**Subject:** Success of the recognition system

**Date:** Wednesday, 12 July 2017 at 11:49:49 British Summer Time

**From:** Christopher Whitmey

**To:** Consultation

**Attachments:** Should the Crime and Courts Act section 40 be in force by now.pdf

Dear PRP,

Last evening I lodged an Internal Review request with the DCMS about their refusal to answer my FOI request about their *Consultation on the Leveson Inquiry and its implementation.* Just finished it when I saw your Tweet about your consultation!

You say, "we would like to consider the full range of perspectives about the success of the recognition system so far.". Depending upon the outcome of your recent court case I would say success is very, very limited.

Until section 40 is brought into force I cannot see it being otherwise. Those who have signed up with Impress have a good arbitration service available. This gives partial protection from a legal costs risk. If a court deems a claim to be unsuitable for arbitration there is still the costs risk. I believe this would not be the case if section 40 was in force.

My views on section 40 are best expressed in my Internal Review request to the DCMS. Please see the attachment.

I have no objection to my name and views being published.

Thank you for all you do to ensure a fair and free press.

Yours sincerely,

Christopher Whitmey

**Should the Crime and Courts Act section 40 be in force by now?**

On the 23 June 2017 the Department of Culture Media and Sport replied to a Freedom of Information request, posted on WhatDoTheyKnow, concerning the government's Consultation on the Leveson Inquiry and its implementation.

The request concerned 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;

(b) Government should fully commence section 40 now;

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

(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;

(e) If Government does not fully commence section 40 now, Government should partially commence section 40, and ask Parliament to repeal those elements that apply to publishers outside a recognised regulator.

1. Can the respondents to this question be placed in various categories?

2. If 'Yes' what are the categories? (e.g. individual citizens, news publishers)

3. How many of each category agreed with each of the above statements?

4. If 2= 'No' how many respondents in total agreed with each of the above statements?

The refusal said: We have dealt with your request under the Freedom of Information Act 2000 (the Act). We can confirm that the Department holds this information. However, although the consultation period has finished, the results of the consultation are still being used to inform the Government's decision making process regarding this issue. Therefore, we have determined that this information is exempt from disclosure under section 35 (a) (formulation of government policy) of the Act.

The Internal Review request presumed that 35(a) should read 35(1)(a). On that presumption an internal review has been requested because:

(A) on the true construction and meaning of the Crime and Courts Act 2013 sections 34-42 the implementation of section 40 is not a question of government policy; or in the alternative

(B) the government has concluded its considerations and decided its policy; or in the alternative

(C) if the government is still considering its policy then the release of the factual information sought would in no way affect the formulation of such policy as it is merely a statistical analysis and the public interest prevails.

The submissions for each of these alternative grounds is as follows.

**(A) On the true construction and meaning of the Crime and Courts Act 2013 sections 34-42 the implementation of section 40 is not a question of government policy.**

The Crime and Courts Act 2013 ('CCA') sections 34-42 inclusive are headed "Publishers of news-related material: damages and costs" and form a complete entity for implementation as a whole and not a question of policy.

The CCA Explanatory Note sets out Parliament's purpose and intent of sections 34-42 (underlining added):
*Sections 34 to 42: Publishers of news-related material: damages and costs*
56. On 29th November 2012 the Report of An Inquiry into the Culture, Practices and Ethics of the Press was presented to Parliament (HC 780) ("the Leveson Report"). In the report, the Rt. Hon. Lord Justice Leveson makes a range of recommendations to reform the regulatory framework for the press, creating a new framework for press regulation, with the principle of industry self-regulation at its heart. The new framework proposed is for a system of voluntary self-regulation, overseen by a recognition body established by Royal Charter and strengthened by a series of incentives for members of the press in the application of costs and exemplary damages, encouraging them to join a recognised regulator. Sections 34 to 42 and Schedule 15 set out the new system for exemplary damages and costs, as well as defining those who meet the definition of a 'relevant publisher' to whom the new system of exemplary damages will apply.

CCA section 67 (7) *Sections 34 to 39 come into force at the end of the period of one year beginning with the day on which a body is established by Royal Charter with the purpose of carrying on activities relating to the recognition of independent regulators of relevant publishers (as defined by section 41)*.

Such a body, the Press Recognition Panel ('PRP'), was formed on 3rd November 2014. To comply with the Interpretation Act section 12(1) and CCA section 67(7) on 4th November 2015 The Crime and Courts Act 2013 (Commencement No. 14) Order 2015, signed on 27th October 2015 by Edward Faulks, Minister of State, Ministry of Justice, brought into force s.41 with Schedule 15 and s.42, as they related to sections 34-39.

Interpretation Act 1978 section 12 (underlining added): *Statutory powers and duties*
*12 Continuity of powers and duties.*
*(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires*.

CCA Commencement No 14 was a statutory duty to be performed to comply with the true meaning and construction and Parliament's purpose in enacting CCA sections 34-42 in accordance with section 67(2) occasioned by the formation of PRP and not a matter of discretion or government policy.

CCA section 67(2) *Subject as follows, this Act comes into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes and, in the case of Part 4 of Schedule 16 and section 44 so far as relating to that Part of that Schedule, for different areas*.

CCA Section 40(6) *This section does not apply until such time as a body is first recognised as an approved regulator.*

In context of the intent and purpose of CCA sections 34-42 the true construction and meaning in section 40(6) of '*does not apply until such time as a body is first recognised as an approved regulator*' is no different in substance or intent from '*applies from such time as a body is first recognised as an approved regulator*'.

Interpretation Act 1978 (IA) section 4 *Time of commencement.*
*An Act or provision of an Act comes into force—*
*(a) where provision is made for it to come into force on a particular day, at the beginning of that day;*

"*on a particular day*" means a day that is specifically described in the relevant Act.

On 25 October 2016 the PRP recognised a body, IMPRESS, as the first approved regulator.
By parity of reasoning with sections 41-42 and IA section 4 a CCA Commencement Order should have been issued as soon as possible after 25 October 2016, 'on a particular day', to bring section 40 into force in accordance with section 67(2). This is a statutory necessity occasioned by the formation of PRP and in accordance with the IA section 2(1) to comply with the true meaning and construction of the CCA and not a matter of discretion and/or government policy. The failure to do so frustrates the true meaning and construction of the CCA and frustrates the will of Parliament.

Dicta in *Regina v. Secretary Of State For The Home Department, Ex Parte Fire Brigades Union And Others* [1995] 2 AC 513 ('FBU') http://www.bailii.org/uk/cases/UKHL/1995/3.html support the proposition that on the true meaning and construction of the CCA 'Publishers of news-related material: damages and costs' section 40 should have been brought into force, as have sections 41-42, as the particular day prescribed in the CCA section 40(6) has come to pass.

In FBU the House of Lords: Held, (1) dismissing the appeal (Lord Keith of Kinkel and Lord Mustill dissenting), that section 171(1) of the Criminal Justice Act 1988 imposed a continuing obligation on the Secretary of State to consider whether to bring the statutory scheme in sections 108 to 117 into force; that he could not lawfully bind himself not to exercise the discretion conferred on him; that the tariff scheme was inconsistent with the statutory scheme; and that, accordingly, the Secretary of State's decision not to bring sections 108 to 117 into force and to introduce the tariff scheme in their place had been unlawful (post, pp. 551c-552b, 554f-g, 570h-571a, d-e, 572c, 573c-e, 575e-h, 578e-f).

Section 171(1) was a common form section like CCA section 67(2).

"*Therefore although the case before your Lordships turns on the construction of section 171(1) it cannot be construed in isolation. Such a widely used statutory formula must have the same effect wherever Parliament employs it. The words of section 171(1) are consistent only with the Secretary of State having some discretion: indeed even the applicants concede that he has a discretion. What is it then which suggests that there will come a time when that discretion is exhausted and that, whatever the change of circumstances since the sections in question were passed by the Queen in Parliament, the Secretary of State becomes bound to bring the sections into force? I can see nothing in the Act which justifies such an implied restriction on the discretion. ... Where Parliament intends to impose a duty on a minister to bring legislation into force under a similar formula, it expressly states the time-limit within which such power is to be exercised: see section 5(2) of the Domestic Violence and Matrimonial Proceedings Act 1976.*" per Lord Brown-Wilkinson at 550 C-D and F.

"*It is to my mind beyond doubt that in every one of these instances "may" invokes a choice and "shall" an order. Looking next at the immediate context of the word "may" in section 171(1), we find that, only a few words before, "shall" is used in its natural sense, which makes it unlikely that*

*the draftsman immediately afterwards chose "may" to convey the same meaning*" per Lord Mustill at 563C-D.

"*The continued existence of section 171(1) means that, even if there is no present duty to appoint a day, there is a continuing duty, which will subsist until either a day is appointed or the relevant provisions are repealed, to address in a rational manner the question whether the power created by section 171(1) should be exercised. This continuing duty overshadows the exercise by the Secretary of State of his powers under the Royal Prerogative.*" per Lord Mustill at 565C.

"*It is, after all, the normal function of the executive to carry out the laws which Parliament has passed, just as it is the normal function of the judiciary to say what those laws mean*." per Lord Lloyd of Berwick at 568H.

"*Parliament could not tell how long it would take to make the necessary regulations. So instead of providing that sections 108 to 117 should come into force after six months or a year, or other finite period, it left the date blank. It was for the Home Secretary to fill in the blank when the necessary administrative arrangements had been put in place.*" per Lloyd of Berwick at 570F

"*They* [sections 108 to 117] *contain a statement of Parliamentary intention, even though they create no enforceable rights. Approaching the matter in that way, I would read section 171 as providing that sections 108 to 117* ***shall*** *come into force* ***when*** *the Home Secretary chooses, and not that they* ***may*** *come into force* ***if*** *he chooses. In other words, section 171 confers a power to say when, but not whether.*" per Lloyd of Berwick at 570H – 571A (emphasis as in original)

"*Ministers must be taken at their word. If they say that they will not implement the statutory scheme, they are repudiating the power conferred on them by Parliament in the clearest possible terms. It is one thing to delay bringing the relevant provisions into force. It is quite another to abdicate or relinquish the power altogether. Nor is that all. The Government's intentions may be judged by their deeds as well as their words. The introduction of the tariff scheme, which is to be put on a statutory basis as soon as it has had time to settle down, is plainly inconsistent with a continuing power under section 171 to bring the statutory scheme into force*." per Lloyd of Berwick at 572D

"*The inescapable conclusion is that the Home Secretary has effectually 'written off' the statutory scheme and that once the tariff scheme has been introduced, there would be no realistic prospect of him being able to keep the exercise of the commencement day power under review. By setting up the tariff scheme the minister has set his face in a different direction. He has struck out down a different route and thereby disabled himself from properly discharging his statutory duty in the way Parliament intended. For this reason the new scheme is outside the powers presently vested in him. I would dismiss both the appeal and the cross-appeal*." per Lord Nicholls of Birkenhead at 578F

In the Criminal Justice Act 1988 there was no indication within the Act when sections 108 to 117 should come into force. CCA section 40(6) in its true meaning and construction clearly states that section 40 should have come into force the day Impress was recognised as an approved regulator. Successive Ministers have unlawfully '*struck out down a different route*' and treated it as a matter of policy and not '*properly discharging his statutory duty in the way Parliament intended*'.

**(B) The government has concluded its considerations and decided its policy.**

On the 18 May 2017 (13 days before the FOIA request on 31 May 2017) the Government published its General Election manifesto and categorically stated, "*We will repeal Section 40 of the Crime and Courts Act 2014, which, if enacted, would force media organisations to become members of a*

*flawed regulatory system or risk having to pay the legal costs of both sides in libel and privacy cases, even if they win.*"

The Second Annual IPSO Lecture Thursday 6th July, 2017, Church House, London was delivered by Rt Hon John Whittingdale OBE MP (former Secretary of State DCMS). The lecturer categorically stated, (underlining added) "*[E]lected on a manifesto which made it quite plain that a decision had been taken by the then Secretary of State not to proceed with the establishment of the second part of the Leveson inquiry, and that section 40, after having been subject to consultation, for which we still await the publication, but the decision had been taken that it should be repealed*."

By the election manifesto and the IPSO lecture the department is estopped from claiming that government policy concerning section 40 is still being formulated.

**(C) If the government is still considering its policy then the release of the factual information sought would in no way affect the formulation of such policy as it is merely a statistical analysis and the public interest prevails.**

The information requested is statistical information. It is merely a factual numerical analysis of the various categories of respondents to the consultation. Section 35(4) specifically provides that there is particular public interest in disclosing background factual information. See ICO Guidance Government policy (section 35) page 25 para. 91.

The factual numerical information requested does not require a safe space for evaluation nor would its release have any chilling effect on any policy discussion still continuing.

The response to the Internal Review is awaited.

Christopher Whitmey