

**British and Irish
Ombudsman Association**

PO Box 308
Twickenham
Middlesex
TW1 9BE

www.bioa.org.uk

Chair: Peter Tyndall
Secretary: Ian Pattison

Leveson Inquiry Team
Royal Courts of Justice
Strand
London
WC2A 2LL

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The Case for a Media Ombudsman

Submission by the British and Irish Ombudsman Association to the Leveson Inquiry

The evidence considered by the Inquiry to date has seen a number of proposals being advanced for future arrangements for press complaints. Many of these envisage a voluntary scheme which would bear some similarity to the successful arrangements now operating in Ireland. However, the Association believes that, given the lack of confidence in the current arrangements for dealing with complaints about the press in the UK, the issues can only be properly addressed by the creation of an independent Ombudsman service. This should be complementary to, but separate from, any future arrangements for regulation. It also believes that in response to the rapidly evolving media landscape, the Ombudsman's jurisdiction should be the media more widely, and not just the press.

This submission builds on the earlier submissions of 19th October and 13th December 2011 and is intended to supersede both. It draws on the contents of the earlier submissions but also takes account of relevant aspects of the emerging evidence considered by the Inquiry. It represents the views of the Association. The policy positions and powers of individual members of the BIOA differ, on some points, from the general recommendations in this submission.

The Inquiry has also received submissions from three BIOA member schemes – The Irish Press Ombudsman, Financial Ombudsman Service and Ombudsman Services.

The role of an Ombudsman

The institution of the ombudsman, first created in Sweden more than 200 years ago, is designed to provide protection for the individual where there is a substantial imbalance of

power. Initially, this imbalance was between the citizen and the state but as the institution has developed, it has embraced other sectors. Ombudsmen now exist, not just in the public sector, but also covering the private and independent sectors. As well as considering complaints about public services, BIOA member schemes consider disputes between consumers and companies or between universities and students, for example.

Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts. They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively. They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.

They are neutral arbiters and not advocates. They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation. They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable. Where they identify injustice, they seek to put this right.

In the private sector, ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the courts. The cost of their services is normally met by a charge to the bodies in their jurisdiction. Many are established by statute, and the relevant industry or sector is obliged to participate in the scheme.

Ombudsmen and Regulation

There is a fundamental difference between the role of ombudsmen and the role of regulators. They can and do co-exist. The Ombudsman's role is to provide redress to individuals who have suffered an injustice through a failing on the part of a body in the ombudsman's jurisdiction. Regulators are typically responsible for the oversight of an industry or sector. There are many examples of such arrangements, as in the case of health ombudsmen and health regulators, the Financial Ombudsman Service and the Financial Services Authority and so on.

Typically, ombudsmen work with regulators to ensure that any systemic issues identified through their casework are taken into account in future inspection and regulation and that their recommendations are being implemented and achieving the desired outcomes.

The case for a Media Ombudsman

There is a substantial imbalance between the power of the press and that of an ordinary member of the public. When things go wrong, there is a need for recourse to a means of resolving disputes. Going to court, as has been evident in the recent phone hacking cases, offers a route to redress for individuals who can afford to take it. However, it is costly for both the individual and the newspaper concerned, not just in the context of any awards or settlements, but also in the extensive legal and court costs which are entailed. In the current financial climate, especially given that such cases will not attract Legal Aid, it is a route which is closed to many individuals. In a recent address, Mr Justice Michael Peart of the Irish High Court captured this issue succinctly when he said that the cost of litigation is a big problem and "a deterrent to any but the rich, the courageous and the foolhardy",

It is equally clear that any process for redress must be independent. Any system operated by the bodies in its jurisdiction will not gain credibility in the current climate. Equally, any system operated by Government will be seen as impinging on the freedom of the press.

While there is some regulation operating within the media currently (e.g. Ofcom and the BBC Trust) which do respond to complaints from the public, there is no independent complaint handling service. In the current fast developing and fluid media environment, platforms are emerging and changing constantly. The division between press and Internet, for example, is being eroded by newspapers' presence on the Web. The growing use of hand held devices and smartphones means that the paper editions are increasingly run

alongside other platforms. Similarly, television and radio content is being accessed via the Web and by handheld devices. In such a fluid environment, the distinction between the platforms is becoming less significant than the content. The news can be accessed from a physical paper, a TV bulletin either live or streamed, a website, an ereader or a smartphone. Research in the UK, as well as in the USA and Ireland has found that the web presences of the traditional or 'legacy' media are among the most heavily trafficked by web users looking for news on-line.

There seems very little point in seeking to develop a platform-specific ombudsman; rather, there is a case for arguing that the Ombudsman's role is defined in terms of relevant content which is published in the UK, regardless of the medium of transmission.

Features of a new Ombudsman service

Any new Ombudsman would need to be independent both of the bodies in jurisdiction and any regulator. The governance arrangements should be determined accordingly. There are many appropriate models available in the private sector where ombudsmen are independent and generally accountable to a board or council, with a majority independent representation, for the operation of their office. However, their decisions are made independently and can only be challenged through the courts by way of judicial review. It is critically important that they should be able to act impartially as only in this way can the schemes have credibility.

The Ombudsman should be established by Statute, and there should be a requirement for all relevant media bodies to be within jurisdiction. The funding of the Ombudsman should be by levy, with consideration being given to varying the charges to reflect the numbers of complaints received and the number upheld.

The appointment of the Ombudsman should follow an open recruitment exercise. The recruitment panel should be drawn from the governance structure, and must have a majority of independent members.

The Ombudsman's decision should be binding on the industry. The decisions should be only capable of challenge through judicial review. However, the Ombudsman should be enabled to establish a review procedure where new information is brought to his or her attention. Ordinarily, the Ombudsman should share draft reports with the complainant and the media body before finalising decisions.

Redress should be on the basis of putting the person as far as is possible, back in the position they would have been in had they not suffered an injustice. This might, for instance, include a payment for loss of earnings and/or any distress or inconvenience but would not include punitive damages, which would remain the prerogative of the courts. Typically, redress might include apologies and retractions.

The Ombudsman should have discretion as to whether to take on any complaint, and be able to reject, for example complaints where there was no evidence of any failing on the part of the body complained about; where the matter complained about was trivial and the level of injustice negligible or complaints where the body complained about had already responded appropriately.

The ombudsman should be empowered to resolve cases by any means which are appropriate, including voluntary settlements or mediation.

The Ombudsman should be able to require media companies to appropriately publicise his or her reports.

Whatever the future outcome regarding regulation, there will be a need for a Media Code or Codes against which complaints can be assessed. This could be developed by an Ombudsman, but ideally, it should be the product of regulation, and be developed in close conjunction with the industry. Where regulators exist, there will need to be a capacity for the Ombudsman to collaborate with them to highlight common problems and to ensure that recommendations about systemic change are implemented. Where existing regulators deal with individual complaints, this work should transfer to the new Ombudsman.

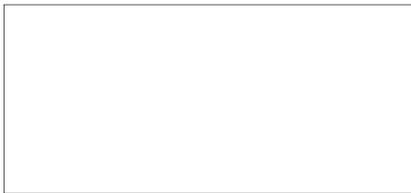
The Ombudsman should publish an annual report on the work of the office and highlighting trends and important individual complaints.

Also sent to:

GeneralEnquiries@levesoninquiry.gsi.gov.uk

Statement of Truth

I believe the facts stated in this witness statement are true.



Signed:

Peter Tyndall, BIOA Chair
on behalf of the British and Irish Ombudsman Association

Date: 23 April 2012