IPSO Response to the DCMS and Home Office Consultation on the Leveson Inquiry and its Implementation

IPSO

The Independent Press Standards Organisation (IPSO) is the independent regulator for the newspaper and magazine industry in the UK. We hold newspapers and magazines to account for their actions, protect individual rights, uphold high standards of journalism and help to maintain freedom of expression for the press. We currently regulate over 1500 print titles and 1100 online titles, comprising 95% of the national daily newspapers and the majority of local and regional newspapers and magazines in the UK.

IPSO provides a free-to-use complaints service regarding possible breaches of the Editors' Code of Practice (the Code). We also help members of the public with unwanted press attention or harassment concerns, provide advice on the Code, run a Journalist's Whistleblowing Hotline, monitor on going compliance with the Code, produce guidance on the reporting of certain topics (such as transgender issues), and currently run a pilot arbitration scheme for legal claims against the press.

These function are provided outside the recognition system devised by the Royal Charter on self-regulation of the press, which the majority of the UK press strongly opposes. In order to assess our efficacy and independence IPSO submits to independent review, the results of which have been published in the Pilling Report[1]. We continue to develop our system of regulation in light of the Pilling Report, taking into account the changing landscape of the press industry.

We have been in operation since September 2014. Our submission stems from the practical experience we have gained during that time. In particular, we attempt to highlight issues of concern relating to section 40, taking into account the conclusions we have drawn from an extensive programme of research and consultation[2] regarding the development of a press arbitration scheme.

IPSO's submission is primarily concerned with the protection of individuals and the provision of incentives which support high standards of journalism through self-

[1] J. Pilling; 'The External IPSO Review' : https://static1.squarespace.com/static/56c5b9c140261d141efac66d/t/580494a73e00be5b9aa542ee/1476695209217/IPSO_REVIEW.pdf

[2] Research began in March 2015. We conducted a three month, public consultation process during the summer of 2015. We then continued to consult with the legal and press industries, taking into account responses from claimant and respondent representatives and different sectors of the press, developing a pilot scheme which has been running since July 2016. We continue to monitor and develop the pilot, which we expect to end in July 2017.

regulation. In line with our Articles of Association we also provide this submission having regard to the importance of freedom of expression and the public's right to know.

Section 40

Before moving onto the questions set by the consultation, IPSO must question the Government's decision not to consider amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) together with the future of section 40.

If a real, low cost alternative to the Court process is to be supported, section 40 and LASPO must be considered concurrently. Without a simultaneous assessment the two will act in contradiction of one another, and may incentivise or even compel the use of unsuitable processes. In order to improve access to a fair and appropriate system for resolving these disputes, Government should consider the entire scope of media dispute resolution.

The Conditional Fee Agreement (CFA) regime in defamation and privacy cases allows a party to recover their legal costs and success fees up to 100% of the value of their legal costs from the opposing side. When combined with After the Event Insurance this allows the party to litigate with no financial risk, whilst threatening the other side with significant financial hardship. Tactically this creates a strong financial advantage to litigation, incentivising the use of the Court process, where CFAs are offered. The CFA regime therefore acts against the purpose of section 40, which seeks to incentivise low cost alternatives to Court.

IPSO agrees that suitable alternative dispute resolution (ADR) mechanisms, which include established press complaints systems as well as arbitration, should be incentivised. However we also acknowledge that in some circumstances the Courts will be needed. The relative ease with which one process may be accessed will impact upon the rate at which other more appropriate processes are used. For example: where a CFA is offered litigation will be incentivised, irrespective of whether arbitration or a press complaints system would be more effective, faster or cheaper. In a similar manner, where a CFA is not offered, arbitration under the threat of section 40 will be incentivised regardless of its suitability to the claim.

There is in effect a spectrum of processes which can be used to resolve media disputes. These range from the free to use regulatory complaints mechanism, low cost arbitration and litigation. Each will have benefits and draw backs, and each will be more suitable to particular types of claim. Mechanisms for incentivising and supporting these processes should be developed in a mutually supportive manner in order to properly improve access to justice. LASPO should therefore be considered in conjunction with any amendments to section 40 and the regulatory landscape. This will provide the overall protection that is required in this field, no one section of which should be viewed in isolation.

Question 1: Which of the consultation statements does IPSO agree with?

In principle IPSO agrees with statement (c). However we note that Government must be satisfied that in removing section 40 there are sufficient incentives for the UK press to apply a high standard of journalism. If the Government is not satisfied on this point, IPSO suggests that an amended version of statement (e), perhaps taking inspiration from the Irish Defamation Act may be beneficial.

IPSO firmly disagrees with statements (a), (b) and (d). We set out our reasoning below.

(a) Government should not commence any of section 40 now, but keep it under review and on the statue book.

Keeping section 40 under review maintains the current level of uncertainty regarding the regulatory landscape. This is not beneficial for members of the public nor the press. What is required is a degree of finality and certainty that allows the business of regulation to work effectively and confidently.

By keeping section 40 under review there is a risk of creating a vehicle for Government interference with the press. Holding section 40 over the industry is likely to, at the very least, have the appearance of pressurising and cajoling the press. As already stated, IPSO believes that a free press and the freedom of expression are vital to a democratic society. Keeping section 40 under review undermines these important principles.

(b) Government should fully commence section 40 now.

The Press has sincere concerns about the system of recognition set out by the Royal Charter. It is not for IPSO to advocate this point, other than to recognise that the vast majority of the UK press have rejected the recognition system. This being the situation, IPSO does not agree that section 40 should be commenced.

Implementing section 40 would ignore the developments that have occurred in press regulation since the Leveson Report. Section 40 has in mind a system of regulation in which the majority of the UK press is covered by a single system of regulation. The legislation does not however take into account the provision of an established regulatory scheme outside the system of recognition. In particular, it does not account for those publishers who are opposed to the system of recognition who are nonetheless willing to engage with a press complaints system, offer reasonable settlements or provide an appropriate low cost method for resolving legal claims.

As outlined above, IPSO has developed a system of regulation into which the majority of the UK Press has voluntarily entered. We have contractual powers to require compliance with the Code and the directions of our Board of Directors. We continue to develop our regulatory role with the industry on behalf of the public. Implementing section 40 would undermine this work. It would, in effect, penalise publishers for working within a robust system of regulation, based upon the Leveson recommendations, that has chosen to

operate independently of the recognition system about which there are genuine concerns regarding governmental control.

A further issue is the matter of arbitration and suitability. During IPSO's arbitration consultation it was seen that for small publishers, whilst cheaper than litigation, arbitration is still disproportionately expensive relative to the ordinary value of claims made against them. It was also acknowledged that low cost arbitration will struggle to deal with complex cases; not having the resources to deal with large amounts of evidence or the authority to secure necessary third party disclosure. In some cases, it may simply be that there is a public interest in having a case heard in public by the Court. Our concern is that there is such a focus upon the perceived benefits of arbitration within the recognition system that the effect of section 40 would be to compel parties to arbitrate even where it is not suitable. This will not create a fair process for either party and may adversely affect the provision of justice; decreasing trust in the regulatory scheme.

Finally, it should be noted that section 40 has the potential to undermine the principle of agreement which runs at the heart of arbitration. Whilst parties may agree to arbitrate ahead of a dispute arising, that agreement must be entered into voluntarily[3]. Section 40 would impose severe financial sanctions on publishers staying outside the recognition system. For publishers that felt compelled to join a recognised regulator with a compulsory arbitration scheme, there would be a strong argument that section 40 had effectively removed the voluntary nature of their agreement to arbitrate. This would invalidate the agreement and disrupt the aim of providing a low cost alternative to Court proceedings.

(c) Government should ask Parliament to repeal all of section 40 now.

In principle, IPSO agrees with this statement. By repealing section 40, its potential to allow for Government interference with the press will be removed. This would also give a sense of clarity which is needed to create a stable and effective regulatory system. However, in repealing section 40, Government should make sure that there is effective protection for members of the public and proper incentives for the press to hold themselves to a high standard of ethics within a self-regulatory system.

There are currently cost incentives regarding the consideration of ADR in the Civil Procedure Rules' (CPR) Pre-Action Protocols[4]. The Protocols rightly suggest that litigation should be a matter of last resort. An unreasonable decision to reject the use of either a regulatory complaints service or arbitration may be taken into account by the Court when awarding costs, particularly with regard to defamation claims. Membership with an established press regulator can therefore be incentivised through this mechanism, and the

[3] Agreement needs to be voluntary as it effectively waives rights under Article 6 (right to a fair trial) of the European Convention on Human Rights. Examples of the legal position regarding such waivers can be found in Stretford v Football Association [2006] EWHC 479 and Deweer v Belgium ECtHR Application Number 6903/75.

[4] Civil Procedure Rules – Pre Action Protocol (Practice Direction – Objectives of Pre-Action Conduct and Protocols & Pre Action Protocol for Defamation) http://www.justice.gov.uk/courts/procedure-rules/civil/protocol

availability of press-specific arbitration schemes now has the potential to strengthen arguments for the Court to use this discretion where either party has unreasonably rejected the use of arbitration[5].

Whilst this goes some way to incentivising the press to join an established press regulator, the Government may wish to consider further provisions. One such provision is discussed under statement (e) with reference to the Irish Defamation Act.

(d) If the Government does not fully commence section 40 now, Government should partially commence section 40, and keep under review those elements that apply to publishers outside a recognised regulator.

IPSO disagrees with this statement for the same reasons outlined under statement (a).

(e) If Government does not fully commence section 40 now, Government should partially commence section 40, and ask Parliament to repeal those elements that apply to publishers outside the recognised regulator.

Like statement (b) this proposal fails to recognise the developments that have occurred since the Leveson Inquiry. In this sense, section 40 acts as a tick-box exercise, focusing on the recognition status of a regulator whilst being blind to a publication's compliance record, adherence to an ethical code, or its attitude towards its chosen regulator. Statement (e) does not therefore support or incentivise adherence to a code of ethics outside the recognition scheme. Neither does it allay industry concerns regarding the recognition system or sufficiently incentivise membership of a recognised regulator in light of those concerns. This leaves us in a position where no form of regulation is adequately supported or incentivised by the Act.

A potential alternative to statement (e) would be to implement a similar measure to that found in the Irish Defamation Act[6], which recognises a defence of 'fair and reasonable publication'. In this regard, the Court will take into account the publication's membership with the Irish Press Council or equivalent regulator and the extent to which it adhered to a code of standards. A similar provision, recognising membership and adherence to an established regulator that submits to independent review of its independence and effectiveness, could be adopted as an alternative to section 40. In conjunction with the CPR provisions outlined above, this could incentivise both active compliance with a code of standards and the consideration of arbitration for suitable cases. This could be achieved without the need for statute-led compulsion which encroaches on the principles of a free press and the right to expression.

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[5] A recent example of costs being assessed in light of an unreasonable refusal to use ADR in a publication case is: *Various Claimants* v *Mirror Group Newspapers Ltd* (SCCO, 4 October 2016) as reported in Litigation Futures (http://www.litigationfutures.com/news/defendant-penalised-unreasonably-refusing-mediate-costs-dispute) and by Temple Garden Chambers (http://tgchambers.com/news-and-resources/news/indemnity-costs-mirror-group-newspapers-failing-engage-adr/).

[6] Section 26(2) (f) & (g) (Irish) Defamation Act 2009

Question 2: Do we have evidence in support of our view, particularly in terms of the impacts on the press industry and claimants?

IPSO is not in a position to provide evidence in relation to the specific financial impacts of section 40. We provide a free-to-use complaints service and offer arbitration to those that wish to use it. We do not therefore have direct involvement in media law litigation or its costs.

In developing our arbitration pilot, we consulted with multiple parties in the legal and press industries. One conclusion we drew from this process is that arbitration will not be suitable in every case. This is something that the recognition scheme and section 40 has not adequately dealt with. Our concern therefore is that the implementation of section 40 will act to funnel unsuitable claims into arbitration.

This will not provide a fair or adequate process. It will likely lead to unsafe rulings which will lower trust in the regulatory scheme and could disadvantage both the press industry and claimants. Quantifiable data regarding costs and the number of potential claims, whilst relevant, does not affect this overall conclusion.

Question 3: To what extent will full commencement incentivise publishers to join a recognised self-regulator?

As previously stated, IPSO regulates the majority of the UK press. Membership is governed by contract, which can only be terminated in distinct circumstances[7]. The want to join another regulator is not a valid reason to cancel this membership. There is no suggestion that IPSO publishers would join two regulators and, as IPSO is not seeking recognition, it is therefore unlikely that the implementation of section 40 would incentivise our publishers to join a recognised regulator.

We also highlight the industry's strong opposition to the recognition system. This opposition is not limited to IPSO members. The Financial Times, The Guardian Media Group, the Independent, the Evening Standard and multiple online providers such as Huffington Post and BuzzFeed have all chosen to remain unregulated by either IPSO or a recognised regulator. Given this wide ranging opposition, it is unlikely that a significant portion of the UK press would join a recognised regulator were section 40 to be commenced. IPSO believes that the imposition of a compulsory arbitration scheme will be a particularly significant obstacle to local and regional publishers in this regard.

Government should therefore focus on supporting adherence to a press code of standards rather than punishing publishers for rejecting the recognition system.

Summary:

Government should repeal section 40. If Government believes that this would leave the press without adequate incentives to adhere to a code of standards, they should consider an equivalent provision to that found in the Irish Defamation Act. Together with the

[7] IPSO Scheme Membership Agreements clauses 6.3 and 11.3.

current Pre-Action Protocols found within the CPR this could achieve the aim of the Leveson recommendations in practice, without resorting to statute-led compulsion of the Press.

Leveson Part 2

IPSO does not have a view on whether Leveson Part 2 should go ahead.