



89up.org
12 TILEYARD, LONDON, N7 9AH

Susie Uppal
Chief Executive
Press Recognition Panel
Mappin House
4 Winsley Street
London
W1W 8HF

& by email to: applications@pressrecognitionpanel.org.uk

Thursday, 11 August 2016

Dear Ms Uppal

Section 5 of PRP's Guidance for applicants

We write to express our concern that Section 5 of the Guidance for Applicants for recognition by the Press Recognition Panel or 'PRP' (set out at: <http://pressrecognitionpanel.org.uk/guidance-for-applicants/> or 'The Section 5 Guidance') has been produced and applied without fair procedure consistent with UK public law.

89up is a social purpose company currently instructed by the Free Speech Network to scrutinise the process of press regulator recognition. We want to see a press regulatory system that is consistent with the UK's historical freedoms and established international free speech norms.

As you are no doubt aware, the PRP is a statutory corporation confined by the scope of the power that conceived it, the Royal Charter, and should act only in accordance with those powers conferred upon it¹. The Section 5 Guidance the PRP has issued to applicants for recognition is a preliminary form of advice that engages principles of natural justice and which should abide by established law on procedural fairness.

We are concerned that the PRP is at risk of demonstrating procedural impropriety by being seen to:

¹ Hazell v Hammersmith and Fulham London Borough Council [1992] 2 A.C. 1.

1. wait for consultation responses to the application by IMPRESS to tailor its interpretation of the Royal Charter in order to prevent any obstacles to that application;
2. deliberately delay publishing the Section 5 Guidance, containing key interpretations of the Royal Charter criteria that are of huge public interest, until 15 July 2016 in order to assist the current sole applicant, IMPRESS.

How did the PRP develop the Section 5 Guidance?

There have been three main stages in the evolution of the PRP's interpretation of some terms and elements in the Royal Charter.

1. Proposed Indicators - [June 2015](#)
2. Post-Consultation Decision on Indicators - [September 2015](#)
3. Section 5 of the Guidance for Applicants - [July 2016](#)

Taking Criterion 6 on the requirements of the regulator's funding arrangements as an exemplar, the PRP's stance evolved from a proposed indicator, to a decision on the format of the indicator following consultation, to a vastly greater elaborated exposition on interpretation of the Royal Charter, as set out below.

Criterion 6

Proposed Indicator	Post-Consultation Decision	The Section 5 Guidance
<ul style="list-style-type: none"> • The Regulator is funded adequately. • The Regulator adopts policies and mechanisms to ensure funding arrangements cover the prescribed period and undertakes reviews in an appropriate time. • The timing for negotiating funding settlements is not such as to create a concern that the negotiation would impact on the independence or perceived 	<p>Contrary to what some respondents said, there is nothing in the Charter that means a regulator must be funded entirely by its members/subscribers and there is no Charter prohibition on a regulator receiving third party funding. In relation to the definition of 'industry', the Charter refers to the concepts of 'press', 'members' and 'subscribers', so we consider 'industry' to be a wider concept.</p> <p>We believe the proposed indicators together with criterion 6 itself sufficiently capture these points.</p>	<p>In relation to criterion 6, we do not interpret the provision for funding for the system 'being settled in agreement between the 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.</p> <p>This is because:</p> <ol style="list-style-type: none"> 1. The Charter envisages that there can be more than one regulator, 2. 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; and 3. Given the sheer scale and diversity of 'relevant publishers' it would be impracticable to identify or contract all the

<p>independence of the Board.</p>		<p>relevant publishers that could or might be affected.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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 preclude an application or 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.</p>
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The PRP rejected many of the responses it received in the Consultation on Criterion 6. It is not the purpose of this letter to rehearse those arguments.

Section 5 and the Royal Charter

The Section 5 Guidance goes beyond what was envisaged in the Leveson Report. It vastly elaborates on aspects of the Royal Charter that were not specifically defined and go beyond the PRP's initial proposed indicators. Terms such as 'in agreement' 'the industry' and 'for the system' have now been interpreted in a way that had not been set out or consulted on with specificity before.

This went as far as reinterpreting the Charter; for example, supplanting 'being settled in agreement between the industry and the Board' with the statement that there should not be 'an effective veto over the recognition of a regulator when they [publishers] have no wish to become a member of that (or any recognised) regulator.'

Herein lies an important distinction to be made between the Royal Charter and the Section 5 Guidance. The Charter Criterion 6 made a positive assertion of the type of situation which was fertile for recognition of a press regulator, which is the industry proactively joining a regulator that subsequently seeks recognition.

Section 5 turns this on its head by invalidating the views of the vast majority of the industry who do not wish to become members of IMPRESS, a radical reinterpretation of the Charter and its precursor, the Leveson Report.

Moreover, Section 5 also uses one of the chief criticisms of Criterion 6 (on its practical unworkability) as a justification to loosen obligations on the applicant for recognition – 'given the sheer scale and diversity of "relevant publishers" it would be impracticable to identify or contact all the relevant publishers that could or might be affected.'

We are alarmed that there was no public consultation on the Section 5 Guidance. Section 5, which was binding on an applicant regulator, was unknown to the public at the time of the calls for information on IMPRESS's application.

IMPRESS's Financial Consultation for recognition

This raises the question, did IMPRESS have sight of Section 5 before or during its application? If so, why was this guidance withheld from public scrutiny until after that application had been submitted?

According to Section 5, the PRP considers that in order for Criterion 6 to be passed, an applicant should show:

'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'.

IMPRESS's first application would have failed to fulfil this criteria. As we previously demonstrated, two of the publications we contacted confirmed to us that they did not know the detail of IMPRESS's third party funding.

Subsequently, after the first application, we believe this chronology of events in relation to the criterion occurred in a procedurally unfair way:

Date	Description
4 June 2016	Second call for information on IMPRESS application closes
8 June 2016	IMPRESS Financial Consultation launched
6 July 2016	IMPRESS Financial Consultation closes
13 July 2016	IMPRESS Financial Consultation Decision published
15 July 2016	Section 5 of the Guidance published

In order for a consultee to the PRP's call for information on the application for recognition to properly scrutinise IMPRESS on Criterion 6, the process could only have been ordered in this way to be fair and lawful:

1. Section 5 of the Guidance published.
2. IMPRESS Financial Consultation launched.
3. IMPRESS Financial Consultation closes.
4. IMPRESS Financial Consultation Decision published.
5. Call for Information on IMPRESS application opened.

The Section 5 Guidance should have been published first, not last. By inverting this chronology, the PRP has alleviated IMPRESS from public scrutiny of its requirement to consult on the whole of its funding arrangements, including any proposals to take funding from third parties. This has impacted the process in two important ways:

1. Consultees to IMPRESS's Financial Consultation did not have sight of the PRP's guidance on third party funding so could not raise legitimate points pertinent to its consultation.
2. The public and interested parties should have had access to the tests and standards the PRP was applying to IMPRESS in order to inform their consultation responses.

This failure of a fair PRP process on Criterion 6 is exacerbated by the fact that IMPRESS's funding arrangements predate its 'Financial Consultation'.

In order for a consultation to be a valid exercise, the decision on the matter should be made after consultees are canvassed. IMPRESS was legally bound to its funding agreement with the IPRT before it asked the members about it. This means its whole process of 'consulting' is flawed and fails even the minimum Sedley requirements² that:

1. Consultation must take place when the proposal is still at a formative stage.
2. Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response.
3. Adequate time must be given for consideration and response.
4. Consultation responses must be conscientiously taken into account.

IMPRESS had agreed its financial arrangements with third parties before consulting its members. The crucial requirement that decision-making follows consultation was willfully ignored.

Why did publishing Section 5 take so long?

Since the PRP's formation five different public consultations have been carried out:

Consultation	Dates	Outcome
Proposals for recognition of press self-regulators	7 June 2015 - 31 July 2015	Decision Following the Consultation on Proposals for Recognition of Press Self-Regulators (September 2015) Guidance for Applicants (Sections 1-4) Section 5 of the Guidance for Applicants (15 July 2016)
IMPRESS application for recognition - 1st call	5 February 2016 - 4 March 2016	Extension of 15 days granted & application still pending
Undertaking cyclical and ad-hoc reviews	16 February 2016 - 11 April 2016	Consultation on ad hoc and cyclical reviews (August 2016)

² R v Brent London Borough Council ex parte Gunning (1985) 84 LGR 168

The Recognition System	18 April 2016 - 12 June 2016	Awaiting report
IMPRESS application for recognition - 2nd call	4 May 2016 - 2 June 2016	Application still pending

It is notable that all of the consultation periods have been followed by timely reporting and decisions, where they have been made to date, except for the publication of Section 5. This took place more than a year after the consultation for the proposals for recognition took place and after IMPRESS had submitted its application. The webpage where Section 5 was published only refers to 4 sections of guidance for applicants.

These specific interpretations of the Royal Charter would have affected how bodies responded to the consultations that occurred in 2016, as set out above. Consultees responded to the two IMPRESS applications based on the proposed indicators when they should have had sight of the Section 5 Guidance. Crucial questions of press regulation were consulted on without lawful insight into how the PRP interpreted the Royal Charter.

Has the process been procedurally fair?

In order for a public body to make a decision using a fair procedure, the process should exhibit a number of features that are lacking in the PRP's composition of Section 5 and consideration of IMPRESS's application:

- The right to know the case one has to meet, to see relevant documentation or information is crucial for informed representations to be made before decision-making is undertaken³.
- The duty to comply with established procedural requirements such as the Civil Service Consultation Principles⁴ or those established at common law are also, as exemplified earlier, lacking in this process.
- The PRP is also required to exercise its functions without delay that is so gross or inordinate that it is unfair, which was contravened by the July 2016 publication of Section 5.

The PRP has fallen short of these established principles in the call for information on IMPRESS's application by denying consultees information on how the PRP, and potentially IMPRESS themselves, had been guided on specifically interpreting the Royal Charter.

³ R v Secretary of State for the Home Department ex parte Doody [1994] 1 A.C. 531.

⁴ Civil Service Consultation Principles:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf

The issues addressed by the respondents to the PRP call for information were based on an understanding of the Royal Charter that the PRP had already restrictively defined, and the applicant, IMPRESS was therefore not able to be scrutinised by interested parties properly.

Should the PRP consult further?

It is clear that the substance of the Section 5 Guidance, the timing of its publication, and the way in which it applied to an ongoing application for the first state-recognised press regulator in the United Kingdom has not demonstrated requisite public law practice.

At this stage, in our view, a further consultation on Section 5 and subsequently on the IMPRESS application for recognition will need to be held to redress the procedural unfairness of the current process.

Such a further consultation would only be required if the PRP were minded to accept IMPRESS's application to be a recognised regulator on 23 August 2016. As stipulated earlier, we do not see how this can be possible given the flawed nature of the IMPRESS consultation on its funding arrangement and how vital that failure is to fulfilling Criterion 6.

We await the PRP's response on the issues we have raised and the next steps it proposes taking. Given the strict timeframes involved, we would appreciate a response by **5.00pm on Friday, 19 August 2016**.

The judgments referred to in this letter are available on request.

Please do contact us if we can be of further assistance.

Yours sincerely,

Mike Harris

CEO, 89up

Sashy Nathan

Director of Advocacy, 89up

Consultants to the Free Speech Network and authors of [Leveson's Illiberal Legacy](#)