

Dr David Wolfe QC

Chair, Press Recognition Panel

By email

2<sup>nd</sup> June 2016

Dear Dr Wolfe

We are writing in response to the PRP's second call for evidence on the application of the IMPRESS regulator for Recognition under the terms of the Royal Charter.

We are all academics or otherwise experts, many of whom gave evidence to the Leveson Inquiry, and are thus well-versed in understanding the purpose and context of Leveson's recommendations and how they might best be interpreted in areas where there is room for contention.

Any relevant conflicting affiliations are set out below.

We are writing specifically in respect of some of the points made by the News Media Association in their [submission](#) during the first call for evidence. Paragraphs 25 – 62 of their submission criticise IMPRESS's funding arrangements as being in breach of the sixth criterion in the Royal Charter's Recognition Criteria (schedule 3). We anticipate these points may be made again by the NMA (as indeed they do in their [submission](#), published today, to this second call of information) and others.

1. The NMA's position on criterion 6 is contrary to the approach advocated by the Leveson Report and thus not an appropriate interpretation of the Charter's 6th criterion.

### Relevance of the Leveson Report

2. The PRP relies on the wording of the Charter when carrying out its functions. But where there are disputed interpretations of wording in the Charter, and where this is significant in terms of recognition decisions, the PRP should turn to the Leveson Report to assist it in coming to a decision. The PRP has acknowledged this and, for example, when drawing up the Recognition Matrix indicators the Panel drew on, "*concepts articulated through the narrative of the Leveson Report*" (see points 45 – 46 of [consultation document on how the PRP would determine applications](#)).

### Criterion 6

3. From Schedule 3 of the Royal Charter:

*Funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry. There should be an indicative budget which the Board certifies is adequate for the purpose. Funding settlements should cover a four or five year period and should be negotiated well in advance.*

- [Schedule 3, Section 6, Royal Charter on Self-Regulation of the Press](#)

The NMA's [submission](#) to the PRP's initial consultation on IMPRESS's application.

References below to paragraphs, except where otherwise indicated, relate to this document.

4. Paragraph 25 claims that criterion 6 can be taken to mean “*a funding system whereby the industry to be (self-) regulated pays for the regulatory structure or at least agrees to the means by which it is to be funded*”. Their wording is not a direct quote from the Charter and that it is not what the Charter says. The Charter specifically does not use the phrase “funding system” because such a phrase implies an established body to manage the funding of the regulator, which was a proposal explicitly criticised (Paragraphs 51 – 56, Leveson Report, [Executive Summary](#)) by Sir Brian Leveson in his report. The “system” referred to in the criterion is the regulator alone. The NMA have, as it would readily admit, a commercial and political interest in promulgating a “re-interpretation” of the Charter.
5. Paragraph 25 goes on to say “*this is not a body set up or supported by the industry*”. But Criterion 6 does not specify that regulators must be either of these so this comment is irrelevant. Even if this was an actual Charter criterion, the IMPRESS body is clearly supported by several publications who are part of the industry and are members of the regulator. So even by the NMA’s own criteria IMPRESS passes the test. They state “*the few prospective members are not remotely representative of the industry*”. This claim is not substantiated but “representative” is ultimately a subjective and changeable matter. Large newspapers are also not necessarily representative of the industry. In any event, perhaps in part because of these problems, neither the Leveson Report nor the Charter requires members of a regulator to be “representative” so this critique of IMPRESS is irrelevant.
6. In essence the question is whether the wording in the Charter (and in the Leveson Report) for this criterion was intended to mean that only a regulator that is approved by the industry as a whole (or by the large corporate groups represented by the NMA) can be recognised. That cannot have been the intention of the Report or of the Charter, otherwise both would have been explicit that the large corporate groups could exercise a veto over the creation/recognition of regulators by withholding their support. The consequence of that would be that only one regulator – that supported, created or subscribed to by the large newspaper groups would ever be recognised. In contrast, the Report envisaged more than one regulator existing and being recognised, possibly catering for different elements in the marketplace. This would most likely to arise, the Leveson Report presciently recognised, when the industry as a whole failed to engage with the recognition process: “*It should be possible for the recognition body to recognise more than one regulatory body, should more than one seek recognition and meet the criteria, although this is not an outcome to be advocated and, should it be necessary for that step to be taken, would represent a failure on the part of the industry*” ([Leveson Report Executive Summary](#), para 32).
7. Paragraph 25 concludes by saying “*it would be unreasonable and unfair to grant the body recognition*”. The NMA at this point appears to be appealing to wider notions of “*reasonableness*” and “*fairness*” in the PRP’s decision to grant recognition, which are, if not irrelevant to the NMA’s case, damaging to it. If the PRP were to be drawn into such considerations it would be re-running the Leveson Inquiry. While the PRP’s decision needs to be rational it should not be for a trade body like the NMA, with a commercial interest, to seek to impose its own interpretation of what is fair and reasonable on the PRP.
8. Paragraph 27 alleges that IMPRESS’s funding arrangements were not settled in agreement with the industry, as criterion 6 of the Charter says “*should*” happen. There are three clauses in criterion 6: (a) funding should be agreed and settled between board and industry, (b) there

should be an indicative budget and (c) funding settlements should cover a four or five-year period.

- i. The NMA makes the false assumption that clause (a) must precede chronologically (b) and (c). But there is no good reason for believing that that must be the case. Indeed, IMPRESS have complied with (b) and (c) in other areas of their application, so those are settled. Clause (a) is complied with as part of the process of publishers agreeing to be regulated by IMPRESS. Any publishers who do not “agree” with the funding arrangements IMPRESS have laid out will, by definition, not seek to be regulated by them, as this is the nature of the voluntary system in place. Signing up to IMPRESS regulation is the act of agreeing and settling funding arrangements.
- ii. Turning to the context of the Leveson Report, the purpose for clause (c) specifically, is that publishers should not be able to manipulate the regulator in any way through funding arrangements. This was identified by Leveson as one of the key deficiencies of the previous PressBoF-PCC system and is present in the RFC-IPSO system. Specifically, the criteria were included to promote the independence of the regulator from the industry, such that it could properly fulfil its purpose. The PCC was unable to be an effective regulator partly because its independence was compromised by the intermittent manner, and inadequate amount, of its funding.

Leveson said:

*In reality, the functional independence of the PCC was restricted by the limited resources which the industry supplied.*

...

*It is also clear to me that the funding made available to the PCC is barely sufficient to enable it to conduct its complaints handling functions effectively. Further, in so limiting the funding available to the PCC, the organisation was unable to exercise other functions that might be properly expected of a regulator, for example, in relation to investigations into industry conduct, and the promotion of standards.*

- [Part J, Chapter 4, Para 3.4 – 3.7, Leveson Report](#)

Interpreting criterion 6 so as to give an “industry veto” over funding arrangements would be contrary to the Leveson Report.

- iii. A key reason for the inclusion of the term “Funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry” is so that the funding is fair, and fairly distributed. In the case of IMPRESS this is, essentially, moot since the funding for the initial period is provided by a Foundation Independent Charitable Trust.

9. Paragraph 30 states:

*“Although the Leveson Inquiry considered a number of other means of regulating the press, only to reject them in favour of its own model of independent self-regulation, it does not appear that anyone at any time suggested to the Inquiry a system of regulation which would depend for the first five years of its operation on a rich private donor (as turns out to be the case with IMPRESS - see below). Such a system raises two*

*fundamental issues of principle which are dealt with below: independence and credibility."*

The submission does not in fact then deal with the issue of credibility "below", perhaps because they realised that it was a subjective matter and one not relevant to the criterion at hand.

10. The NMA is right to point out that Leveson only considered funding for regulators by the public purse (which he rejected as his preferred option) and by industry members of the regulator, and did not envisage a system of regulation funded to a significant degree by a third party such as a charity. He therefore did not rule that out. Crucially the content and context of his report makes it clear he would have had no rational reason to rule it out. This is because his concerns about funding related exclusively to independence (from the Government and the industry members of any regulator), as can be seen from Part K Chapter 7 para 4.14:

### **Funding**

*4.14 The industry, through Lord Black, has made a principled point that the industry should fund self-regulation without requiring input from the public purse. Certainly, I agree that any industry established independent regulatory body must be funded by its members. There are, however, some important points to be made about funding. The body will only be able to do what it is funded to do. If it is to be genuinely independent in operational and strategic terms, it must have both some certainty and some influence over the level of its funding across a reasonable period. Practice in the industry has been for an industry body (PressBoF) to set, and levy, the membership fees for self-regulation. In my opinion there is no need for such a body to exist at all: it would be perfectly possible for the regulator to set its own fees and collect them directly from its members, taking account of the financial position of the industry. Equally, however, there is not necessarily any problem of principle with an industry body acting as a coordinator.*

- [Part K, Chapter 7, para 4.14, Leveson Report](#)

11. So if the funding arrangements between a regulator and a third party funder included the necessary "Chinese walls" and guarantees relating to independence of decision-making and of operation of the regulator, then the system would seem logically to have even more independence than the system he envisaged – where the regulator is funded by individual industry members, and certainly more than the model supported by the NMA where the funding comes through a corporate body which has significant control over the way the regulator operates (e.g. the Standards Code, the existence of arbitration, changes to its rules and governance, etc.).
12. In relation to this point, therefore, what the PRP needs to do is solely to determine whether IMPRESS has operational independence from its funder(s).

IMPRESS will not "depend... on a rich private donor". IMPRESS has received a guaranteed funding stream for 5 years from an Independent Charitable Trust (IPRT) under arrangements whereby the funding is not dependent on any operational matters or actions of the regulator. In addition to the arrangements mentioned at para 11 above, the IPRT's charitable objectives include upholding "best practice in journalism" and "establishment and support of an independent press regulator or independent press regulators to be established and conducted for the whole or any part of the United Kingdom in accordance with the recommendations and principles set out in the Leveson Report". Interference from the IPRT in IMPRESS' operations

would constitute a clear violation of these objectives and could lead to regulatory action from the Charity Commission, so there is a “double-lock”. Thus IMPRESS is in no way “dependent” on an on-going basis in the way implied by the NMA.

Furthermore, to argue that IMPRESS will “depend” on a rich donor simply because the funding originates in that way (and without reference to the safeguards and guarantees of independence of operation and decision-making) is to concede the somewhat stronger case that any purely industry-funded regulator will depend on wealthy individuals or large companies (who own publishers). In the case of industry-funding, not only is there no “double-lock” on independence as outlined above, but the funders have a direct vested commercial interest in the regulator’s decisions and operations.

13. Paragraphs 31 – 35 make a series of assumptions about funding which are unsubstantiated, and do not relate to criterion 6.

14. The NMA say at paragraph 36:

*"The potential for a funder to interfere with a regulator's independence was recognised by Sir Brian Leveson. Under the heading "Independence of funding" in Chapter 3 of Part K of his report, he said this (albeit in a somewhat different context, as explained below):*

*"It is easy to see how a regulator which is dependent for next year's funding on the goodwill of its regulated bodies might be expected to regulate with a light touch, and to seek to avoid conflict - particularly with those publishers who have most influence with the [funding body]. I noted earlier that the composition and appointment processes of the [funding body] remain entirely opaque, so the public will never even know who wields that influence and, therefore, who the regulator is most likely to want to propitiate."*

And at paragraph 37:

*"The context in which Sir Brian expressed these remarks was his analysis of the regulator model then proposed by the PCC and PressBof. However, although he was addressing a situation whereby regulated entities provided funding for the regulator, his concerns about independence would apply also to a situation in which a third party is funding the regulator. Indeed, there is surely an even greater risk of influence in a situation where, as here, one rich individual is providing the regulator's funds as opposed to a situation such as the one under consideration by the Leveson Inquiry in which funding for the proposed regulator was to be provided by a multiplicity of publishers, meaning that no single publisher was likely to be in a position to exercise undue influence unless acting with others."*

These points are deeply flawed.

15. As the NMA concedes, Sir Brian was expressing his concerns about the potential for problems of independence of a model – proposed by the industry (including the NMA’s founder bodies the NPA and the Newspaper Society) – where an industry body was the funder and exercised a high level of control over the regulation through its funding powers and other powers. The NMA’s founder bodies claimed at the time that such a system provided the necessary independence

and continues to do so through its expressed view that IPSO (financed and controlled through the RFC) is sufficiently independent of the press.

16. It is therefore inconsistent and contradictory for the NMA to argue that a funding arrangement from a third party charitable trust...

- a) with no commercial or other interest in the decisions of the regulator
- b) where attempts to influence the regulator would be a breach of its own objects, and
- c) whereby the Regulator's governance arrangements are such that there is no mechanism for the funder to control, or influence over the regulator,

...is *less* independent than the model that Leveson was criticising and which the NMA advocates.

17. Furthermore, the NMA in its argument seeks to extend Leveson's meaning far beyond anything Leveson actually said, and beyond anything that is contained within the criteria. It is not for the NMA to extend the Leveson criteria, or for the NMA to propose that the PRP make assumptions about a scenario that Leveson did not account for. Leveson sought to create a system of self-regulation that was independent and effective on behalf of the public. The PRP should evaluate the financial independence of IMPRESS in its first four to five years, and make a judgement based on that evaluation, not on the extension and reinterpretation of Leveson and the Charter by the NMA.

18. The time for consultation over what became criterion 6 and the rest of the Recognition Criteria was during the Leveson Inquiry, and the NMA had a chance to make representations then. But criterion 6 as it stands now does not in any way rule out external funding arrangements in addition to industry funding. Even in the NMA's shortened (and thus misleading and tendentious) Leveson quotes, it is clear that he recognises that regulators may require and are free to seek external funding.

19. Paragraphs 60 – 62 say:

*The position of the PRP*

*60. From 3 November 2017 the PRP will be permitted to charge fees for cyclical reviews of approved regulators. Paragraph 11.3 of the Royal Charter provides that the aim of the scheme for charging fees to regulators "shall be for the [PRP] to recover its full costs ... for conducting cyclical reviews."*

*61. It follows that if IMPRESS is recognised, the PRP will be expected to look to IMPRESS for the cost of its first review which will be due two years after recognition. That will mean some time in 2018. IMPRESS has projected that it may be charged £220,000 a year by the PRP from 2017 (the maximum permitted sum): see page 9 of its Executive Business Plan.*

*62. As explained above, IMPRESS will be financially dependent on Max Mosley for the foreseeable future. It follows that in the absence of any other approved regulator (of which there is no realistic prospect), the PRP (if it recognises IMPRESS) will also be financially dependent on Mr Mosley. If Mr Mosley should decide no longer to fund IMPRESS, the PRP will have no other source of funds from which to derive its fees. 7 So Mr Mosley's funding of IMPRESS affects not only the*

*independence of that body, it would also affect the independence of the PRP. Just as Mr Mosley has the power to close down IMPRESS, so he would have the power to close down the PRP. In other words, the PRP cannot credibly claim it is independent if it recognises a body that relies for its funding on Mr Mosley.*

Here the NMA appear to make the remarkable claim that the PRP cannot be independent if it recognises IMPRESS and then charges IMPRESS for the cyclical review because IMPRESS's funding comes from a Trust which has a major donor, even despite the "double-lock" arrangements in place to prevent any influence. Again, this isn't covered in the Charter criteria so it is irrelevant. But regardless of the fact that this is based on assumptions about IMPRESS's future funding, if IMPRESS came to be funded primarily by publishers then by the same argument both IMPRESS and the PRP would not be independent of those publishers.

Indeed, all systems of regulation where a regulator ultimately receive its funding from those it regulates (which is a common model) – or in fact from anywhere other than guaranteed anonymous donations – would be affected by the same argument.

## **Summary**

20. In our view there is nothing in the NMA's previous submission on IMPRESS's compliance with criterion 6 that gives adequate grounds for the PRP rejecting the IMPRESS application.

## ***Signed***

Prof Julian Petley, Brunel University, (Declaration: Chair, Campaign for Press and Broadcasting Freedom)

Prof Ivor Gaber, University of Sussex

Dr Martin Moore, King's College, London (Declaration: former Director of the Media Standards Trust)

Prof Chris Frost, Liverpool John Moores University (Declaration: Chair of Ethics Committee, NUJ)

Prof Steven Barnett, Westminster University (Declaration: Director of Hacked Off)

Prof Des Freedman, Goldsmiths, University of London

Prof Natalie Fenton, Goldsmiths, University of London (Declaration: Director of Hacked Off)

Prof Brian Cathcart, University of Kingston (Declaration: Director of Hacked Off)

Prof James Curran, Goldsmiths, University of London

Prof Gavin Phillipson, Durham University (Declaration: Member of Code Committee IMPRESS)

Dr Paul Wragg, Leeds University (Declaration: Member of Code Committee, IMPRESS)

Prof Justin Lewis, Cardiff University

Prof Alastair Mullis, Leeds University (Declaration: former member, IMPRESS Project Board)

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