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Response to DCMS and Home Office Consultation: The Leveson Inquiry and its Implementation

Introduction

I am a regulatory consultant. I have submitted a response using the online survey form for this consultation. I am now writing with some additional information relating to the first part of the consultation, addressing section 40 of the Crime and Courts Act 2013 ("section 40").

In 1 November 2016, when the Secretary of State for Culture Media and Sport announced this consultation, she said it was necessary to:

> "take a step back and to consider the position … in terms of the situation and the press regulation we have today, to make sure we get the right, appropriate, robust, effective press regulation."[1]

The aim of this submission is to analyse, from a regulatory perspective, a number of the issues identified by the Secretary of State as relevant factors for that review, so as to assist in building a robust basis for the final decision. In particular, this submission addresses the role of the internet, changes over the past five years, its impact on the regulatory context and the relevance of IMPRESS and IPSO to this consultation. The submission also examines the widely published arguments and tests them against the evidence.

The role of the internet

During her evidence to the House of Lords Communications Committee on 13 December 2016, the Secretary of State said:

> "When Sir Brian Leveson looked at this, he was looking at the printed press. Many of [the inaccurate] headlines and reports are in publications that are not printed but are on the internet, to which the proposed systems of regulation do not apply."[2]

It is not surprising that the Secretary of State should repeat this comment about Leveson, because it has been said so often, by others. But it is not correct, as the following evidence demonstrates:

- In the section of the report setting out recommendations for a regulatory regime, Leveson said:

  > "[it] would clearly be appropriate that websites providing news coverage aimed substantially at a UK audience, with a substantial stable audience should be covered by any new regulatory system."[3]

- An earlier section of the report anticipated – and dismissed – the criticism that the outcome of the inquiry would not be relevant in an internet age:

  > "Many editors and commentators have argued that the burgeoning of the internet is likely to render irrelevant much of the work of the Inquiry even assuming that it has not already done so. … In my view, this argument is flawed …"[4]

- An electronic search of the Leveson Report reveals, in all, over 600 internet-related references.[5]

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1 https://goo.gl/aixRua
2 https://goo.gl/fMZqnR (4th part of the answer under Question 1)
3 Paragraph 6.20 on page 1793 of the Leveson Report
4 Paragraphs 3.1 and 3.2 on page 736 of the Leveson Report
5 The terms I searched for were "internet", "online", "website" and "worldwide web".

Of course, it is not sufficient merely to point out that Lord Justice Leveson *believed* he was doing enough to address the internet. The point needs to be tested, which I do in the following sections.

The role of Google, Facebook and others

Reacting to the announcement of this consultation in the House of Commons, the Secretary of State's predecessor, John Whittingdale MP, asked the current Secretary of State if she would:

> "bear in mind that the real media giants of today, such as Facebook and Google, are outside the scope of legislation and regulation altogether?" [6]

In her response, the Secretary of State said (in essence) that she would.[7] The exchange repeats a popular misconception about the role of Facebook, Google and the internet, more generally. The misconception was exposed, the very next day, by the editor of the Financial Times in a leading article:

> "The media industry has changed beyond recognition in the past five years. Facebook, Google and Twitter have usurped *newsagents* as the primary distributors of news …"[8] [emphasis added]

The Financial Times is well-placed to understand that Facebook, Google and Twitter merely act as *agencies* through which members of the public may find news which has been gathered and published by others. Facebook, Google and Twitter do not gather or publish news, themselves. Whatever disruption the internet may have caused to newspapers, the Financial Times recognises that social media, search engines and news aggregators (etc) have not replaced newspapers as the media *publishers* of today.

But I do not ask the Secretary of State to rely on one sentence in the Financial Times. In the paragraphs below, I provide a full regulatory analysis of the role of these organisations in news coverage.

Regulatory analysis: The relevance of the internet to regulation of news coverage

As a regulatory consultant, I have often carried out an analysis which breaks an industry down into its constituent elements in order to identify where regulation needs to bite – and how. The news industry is remarkably simple compared to complex utilities such as energy and telecoms, where I have experience.

As shown in the analysis below, the processes of *news gathering* (labelled "A" below) and *the decision to publish* (C) have the potential to cause harm in ways which may need to be addressed by a regulatory regime. But the internet plays no part in these two processes. The other three processes – content creation (B), distribution (D) and supply (E) – are not subject to regulation; they were not recommended by Leveson to be subject to regulation; and there is no suggestion that they are likely to need to be.

The detailed structural breakdown is as follows:

A ***Fact-finding (or "news gathering")***: This is the process by which journalists find out raw information, other than by reading material that has already been published.

News gathering can involve misbehaviour, such as phone-hacking, which is illegal, and the pursuit of celebrities, which is typically not illegal but has caused concern on privacy and harassment grounds. But the aspects of news-gathering which might be regulated, and the means by which they could be regulated, are not affected by the technical opportunities, or the commercial threats, which the internet has brought.

B ***Converting the raw data into content***: This is the process of writing-up the content and/or selecting images in a form which can be considered for publication. This is a necessary step in the process leading to publication, but the *unpublished* words and images present no regulatory issues. This remains true regardless of whether the internet or any other technology assists the writing and/or image handling.

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6 https://goo.gl/kJ5rhq
7 https://goo.gl/b4jYbI
8 https://www.ft.com/content/8f64e324-a0f3-11e6-86d5-4e36b35c3550

C ***The decision to publish***: This is the point at which someone decides whether to make the output from the previous step publicly available – in hard-copy or online. The decision involves judgements about legality, taste and likely interest to the readers etc, which are editorial and/or legal matters.

Technology has produced machines which can find, curate and replicate material that has already been published, but technology has not yet automated the decision *whether* to publish material for the first time, nor is technology threatening to do so imminently.

Regulation is highly relevant to this decision stage and any regulations would clearly need to be re-thought if the decision to publish were ever taken over by machine (unless the regulations could be programmed into the machines), but we are simply not faced with this issue yet.

D ***The distribution of published material***: This is the process by which the published material is passed on to readers. For printed media, this step comprises the mechanics of printing hard copy and the logistics of distributing it. For online media, it is an electronic step of uploading the material to the designated sites, incorporating all the appropriate internet links, tags and search engine optimisation etc, so that human and electronic readers can navigate to the online location of the published material. This is not a regulated activity.

E ***The supply of published material to consumers***: This is the mechanism by which readers can access the news. Once again, this is not a regulated activity. In the case of printed papers, it is through retail outlets, which vary in size and range from traditional "newsagents", ie specialist newspaper vendors, to multi-purpose retail outlets, such as supermarkets.

In the case of online publications, news can be obtained in a variety of ways, which include viewing the publishers' own websites, viewing intermediate sites such as Facebook and Twitter, or news aggregators, such as Google.

As shown by this analysis, whatever commercial disruption the internet may be causing the newspaper industry, it is not doing so in the areas which are regulated or for which any need for regulation has been identified.

Does section 40 encourage, or cajole, the press to sign-up to IMPRESS?

In recent weeks, there have been many articles suggesting that commencing section 40 would impose legal costs on publishers if they did not join IMPRESS. This is utterly misleading. As Sir Oliver Letwin pointed out in the House of Commons in response to the Secretary of State's announcement of this consultation, the issue would be resolved if IPSO were to provide "a genuinely Leveson-compliant regime, including the provision of a low-cost arbitration service."[9]

On any analysis, the debate over section 40 is not about forcing publishers to join IMPRESS (or even encouraging them to do so). It is inherently unlikely that publishers who created the self-regulator, IPSO, will move across to a far smaller regulatory body which they had no role in creating and which is indirectly part-funded by a man whom they appear to despise.[10] Examples of the press's misinformation include:

- ***The Spectator***: "The Section 40 proposal violates any basic notion of justice, yet this is the technique that the government would use to force us to sign up to Max Mosley's regulator, 'Impress', rather than Ipso, the independent press regulator."[11]
- ***The Daily Telegraph***: "publications who fail to submit themselves to Mr Mosley's regulator could have to pay the legal costs for anyone who sues them – successfully or not."[12]
- ***The Times***: "What [section 40] says is that any publication not agreeing to be regulated by Impress will be subject to the costs of a legal action — even where it wins. Really. That's what it says."[13]

9 https://goo.gl/2bQ7t4
10 For example, The Spectator: "no self-respecting publication would sign up to a regulator bankrolled by a figure as egregious as Max Mosley."
11 http://blogs.spectator.co.uk/2016/12/defence-press-freedom/
12 http://www.telegraph.co.uk/news/2016/12/16/battle-press-freedom-uk-may-have-fought/
13 http://www.thetimes.co.uk/article/a-free-press-must-not-be-bullied-by-the-state-5wv7ssvmc

- ***Chairman of the Editors' Code Committee***: "I still have to pinch myself that we live in a country in which the Government's press regulator is financed by Max Mosley and that papers who refuse to sign up to it will not only face punitive damages in libel courts but could be forced to pay a claimant's costs even if the article concerned is entirely true and the paper wins its case."[14]

As the Secretary of State is aware,[15] Sir Oliver Letwin is very knowledgeable on these matters. As a Cabinet Office minister in 2013, he played a major role in developing the cross-party agreement which culminated in, amongst others things, section 40.

It is particularly striking that the press should use such blatant myths, half-truths and untruths as those cited in the bullet points above as supposed evidence to support their collective thesis that press freedom is under threat. From a regulatory perspective, it is a sign of failure that their recourse to such deception can be conducted without any apparent intervention, correction or control by their regulator.

The two realistic options for publishers are *either* to accept the costs imposed by section 40, and decline the protections afforded by the same section, *or* to take suitable steps so that IPSO becomes an "approved regulator" for the purposes of the Act.[16] The press are understandably opposed to the first of those two options (higher costs). But they appear to be opposed to the second option also (section 40) and yet, on analysis (see next section), the refusal to adopt the second option has no rational basis.

Reasons given by publishers for not wanting to sign up to an "approved regulator"
The press has given several reasons for not wishing IPSO to be an approved regulator, but those reasons do not fit the facts, as is shown by the following analysis of the often-stated reasons.

- An approved regulator must submit to ***periodic reviews*** by the Press Recognition Panel (PRP) to ensure that it continues to meet certain criteria. In various attempts to justify an objection to this, the press repeatedly confuses a review *of* the regulator with actions *by* the regulator. For example:
  - ***The Daily Mail***: "As for the Royal Charter, the newspaper industry rejected it as gross State interference in free expression."[17]
  - ***Nottingham Post***: "Ipso has refused to seek recognition by the PRP for the simple reason that it believes it would be submitting to state regulation."[18]

  In fact, IPSO has made it clear that it has no objection to being independently reviewed, as evidenced by (i) its commissioning of the recent Pilling Review;[19] (ii) evidence from the Chief Executive of IPSO to the House of Lords Communications Committee that "we intend to repeat that exercise at periodic intervals";[20] and (iii) evidence from the Chairman of IPSO at the same hearing that IPSO "remains neutral. If somebody said to us tomorrow, 'Make sure you [seek recognition from the PRP]', of course IPSO would do that".[21]
- Many leading writers and columnists have suggested that the PRP's status as a chartered body makes it an ***arm of the State***. For example, the Daily Telegraph and the Spectator have both referred to an approved regulator as a "state regulator".[22] The Times has referred to "state-backed regulation"[23] and a "state-approved press regulator … given the thumbs-up by the odd panel appointed under the terms of a royal charter granted by MPs, and therefore opposed on principle by almost the entirety of the

14 https://goo.gl/BNOnB3
15 https://goo.gl/Xu1bKn
16 http://www.legislation.gov.uk/ukpga/2013/22/section/42
17 https://goo.gl/0Ey8XL
18 https://goo.gl/CPy7oL
19 http://www.ipsoreview.co.uk/
20 https://goo.gl/7ta9ll (in answer to Question 9)
21 https://goo.gl/7ta9ll (in answer to Question 8)
22 http://www.telegraph.co.uk/news/2016/12/16/battle-press-freedom-uk-may-have-fought/ and http://blogs.spectator.co.uk/2016/12/defence-press-freedom/
23 http://www.thetimes.co.uk/article/not-impressed-srf2bdrsj

British press, which values its independence from government and the legislature above most other things."[24]

But the press industry themselves positively advocated a chartered body as the appropriate basis for a reviewer of press regulation. The industry drafted a charter and submitted it for royal approval[25] under exactly the same mechanism through which the PRP gained its own royal charter – a process which the press now decry as "appointed under the terms of a royal charter granted by MPs."[26]

- The Times has suggested that, under the arrangements of the chartered body in existence, the state is not sufficiently removed from ***the appointment process***:

  > "the state is skulking in the background. It does not directly approve the board of regulators. Another board does that. But the state sets up the board that does the approving."[27]

  But not only are the arrangements in place further removed from the State than this description suggests, they are also, crucially, the *same* protections as the industry's own charter had proposed. The board of the chartered body that now exists (ie the body "that does the approving") is required to be appointed by an Appointments Committee, which, in turn, has to be appointed by the Commissioner for Public Appointments,[28] just as the industry intended to be the case for the body envisaged in their own draft charter.[29] These requirements are written into the royal charter and cannot be changed by, for example, ministerial changes to the governance code on public appointments.

  Such is the press's distaste for the chartered body that the Spectator refers to it as "the government's Orwellian-sounding Press Recognition Panel".[30] But, once again, the charter has used the same name as the industry had adopted in the charter it proposed.

  Moreover, the board of an approved regulator is not vetted by the Press Recognition Panel. The appointment process for the regulator is required to be an entirely free-standing and independent process. The PRP must satisfy itself that the independent process has been followed, but it has no power to overrule the actual appointments made.[31]

  For all of the reasons set out above, the source of the press's concern cannot properly be the processes by which the boards of the charter body and the regulator are appointed.

- This leaves us with the ***criteria for approval***. When asked by the House of Lord's Communications Committee whether IPSO would "qualify for recognition" (ie whether it is capable of being an "approved regulator"), Matt Tee, IPSO's Chief Executive, identified two reasons why it would not: (i) the absence of a compulsory arbitration scheme; and (ii) the absence of a power to require newspapers to publish an apology (as distinct from a correction).[32]

  Mr Tee is right that these are genuine obstacles to IPSO being approved. But it is not credible that the press are baulking at seeking recognition on account of the distinction between an apology and a correction – not when the consequences of section 40 are plainly of such concern to the industry. One is forced to the conclusion that it is the low cost arbitration scheme that forms the stumbling block.

  In the interests of access to justice for those who may be damaged by the press, of which there have been numerous cases going through the courts in recent years, Leveson considered it a fair exchange for society to conclude (through parliament) that publishers should either be regulated under an approved scheme, including a low-cost arbitration arrangement,[33] or else meet the additional costs of requiring claimants to go through the courts[34] (which section 40 provides for).

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24 http://www.thetimes.co.uk/article/a-free-press-must-not-be-bullied-by-the-state-5wv7ssvmc
25 https://goo.gl/JPIk45
26 http://www.thetimes.co.uk/article/a-free-press-must-not-be-bullied-by-the-state-5wv7ssvmc
27 http://www.thetimes.co.uk/article/mays-state-controls-will-destroy-the-press-37p3pk7mm
28 https://goo.gl/jjaDko (Paragraph 2.1-2.2 of Schedule 1)
29 https://goo.gl/JPIk45 (Paragraph 2.1-2.3 of Schedule 1).
30 http://blogs.spectator.co.uk/2016/12/defence-press-freedom/
31 https://goo.gl/jjaDko (Criteria 1 to 5 in Schedule 3)
32 https://goo.gl/7ta9ll (in answer to Question 9)
33 Recommendation 22 of the Leveson Report
34 Recommendations 26 and 73 of the Leveson Report

Leveson's proposed scheme would enable potentially expensive litigation to be conducted by way of an inquisitorial process, rather than the adversarial process normally adopted for litigation in the UK. This form of arbitration was recommended as a means to reduce costs for the press as well as for claimants, who would be able to access the scheme for no more than a nominal charge. But this does not mean that claimants could cause a nuisance to publishers by bringing unmeritorious claims. The criteria expressly require that there be arrangements for claims to be struck out.[35]

Moreover, the proposed arbitration scheme would protect publishers from wealthy individuals who threaten expensive legal action in order to suppress the publication of stories by publishers which cannot afford to meet the legal risks. According to the Times, "this happens ... almost every single time you expose someone or something".[36] Not only would the arbitration scheme make the publisher's costs very low, section 40 (once commenced) would deliver the added advantage to publishers that a claimant who insisted on litigation in the courts would be required to bear both sides' costs.

In a free society, publishers are quite entitled to prefer access to the courts rather than arbitration. But the press do not say they prefer litigation over arbitration. As shown by the analysis above, the arguments advanced by the industry are neither factually accurate nor rational.

[Note: I have carried out a full analysis of the recognition criteria imposed by the Royal Charter, in comparison with the criteria originally proposed by the industry. The two sets of criteria are substantially identical, as can be seen from the Appendix to this submission which shows the actual criteria marked-up where they are different from the industry's proposed criteria. It is easy to see why Mr Tee felt able to say, in his evidence to the House of Lords, "I do not think [recognition] would greatly change the way we do our job."[37]

In addition to the two issues mentioned above (arbitration and apologies), there are four other criteria which were not set out in the industry's draft charter. But Sir Joseph Pilling has said IPSO meets these four criteria. Those criteria are numbers 8A (advice to the public); 8B (publishers to be strictly accountable for the content they publish); 12A (a complaint can be started prior to legal proceedings); and 19A (income from fines to be ring-fenced).[38]

The remaining differences are 5(e) (a wider class of parliamentarians prohibited from regulating the press); 8C (regulator to give guidance on public interest issues); and 19 (power for regulator to know the turnover of publishers for fining purposes). These differences are obviously not the stumbling block.]

IPSO's entry into the debate

I have read IPSO's written submission to the DCMS in response to this consultation. IPSO says it opposes section 40 because the press do ("… 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" [39]). IPSO goes on to argue as follows:[40]

- "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 second half of the statement is not true and, on analysis (below), the complete sentence does not actually support IPSO's argument:
  - ***Accuracy:*** The language of section 40 plainly contemplates the existence of more than one regulator without making any assumption about the relative proportions of the press that each one regulates.
  - ***Logic:*** The logic of the point fails, because we currently have a situation in which the majority of the UK press *is* covered by a single system of regulation (ie IPSO) and, therefore, on IPSO's own argument, this is exactly what section 40 had in mind.

35 https://goo.gl/jjaDko (Criterion 22(c) in Schedule 3)
36 http://www.thetimes.co.uk/article/a-free-press-must-not-be-bullied-by-the-state-5wv7ssvmc
37 https://goo.gl/7ta9ll (in answer to Question 9)
38 Annex C of the Pilling Report at https://goo.gl/oMDcZf at paragraphs 112, 115, 105 and 108, respectively
39 https://goo.gl/yzhW6F (pre-penultimate paragraph on page 3)
40 https://goo.gl/yzhW6F (penultimate paragraph on page 3)

- "The legislation does not … 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."

  This argument ignores recent history and stands logic on its head. The legislation was formed in the knowledge that previous enquiries into the functioning of the press concluded with recommendations which the press did not sufficiently follow through. Section 40 was framed on the basis that some, or even all, of the press might, once again, seek to avoid adopting the proposals unless there was a financial incentive for them to comply with the recommendations.

  This is exactly what has happened: the industry has created IPSO without implementing Leveson's recommendation that there be compulsory low-cost arbitration. And it is exactly the circumstance that section 40 was designed to address, by creating a financial incentive to step into line.

Concluding remarks

The analysis in this submission indicates that the arguments deployed in opposition to section 40 are largely comprised of a misrepresentation of the implications and the effect of section 40, coupled with a misunderstanding of the role of the internet in relation to the regulated functions of a news publisher.

It seems difficult to avoid the conclusion that the section 40 issue is a straightforward debate about access to justice, in relation to both print and online journalism. The press has, quite openly, set its face against making low-cost arbitration an option which claimants can choose. The press is free to hold that opinion. But, rather than being transparent about its motives, it has (as shown in this submission) employed myths, half-truths and blatant untruths in an attempt to bolster a claim that it would be an affront to press freedom if publishers are required to foot the higher costs which would flow from having denied claimants the low-cost option.

The recourse to such deceptive arguments has been conducted without any sign of correction or control by the regulator. In fact, IPSO has weighed in, in support of the publishers it regulates, deploying an argument which (see above) is neither factually accurate nor logically sustainable.

4 January 2017

Appendix (see next page)

Comparison of the recognition criteria imposed by the Royal Charter and the criteria originally proposed by the industry

SCHEDULE 3

RECOGNITION CRITERIA

The following requirements are the recognition criteria for the Scheme of Recognition established under Article 4 of, and Schedule 2 to, this Charter:

1. An independent self-regulatory body should be governed by an independent Board. In order to ensure the independence of the body, the Chair and members of the Board ~~of the self-regulatory body~~ must be appointed in a genuinely open, transparent and independent way, without any ~~direction from industry or~~ influence from industry or Government. For the avoidance of doubt, the industry~~"~~'s activities in establishing a self-regulatory body~~:~~, and its participation in making appointments to the Board ~~of the self-regulatory body~~ in accordance with criteria 2 to 5; ~~and~~or its financing of the self-regulatory body, shall not constitute influence by the industry in breach of this criterion.

2. The Chair of the Board ~~of the self-regulatory body~~(who is subject to the restrictions of criterion 5(d), (e) and (f)) can only be appointed if nominated by an appointment panel. The selection of that panel must itself be conducted in an appropriately independent way and must, itself, be independent of the industry and of Government.

3. The appointment panel:

~~(~~a) should be appointed in an independent, fair and open way;

~~(~~b) should contain a substantial majority of members who are demonstrably independent of the press;

~~(~~c) should include at least one person with a current understanding and experience of the press;

~~(~~d) should include no more than one current editor of a publication that could be a member of the body.

4. The nomination process for the appointment of the Board ~~of the self-regulatory body~~ should also be an independent process, and the composition of the Board ~~of the self-regulatory body~~ should include people with relevant expertise. The appointment panel may only nominate as many people as there are vacancies on the Board ~~of the self-regulatory body~~ (including the Chair), and the Board ~~of the self-regulatory body~~ shall accept all nominations. The requirement for independence means that there should be no serving editors on the Board ~~of the self-regulatory body~~.

5. The members of the Board ~~of the self-regulatory body~~ should be appointed only following nomination by the same appointment panel that nominates the Chair, together with the Chair (once appointed), and should:

~~(~~a) be nominated by a process which is fair and open;

~~(~~b) ~~include~~comprise a majority of people who are independent of the press;

~~(~~c) include a sufficient number of people with experience of the industry (throughout the United Kingdom) who may include former editors and senior or academic journalists;

~~(~~d) not include any serving editor; ~~and~~

~~(~~e) not include any serving member of the House of Commons, the Scottish Parliament, the Northern Ireland Assembly, the National Assembly for Wales, the European Parliament or ~~any~~the House of Lords (but only if, in the case of the House of Lords, the member ~~of the~~holds or has held within the previous 5 years an official affiliation with a political party) or a Minister of the Crown, a member of the Scottish Government~~,~~, a Northern Ireland Minister or a Welsh Minister; and

f) in the view of the appointment panel, be a person who can act fairly and impartially in the decision-making of the Board.

6. Funding for the system should be settled in agreement between the industry and the Board ~~of the self-regulatory body~~, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry. There should be an indicative budget which the Board ~~of the self-regulatory body~~ certifies is adequate for the purpose. Funding settlements should cover a four or five year period and should be negotiated well in advance.

7. The standards code must ultimately be the responsibility of, and adopted by, the Board ~~of the self-regulatory body, and be written~~, advised by a Code Committee which ~~is comprised of~~ may comprise both independent members of the Board and serving editors. Serving editors have an important part to play although not one that is decisive.

8. The code must take into account the importance of freedom of speech, the interests of the public (including but not limited to the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled), the need for journalists to protect confidential sources of information, and the rights of individuals. Specifically, it must cover standards of:

~~(~~a) conduct, especially in relation to the treatment of other people in the process of obtaining material;

~~(~~b) appropriate respect for privacy where there is no sufficient public interest justification for breach; and

~~(~~c) accuracy, and the need to avoid misrepresentation.

8A. A self-regulatory body should provide advice to the public in relation to issues concerning the press and the standards code, along with a service to warn the press, and other relevant parties such as broadcasters and press photographers, when an individual has made it clear that they do not welcome press intrusion.

8B. A self-regulatory body should make it clear that subscribers will be held strictly accountable under the standards code for any material that they publish, including photographs, however sourced. This criterion does not include advertising content.

8C. A self-regulatory body should provide non-binding guidance on the interpretation of the public interest that justifies what would otherwise constitute a breach of the standards code. This must be framed in the context of the different provisions of the code relating to the public interest.

~~8A~~D. A self-regulatory body should establish a whistleblowing hotline for those who feel that they are being asked to do things which are contrary to the standards code.

9. The Board ~~of the self-regulatory body~~ should require, of those who subscribe, appropriate internal governance processes (for dealing with complaints and compliance with the standards code), transparency on what governance processes they have in place, and notice of any failures in compliance, together with details of steps taken to deal with failures in compliance.

10. The Board ~~of the self-regulatory body~~ should require all those who subscribe to have an adequate and speedy complaint handling mechanism; it should encourage those who wish to complain to do so through that mechanism and should not receive complaints directly unless or until the internal complaints system has been engaged without the complaint being resolved in an appropriate time.

11. The Board ~~of the self-regulatory body~~ should have the power to hear and decide on complaints about breach of the standards code by those who subscribe. The Board ~~of the self-regulatory body~~ will need to have the discretion not to look into complaints if they feel that the complaint is without justification, is an attempt to argue a point of opinion rather than a standards code breach, or is simply an attempt to lobby. The Board ~~of the self-regulatory body~~ should have the power (but not necessarily the duty) to hear complaints:

~~(~~a) from anyone personally and directly affected by the alleged breach of the standards code, or

~~(~~b) where there is an alleged breach of the code ~~is significant~~ and there is ~~substantial~~ public interest in the Board ~~of the self-regulatory body~~ giving ~~formal~~ consideration to the complaint~~,~~ from a representative group affected by the alleged breach, or

~~(~~c) from a third party seeking to ensure accuracy of published information.

In the case of third party complaints the views of the party most closely involved should be taken into account.

12. Decisions on complaints should be the ultimate responsibility of the Board ~~of the self-regulatory body~~, advised by complaints handling officials to whom appropriate delegations may be made.

12A. The Board should be prepared to allow a complaint to be brought prior to legal proceedings being commenced. Challenges to that approach (and applications to stay or sist) can be decided on the merits.

13. Serving editors should not be members of any Committee advising the Board ~~of the self-regulatory body on~~ on complaints~~.~~ and should not play any role in determining the outcome of an individual complaint. Any such Committee should have a composition broadly reflecting that of the main Board ~~of the self-regulatory body~~, with a majority of people who are independent of the press.

14. It should continue to be the case that complainants are able to bring complaints free of charge.

15. In relation to complaints, where a negotiated outcome between a complainant and a subscriber (pursuant to criterion 10) has failed, the Board ~~of the self-regulatory body~~ should have the power ~~where~~to direct appropriate ~~to require~~ remedial action for breach of standards ~~where a negotiated outcome between a complainant and a subscriber has failed.~~and the publication of corrections and apologies. Although remedies are essentially about correcting the record for individuals, the power to ~~require~~direct a ~~remedy~~correction and an apology must apply equally in relation to:

~~(~~a) individual standards breaches; and
~~(~~b) groups of people as defined in criterion 11 where there is no single identifiable individual who has been affected; and
~~(~~c) matters of fact where there is no single identifiable individual who has been affected.

16. In the event of no agreement between a complainant and a subscriber~~,~~ (pursuant to criterion 10), the power to ~~require~~direct the nature, extent and placement of ~~a remedy~~corrections and apologies should lie with the Board ~~of the self-regulatory body~~.

17. The Board ~~of the self-regulatory body~~ should not have the power to prevent publication of any material, by anyone, at any time although (in its discretion) it should be able to offer a service of advice to editors of subscribing publications relating to code compliance.

18. The Board ~~of the self-regulatory body~~, being an independent self-regulatory body, should have authority to examine issues on its own initiative and have sufficient powers to carry out investigations both into suspected serious or systemic breaches of the code and failures to comply with directions of the Board ~~of the self-regulatory body. Those~~. The investigations process must be simple and credible and those who subscribe must be required to cooperate with any such investigation.

19. The Board ~~of the self-regulatory body~~ should have the power to impose appropriate and proportionate sanctions (including but not limited to financial sanctions up to 1% of turnover ~~of~~attributable to the publication concerned with a maximum of £1,000,000) on any subscriber found to be responsible for serious or systemic breaches of the standards code or governance requirements of the body. The Board should have sufficient powers to require appropriate information from subscribers in order to ascertain the turnover that is attributable to a publication irrespective of any particular accounting arrangements of the publication or subscriber. The sanctions that should be available should include power to require publication of corrections, if the breaches relate to accuracy, or ~~other remedial action~~apologies if the breaches relate to other provisions of the code.

19A. The Board should establish a ring-fenced enforcement fund, into which receipts from financial sanctions could be paid, for the purpose of funding investigations.

20. The Board ~~of the self-regulatory body~~ should have both the power and a duty to ensure that all breaches of the standards code that it considers are recorded as such and that proper

data is kept that records the extent to which complaints have been made and their outcome; this information should be made available to the public in a way that allows understanding of the compliance record of each title.

21. The Board ~~of the self-regulatory body~~ should publish an Annual Report identifying:
~~(~~a) the body's subscribers, identifying any significant changes in subscriber numbers;
~~(~~b) the number of:
(i) complaints it has handled, making clear how many of them are multiple complaints,
(ii) articles in respect of which it has ~~handled substantive~~considered complaints to be without merit, and
(iii) articles in respect of which it has considered complaints to be with merit, and the outcomes reached,
~~both~~ in aggregate for all subscribers and individually in relation to each subscriber;
~~(~~c) a summary of any investigations carried out and the result of them;
~~(~~d) a report on the adequacy and effectiveness of compliance processes and procedures adopted by subscribers; and
~~(~~e) information about the extent to which the arbitration service has been used.

22. The Board ~~of the self-regulatory body may~~ should provide an arbitral process ~~in relation to~~ for civil legal claims against subscribers~~, drawing on independent legal experts of high reputation and ability on~~ which:
a) ~~cost-only basis to the subscribing member. The process should be fair and quick, inquisitorial and inexpensive for complainants to use (save for a power to make an adverse order~~complies with the Arbitration Act 1996 or the Arbitration (Scotland) Act 2010 (as appropriate);
b) provides suitable powers for the ~~costs of the~~ arbitrator ~~if proceedings are frivolous or vexatious). The arbitrator must have the power to hold hearings where necessary but, equally, to dispense with them where it is not necessary. The process must have a system to allow~~ to ensure the process operates fairly and quickly, and on an inquisitorial basis (so far as possible);
c) contains transparent arrangements for claims to be struck out, for legitimate reasons (including on frivolous or vexatious ~~claims to be struck out at an early stage. The Board of~~grounds);
d) directs appropriate pre-publication matters to the courts;
e) operates under the ~~self-regulatory body may consider operating a pilot scheme to test~~principle that arbitration should be free for complainants to use; [1]
f) ensures that the ~~fairness, effectiveness and sustainability~~parties should each bear their own costs or expenses, subject to a successful complainant's costs or expenses being recoverable (having regard to section 60 [2] of the ~~arbitral process~~1996 Act or Rule 63 of the Scottish Arbitration Rules [3] and any applicable caps on recoverable costs or expenses); and
g) overall, is inexpensive for all parties.

23. The membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different types of publisher.

1 The principle that arbitration should be free does not preclude the charging of a small administration fee, provided that: (a) the fee is determined by the Regulator and approved by the Board of the Recognition Panel; and (b) the fee is used for the purpose of defraying the cost of the initial assessment of an application and not for meeting the costs of determining an application (including the costs of the arbitration).

2 Section 60 (Agreement to pay costs in any event): *An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.*

3 The Rules are set out in Schedule 1 to the Arbitration (Scotland) Act 2010. Rule 63 (Ban on pre-dispute agreements about liability for arbitration expenses) M: *Any agreement allocating the parties' liability between themselves for any or all of the arbitration expenses has no effect if entered into before the dispute being arbitrated has arisen.*