



**BY EMAIL:** [hperry@pressrecognitionpanel.org.uk](mailto:hperry@pressrecognitionpanel.org.uk)

Ms Holly Perry  
The Press Recognition Panel  
107-111 Fleet Street  
London  
EC4A 2AB

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Dear Ms Perry

### **QUESTIONS TO INTEREST GROUPS**

Many thanks for providing me with a copy of the questions that the Recognition Panel has distributed to the various groups that it has planned to meet (as described in the "Meeting Up" section of the website Home page).

I am not a member of any of those groups, but I have a number of comments in reply to some of the questions posed, which I set out in the note attached to this letter in the hope that it will be of use to the Recognition Panel. You will see from my note see that I have taken the questions out of order (and not answered all of them). Given the views that I express, I think my overall response is shorter and more coherent for having followed the sequence I took.

I write from the perspective of someone who has been an adviser to several regulators and self-regulators over the past 20 years. I took a keen interest in the Leveson Inquiry and was an occasional commentator on the its progress and afterwards.<sup>1</sup>

I should also mention that, as a result of my role as a commentator, I was asked to provide occasional advice and support to the IMPRESS Project during the course of 2014, which I was happy to do on a pro bono basis. With the IMPRESS board and initial staffing now in place, I am not currently working with IMPRESS and they have not (yet) seen this response. I believe my comments meet the test of independence, in the sense that I would have commented no differently if I had had no prior involvement with IMPRESS, but if the Panel senses any bias in my comments, please adjust for that as appropriate.

If you would like me to provide any follow-up comments or answer any additional questions that I have not yet addressed, please let me know. I would, of course, be happy to attend a meeting with any of the Panel or its Executive, if they think that would be of assistance.

Yours sincerely

Simon Carne

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<sup>1</sup> See, for example, <http://www.simoncarne.com/index.php?s=leveson>

## RESPONSE TO QUESTIONS POSED THE RECOGNITION PANEL

I offer the following comments in response to some of the questions posed by the Recognition Panel to various interest groups.<sup>2</sup>

### **The approach where the criteria are least specific, eg public interest and internal governance**

In the context of the Criteria, it is not clear to me that it falls to the Recognition Panel to take any approach at all to the public interest or internal governance processes. For the reasons I explain below, I think these are matters for the regulator, itself, not the Panel.

#### **Public interest**

The term “public interest” (and “interests of the public”) appears in three specific criteria:

- Criterion 8 requires that the regulator’s standards code must take into account the public interest. This invites a question as to how far the Recognition Panel must go to satisfy itself that the code takes account of the public interest sufficiently and/or in an appropriate way. But Criterion 7 requires that the standards code “must ultimately be the responsibility of” the regulator, advised by the regulator’s own Code Committee. It is difficult to see how such wording can be reconciled with any suggestion that the regulator should have to adopt, or conform to, an “approach” laid down by the Panel.

Moreover, the sixth recital of the Charter envisages that the existing Editors’ Code of Practice will be adopted as the initial standards code by the successor to the PCC, thereby ruling the Panel out of any say in the matter so far as IPSO is concerned (if IPSO were to apply for recognition). It should not be the case that a code which meets the recognition test for one regulator is unacceptable for another.

None of this means that the Recognition Panel is an idle observer. The Panel must check that there is a standards code; that the code takes into account (amongst other things) the public interest in relation to the matters specified in Criterion 8; and that the Board of the regulator takes advice from a Code Committee before deciding on the content. I say more about the role of the Panel, below.

- Criterion 8C requires that the regulator should provide non-binding guidance on the interpretation of the public interest in relation to the standards code. It would be wholly illogical if a code which must be written by the regulator and applied by the regulator were to be accompanied by an interpretation guide in which the meaning of any of the terms was required to conform to an approach taken by someone who is *not* the regulator.
- Criterion 11 stipulates that the regulator should have the power to hear complaints, not only from parties directly affected by the matter complained of, but also from a representative group where there is public interest in the Board doing so.

This wording does not rule out the Panel seeking to know in advance how the regulator intends to exercise that power. But neither does this wording demand that the Panel should take a view. If the Panel accepts my arguments in the first two bullet points above, it would be entirely reasonable for the Panel to accept that Criterion 11 is met by having a power worded in accordance with the criterion, without the Panel having to seek additional evidence as to how the power will be applied.

On the basis of these comments, there is no need for the Recognition Panel to formulate an “approach” to the public interest, so far as the Charter criteria are concerned.

#### **Internal governance processes**

I have searched the criteria for reference to “governance”. It appears in two criteria. The first is Criterion 9, which requires the regulator to be satisfied of the governance processes of the regulated bodies (ie the publishers). Plainly, it is for the *regulator*, not the Panel, to determine what governance processes are suitable. If the Panel makes that determination, the Panel is stepping into the shoes of the regulator, which is not what the Charter intends or empowers.

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<sup>2</sup> Published on the Panel’s website at <http://www.pressrecognitionpanel.org.uk/documents/Letter%20to%20attendees.pdf>

The only other mention of “governance” is in Criterion 19 which merely refers to the regulated body’s governance, without stipulating any requirements relating to governance.

To the extent that there are other criteria which address matters relating to the governance of the regulator itself, they are quite specific (eg the appointment process and composition and the regulator’s board). The Recognition Panel will need to ensure that those criteria are met, but that does not call for the Panel to adopt an “approach” to “internal governance processes”, which the question asks about.

**How the Panel should give effect to the concepts under paragraph 1 of Schedule 2 of the Charter**

The question lists nine concepts which are set out in the paragraph 1 of Schedule 2 of the Royal Charter. The listing of those nine concepts is followed by the words “as articulated in the Leveson Report, Part K, Chapter 7, Section 4”. So the starting point must be to see what Sir Brian Leveson had to say about the matter. Indeed, that may well be the end point, as well, unless one considers the eleven pages of Part K, Chapter 7, Section 4 to be inadequate.

If we take the first of the nine concepts, effectiveness, I submit that this word means nothing more than “satisfying the criterion laid down in the Royal Charter”. In support of that proposition, I cite paragraph Leveson paragraph 4.2:<sup>3</sup>

“It is important to be clear about what I mean by ‘genuinely independent and effective regulation’. **My criteria for an effective regulatory regime set the broad framework. What I will do now is set out** at a level of detail **the minimum criteria** that I believe it would be **necessary** to have in place in order **to deliver against that broad framework.**” [Emphasis added]

If there are issues surrounding the interpretation of the Charter, those issues must, of course, be explored. But, in the case of “effectiveness”, I suggest that the above quote tells the Panel to look no further than the Charter itself.

I am reluctant to go through all the remaining concepts, in writing, and the Panel would probably not wish me to do so! My general proposition is that, if there are any specific concepts which are not adequately explained by Leveson Part K, Chapter 7, Section 4, the Panel might wish to identify (1) the concepts in question; (2) the specific criteria to which they apply; and (3) the passage from Leveson (if there is one) which creates a doubt. The concepts can then be examined in their full context.

In support of my approach, I would draw attention to three further extracts from Leveson:<sup>4</sup>

“6.9 The role of the recognition body is essentially an objective one. Its task would be simply to check that the statutory requirements have been met by the body applying for recognition. Having said that, it is also one that requires a degree of expertise in order to assess that the criteria have been met...”

“6.24 ... all the while recognising the very limited role that [the Recognition Panel] would have.”

“6.25 ... [The Recognition Panel] would test each against the statutory requirements and either approve the body or raise any reasons as to why the requirements are not met. ... Speaking for myself, assuming that the exercise is undertaken in a way that seeks to fulfil that which I have described, I see no difficulty in recognition being comparatively straightforward.”

I must acknowledge that, as the paragraph numbers indicate, this is from Section 6, not Section 4, of Leveson, Part K, Chapter 7, so these quotes do not fall within the material that paragraph 1 of Schedule 2 of the Royal Charter identifies. Moreover, Leveson wrote Section 6 on the premise that recognition would be assigned to Ofcom, a recommendation which was not taken up. Some might argue that the decision to create a separate Recognition Panel to carry out the task undermines the whole of Section 6.

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<sup>3</sup> Part K, Chapter 7, on page 1759

<sup>4</sup> Part K, Chapter 7, on pages 1773 and 1776

I think that would be wrong. Much of the section reflects views that are independent of who takes on the recognition duties.

The Recognition Panel may, of course, find that, as it carries out its work, Sir Brian Leveson was wrong to expect that the process would turn out to be “comparatively straightforward” (as he suggested in paragraph 6.25 quoted above). The statement was, in part, in the nature of a prediction which may prove false. But I see no reason why the Recognition Panel cannot (i) approach the task on the premise that the *intention* was for the process to be comparatively straightforward and (ii) set out to operate on a basis which reflects that expectation – or, at the very least, to minimise any deviation from it.

### **What evidence should the Panel require in support of applications?**

The first (implied) part of this question is whether the Recognition Panel should specify the evidence that it wants to receive or invite the regulator to submit evidence so that the Recognition Panel can respond with questions and requests for more details, as the Panel sees fit.

To some, the latter (passive) approach may sound disorganised. Indeed, it would be if the Recognition Panel were expecting to receive multiple, simultaneous applications, all of which needed to be treated on the same footing. But that is not the case, at least not in the short term. It is unlikely that the Recognition Panel will face more than one application for recognition during the course of 2015. I suggest that it would be pointless for the Panel to create a system which the applicant regulator must then organise itself to comply with. I refer again to paragraph 6.24 from Leveson Part K, Chapter 7:

“6.24 ... I would encourage a continuing dialogue between those establishing a [regulator] and [the Recognition Panel] throughout the process, to ensure that the statutory requirements were fully understood, all the while recognising the very limited role that [the Recognition Panel] would have.”

This seems to be an open invitation for the applicant regulator to present the Recognition Panel with the evidence it has and for the Panel to respond accordingly. At the very least, it suggests a dialogue in which the Panel should ask the applicant regulator what evidence it envisages supplying so that the Panel base any requests on that starting point, rather than the other way around.

The testing of the criteria might even be carried out in stages – probably not one at a time, but in groups of related items. Approval against individual criteria would doubtless need to be contingent on an overall decision, once all the evidence had been submitted and reviewed as a whole. But some of the criteria are plainly independent of others and there is a natural chronology to them. To take one very obvious example, if the Recognition Panel were not satisfied with the membership of an applicant regulator’s board – or the process by which the board had been selected – that is something which the applicant regulator should be made aware of as soon as possible so that it does not progress with the rest of its start-up processes without having a chance to explore a remedy for the initial problem.

Once again, I cite the Leveson report in support of my contention:

“6.25 Once a body was fully established it would seek recognition from [the Recognition Panel], providing evidence of its funding agreement, governance structures and code. [The Recognition Panel] would test each against the statutory requirements and either approve the body or raise any reasons as to why the requirements are not met. The body would then have the option of amending the proposal in a way which would satisfy the statutory requirements, withdrawing its application, or challenging the decision ... not to recognise it. ...”

### **Should the Panel take into account public comment on recognition applications?**

Yes. But I think this should be a negative test, rather than a positive one. In other words, the Recognition Panel should ask whether members of the public know of any reasons why recognition should not be granted or have any information about the applicant regulator which they wish the Recognition Panel to consider. I don’t think the Recognition Panel needs to seek active public support for a positive result.

**The general approach the Panel should adopt to the recognition criteria and process**

It has been a theme of my response that the recognition process should be a relatively straightforward one, applying each of the Charter criteria objectively. The criteria do not need to be interpreted in a manner which makes the hurdle as high as it can be within the language used. The Panel should look at the requirements in context, recognising what the Leveson report had to say about the matter, most certainly in Part K, Chapter 7, Section 4 but also, in my submission, in Section 6 of the same Chapter.

The Charter criteria need to be met. But they do not need to be passed with room to spare. The Charter sets out a process for “approval”, not a search for “excellence”, nor even a search of the best out of several contenders. The Panel has the power to recognise every regulator who applies, if they all meet the criteria.

I very much hope that any approved regulator(s) will aspire to, and achieve, excellence. But starting from where we were at the time of the Leveson Report, excellence would be a huge leap and there is nothing in the Leveson Report to suggest that such a leap had to be made in order for recognition to be granted. On the contrary, in Part K, Chapter 7, paragraph 4.2, Leveson set out what he described as “the minimum criteria” for “independent and effective regulation.” I see nothing in the Charter to suggest a higher hurdle.

Simon Carne  
10 March 2015