Briefing to Peers – December 2017

Press Regulation and the Data Protection Bill

This note provides some background information about the Press Recognition Panel, press regulation, and the Data Protection Bill which is currently progressing through the House of Lords.

The Leveson Inquiry

The Leveson Inquiry (2011-12) examined press behaviour following the public outcry over illegal phone-hacking and after it emerged that there had been many victims of press intrusion.

A key recommendation of the report was the creation of a 'genuinely independent and effective system of self-regulation'. The new system was debated in Parliament and it received cross-party agreement. It involved creating the Press Recognition Panel (PRP) by Royal Charter in October 2013, as an independent body to oversee press regulators.

The PRP's independence

The PRP is entirely independent of politicians and the press. The PRP board was appointed through an independent process. The Charter itself can only be changed (or any board members removed) by a two-thirds majority of those who vote in the House of Commons, the House of Lords and the Scottish Parliament, and with the unanimous agreement of the PRP board. There are no mechanisms by which Government, politicians or publishers could influence the way the PRP discharges its obligations.

Since it was established, the PRP has demonstrated its commitment to transparency and shown that it's decisions cannot be unduly influenced. The PRP has seen no evidence to suggest that its independence has ever, or could ever, be compromised.

The PRP's role

The Charter lists 29 criteria for regulators which, if met, ensure they are independent, properly funded and able to protect the public. The PRP's role is to assess regulators against all 29 criteria. The criteria are interlinked and they must all be met for a regulator to recognised. Where, following an ad hoc or cyclical review, the PRP concludes that a regulator no longer meets any of the Charter criteria, the PRP must withdraw recognition.

The PRP's powers are specific and limited. The PRP is not a regulator. The PRP has no control over the press and cannot tell any press organisation, publisher or regulator what to do.

Approved regulators

There can be more than one approved regulator. Regulators choose whether or not they want to apply to be assessed against the Charter.

In October 2016, the PRP board recognised IMPRESS as an approved regulator following a rigorous assessment process. In October 2017, a Judicial Review confirmed that this decision was made independently, transparently and lawfully, and that the PRP had interpreted and applied the Charter correctly.

Relevant publishers

The new system of regulation applies to what the Crime and Courts Act 2013 terms 'relevant publishers' namely businesses that publish news-related material that is written by different authors and that is subject to editorial control. This includes international, national, regional, local and hyperlocal titles, operating across print or online or both. It encompasses what might be termed the 'traditional print press' as well as the range of newer publications that are proliferating due to the internet.

The new system of regulation applies to any and all news publishers that can be sued in the courts of England and Wales. For global companies established overseas, if they have a legal base in England or Wales sufficient for them to be subject to the jurisdiction of the courts here, the system applies to them.

Arbitration

A key recommendation of the Leveson Report was to ensure that ordinary members of the public have affordable access to justice when they are wronged by a publisher – for example in civil cases of libel, slander, breach of confidence, misuse of private information, malicious falsehood or harassment.

Arbitration is far cheaper than bringing a legal challenge in court. As with the courts though, there is a filter system for arbitration, and claimants would need an arguable case before they could take a claim forward through arbitration. Vexatious or frivolous challenges would be filtered out.

Under the Charter, an approved regulator's arbitration scheme must be mandatory for all publishers. A regulator cannot choose which publishers are covered by the scheme, and publishers cannot choose which cases they allow through to arbitration.

Incentivising publishers and protecting the public

The majority of news publishers in the UK have not currently subscribed to the new system of regulation in the UK. Although some publishers have chosen to sign up to IMPRESS and others to IPSO, a great number do not belong to any regulatory or complaints body.

As Leveson acknowledged, convincing incentives are required to encourage publishers to form or sign up to recognised publishers.

A key incentive is provided by section 40 of the Crime and Courts Act 2013, which has not yet been commenced by the Government. If commenced, section 40 would give legal protections to publishers who are members of an approved regulator as well as to the public. This is because anyone wanting to bring legal action against those publishers could raise the issue through arbitration, and avoid a costly court case. If someone chose to pursue the matter through the courts rather than through arbitration, those publishers would be protected from paying any legal costs.

If a regulator chooses not to apply for recognition**,** there can be no independent verification of its independence, funding or ability to protect the public. Even if the regulator offered an arbitration scheme, it would not have been independently assessed by the PRP including in key respects such as whether it is mandatory and to the processes it offers. This means that the regulator is denying ordinary people access to independently verified, guaranteed affordable justice. In this situation, under section 40, if someone pursued a legal case against a publisher through the courts, the publisher would have to pay its own and the claimant's costs.

Section 40

The new system of regulation was intended to prevent politicians from interfering with press regulation, which everyone agrees should not happen. However, because the Government has not commenced section 40, political involvement is continuing.

The new system of regulation was devised by Parliament following an independent judge-led inquiry; it had all-party agreement. None of the arguments against the system that have subsequently emerged bear scrutiny.

Section 40 should be commenced to give the new system an opportunity to operate.

The Data Protection Bill

Leveson recognised the role that data protection regulation could have in press regulation.

The Data Protection Bill lists exemptions to the protection of personal data for special purposes that include journalism. Part 5, paragraph 24 states the codes of practice and guidelines the controller must have regard to in determining whether it is reasonable to believe that publication would be in the public interest and would therefore be entitled to exemptions. The codes of practice and guidelines currently included in the Bill are—

(a) BBC Editorial Guidelines;

(b) Ofcom Broadcasting Code;

(c) IPSO Editors' Code of Practice

When assessing a regulator, the independent PRP assesses its standards code to ensure it is Charter compliant, and therefore protects the freedom of the press and the public interest. It is the PRP's contention that 'any code which is adopted by an approved regulator as defined by section 42(2) of the Crime and Courts Act 2013,' should be added to the list. This wording should be used, rather than name a specific approved regulator.

The omission of the recognition system from the Data Protection Bill is inconsistent with the framework previously put in place by Parliament, and means that the very system agreed by Parliament to oversee press regulation is now disregarded.

Both the current and proposed legislation also allowed/allows for the Minister to decide, following consultation, to add additional codes to those specified in the Act itself. But that consultation obligation (or the fact that the Minister has not consulted on adding to the list in the way we contemplate above) has no relevance at all at this stage when Parliament is deciding what should be explicitly specified in the Bill itself.

The basis for including the IPSO Editors' Code of Practice as a separate category in this legislation is unclear to the PRP. Moreover, it is the PRP's understanding that the Regulatory Funding Company, not IPSO, owns the copyright in the Editors' Code of Practice.

Contact details

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