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The Rt Hon Karen Bradley MP
Secretary of State for Culture, Media and Sport
Department of Culture, Media and Sport
100 Parliament Street
London SW1A 2BQ

6 January 2017

Dear Secretary of State

Thank you for your letter dated 1 November 2016 regarding the Government's consultation on press regulation. I am writing to submit the Press Recognition Panel's (PRP) formal response to that consultation.

We note that the consultation relates to section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry. The PRP was established by Royal Charter following the Leveson Inquiry to independently oversee press regulation in the UK. Our work, role and remit relate only to the section 40 element of the consultation, so we have restricted our response to that area.

We published our first annual report on the recognition system on 25 October 2016. The report noted that section 40 had not been commenced and we stated that 'urgent action needs to be taken if the recommendations of the Leveson Report are to be given a chance to succeed. Section 40 should be commenced in England and Wales.'

This continues to be the PRP's view. As such, we would be obliged if you could consider our enclosed annual report as part of our consultation response.

Commencement of section 40 would complete a system that will:

- Protect ordinary people, not just the rich;
- Protect the press from the chilling effect of large legal costs; and
- Remove political influence on press regulation.

Our consultation response provides the background and detail to these essential public benefits.

Yours sincerely

A handwritten signature in black ink, appearing to be 'David Wolfe', written over a faint circular outline.

David Wolfe
Chair
Press Recognition Panel

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1. PRP's consultation response
2. PRP's first annual report on the recognition system (consultation response annex)

The Press Recognition Panel's response to the Government's consultation on press regulation

The Press Recognition Panel (PRP) strongly supports implementation of section 40 because it completes a system that will:

- Protect ordinary people, not just the rich;
- Protect the press from the chilling effect of large legal costs, and
- Remove political influence on press regulation.

Our consultation response provides the background to these essential public benefits.

A new system of regulation

A key recommendation of the Leveson Report was the creation of a 'genuinely independent and effective system of self-regulation'. Lord Justice Leveson explicitly identified the need for incentives for publishers to join such a system. The recognition system was created by Parliament in response.

The recognition system's two parts are designed to work together, and in their entirety. The system is not complete without both parts:

1. The Royal Charter's objective measures of a regulator's independence and effectiveness. The Charter criteria are interlinked and a recognised regulator must meet them all. The Charter received cross party support.
2. Incentives for joining an approved regulator, which are provided by the relevant sections of the Crime and Courts Act. The Act was agreed by both Houses of Parliament.

The system:

- Provides objective measures of independence and effectiveness. Regulators can choose to be assessed against the criteria and be recognised, if they meet all of them.
- Gives affordable access to justice to ordinary people. This would be achieved either through an approved regulator's arbitration system or, if a publisher chose not to join an approved regulator, through protecting ordinary people from incurring legal costs.
- Encourages and enhances freedom of speech by protecting publishers against costs of legal challenge by the wealthy or by organisations that seek to stifle publications. By joining an approved regulator, other than in exceptional circumstances, publishers would not have to pay the legal costs of a claimant

who chose to take them to court and won, rather than going through the approved regulator's Charter-compliant arbitration system.

However, the system has not been put in place; section 40 has not been commenced. Until this happens, we cannot report on its success or failure, as the Charter requires us to do. Success would then be when all or most significant relevant publishers were members of one or more recognised regulators.

The status of the Charter and the criteria

The Charter criteria specify the minimum requirements for a satisfactory regulator.

In October 2015, the previous Secretary of State for Culture, Media and Sport, John Whittingdale MP, urged publishers to move within the recognition system:

'Like Sir Brian Leveson, I want there to be a strong, independent and effective self-regulatory system for the press that commands the confidence of both the public and the industry. [...] I want to see the press voluntarily comply with the reforms recommended by Leveson and enshrined in the Royal Charter.'¹

In October 2016, the Secretary of State for Culture, Media and Sport, Karen Bradley MP, made it clear that she wants relevant publishers to be members of regulators that at least meet the Charter criteria:

'I want to see a press regulation that, even if it does not apply for recognition under the PRP, achieves at least as good regulation as we have under the PRP. [...] I do want to see press regulation that meets at least the standards of the Press Regulation Panel, (sic) even if recognition is not applied for.'²

Neither the Secretary of State nor her predecessor have disputed the value of the Charter. But they have not yet brought in legislation to allow the recognition system to operate.

We have seen no evidence to suggest that the Charter criteria are onerous or inappropriate. As far as we are aware, no one has argued against the principle of regulators being assessed against the criteria.

The role of the PRP

The PRP was established to independently assess regulators against the Charter criteria. However, there appears to be concern that the PRP is 'state-controlled'. We strongly contend that there is no logical argument for this concern. At no stage has anyone identified anything about us or our framework which compromises our independence.

¹ Culture Secretary keynote to Society of Editors, 19 October 2015

² Culture, Media and Sport Committee; Oral evidence: Responsibilities of the Secretary of State for Culture, Media and Sport, HC 764; Monday 24 October 2016

The PRP simply assesses regulators who choose to apply for recognition. There are no mechanisms which would allow for anyone to influence how we make that assessment. We have no role in or influence over a regulator's operations and decision making. We have no power to impact on the freedom of publishers to publish.

The Charter itself can only be amended by a two thirds majority of each of the House of Commons, the House of Lords and the Scottish Parliament, and with the unanimous agreement of the PRP Board itself.

Approved regulators

So far, one regulator has applied to the PRP for recognition. However, the Charter framework clearly envisages the possibility of multiple recognised regulators. There is absolutely no reason why other regulators should not be created, and then successfully apply for recognition, in order to afford their members the section 40 incentives.

Online publishers

The recognition system applies to all print and online news publishers who can be sued for what they publish in England and Wales. That includes publishers who have joined IMPRESS and would apply to those who have joined IPSO. It would also include many others, such as the high profile online news publishers with substantial readerships, who have joined neither body. The recognition system applies to online publications.

Question 1: Which of the following statements do you agree with:

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

We do not agree with this.

Section 40 should be commenced immediately. This would give the recognition system a chance to succeed, and achieve the intentions of safeguarding free speech and providing affordable access to justice. It would also remove political involvement from press regulation.

If section 40 is not fully commenced:

- The public will continue to be deprived of an inexpensive alternative to taking court action to challenge illegality by publishers;
- The wealthy will still be able to stifle publications by threatening legal action against publishers; and

- There will be no meaningful incentives for publishers to join regulators that meet the criteria set out in the Charter.

Keeping section 40 under review and on the statute, suggests a view that there is a need for further evidence to justify bringing it into effect to incentivise the recognition system. This goes against Lord Justice Leveson's recommendation of the need for a 'genuinely independent and effective system of self-regulation', with incentives to bring it into effect.

(b) Government should fully commence section 40 now;

We strongly agree with this.

Section 40 should be commenced immediately. This would give the recognition system a chance to succeed, and achieve the intentions of safeguarding free speech and providing affordable access to justice. It would also remove political involvement from press regulation.

Full commencement of section 40 would complete the system of regulation envisaged in the recommendations of the Leveson Report. Full commencement would:

- Provide guaranteed access to low-cost arbitration offered by a recognised regulator ensuring that ordinary people who have legitimate grievances with the press have affordable access to justice.
- Protect the press from the potentially chilling risk of legal costs by those who chose to pursue their claims through the courts rather than using the arbitration scheme.

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

We do not agree with this.

If section 40 was repealed, there would be no significant mechanism for incentivising publishers to sign up to the recognition system and there would be no inexpensive means for ordinary people to challenge illegality by publishers.

Repealing section 40 would abandon Lord Justice Leveson's recommendations for a 'genuinely independent and effective system of self-regulation', and his anticipation of the need for incentives to bring it into effect.

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

It is hard to see how the intentions for the recognition system could be achieved by keeping section 40 on the statute book, but not fully commenced.

Keeping elements of section 40 ‘under review’ undermines the principle that politicians should not be involved in press regulation. It would leave an ongoing question over when and how the government will affect the system of regulation, giving unfair and undemocratic control to politicians.

If section 40 is not fully commenced:

- The public will continue to be deprived of the ability to challenge illegality by relevant publishers cheaply;
- The wealthy will still be able to stifle publications by threatening legal action against publishers; and
- There will be no meaningful incentives for publishers to join regulators that meet the criteria set out in the Charter.

Not applying section 40 to publishers outside a recognised regulator system means that there would be no requirement for them to have an independent arbitration system and the public would have no guarantee of affordable justice. The public will therefore still be dependent on the courts for seeking justice. While it may be reasonable for the press to make their own assessment of the right balance about the chilling effect on their journalism of the threat of costs by wealthy litigants, it is not reasonable to deny the public the benefits that the new system is designed to confer upon them.

Given the stated reluctance of many publishers to join a compulsory arbitration scheme, we may legitimately surmise that a decision not to enforce those elements relating to publishers outside a recognised regulator would mean that the public will not have guaranteed access to an arbitration scheme.

Repealing the elements of the system that apply to publishers outside a recognised regulator would mean the government abandoning the commitment to affordable access to justice for people.

Question 2

Do you have evidence in support of your view, particularly in terms of the impacts on the press industry and claimants? If so, please provide evidence. (We are particularly interested in hearing from legal professionals - using their experience of litigation - in respect of the financial impacts on publishers outside a recognised self - regulator should government fully commence section 40, and specifically on (a) the likely change in volume of cases brought; and (b) the extent of average legal costs associated with bringing or defending individual cases).

The PRP's response

In preparing our annual report on the recognition system, the PRP sought stakeholders' views via a public call for information, and considered representations from a range of sources.

Financial impact on publishers outside the system

Paragraphs 43 and 44 of DCMS's consultation document outline the argument expressed by some about the financial impact of commencement of section 40 on publishers who are not members of an approved regulator. Some also state that they believe that the commencement of section 40 would increase the number of claims against those publishers.

No evidence has been provided to us in support of either of these claims. However, even if true, any such impacts or disincentives to remaining outside the recognition system would be addressed by a publisher coming within an approved regulator which would insulate them from the threat of costs. It is open to publishers to create, or join, any other regulator which, provided it complied with the Charter criteria, would confer these benefits upon them.

Impact on small and local publishers

Paragraphs 39 and 44 of DCMS's consultation document highlight a view that commencing section 40 might have a particularly adverse impact on local titles and small publishers, because of an increased number of actions they might have to defend from claimants who faced no threat of costs being awarded against them even if they lose. This concern would be addressed by a publisher coming within an approved regulator, in which case, if a claimant rejects arbitration they will not get their court costs paid, even if they win.

Arbitration

The recognition system is intended to protect publishers against legal costs and to give ordinary people who have legitimate grievances with the press, affordable access to justice. Section 40 and the Charter's requirement for a system of arbitration work together to provide these.

Currently, all publishers face serious financial risk if they are sued by a wealthy litigant, a risk that is particularly serious for small local publishers with modest or precarious revenues. Section 40 would protect all publishers who chose to join a recognised regulator from this threat, therefore giving protection to those, such as small local publishers, who face the greatest risk from legal action.

Arbitration as specified within the Charter criteria would provide the public with an affordable alternative to court action. Alternative schemes for arbitration where the complainant still pays a substantial fee and where the publisher can opt not to allow the challenge to be brought through arbitration have been suggested by some publishers, but they would not meet the basic requirements identified by the Leveson Report; and many publishers are not even proposing schemes of that kind.

Importantly though, providing access to low-cost arbitration is not enough to secure the public interest and provide the protections intended by the Leveson recommendations. All 29 of the Charter criteria must be met as the minimum for a responsible and accountable press.

Concerns about arbitration have been put forward by others; we address them below.

Arbitration – concerns about the financial burden

It has been suggested by some that offering an arbitral system through a recognised regulator might have a serious adverse financial impact on smaller publishers. This is incorrect. The recognition system includes specific protection for local and regional publishers to avoid causing them financial hardship.

Arbitration – concerns about frivolous and vexatious claims

Some commentators have suggested that offering an arbitral system will cause an increase in the number of vexatious or frivolous challenges. This is incorrect. Any Charter-compliant arbitration scheme must include a mechanism that allows for claims to be struck out if they are brought on frivolous or vexatious grounds. A further filter allows an approved regulator to charge a small administration fee for initially assessing an application for arbitration.

Arbitration is an alternative to taking claims against publishers through the courts. A claimant would therefore need to have an arguable case in law to be offered arbitration, related to the very specific list of potential claims set out in section 42 of the Crime and Courts Act. Arbitration should therefore not be confused with a regulator's complaints system, which remains the only process by which complaints related to breaches of the relevant standards code can be addressed.

The fears now expressed about the financial impact of arbitration on local and regional publishers are not new. Indeed, they were specifically considered as part of the framing of the Charter and a mechanism was put in place to respond to the problem if it arose in practice. Specifically, when the PRP conducts a cyclical review of an approved regulator, if it appears that the arbitral process causes serious

financial harm to those who publish only on a local or regional basis, the PRP may decide that such subscribers are not required to be part of an approved regulator's arbitration scheme.

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

The PRP's response

It is clearly not possible to supply evidence of the effectiveness of full commencement in incentivising publishers to join a recognised self-regulator, as full commencement has not happened yet. There has therefore been no opportunity to test the effectiveness of the incentives.

We can surmise that Lord Justice Leveson was correct in believing that incentives would be necessary, and that there is a link between the absence of full commencement of section 40 and the lack of any significant move amongst publishers to join a recognised self-regulator.

However, even if section 40 did not encourage all publishers to join a recognised regulator, then it would at least ensure that people would have a low cost means of challenging illegality by such publishers.