Press Recognition Panel
Mappin House
4 Winsley Street
London W1W 8HF

Ms G Elliott
RPC
Tower Bridge House
St Katherine's Way
London E1W 1AA

By email

21 December 2016

Dear Ms Elliott,

Reply to judicial review letter before claim

I reply on behalf of the PRP Board to your letter of 5 December 2016 addressed to me as Chair of the PRP.

Our Chief Executive, Susie Uppal, has already responded (in her letter of 9 December 2015) to the point in paragraph 60 of your letter. She explained that all the documents relevant to the PRP's consideration of the IMPRESS application are already available through our web site.

You explain a potential challenge by the NMA to the legality of the PRP's Board's decision of 25 October 2016 to recognise IMPRESS as meeting the requirements of the Royal Charter on Self-Regulation of the Press (the Charter).

In your paragraph 9, you correctly note that the PRP Board is required by the Charter to assess applications for recognition against the 29 recognition criteria in Schedule 3 of the Charter. The PRP must recognise a regulator which meets all 29; it cannot impose additional requirements (such as anything arising from the Leveson Report which is not part of the Charter criteria); and it cannot recognise a regulator which does not meet all 29 criteria.

In paragraph 10 you comment on what many newspapers have done, and why, and what "the press" (as you describe it) has done, and why. I assume you speak only on behalf of the members of the NMA (on whose behalf you write). In any event, I say nothing on the substance of those points because they have no bearing on IMPRESS' compliance with the Charter or otherwise on the legality of the PRP's decision other than if relevant to one or more of the Charter criteria. If you consider that to be the case, please explain how.

In paragraphs 11 to 13 you outline some of the process leading up to the PRP Board's decision. As you note, the NMA and others were given several formal opportunities to make representations in relation to IMPRESS' application and IMPRESS compliance (or not) with the Charter criteria. You mention the representations made by the NMA within each of the three public calls for information which the PRP held. The NMA also wrote on other occasions during the process, including immediately prior to the Board's August meeting. As explained in the PRP's 190-page decision document, all those representations were considered by the PRP Board when it came to make its decision.

Ground 1 – "regulator"

The points you make are in substance the same points which the NMA made as part of the process described above. They were considered by the PRP Board, as explained in the decision document. I will not repeat the detail of that here.

Your core argument of law (in your paragraph 15 and 24) appears to be the contention that the PRP can only consider an application for recognition from a body which had relevant publisher members (or at least the support of particular relevant publishers) at the time of its formation. For the reasons explained in our decision document, we do not accept that to be the case.

We are also entirely unclear as to why you say the Charter should be read as imposing such a requirement.

In any event, you now particularly rely on passages taken from Part K, Chapter 7, Section 4 of the Leveson Report. By paragraph 1 of Schedule 2 of the Charter, in making its decision on whether IMPRESS met the criteria in Schedule 3, the PRP Board was required "to consider the concepts of effectiveness, fairness and objectivity of standards, independence and transparency of enforcement and compliance, credible powers and remedies, reliable funding and effective accountability" as articulated in that Section. That was an important obligation (with which the Board complied), although it does not make what is said in that Section into supplementary or alternative criteria with which an applicant regulator must comply as you appear to suggest.

As it happens, paragraphs 4.1, 4.2, 4.3, 4.9 and 4.11 in that Section (which you quote) indeed refer to how a regulator might be formed: they describe how the Leveson Report thought things might or should ideally develop. Nevertheless, they do not constrain the meaning of the term regulator in the way you suggest (including by imposing some initial membership requirement, as you contemplate) not least because they are not part of the articulation of the "concepts" specified in paragraph 1 of Schedule 2.

Your secondary argument (in your paragraph 28) appears to be that the description of a regulator as being "self-regulatory" in criterion 1 adds some additional requirement to what we have considered above. It is, however, entirely unclear what you have in mind.

Ground 2 – criterion 6

Again, the points you make are essentially the points which the NMA made as part of the application process. The PRP's consideration of them is set out in the decision document.

At their heart appear to be the following propositions: (1) that (per your paragraph 29 and 33) criterion 6 requires that a recognised regulator must be funded entirely by "the news industry" (which we take to mean its member publishers since we doubt you are suggesting funding from publishers which are not members of the regulator); (2) that (per your paragraph 35) the PRP cannot grant recognition to a body which has not secured agreement

from “any meaningful proportion of the industry”; and (3) that the PRP “erred in its approach” to assessing whether IMPRESS’ funding compromised its independence and effectiveness.

As for (1), as above, the PRP cannot impose requirements which are not part of the Charter criteria. You have not identified anything in the Charter criteria which requires all of a regulator’s funding to come only from its members, or which precludes funding from third parties. Nor is there anything in Part K, Chapter 7, Section 4 constraining that point, not least because the “concept” from that Section which the Board was required to consider in relation to this issue was that of “reliable funding” not the point you now make.

As for (2), you correctly recognise that criterion 6 cannot be read as requiring the agreement of all relevant publishers (in which context we note that the definition of relevant publisher does not include any geographical limitation). You postulate a “meaningful proportion” requirement, but without identifying any basis for it (other than repeating the point that “a body must already have support from industry before it is recognised” (your emphasis)), as considered above.

The PRP considers that the requirements of criterion 6 can be met by the fact of the agreement of a regulator’s members (seen in them joining up) and by a decision on funding following a consultation process which ensures (among other things) compliance with the criterion 23 requirement for membership to be open to all publishers on fair, reasonable and non-discriminatory terms.

Again, the Section 4 concept in play here is “reliable funding”, not the point you now make.

As for (3), you suggest (at paragraph 38) that the PRP “failed to engage with or take a decision on” an “important question of fact” in relation to criterion 6, namely whether IMPRESS’ funding means that it meets the Charter’s requirements for independence.

As you contemplate in your paragraph 40, the PRP Board’s analysis of that factual point was set out in the decision document as part of its consideration of criterion 1.

As you will be aware from the decision document, when the Board came to consider the application, it initially discussed all the criteria in order without making decisions on any of them before then considering them again in turn and reaching conclusions. It did that precisely because the criteria interact and matters relevant to some are also relevant to others.

In any event, in your paragraphs 41 to 43 you then challenge the PRP’s factual conclusion on the point; however, that is a challenge to the merits of the PRP’s decision, not its legality.

Ground 3 – criteria 7 and 8

Again, the various points you make were essentially made by the NMA as part of the PRP’s decision-making process. The Board’s consideration of them is set out in the decision document.

You now make two specific points: (1) that a regulator cannot “adopt” a standards code “in whose formulation and maintenance it played no part”; and (2) the words “serving editors have an important part to play” mean that there must be serving editors on a regulator’s code committee.

As for (1), you assert (in your paragraph 48) that criterion 7 requires that the body applying for recognition must have formulated and adopted its own standards code such that a regulator’s board cannot take responsibility (in the requisite sense) for a code which another body formulated or has also adopted.

You base that argument (your paragraph 50 and 51) on passages setting out recommendations in the Leveson report (and things which you say Leveson "intended" or "envisaged") which are simply not part of the Charter criteria against which the PRP assesses applications.

As you correctly recognise, the preamble to the Charter itself contemplates that the board of a new regulator could put forward and take responsibility (in the requisite sense) for the Editors Code as its initial standards code. So the suggestion that a new regulator must first develop its own separate standards code and cannot adopt an existing standards code (and in particular the Editors' Code) is plainly incorrect. Your suggestion that that was somehow time-limited in application is not part of the Charter.

We are also entirely unclear as to why you contemplate an interpretation of the Charter that would require multiple regulators to have different standards codes, rather than allowing for the situation where different regulators use the same code.

You also suggest (your paragraph 53) that the PRP could not assess IMPRESS in relation to one standards code while IMPRESS consults on the possible adoption of another. We do not understand the basis for that suggestion. There is certainly no such limitation in the Charter. As the PRP has made clear, if IMPRESS adopts a new or amended code at any point, then its continuing status as an approved regulator would depend on the PRP being satisfied that the code in question met the requirements of the Charter. There is nothing in the Charter to support your contention that the code by reference to which the initial assessment is made must then remain unchanged forever.

As for (2), you contend (your paragraph 56) that criterion 7 requires that there must be at least one serving editor on a regulator's code committee. That is not what criterion 7 says. As explained in the decision-document, criterion 7 is not limited in that way, requiring only that serving editors have an important part to play in the overall process of formulating and adopting a code. Your suggestion that this aspect of criterion 7 was based on the Leveson recommendations is irrelevant given that it is the criterion which the PRP must apply, not the recommendation. As it happens, it is also incorrect given that the words in question were not in any event part of the Leveson recommendations.

PRP's response

In the light of what the PRP set out in its decision document and as above, the PRP does not accept that it has acted unlawfully as you allege in your letter, at all.

It follows that the PRP does not intend to withdraw its decision.

The PRP will defend any proceedings which the NMA brings based on the points in your letter.

Information and documents

As noted above, the documents to which you refer are already available from the PRP's website.

Legal advisors

We note you act as the NMA's legal advisors in this matter.

Please continue for now to correspond directly with the PRP on this matter. We will let you know if we engage external legal advisers to act on our behalf.

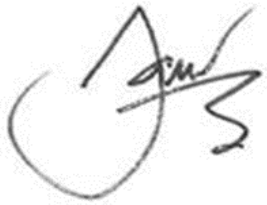
Interested Parties

We agree that IMPRESS would be an interested party in a judicial review challenge to the legality of the PRP's decision.

ADR proposals

You contemplate discussions between the NMA and PRP on this matter. As the NMA is fully aware, the PRP has at all times been willing to have discussions with any stakeholders about any aspect of its work. That remains the case. The NMA has not so far taken up that invitation.

Yours sincerely,



David Wolfe
Chair
Press Recognition Panel