

20 September 2016

NMA Submission to the Press Recognition Panel on the Third Call for Information about IMPRESS's Application for Recognition

1. This submission is made in answer to the PRP's third Call for Information about IMPRESS's original application for recognition. In so doing, we comment on the new and revised documents filed by IMPRESS with the PRP following the second Call for Information including, in particular:

IMPRESS letter to the PRP dated 1 July 2016 (the **Clarification Paper**) (of which the last four pages have not been published)

IMPRESS Regulatory Scheme Procedures (33) (the **Regulatory Scheme Procedures**)

IMPRESS Regulatory Scheme (34) (the **Regulatory Scheme**)

IMPRESS CIArb Arbitration Scheme Rules (43) (the **CIArb Rules**)

IMPRESS CIArb Arbitration Scheme Guidance (45) (the **CIArb Guidance**)

IPRT IMPRESS Funding Agreement Deed of Variation (50) (**Funding Deed of Variation**)

2. We have not, in this response to the PRP's third Call for Information, repeated all of the points made in previous submissions dated 4 March 2016 and 1 June 2016 and the letters that we sent to the PRP prior to the meeting on 23 August 2016. As you will be aware from those submissions and that correspondence, we have deep rooted concerns about the deficiencies in the IMPRESS scheme and its failure to meet the Royal Charter criteria, not least that the scheme is not an effective scheme as envisaged by paragraph 1 of Schedule 2 of the Royal Charter. These concerns have not been alleviated. We also have ongoing concerns that the "indicative interpretation" published by the PRP in July purports to interpret the Royal Charter in a way that is not borne out by the language of the Royal Charter or the findings of the Leveson Inquiry. In this submission, we focus on our response to the PRP's third Call for Information.

The status of the Call for Information

3. The PRP has stated that the third Call for Information is not intended to be a general opportunity for third parties to assess or decide whether or not an applying regulator meets the criteria in the Royal Charter. Rather, it is said to be an opportunity for "third parties to share relevant information" with the PRP to inform the assessment.
4. A significant amount of material has been submitted by IMPRESS to the PRP since the second Call for Information. This material has been made public for the first time and there should be an opportunity for third parties to respond, setting out the ongoing deficiencies in the application.

PRP's role

5. The content and scope of the revised materials submitted by IMPRESS, that appeared recently on the PRP website, demonstrate that the PRP has given IMPRESS specific guidance on how it should update and modify its application, to give it the appearance (albeit not the substance) of more closely conforming to the Royal Charter recognition criteria. This creates the strong impression that the PRP has concluded, in advance of an objective assessment of the facts, that IMPRESS should be recognised, and its communications with IMPRESS have been directed at ensuring that such a decision can be justified.
6. This is clear from the Clarification Paper particularly, for example, in the context of the management of tariff setting, the Editors' Code and the complaints process. (As noted above, it appears that there are four pages missing from the Clarification Paper without any explanation.)
 - 6.1 The responses to criteria 6 and 23 on pages 5 to 9 of the Clarification Paper confirm that the PRP has invited IMPRESS to amend its proposal to manage tariff setting. Indeed, the PRP has effectively told IMPRESS how to amend its proposal by asking whether there is any provision requiring IMPRESS to consult participants before making amendments to tariffs (as opposed to the overall budget) and through the provisional views that were sent by the PRP to IMPRESS on 31 May 2016.
 - 6.2 The response to criterion 8 on page 10 of the Clarification Paper confirms that the PRP has invited IMPRESS: (1) to set out how the Editors' Code (which IMPRESS had indicated would be its initial code – notwithstanding that it has no licence to use the Code) complies with Criterion 8; and (2) to confirm that IMPRESS has 'ticked the box' insofar as it has purported to demonstrate that it has considered relevant legislation, codes, rules and/or guidance in developing the code.
 - 6.3 The responses to criterion 10 on page 12 and 13 of the Clarification Paper confirm that the PRP has highlighted to IMPRESS the specific issues that it has with the IMPRESS complaints process including, in particular, the deficiencies in the process as regards to confidentiality and the anonymity of complainants. Indeed, the PRP appears to have listed the information to be included on a complaint form (point 21 of the Clarification Paper) in order for IMPRESS to meet (in the PRP's view) the relevant criterion.
7. The IMPRESS application has been amended specifically to address the points raised by the PRP. For example:
 - 7.1 The Regulatory Scheme Procedures have also been adapted to address the specific queries from the PRP regarding conflict of interest.
 - 7.2 The CI Arb Rules have been amended so that they do not extend to pre-publication matters.
 - 7.3 The CI Arb Guidance has been amended accordingly, and also to state that the arbitrators will be selected from a panel of legally qualified arbitrators with media law experience (as opposed to a panel of experienced media law practitioners).



- 7.4 The Funding Deed of Variation has been amended to limit the circumstances in which the IPRT will cancel the funding to those in which it has insufficient funds to continue funding IMPRESS - and not in response to any regulatory decision.

The draft IMPRESS code

8. IMPRESS's right simply to adopt the Editors' Code has been addressed in our previous submissions. IMPRESS has no licence to use the Editors' Code. On 18 August 2016, IMPRESS published its own draft standards code. It is consulting on this draft, and that consultation will not conclude until 29 September 2016. Of course, until IMPRESS settles on a final code, the PRP cannot consider it. That is the standards code on which IMPRESS, if it were to be recognised, would be adjudicating as a regulator. We do not consider that there is any basis on which PRP could recognise a regulator without knowing, let alone assessing, its underlying code.
9. It is unclear whether the PRP is inviting submissions on the content of the draft IMPRESS code as part of the third Call for Information but the NMA considers that it is important for the PRP to understand its inadequacies in its current form. Critically, the draft IMPRESS code does not provide adequate protection to members of the public and press subjects in a variety of significant respects. This is highlighted by a simple comparison between the draft IMPRESS code and the Editors' Code which we have set out in the appendix to this submission.

Funding

10. Although the IMPRESS application as amended has restricted the circumstances in which the IPRT funding could be withdrawn, the central and fundamental problem with the funding of the IMPRESS scheme is the source of its funding. That has not changed. The Royal Charter recognition scheme requires the recognised regulator to be independent. The source of funding is an insurmountable obstacle to true independence. It is evident from the Clarification Paper that the sole *raison d'être* of AMCT is to provide a source of funding for IMPRESS to further AMCT's agenda. It is notable that within days of the ruling of the Charity Tribunal on 15 June 2016, the Board proposed to approach IPRT for funding, making it clear beyond any doubt that, until IPRT's tax status was resolved in a way that was satisfactory to Mr Max Mosley, then IMPRESS could not function as a regulator.
11. In this connection, we should also note that the Funding Deed of Variation offers no solution at all to the ongoing viability of IMPRESS from a funding perspective since the sufficiency of funds depends entirely on ongoing funding to IPRT by the AMCT. Put simply, the ongoing continuity of IMPRESS from a funding perspective is still at the mercy of AMCT; it can be put into a position where there is "insufficiency of funds" at the whim of AMCT.
12. The funding is to be settled in agreement between the industry and the regulator's board (criterion 6). The PRP's initial indicative interpretation of this criterion is that this does not require agreement with the whole of, or any particular minimum of the industry. In other words there need be no agreement with any member of the industry to the funding arrangements. This interpretation flies in the face of the plain words of the criterion. As far as we can discern, there has been no agreement with any industry member on the IMPRESS funding arrangements.



13. In its Clarification Paper, by way of a response to criterion 6, IMPRESS appears to be suggesting that the endorsement by the Charity Tribunal of IPRT as a charity is equivalent to an endorsement by the PRP that charity funding is a legitimate source of funding for a recognised regulator and that this meets the funding criterion. Consideration by the Charity Tribunal can have no bearing whatsoever on the PRP's consideration of criterion 6 under the Royal Charter.

Royal Charter: State of Recognition (Success or Failure reporting)

14. According to the Royal Charter (paragraph 10, schedule 2), the PRP was bound to *“inform Parliament, the Scottish Parliament and the public as soon as practicable if, on the first anniversary of the date the Recognition Panel is first in a position to accept applications for recognition [which was 10 September 2015] and thereafter annually if:*
- *there is no recognised regulator; or*
 - *in the opinion of the Recognition Panel the system of regulation does not cover all significant relevant publishers”*
15. We are not aware that the PRP has complied with its obligation in this respect and, if it has not, on what basis it can justify delay.
16. Our 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.



APPENDIX

Comments on draft IMPRESS code

1. Financial Journalism

- 1.1 The draft IMPRESS code does not refer to financial journalism. Journalists have been exempted from the Regulatory Technical Standards of the Market Abuse Regulation because the Editors' Code, Financial Journalism Best Practice Note and IPSO's robust policing of the Editors' Code and its sanctions have been judged by the government to offer equivalent regulation for notification to the EC. The financial journalism provisions are contained in paragraph 13 of the Editors' Code.
- 1.2 Since the draft IMPRESS code does not refer to financial journalism any media organisations that are regulated by the 2016 Regulatory Technical Standards will be subject to statutory regulation by the FCA such that there will be no self-regulation at all for these organisations. This is a significant lacuna in the draft IMPRESS code.

2. Accuracy

- 2.1 Accuracy is dealt with in paragraph 1 of both the Editors' Code and the draft IMPRESS code.
- 2.2 The draft IMPRESS code is less strict than the Editors' Code with respect to accuracy. Pursuant to the Editors' Code, the press must take care not to publish inaccurate, misleading or distorted information or images including headlines not supported by text rather than taking reasonable steps to ensure accuracy or not to misrepresent or distort the facts whilst retaining the freedom to be partisan.
- 2.3 There is no requirement in the draft IMPRESS code to make corrections promptly and with due prominence (as required by IPSO if the regulator is involved) in relation to those wider categories, or an apology. The Editors' Code requires that a significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.
- 2.4 Further, there is no requirement in the draft IMPRESS code for an opportunity to reply to a significant inaccuracy and there is no provision for being free to editorialise or campaign in distinguishing between comment and opinion, conjecture and fact.

3. Attribution

- 3.1 Paragraph 2 of the draft IMPRESS code provides that publishers must take all reasonable steps to identify and credit the originator of any third party content and they must also correct any failure to do so with due prominence at the earliest opportunity.



3.2 It seems clear that this provision is aimed at s.30(1) and s.30(2) of the Copyright Designs and Patents Act 1988 but compliance with this provision of the draft IMPRESS code would not protect the publisher against claims for infringement of copyright where those defences might not apply. Indeed, we are concerned that the inclusion of such a provision might serve to lure a publisher into believing that mere identification and credit at the time of publication or as soon as possible thereafter would serve as a general defence to any claim for infringement of copyright.

4. Harassment

4.1 Harassment is dealt with in paragraph 3 of the Editors' Code and paragraph 5 of the draft IMPRESS code. The Editors' Code has more specific and detailed provisions that make it easier to observe.

5. Children

5.1 The category of children as press subjects are addressed in paragraphs 6 and 7 of the Editors' Code and paragraph 3 of the draft IMPRESS code. The IMPRESS draft is seriously deficient in this respect.

5.2 The draft IMPRESS Code takes a weak approach to the protection of children insofar as it allows a child under the age of 16 to provide consent to being interviewed, photographed or otherwise recorded.

5.3 It also fails to build in any safeguards to prevent the exploitation of children by avaricious parents insofar as it enables an adult also to consent to a child under 16 being photographed, interviewed or otherwise recorded but does not place any corresponding restrictions or prohibitions on payments to the guardians or parents of the children in question.

5.4 The same issue arises with respect to the identification of a child and in any event, a child under 16 can be identified without consent if such identification is not detrimental to the safety and well-being of the child.

5.5 It is important to note also that there is no standard age by which a "child" is defined as a matter of English law. In linking the provisions to a 16 year old child, the draft IMPRESS code fails to have regard to the wider concept of the child's welfare as opposed to the child's safety or well-being. Paragraphs 6(i) and (ii) of the Editors' Code, on the other hand, provide that all pupils (not just children under the age of 16) should be free to complete their schooling without unnecessary intrusion and they must not be approached or photographed at school without the permission of the school authorities.

5.6 Further, there is no specific provision in the draft IMPRESS code for the children of adults who might be in the public eye and thus more likely to attract press attention whereas paragraph 6(v) of the Editors' Code prohibits editors from using the fame, notoriety or position of a parent or guardian as the sole justification for publishing details of a child's private life.



6. **Discrimination**

- 6.1 The IMPRESS Code covers pejorative reference and incitement to hatred, which is partially covered by the law. The Editors' Code may therefore be wider and stricter as it prohibits pejorative or prejudicial reference.
- 6.2 The discrimination of press subjects is addressed in paragraph 12 of the Editors' Code and paragraph 4 of the draft IMPRESS code.
- 6.3 Paragraph 4.1 of the draft IMPRESS code adds age as a potential basis for discrimination so making it difficult for journalists to comment on whether or not politicians or athletes are past their prime, for example. Further, the vagueness of the words "another characteristic" in paragraph 4.1 of the IMPRESS draft essentially means that any individual will be able to claim discrimination which cannot be workable in practice.
- 6.4 Paragraph 4.2 of the draft IMPRESS code prohibits reference to pregnancy unless the "characteristic" in question is relevant to the story. This might be weaker than the privacy protection relating to pregnancy as interpreted under the Editors' Code.

7. **Protection of Sources**

- 7.1 The protection of sources is addressed in paragraph 14 of the Code and paragraph 8 of the draft IMPRESS code.
- 7.2 The protection of sources in the IMPRESS draft code is not necessarily aligned with the laws hence why the Editors' Code refers to the "moral obligation" on the part of the journalist. In any event, the effect of paragraph 8.1 of the draft IMPRESS code is that it might serve to assist the more sophisticated source who will insist on confidentiality.

8. **Justice**

- 8.1 The treatment of press subjects who are involved in criminal investigations or criminal proceedings is dealt with at various provisions in the Editors' Code such as paragraph 7 (children in sex cases), paragraph 9 (reporting of crime), paragraph 11 (victims of sexual assault), paragraph 15 (witness payments in criminal trials) and clause 16 (payments to criminals). Conversely, this is dealt with in a single paragraph in the draft IMPRESS code at paragraph 6.
- 8.2 Paragraph 6 does not reflect the law on contempt in a helpful way and neither does it serve to ensure compliance with court reporting restrictions. The collection of provisions in the Editors' Code was carefully designed to find a solution to the problem of "jigsaw identification" (i.e. the phenomenon whereby the identify of a person protected by a reporting restriction may be inadvertently disclosed as a result of different media reports, none of which breach the terms of any order or statutory provision but which, taken together, enable the protected person to be identified). In recognition of these potential difficulties, the newspapers and broadcasters have aligned their respective codes so that the media adopts a common approach when reporting on sexual offences which is where jigsaw



identification is a particular risk. This has been drawn to the attention of the judiciary (judges and magistrates and their legal advisors), Crown Prosecution Service and other legal practitioners and media in successive editions (1999- 2016) of the Guide on Reporting Restrictions in the criminal courts jointly published by the Judicial Communications Office and media organisations under the auspices of successive Lord Chief Justices in the Updated Guide on Reporting Restrictions in the Criminal Courts.

- 8.3 IMPRESS does not appear to have analysed to any great extent the practical implications of the drafting of paragraph 6 which is wholly inadequate and not fit for purpose.
- 8.4 The same provision also places a blanket ban on the publication of the identity of victims of sexual assault even where lawful to do so - for example, where the victim has given written consent to such publication. This provision would result in very wide restrictions on reporting and publication yet it also provides the victims of sex crimes with less protection than paragraph 7 of the Editors' Code which requires that identification and publication is not only lawful but capable of adequate justification.
- 8.5 Paragraph 6.2 of the draft IMPRESS code requires the protection of the identity of people under 18 who are or who have been involved in criminal proceedings, even where the law permits this. It would prevent the identification of a young person convicted of a serious crime, such as murder, whether or not the courts have imposed a reporting restriction or might have lifted any automatic or discretionary reporting restriction. It would also prevent the identification of any under 18 year old victim or witness even where the law permits such identification – if reporting restrictions do not apply, are lifted or appropriate consents apply. It could even prevent the identification of a murder victim. Protection of identity requirements can entail very far reaching restrictions upon reporting, well beyond the omission of a name. Such restrictions can render fair and accurate court reporting or other lawful reporting relevant to the incident impossible. The Editors' Code provides strong protections which have been observed by the press such that, for example, it was not necessary to bring certain provisions of the Youth and Criminal Justice Act 1999 into force.

9. **Suicide**

- 9.1 The reporting on suicide is dealt with in paragraph 5 of the Editors' Code and paragraph 9 of the draft IMPRESS code.
- 9.2 As currently drafted, the prohibition in the draft IMPRESS code against speculation on the motive for suicide would unduly restrict inquest reporting and reporting of related court proceedings and inquiries - including on the motivations of protestors or even terrorists. It would also prevent the reporting of comments made by family, friends, experts, public authorities and it would stifle editorial coverage of issues that are matters of genuine public interest relating to motives for self-harm and suicide. This would include scrutiny of authorities and institutions responsible for the care of the person - police, prisons, asylum detention centres, hospitals, universities and schools.



9.3 It is important also to note that paragraph 5 of the Editors' Code was originally introduced in response to a submission by the Samaritans and others to the PCC in January 2006 following certain media coverage. This led to the expansion of the Editors' Code beyond its provisions on intrusion into grief or shock in order to prevent simulative acts when reporting on suicide. Specifically, care should be taken to avoid excessive detail of the method used whilst taking into account the media's right to report legal proceedings.

10. Privacy

10.1 Paragraphs 2, 3, 4, 8, 9 and 10 of the Editors' Code provide more specific and more certain protection against breaches of privacy and clearer guidance for editors and journalists as well as for courts to take into account for the purposes of s.12 of the Human Rights Act 1998 or s.32 of the Data Protection Act 1998. Paragraph 7 of the draft IMPRESS code that deals with privacy is very vague and potentially very wide indeed. This is unhelpful to both the press and the public.

11. Transparency

11.1 Paragraph 10 of the draft IMPRESS code is said to promote accountability and transparency in news reporting and to make it clear where content has been paid for and is controlled by a third party such as an advertiser.

11.2 The issue addressed in paragraph 10.1 of the draft IMPRESS code is already addressed by the CAP Code upheld by the ASA with appropriate mechanisms to consider the divide between editorial and advertising. As currently drafted, paragraph 10 of the draft IMPRESS code is likely to cause problems for consumers and the industry and cut across the work being done by the well-established advertising regulator.

11.3 Paragraphs 10.2 and 10.3 of the draft IMPRESS code are obscure and their purpose is not fully understood.

