Annex C to PRP52(16)

Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS

7 October 2016

Introduction

This document brings together certain information available to the PRP Board in various other documents as explained below. It is designed to assist the PRP Board with its deliberations in coming to a decision about IMPRESS's application for recognition and will be published after the decision making process (along with all the other documents).

This note records indicative views reached by the Board previously and provides the Board with advice on other matters. Like the Assessment report itself, none of that should be seen as constraining the Board at this stage, although if the Board disagrees with or departs from any of what is set out in the documents in question during the course of decision-making, it would be useful for that to be made clear to avoid confusion as to what has and has not been decided, and on what basis.

As a preliminary point, we would remind the Board that the Public Sector Equality Duty (PSED) was considered in drafting and consulting on the process and indicators and it is not therefore specifically discussed in the assessment and recommendation report. However, the PSED is nonetheless in play in the taking of this decision and so (in summary, and as set out more fully in the Board's Equality Policy) the Board should at all times give due regard to the need to avoid unlawful discrimination and to the need to promote equality of opportunity in relation (by reference to any of the protected characteristics in the Equality Act 2010). If you are aware of relevance to that in the course of discussions, please raise them.

Section A: Analysis and PRP Board's Indicative View on Preliminary Issues

1. This section of the document is a summary of the PRP Board's preliminary view on the interpretation of some terms and some elements of the Royal Charter for Self-Regulation, and the underlying analysis. The PRP Board discussed the issues in this document during the confidential session of the Board's meeting on 24 May 2016. This paper brings together the analysis prepared for that discussion, together with the indicative view reached by the Board. In addition, this paper includes a brief summary of objections made to the PRP in relation to these issues in recent letters to the PRP as well as in the context of responses to the Call for Information.

2. As a starting point in its discussion on 24 May 2016, the PRP Board noted that a key aim of the Royal Charter is to encourage and facilitate independent self-regulation. The Board indicated that the PRP's role is to apply the criteria in the Charter to applications for recognition and that in doing so we will not adopt an overly restrictive approach to interpretation. The Board recognised that there might be more than one way of meeting each criterion, although each one of them must be satisfied in order for an applicant regulator to be recognised. The Board stated that they will not read in or imply additional restrictions or requirements for recognition that are not clear in the Charter.

A 1: Interpretation of the Charter's requirement for eligibility for consideration for recognition

3. Paragraph 87 of our 2015 response to our Consultation on Proposals for Recognition of Press Self Regulators, states that …." nothing in the Charter states that recognition should depend on the nature and extent of membership of the applicant".

4. The term *"regulator"* is defined in Schedule 4 of The Charter as follows: *"Regulator" means an "independent" body formed "by or on behalf of"" relevant publishers" for the purpose of conducting regulatory activities in relation to their publications"*. Our proposed interpretation of *"independent"*, *"by or on behalf of"*, and *"relevant publishers"* are set out below in order to determine more fully the intended meaning.

5. An interpretation of *"independent"* is needed in order to determine what the body is required to be independent from. The Charter uses the term in the context of describing a regulator, by reference to a requirement for independence from influence by government and by industry. This interpretation is consistent with the use of the term in the context of the development of a regulatory framework for the Press as set out in the Leveson Report. Lord Leveson views press regulation as requiring independence from government and industry, and also from political influence. So we may assume that the intended meaning of "independent" in the Charter's definition of a regulator is in respect of influence by industry or government or both. However, a wider interpretation may be required when considering funding arrangements for a regulator (see below) as it is possible that these could themselves compromise independence.

6. Use of the term *"by or on behalf of"* in this context implies the regulator should either be formed by *"relevant publishers"*, or for the benefit of *"relevant publishers"*. As the Charter provides a framework for self-regulation, there is no statutory body with the power to create a regulator or regulators, and so the initiative to do so needs to come from somewhere. In these circumstances relevant publishers would either need to get together to create a regulator (or regulators), or another body would need to do so on their behalf (or both could happen). The wording can be interpreted as meaning the initiative to create a regulator may be publishers' or another body's, but that either approach is acceptable provided that the regulator is created in order to regulate *"relevant publishers"*.

7. *"Relevant publisher"* is defined in Section 41 and Schedule 15 of The Crime and Courts Act 2013 (CCA). The CCA definition encompasses all news publishers including websites (provided they fulfil requirements for having multiple authors and being subject to editorial control). Schedule 15 of CCA read with section 42(7) of the Act makes clear that whilst microbusinesses[1] publishing news-related material which is either contained in a multi-author blog, or is published on an incidental basis that is relevant to the main activities of the business, are excluded from scope of being a *"relevant publisher",* they nonetheless fall within scope if they choose to become members of a recognised regulator. In this way, if such microbusinesses (i.e. those which are multi author blogs or incidental publishes) opt into the recognition system they become and are treated as *"relevant publishers"*.

Are there any restrictions on a regulator's membership?

8. In our view there is nothing in this interpretation of a regulator that specifies anything regarding the number or nature of *"relevant publishers"* that the regulator would need to have been formed *"by or on behalf of"*. The Charter's definition would be met as long as the regulator had been created for publishers which met the definition of *"relevant publisher"* (see below).

9. Criterion 23 specifies that membership of a regulator should be open to all publishers on fair, reasonable and non-discriminatory terms. It can be inferred from this that as long as there is no evidence that any publishers would be excluded in a way that is contrary to the requirements of

[1] with fewer than 10 employees and a turnover of £2,000,000 or less

Criterion 23, then a regulator could not be denied consideration for recognition on the basis of the composition of its membership.

10. In our opinion there is nothing in the Charter that explicitly specifies that a regulator must have any membership at all in order to apply for recognition either at the time of its formation, or when it applies for recognition, or when that application is considered and determined by the Board.

11. It is true that Criteria 9 and 10 could be interpreted as implying membership is required in order to demonstrate compliance. Criterion 9 sets out requirements on a regulator to require its subscribers, or members, to have appropriate governance processes in place. Criterion 10 sets out requirements on a regulator to require its subscribers to have adequate complaint handling processes in place. These criteria might therefore be interpreted as implying a requirement for membership in order to demonstrate compliance.

12. However, an alternative view is that a regulator would only need to demonstrate how it would fulfil these obligations, should members wish to sign up. With the latter interpretation, a regulator would only need to be able to demonstrate that it was “operational”, rather than “operating”. This interpretation would more easily allow for a regulator being able to add to its membership without needing to be reassessed for compliance each time, so seems more likely. Also, given the cost protections would only arise if a publisher was a member of an approved regulator, publishers may wish to wait for a regulator to be approved before joining. The latter interpretation is in line with the PRP Board’s general approach of not adopting an overly restrictive approach to interpreting the Charter, including not implying into it restrictions which it does not set out.

13. If the alternative view were taken, i.e. that the Charter requires a regulator to have members in order to be eligible to be considered for recognition, a further question would arise if, at the time of its application for recognition, a regulator’s membership consisted only of microbusinesses which were either multi-user blogs or incidental publishers as described in CCA Schedule 15 section 8. These microbusinesses are exempt from the recognition system unless (by section 42(7) of the Act) they choose to opt in by joining the regulator, when they would qualify as *“relevant publishers”*. Microbusinesses of that kind only become *“relevant publishers”* through virtue of being members of a recognised regulator. In these circumstances it could be argued that

a regulator with only microbusiness members of that kind would have no relevant publishers at the time of its application.

Indicative view

- The PRP does not consider that the Charter's definition of a regulator in Schedule 4 precludes a body from being eligible for consideration for recognition on the basis of the number and size of its members whether at the time of formation, or application or determination of that application.
- A regulator being formed 'by or on behalf of' relevant publishers could include a situation where the regulator is formed on behalf of any publishers that might later choose to join.
- Given that the costs protections afforded by Section 40 of the Crime and Courts Act only arise if the publisher is a member of an approved regulator, publishers may choose to wait for a regulator to be approved before joining. The PRP does not interpret the Charter criteria as requiring the regulator to have current members in order to be eligible for consideration for recognition.[2]
- However, an applicant regulator will need to show that they have the relevant procedures in place and that they are ready and able to operate those procedures in relation, in particular to Criteria 9 and 10.

Challenges to the PRP indicative view:

14. In response to publication of the PRP Board's indicative view on preliminary issues, Peter Wright's letter to David Wolfe dated 11/08/16[3] queries how the PRP Board reached its preliminary view on the second and third bullet points above. He also referred to PRP's guidance which states that *"an applicant regulator will need to show that they have the relevant procedures in place and they are ready and able to operate those procedures"* and queries how the PRP would be able to determine this in respect of IMPRESS which does not yet have evidence of operating in practice.

[2] At its meeting on 24 May the PRP Board considered these general points of interpretation that would be relevant to any application without discussion taking place regarding IMPRESS's application in particular, However it should be noted that IMPRESS is now operational and has a membership that includes, for example, the Caerphilly Observer. See IMPRESS statement in their first call for information response paper (annex A4 to the PRP Executive Assessment) "In any case, the claim that Richard Gurner is not editor of a relevant publisher relies on a misreading of the Act, which only excludes a micro-business from the definition of 'relevant publisher' if it is *also* a 'multi-author blog'. The Caerphilly Observer is not a multi-author blog by any stretch of the imagination. It is printed (on paper) on a fortnightly basis and widely distributed in the Caerphilly area."

[3] Of which you have a copy (along with David Wolfe's reply)

15. Also in response to the PRP Board's indicative view on preliminary issues, NMA's letter to David Wolfe of 15/08/16 [4] suggests that the PRP has grossly distorted the intended meaning of *"Regulator" means an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications"* with its interpretation of *"by or on behalf of"*. The NMA asserts that this does not include the situation where a regulator acts *"independently of, and indeed despite the objections of, those it purports to represent"*.

16. NMA's and Ivor Gaber's responses to the first call for information state that there is no evidence that IMPRESS has been formed by or on behalf of relevant publishers – see annexes J6 and J10 to PRP executive assessment and recommendation report.

17. In response to the first call for information on the IMPRESS application, NMA, Associated News, Guardian News and Media, 89 Up and the Telegraph Media Group, also raised similar concerns as to whether IMPRESS's membership qualified as relevant publishers, and for IMPRESS to qualify as a self-regulatory body – see annexes J1, J2, J4, J10 and J13 to the PRP executive assessment and recommendation report and page 9 of that report. Further representations raising these points have been made by 89 Up (annex N20); Associated News (annex N21 and annex M5); NMA (annex N7); Scottish Newspaper Society (annex N11) and the Society of Editors (annex M7).

A 2: Interpretation of the Charter's requirements of a regulator's funding arrangements

18. Criterion 6 of the Charter states that: *"Funding for the system should be settled in agreement between the industry and the Board, taking 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 certifies is adequate for the purpose. Funding settlements should cover a four or five year period and be negotiated well in advance".*

19. The Charter envisages a regulatory model with one or possibly more regulators seeking recognition which together would encompass many or the majority of relevant publishers. In such circumstances, agreement on fees might be achieved for example by an industry-wide consultation. It is helpful to consider whether Criterion 6 can be met in different ways, i.e. in

[4] Of which you have a copy (along with David Wolfe's reply)

circumstances where there are different shapes and sizes of regulator to what was envisaged, and consequently, different funding models.

20. This requires interpretation of what the phrase *"settled in agreement between the industry and the Board"* should mean in practice in the context of Criterion 6 and the Charter more generally, and whether this requirement extends to the regulator's entire funding, or only the element of funding that is collected through membership fees, in circumstances where a regulator is able to subsidise membership fees by some other source of funding.

21. The term *"the industry"* is not defined in the Charter but the Leveson Report sheds some light on the intended meaning. Leveson uses "*the industry"* to mean the news publishing industry, i.e. the sector he was considering when designing the requirements of a new model of self-regulation. He refers to *"the industry"*, when making a distinction between the interests of that sector and of other parties including the public, government and interest groups.[5]

22. Determining how widely *"the industry"* should be interpreted should be considered in the context of Criterion 6 which intends that the fee structure should be fair for publishers whilst at the same time being adequate for the needs of the regulator. In this context, the part of industry with the strongest interest in agreeing the fees will be the part that is interested in membership of the regulator. If there were widespread interest in membership it might be possible to achieve agreement on fees through industry-wide consultation. It can be argued that Criterion 6 should not be interpreted as requiring positive agreement with the whole of, or any particular minimum threshold of the news publishing industry given in particular that the Charter envisaged the possibility of more than one regulator. Indeed, it is hard to see how Criterion 6 could be interpreted as meaning that one or other publishers could operate a veto by withholding agreement, given that the Charter plainly contemplates multiple regulators (each of which may be objected to or at least not supported by some publishers). However, it can be assumed that Criterion 6 still implies a requirement for some kind of engagement on funding that the industry could respond to if it wished, to ensure that certain types and sizes of publisher were not precluded from

[5] For example, the context in which *"industry"* is used in Part K, Chapter 1 paragraph 2.3. *"The draft criteria indicated that, in order to be effective, a regulatory regime for the press must be accepted as credible both by the press and the public and this proposition has not been seriously disputed by anyone. This does not mean that either the industry or interest groups should have a veto over the solution, but it is important that the regime should be grounded in an understanding of the industry, the law, the rights and freedoms of both individuals and the press, and the public interest in its widest sense. A regime that fails to take any of those factors fully into account will fail to meet the expectations and needs of the public".*

joining at a later stage. This is necessary in order to meet the requirement of Criterion 6 to *"take into account …. the commercial pressures on the industry"*, and the requirement of Criterion 23 that membership is open to all publishers on fair, reasonable and non-discriminatory terms.

23. We also need to consider whether a regulator may subsidise membership fees with external funding. Whist the Charter does not explicitly consider funding being secured from other sources, there is nothing in the wording that rules it out either. The Leveson Report did envisage that start-up costs might need to be derived from other sources when discussing the issue of reliable funding in Part K, Chapter 7 paragraph 4.176. If a regulator secured additional funding, we need to decide whether Criterion 6 would require agreement to be secured with industry on the part of its funding that was not fee based.

24. If a regulator subsidises membership fees with external funding, the Charter implies an expectation that it should secure agreement on the entirety of its funding, and not just its regulatory fees. Criterion 6 refers to the requirement for agreement on "*funding for the system"*, which implies a wider consideration.

25. If a regulator subsidised its membership fees with external funding, it would also be necessary to ensure such a funding model could not pose a challenge to the independence of the regulator. The concept of independence in the context of the definition of a regulator is discussed above, and is interpreted as mainly meaning independence from industry and from government. However, in the context of the regulator's funding a wider interpretation is needed, i.e. independence from anything which might inappropriately influence or distort the decisions of the regulator. There would be clear risks if a funder could exert influence over the decisions of the regulator. There would also be risks if a funder could compromise the credibility or effectiveness of the regulator by withdrawing or reducing funding. These risks would need to be addressed by ensuring appropriate governance and control structures were put in place.

Indicative view:

- In relation to criterion 6, we do not interpret the provision for funding for the system 'being settled in agreement between the

[6] *"I recognise that the start-up costs of such a body may be significant and those putting together such a proposal may need to look for sources of funding to help cover some of those costs."*

industry and the Board' as requiring positive agreement to the funding arrangements with the whole of (or any particular minimum threshold of) the news publishing industry (whatever that means). This is because:

  - The Charter envisages that there can be more than one regulator,
  - Such a requirement could allow publishers an effective veto over the recognition of a regulator when they have no wish to become a member of that (or any recognised) regulator, which is plainly not contemplated; and
  - Given the sheer scale and diversity of 'relevant publishers' it would be impracticable to identify or even contact all the relevant publishers that could or might be affected.

- However, we bear in mind that the regulator has to 'take into account the … commercial pressures on the industry' and is required by criterion 23 to ensure that membership is open to all publishers on fair, reasonable and non-discriminatory terms….'. In those circumstances we consider that criterion 6 does, as a minimum, require some form of consultation that the wider industry could respond to if it wished.

- We also consider that criterion 6 requires the regulator to provide a rationale for the decisions taken following the consultation including for example, how the regulator will ensure that certain types or sizes of publishers are not precluded from joining at a later stage (and therefore excluded from cost protection) because the fees do not sufficiently reflect the commercial pressures on the industry.

- Given that criterion 6 refers to 'funding for the system' being agreed and not just the 'regulatory fees', we also consider that consultation should be on the whole of the funding arrangements, including any proposals to take funding from third parties.

- There is nothing in the criteria or the Charter which precludes funding for the regulator being provided via or from a third party and such funding does not mean that a regulator is automatically not 'independent'. It would be possible for third party funding to compromise the independence of a regulator, but whether it does so will be a question of fact and will depend on the safeguards that were put in place to protect independence, such as the terms of the agreement between the funder and the regulator and the regulator's governance arrangements.

Challenges to the PRP indicative view:

26. In response to publication of the PRP Board's indicative view on preliminary issues, Peter Wright's letter to David Wolfe dated 11/08/16 queries how the PRP Board reached its preliminary view on the fifth bullet point above. He also queries why the PRP did not notify stakeholders of its view on bullet point 2 above, before IMPRESS launched their consultation on fees which he claims his and other organisations were unaware of.

27. Similarly, in a letter dated 15 August 2016 in relation to the PRP Boards indicative view, the News Media Association (NMA) states that the fifth bullet point above *"negates the plain meaning of the words that have been specified in the Charter and in the Leveson Report*[7]*, which requires funding to be from, or at the very least sanctioned by, a substantial proportion of the industry."*

28. Detailed points on this issue of IMPRESS's funding were raised in response to the calls for information on the IMPRESS application. Guardian News Media and 89 Up stated a view that the Charter intended a regulator to be funded by the industry it regulated. 89 Up, the Professional Publishers' Association and News Media Association also raised concerns that IMPRESS's funding had not been agreed with industry, and The Telegraph Media Group, NMA, News UK, the Society of Editors and Associated News raised concerns about the independence of IMPRESS's funding model. See annexes J1, J2, J4, J9, J10, J11, K1, K6 and K11 to the PRP executive assessment and recommendation report and pages 61-67 of that report, and submissions from PPA (annex N23); 89 Up (annex N15); Associated News (annex N21 and annex M5); NMA (annex M1).

A 3: Interpreting the Charter's requirements regarding the constitution of the Code Committee (Criterion 7)

29. Criterion 7 states that: *"The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which 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 …."*

[7] *"…any industry established independent regulatory body must be funded by its members."* Leveson Report Part K, Chapter 7, Section 4

30. The wording of Criterion 7 could either be interpreted as setting a requirement for one or more serving editors to be included in the Code Committee, or alternatively, merely permitting the inclusion of serving editors amongst the Code Committee's membership. The use of the wording *"may comprise both independent members of the board and serving editors"* implies the intended interpretation is permissive. We therefore do not interpret this criterion as requiring such participation, bearing in mind our general approach of not adopting an overly restrictive approach to interpreting the criteria.

Indicative view:

- We consider criterion 7 as permitting serving editors to be part of the Code Committee and, if they are, to play an important (but not decisive) role in such a committee. However, we do not interpret the criterion as requiring such participation in light of the words 'may comprise both independent members of the board and serving editors' in the first sentence. If the criterion had intended a minimum requirement for serving editors this would have been stated more clearly, and we bear in mind our general approach of not implying additional restrictions into the criteria.

Challenges to the PRP indicative view:

31. In response to publication of the PRP Board's indicative view on preliminary issues, Peter Wright's letter to David Wolfe dated 11/08/16 queries how the PRP Board can justify its view on this matter, in the light of the final sentence if criterion 7 *"Serving editors have an important part to play …."*

32. The NMA have made the same point in their letter of 15/08/16, taking the view that the clear meaning of Criterion 7 was that serving editors would be involved. They state that *"the PRP's interpretation stretches the meaning of "an important part to play beyond all logic to include having no part to play at all".*

33. These points had also been raised in responses to the calls for information on the IMPRESS application. Associated News and 89Up both challenged the composition of IMPRESS's Code Committee, taking the view that it did not meet their interpretation of Criterion 7 regarding serving editors. See annexes J1 and J2 to PRP executive assessment and recommendation report and page 75-77 of that report, and submissions from 89 Up (annex N15); Associated News (annex N21 and annex M5) and NMA (annex N7).

A 4: Interpretation of the Charter's requirements regarding use of the Editors' Code.

34. The Editors' Code was originally developed for the Press Complaints Commission, and it is kept under review and developed by the Editors' Code Committee. The Charter envisaged a new regulator emerging from the Press Complaints Commission and taking over the role of the Editors' Code Committee. The Charter appears to expect that such a regulator would start with the Editors' Code, but take responsibility for its ongoing development.

35. The Charter's preamble states *"… the independent regulatory body which is intended to be the successor to the Press Complaints Commission should put forward the Editors' Code of Practice as its initial code of standards".* Criterion 8 requires the PRP to assess the regulator's code. In order to determine whether the Charter would require an assessment of the Editors' Code against Criterion 8, we bear in mind that the Criteria are legally operative whereas the preamble merely explains the Charter's background and provides an aid to interpretation. On this basis, it can be interpreted that the Charter intends that, should the Editors' Code be adopted by a regulator applying for recognition, it would need to be assessed against the requirements of Criterion 8.

36. We also need to consider whether the Charter permits a regulator other than IPSO to adopt the Editors' Code, and whether, if a regulator adopts the Editors' Code as its initial code, the PRP would be required to assess the code against Criterion 8.

37. It has been noted that the ownership of the copyright of the Editors' Code of practice apparently belongs to the Regulatory Funding Company (which is the financing body for IPSO). However, the Charter's preamble could be interpreted as implying an alternative view that publishers outside IPSO are able to use the code. This difference of view has not been determined, and gives rise to a question over whether any regulator other than IPSO would be able to adopt the Editors' Code as its initial code of standards. Our view is that it would be inappropriate for the PRP to determine ownership of, and entitlement to use the Editors' Code. Another regulator would either need to confirm entitlement to use the Editors' Code themselves, or alternatively, could adopt the Editors' Code as their initial code, and face the risk of potential legal challenge.

Indicative view:

- The Board has considered the interaction between the wording of the preamble to the Charter which states that 'the independent regulatory body which is intended to be the successor to the Press Complaints Commission should put forward the Editors' Code of Practice as its initial code of standards' and criterion 8 which requires the PRP to assess the regulator's code. We bear in mind that the criteria are legally operative whereas the preamble simply explains the Charter's background (providing, at most, an aid to interpretation). Whilst there is nothing in the Charter to prevent a regulator from putting forward the text of the current Editors' Code as its own code, we would still need to assess that submitted code against criterion 8 (even the preamble only talks of 'putting forward').
- We do not consider it part of the PRP's role to determine any dispute over ownership of the Editors' Code (or any other code which an applicant submits) provided that that the criteria are met in relation to the standards code which an applicant regulator has properly adopted.
- What matters is whether the Code which is submitted by an applicant regulator complies with the requirements of the Criteria.

Challenges to the PRP indicative view:

38. In response to publication of the PRP Board's indicative view on preliminary issues, Peter Wright's letter to David Wolfe dated 11/08/16 queries how the PRP Board had reached its view on the second bullet point above, in light of the wording of Criterion 7 which states that *"The standards code must ultimately be the responsibility of, and adopted by, the Board"*. The NMA have made the same point.

39. This issue of IMPRESS's lack of ownership of the Code featured heavily in responses to the calls for information. The News Media Association, Telegraph Media Group, News UK, Associated News, the Professional Publishers' Association, 89 Up and the Society of Editors all raised concerns about IMPRESS's lack ownership of, and responsibility for the Editors' Code. See annexes J2, J9, J10, J13, K1, K7, K11 to the PRP executive assessment and recommendation report and pages 74 to 78 of that report, and further submissions from NMA (annex N1 and annex M1); 89 Up (annex N15) and the Society of Editors (annex M7).

Section B: Issues raised in response to the calls for information on IMPRESS application that are not considered in the PRP Executive's assessment

40. This section lists the main issues raised in response to the three calls for information on the IMPRESS application and related correspondence to the PRP, which the PRP Executive considered were not relevant to the recognition assessment and are therefore not discussed in the report. All representations were reviewed carefully to ensure that all points relevant to the Charter Criteria were considered. PRP Board members are reminded to read the representations in full (annexes J1-J13, K1- K12, M1-M9, and N1-N26) and form their own view.

41. The points below are more general expressions of disagreement with the Charter, or other wider concerns including about procedural matters. The examples are extracted from correspondence and responses to the calls for information.

B1: That the Charter is itself incompatible with free speech.

For example:
'The Royal Charter, drawn up without final agreement of the industry allows for its terms to be amended by a two-thirds majority of both Houses of Parliament. This is incompatible with free speech.' (News UK)

'A similar co-regulatory system, introduced in Hungary in 2011, was widely viewed as a severe restriction on free media and criticised by the US State Department, the OSCE and EU. Co-regulation is an unusual model in democratic states.' (89up)
The PRP Executive suggests that is not an issue for the PRP to consider or determine and certainly is not a basis for rejection of any particular application for recognition.

B 2: That the recognition of IMPRESS could trigger the activation of s40 of the Crime and Courts Act 2013 which would be unfair on other publishers and that this provision is in itself in breach of the ECHR.

For example:
'Should the PRP … (wrongly) decide that IMPRESS should be recognised as an approved regulator, there is a further reason why it should stop short of conferring recognition. This is that the grant of recognition would be a travesty of the policy underlying the recognition

scheme. That policy was that there should be incentives to publishers for joining a recognised regulator (immunity from exemplary damages and potential awards of costs in cases even where it loses) and disincentives for not joining a recognised regulator or joining an unrecognised regulator (potential awards of exemplary damages and awards of costs against publishers even where they successfully defend cases against them). The purpose of that policy was to ensure that all significant publishers joined a recognised regulator. Hence, the incentives and disincentives would operate only once a regulator was recognised. As events have unfolded, 90% of the industry – due to fundamental concerns over freedom of expression and the way in which the Crime and Courts Act 2013 conflicts with article 10 of the European Convention on Human Rights – has chosen to join a regulator that does not seek recognition from the PRP and the regulator that does seek recognition has next to no members and is not remotely representative of the industry. In those circumstances it would be perverse for the incentives and disincentives to be triggered by the recognition of IMPRESS since that would mean conferring a privilege on a tiny minority of publishers while penalising the majority. Although this may be assumed to be precisely the intention of IMPRESS's benefactors, it is the opposite of what the system intended, which was that the majority (having opted for self-regulation) would get the privilege and the minority (having opted out) would be penalised.' (NMA)

'The present Culture Secretary has wisely decided not to make the ministerial order bringing these provisions into effect, but a future Culture Secretary can always reverse that decision (evidence if any were needed that the system of regulation overseen by the PRP is subject to political control).' (Associated News)

'We have a legal opinion from Lord Pannick QC that newspaper publishers would have a "strong claim" that section 40 is in breach of articles 10 and 14 of the European Convention on Human Rights.' (Associated News)

"Under the rules of the Royal Charter settlement, GNM recognises that its decision not to join a regulator that is recognised as being compliant with the criteria set out in the Royal Charter could expose GNM to significant financial risk. GNM expressed detailed concerns about the way in which those financial risks have been constructed through clauses of the Crime & Courts Act (CCA). Specifically, GNM made the point that these clauses have been drafted in ways that place undue emphasis on penalising a publisher defendant and don't properly deal with, for example, an

unreasonable claimant. Clauses in the CCA also provide for an element of double jeopardy, in the sense that even if one is a member of an approved regulator and has been fined by that regulator, the clauses in the CCA enable a judge to punish a publisher again. GNM made clear that it does not support any initiative that might lead to these provisions coming into effect."
(Guardian Media)

"Recognition would lead to the introduction of legal measures inimical to the liberal tradition of press freedom. Among the most oppressive of these is section 42(3) of the Crime and Courts Act 2013".Tim Luckhurst, annex M4*)*

The PRP Executive suggests that is not an issue for the PRP to consider or determine and certainly is not a basis for rejection of any particular application for recognition. In any event, the analysis that the cost shifting provisions of the Crime and Courts Act 2013 will come into effect automatically with the recognition of a regulator is incorrect. Section 40 must be commenced by a commencement order made by the Secretary of State for DCMS.

B3: That any decision to recognise IMPRESS would compromise the PRP's own independence.

For example:
"Furthermore, were the PRP to recognise IMPRESS as a recognised regulator, the PRP would itself become reliant on fees from recognised regulators – IMPRESS - to fund the annual reviews of those regulators. In recognising IMPRESS the PRP would itself become reliant on the subjective conditions of a charitable trust, exposing the PRP to the same insecurities of funding and lack of independence as IMPRESS. Given the Rubicon that is crossed in terms of the activation of punitive clauses of the CCA by dint of the PRP recognising a regulator as Royal Charter compliant, the sustainability of both the regulator and the PRP that recognised the regulator should be a significant concern in the PRP recognition process."
(Guardian Media)

"As explained above, IMPRESS will be financially dependent on Max Mosley for the foreseeable future. It follows that in the absence of any other approved regulator (of which there is no realistic prospect), the PRP (if it recognises IMPRESS) will also be financially dependent on Mr Mosley. If Mr Mosley should decide no longer to fund IMPRESS, the PRP

will have no other source of funds from which to derive its fees.7 So Mr Mosley's funding of IMPRESS affects not only the independence of that body, it would also affect the independence of the PRP. Just as Mr Mosley has the power to close down IMPRESS, so he would have the power to close down the PRP. In other words, the PRP cannot credibly claim it is independent if it recognises a body that relies for its funding on Mr Mosley".
(NMA)

In the Executive report and above, we consider the relationship between IMPRESS' particular funding and its 'independence' within the meaning of the Charter. Any such considerations would be even more remote in relation to the PRP itself. It is inherent in the Charter (and therefore not something for the PRP to evaluate or act on, let alone as the basis for rejecting any particular application) that the PRP's long-term funding is in part at least dependent on decisions the Charter requires it to take.

B4: That the PRP should consider matters going beyond the Criteria or the Charter.

For example:
"In considering IMPRESS's application for recognition, the PRP is obliged to take a wider view: it cannot and should not view matters from the narrow perspective of the criteria, as IMPRESS invites it to do. While IMPRESS chooses to overlook the fact that there is currently in place a successful self-regulatory regime to which the overwhelming majority of the press subscribes, the PRP cannot ignore that fact..."
(NMA).

The NMA (annex N1), and the PPA (annex N23) have both criticised the PRP for approaching the assessment process as a box ticking exercise.

The Board has previously noted that it cannot reject an application by reference to requirements or considerations not in or required by the Charter.

B5: That the PRP has gone beyond its appropriate role in that it has been helping IMPRESS

In recent correspondence (see annex N1 and annex M1) NMA argued that the PRP has gone beyond its appropriate role in that it has been 'helping' IMPRESS. Key to this claim is the IMPRESS clarification letter (annex A7) where questions asked of IMPRESS by the PRP Executive

are set out with IMPRESS responses. NMA stated that these questions told IMPRESS how to amend its procedures to comply with the Charter. NMA also stated that the IMPRESS documentation (for example the Regulatory Scheme Procedures and the Arbitration Scheme) were amended in response to specific questions raised by the PRP. Similar points were raised in AN's letters to PRP (annex N17 and annex M5), and by PPA (annex M2). AN and PPR have also commented that PRP has shown leniency towards IMPRESS which has not been extended to the rest of the industry, for example by extending deadlines for IMPRESS to respond to PRP, whereas short notice was given of the August proposed decision meeting making it difficult for interested parties to attend.

On the other hand, 'Hacked Off' quoted at length from the PRP consultation and response to consultation on the recognition process in 2015. They pointed out that the PRP had stated in its final response to consultation that '*73. We will welcome discussions between the PRP executive team and applicants before they formally apply and will provide assistance with the application process as required'*
and that
'Any discussions that take place once an application has been made will be noted in the outcome report following the Board's decision, but the content of those discussions will remain private.'

In this case, all discussions that have taken place the PRP Executive and IMPRESS have been recorded and those records are before the Board (see annexes H1 – H32 in the August report). The PRP Executive have raised a number of queries of IMPRESS as to how it meets the criteria and indicators where the evidence provided did not make this clear. Many of these same points (as well as some additional points) were also raised by the respondents to the calls for information. In response, IMPRESS has provided clarification as well as at times amending the documentation upon which its application was based. Respondents have been given to the opportunity to comment on those amendments in the various calls for information. The PRP Executive has taken the view that amendments to the documentation was permissible during the process and we refer to our comments on page 13 of the August report. This is not an adversarial process and if an applicant wants to amend its application having considered the information received through the call for information or the questions raised by the PRP executive we do not see that as a negative response.

For the avoidance of doubt, the PRP Executive has not suggested to IMPRESS how it should design its arrangements to meet the criteria or indicators and has given no help to IMPRESS with designing its internal processes.

Some correspondents also suggested that the PRP Board's indicative interpretation of criteria was designed to help IMPRESS. As the PRP Board will recall, the issues were discussed without any consideration of IMPRESS's application by the Board. Associated Newspapers repeated the contention contained in previous correspondence that the PRP Board has no authority to interpret the Charter. Hacked Off provided its own view on these points in detail – see annex M3.

B6: That the PRP has acted improperly

A number of the letters sent immediately prior to the proposed decision meeting on 23 August 2016, and the responses to the third call for information raised concerns that the PRP had made procedural errors in its approach, and some expressed the view that this would make the PRP vulnerable to legal challenge. For example, Associated News and 89 Up stated that the PRP should have consulted on its indicative interpretations published on 15 July 2015, and that it had been wrong to discharge such functions without public input. Associated News and NMA also stated that PRP had failed to act in an adequately transparent manner, by failing to notify stakeholders that it had published its indicative interpretations on its website, whereas it had previously communicated this information to IMPRESS. Associated News (annex N17) questioned *"has the PRP given consideration to the likelihood of legal challenge"* because *"it appears to many stakeholders that this guidance has been drawn up without consultation and published without notice in order to give the PRP grounds to decide that IMPRESS fulfils a number of Royal Charter Criteria which it would otherwise fail to fulfil".* 89 Up (annex N13) stated that the PRP had fallen short of established principles required to be procedurally fair, by *"denying consultees information on how the PRP, and potentially IMPRESS themselves, had been guided on specifically interpreting the Royal Charter"*. NMA (annex M1) informed PRP that *"its rights to proceed with an application for judicial review of any decision made by the PRP in connection with the recognition application are expressly reserved and the PRP should be in no doubt about the strength of our commitment to ensuring that there is proper compliance with the Royal Charter".*

We disagree that there have been any procedural improprieties in the way we have carried out our functions in relation to the assessment process. There is no requirement on us to undertake specific consultations on interpretation of the wording of the Charter. We need to interpret the Charter in order to carry out our work, given its status as our governing document. Even so, we believe our third call for information issued on 24 August 2016 should assist in addressing the concerns of those who have disputed our view. Further the PRP Board now has before it the views of those respondents on the issues, as summarised above and contained in the listed correspondence and responses to the calls for information, and will no doubt take those views into account when considering whether to maintain or amend its indicative interpretation in light of the specific circumstances of IMPRESS' application.

B7: That PRP has failed to meet its requirement to report on the State of Recognition

The NMA (20/09/16) point out the PRP's obligation under the Royal Charter to inform parliament as soon as practicable after its first anniversary if there is no recognised regulator or if the system does not cover all significant relevant publishers, and state *"we are not aware that the PRP has complied with this obligation in this respect and, if it has not, on what basis it can justify delay."*

Our first annual report on the state of the recognition system will be published on 13 October 2016, By the time the PRP Board considers the IMPRESS application on 25 October 2016, the report will be in the public domain. The date was the earliest possible date we could publish after our first anniversary on 10 September 2016, taking into account the requirement to fit in with parliamentary schedules.

Section C: Additional Leveson recommendations

42. Schedule 2 paragraph 4 of the Charter provides that the PRP Board may also, but need not, take into account a number of additional recommendations from the Summary of Recommendations from the Leveson Report as follows: 34 to 36 inclusive, 38, 43, 44 to 45 (inclusive) and 47. These recommendations are reproduced in annex L1 to the PRP Executive's assessment and recommendations.

43. We have referred to these Leveson recommendations specifically in the assessment as follows:

Recommendation 34 – page 112
Recommendation 38 – pages 76-77 and 86. (Note that the reference on page 86 wrongly gives the recommendation number as 43 but the actual recommendation quoted and discussed is 38).
Recommendations 43 and 44 – page 106
Recommendation 47 – page 105

Section D: IMPRESS's readiness and ability to implement procedures

44. Our assessment of IMPRESS's readiness and ability to implement procedures was principally carried out as part of the validation and verification visit on 06 June 2016- annex H15. The first part of the discussion was in relation to funding issues (and this is referenced in criteria 1, 6 and 23). We have specifically referred to the assessment of readiness and ability to implement procedures in our discussion of criteria 9, 10 and 15.