was not taken, Ipso will consider, as regards an approach to a person before publication, the extent to which they have actually been told the substance of the allegation against them, and been given a 'substantive' opportunity to respond (*Clarke v The Sun on Sunday*, 10 May 2018). The Editors' Codebook advises that if necessary 'key points' be put to the person about whom publication is planned. For the Codebook see Useful Websites, below.

Making clear that allegations are unproven

Ipso requires what is published to make clear when allegations cited are unproven, and has warned that omitting to report that a person denies an allegation may breach clause 1 (*Craig v The Mail on Sunday*, 11 August 2016, not upheld; *Wass v The Mail on Sunday*, 20 July 2017)

The nature of sources

Ipso expects factual information cited to be from a 'credible' source (*A woman v Daily Star Sunday*, 10 July 2017, not upheld). It accepts that publishers are entitled to make use of 'off the record' conversations with confidential sources to ensure accuracy and that, in some circumstances, use of such sources can demonstrate there was no failure to 'take care' (*Moloney v Irish New*, 12 June 2015 and *Issroff v London24.com*, 13 November 2015, complaints not upheld). Ipso has said that if 'claims of significance or of a potentially damaging nature' are to be published from information provided 'off the record' (that is, from confidential sources) it will generally expect the publisher to have taken further steps – such as an approach to the individual against whom the claims are made, to give him/her opportunity to comment, or the obtaining of other, corroborative, on-the-record information – to seek to ensure that the material is accurate (*Spinks v The Sun*, 28 April 2015, not upheld; *Solash v The Times*, 30 November 2015). For the ethical obligation to protect the identity of a confidential source, see 34.1 in *McNae's*.

Notes

A publisher is expected to be able to produce notes or a recording of quotes published and of the points the journalist put to a person or organisation being given opportunity for comment on allegations (*Brighton and Hove Council v The Argus*, 22 May 2017). Ipso expects shorthand notes of a court case to be clear about what was said (*Gatt v Ayrshire Post*, 8 March 2017, not upheld).

'Read-back'

Ipso has said that if - before publication - text or quotes are read back to a person to check accuracy, there should be 'a proper record' of the read-back having been completed satisfactorily, which could be created by the journalist signing and dating the checked version (*Owens v That's Life*, 26 June 2015).

2.4.4.2 Recording interviews and phone calls

Case study: In 2017 a man complained to Ipso that a journalist from *The Times* had audio-recorded an interview with him without telling him he was being recorded. Ipso said that the journalist had made clear to the man that she was a journalist and that she was seeking his comments. She had clearly stated her name, her newspaper and her role at that newspaper. Ipso said that *The Times* had not published the recording, and that 'mere use' of a recording device by a journalist did not represent a failure to respect the man's privacy. Ipso ruled that clause 2 of the Editors' Code had not been breached (*Sword v The Times*, 13 June 2017). For clause 2, see 4.2 in *McNae's* 24th edition.

2.4.5 Discriminatory material

Case study: In 2015 Ipso ruled that *The Sun* breached clause 12 in the content of a Rod Liddle column about Emily Brothers hoping to become Labour's first blind transgendered MP. Ipso condemned the column's 'crude' and 'plainly wrong' suggestion that Ms Brothers could only have become aware of her gender by seeing its physical manifestations. This had a pejorative meaning, said Ipso, adding: 'It belittled Ms Brothers, her gender identity and her disability, mocking her for no reason other than these perceived "differences"' (*Trans Media Watch v The Sun*, issued 5 May 2015).

Useful Websites

www.levesoninquiry.org.uk/about/the-report/
Leveson Report

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06535>
House of Commons Library briefing paper on implementation of the Leveson Report, including how this led to the Royal Charter 'recognition' model

<http://pressrecognitionpanel.org.uk/>
Press Recognition Panel

<https://pressrecognitionpanel.org.uk/wp-content/uploads/2015/09/The-Recognition-Criteria-Schedule-3.pdf>
'Recognition' criteria specified in the Royal Charter

<http://www.ipso.co.uk/>
Ipso

<https://www.ipso.co.uk/arbitration/>
Ipso arbitration scheme

<http://www.regulatoryfunding.co.uk/>

Regulatory Funding Company

<http://www.editorscode.org.uk/index.php>

Editors' Code of Practice Committee

http://www.editorscode.org.uk/the_code_book.php

Editors' Codebook

[https://www.impress.press/downloads/file/impress-ciarb-arbitration-scheme-2018\(1\).pdf](https://www.impress.press/downloads/file/impress-ciarb-arbitration-scheme-2018(1).pdf)

Impress arbitration scheme

<https://hackinginquiry.org/>

Hacked Off