Hacked Off response to the PRP Call for Information on the State of Recognition

This has been submitted subsequent to the rejection by the Court of the Judicial Review by the NMA of the PRP's recognition of IMPRESS, and in the light of developments in October relating to the Data Protection Bill.

Summary

1. The PRP's position in its 2016 Report was correct and the situation remains unchanged: the PRP should reiterate its position that the recognition system has not been brought into effect as agreed and that section 40 must be commenced for the agreed system to be considered operational. As the PRP told Parliament in October 2016, in its first State of Recognition Report, "Until [section 40 is commenced] free speech and the public interest can not be safeguarded."
2. Although the Royal Charter requires the PRP to do no more than give a binary judgment on whether all major publishers have joined a recognised regulator or not (leaving the PRP free to elaborate if they choose), the PRP was correct in 2016 to go beyond that and give a broad explanation for why that was the case, as well as suggest basic points to remedy the failure. The PRP should do so again and, consistent with Leveson Report, the PRP's Report should suggest further incentives are necessary, which Leveson proposes, to remedy the failure.
3. The PRP must seek to fix the error in the Government's Data Protection Bill, which designates IPSO's Code instead of the code of a recognised regulator. The purpose of the PRP's existence is to definitively judge the independence and effectiveness of a regulator. Not only is the absence of reference to a recognised regulator's code from the bill a serious error in light of the Government's official position of support for the recognition system, but the inclusion of IPSO's code specifically undermines the role of the PRP. The relevant provision in the bill exists so that publishers can refer to a credible code in their determination of the public interest. But the only measure of the credibility of such a code is in the recognition status of the regulator enforcing it (and who is therefore responsible for it under the terms of recognition). IPSO does not meet the tests of recognition, and doesn't even have responsibility for the Editors' Code itself. The most appropriate response from the PRP, therefore, is to set out its clear and specific objection to the designation of the Editors' Code and endorsement of the inclusion of a recognised regulator's code in its place.
4. Although the system has not yet been brought fully into effect (by virtue of the non-commencement of s40), "Failure" as defined in the Royal Charter has nonetheless occurred. Critically the Secretary of State by continuing to hold a "sword of Damocles" (the threat of commencement of section 40) over the press, has given itself inappropriate influence over the press and this in itself constitutes a threat to free expression. In the light of this, the PRP was correct in 2016 to argue that Parliament must consider a statutory solution as Leveson said should happen in the event of failure. Given that circumstances are unchanged, and we are now two years on from the launch of the PRP, the PRP should reiterate that Parliament must legislate to break the deadlock.

Detail

The position remains unchanged and section 40 should be commenced immediately

1. It remains the case, as with last year, that most significant news publishers have not joined a recognised regulator.
2. The argument perversely used by the Government in favour of non-commencement, including by the Secretary of State at a recent Committee appearance, is that Parliament did not envisage large scale non-compliance when it enacted the incentives and that incentives should not be used when there are so many actors who have been unmoved in the absence of those incentives.
3. Not only was that view not expressed by any Parliamentarian at that time (or anyone else, to our knowledge), but it is plainly nonsensical. If Parliament did not envisage non-compliance, then incentives would not be needed at all. The whole point of an incentive, by definition, is that it unbalances outcomes to encourage one course of action over another. The scale of the lack of compliance is the strongest argument to bring forward the incentive.
4. In addition, of course, section 40 also exists to provide access to justice for potential media claimants (and regulated defendants) through its costs-shifting effects and promotion of recognised arbitration.
5. Our view is that the PRP should rebut and refute the Government's argument which is essentially that the incentives were never intended to operate as incentives. The PRP has authority in the matter of the Leveson system, and it is up to the Panel to make clear why incentives were recommended by Leveson, and comment on whether they are needed.

Further incentives should be considered

1. Leveson recommends other possible incentives in his report. While the PRP are not obliged by the Charter to go beyond a statement of success or failure, the PRP were correct last year to publish a more detailed report which included explanation of the current circumstances and suggestions for moving forward. Our view is that the PRP should continue to provide more advice and recommendations in its Report and when doing so should be guided by the Leveson Report.
2. Given the Government's failure to implement the existing incentive, it is incumbent on the PRP, in our view, to advise on some alternatives to make the system work.
3. Leveson recommends other incentives to encourage the system to work. Apart from section 40, and the exemplary damages incentive, he also suggests the variable application of data protection regulation to incentivise membership of an independent, recognised regulator.
4. There is an opportunity for precisely this sort of reform in the Data Protection Bill currently before Parliament.
5. Therefore, in our view, the PRP should raise the fact that other incentives were suggested by Leveson, and call for Parliament to legislate for further incentives, such as differential application of the data protection regime to those relevant publishers who are regulated and those who are not.

The Data Protection Bill must de-designate the "IPSO code" and designate "any code operated by a recognised regulator"

1. There is a surprising inclusion in the Data Protection Bill of a provision which enables publishers to rely on the Editors' Code in determining the public interest (it actually says "IPSO Editors' Code", but the Editors' Code isn't owned by IPSO and is instead owned by the Regulatory Funding Company, the body of newspaper executives which controls both the Code and IPSO). It makes no reference to the code of a recognised regulator, despite the IMPRESS code having been adopted by IMPRESS, and approved by the PRP as compliant by the PRP prior to the publication of the Bill.
2. The absence of the Code of a recognised regulator is a serious omission given the Government's official position of support for the Charter system. The system was established by Parliament on a cross-party basis and the relevant statute voted for by an overwhelming majority in both Houses. The only manner by which the code of a self-regulator can be judged is by its ownership, formulation, and enforcement by a recognised regulator. Any other code has no worthwhile status.
3. For this reason, the inclusion of the Editors' Code further undermines the Charter system. The Editors' Code was drawn up by a group of newspaper editors with no independent accountability (as provided by the PRP). It might as well have been jotted down on the back of a napkin by Rupert Murdoch. To imagine such a code, which exists outside the transparent and reliable Leveson recognition system, carrying any status, is to undermine that system.
4. The PRP, therefore, should work with Parliament and the Government to fix this error, and both include provision that "any code operated by a recognised regulator" may be relied upon, and remove the Editors' Code. Only this will protect the integrity and functioning of the Charter system.
5. If the PRP were not to oppose the inclusion of the Editors Code alongside the Code of a recognised regulator in the statute, then this would amount to the PRP conceding that such a code had equivalent legitimacy. The PRP was established by Parliament precisely to differentiate the legitimacy of self-regulators and their Standards Codes for the press.

The PRP should reiterate its calls for a statutory "backstop regulator" more forcefully

1. Leveson recommends that if there is "failure": i.e. if at least one significant publisher fails to join an independent recognised regulator, then Parliament should legislate to make the Leveson system compulsory.
2. Although the current system has yet to be implemented, there can be no doubt that on the basis of Paragraph 10 of Schedule 2 of the Charter, "failure" has occurred. There is at least one significant publisher which is not a member of a recognised regulator.
3. Therefore, the PRP was correct last year to recommend that Parliament consider legislation to make the system work. The PRP should be more forceful this year: another year has passed, and there has been no change, and call for Parliament to legislate to deliver the Leveson system.