

Media Standards Trust

Press Review Group

Supplementary submission regarding Self Regulatory Organisations (SROs) and the Backstop Independent Auditor (BIA)

This is a supplementary submission to the Leveson Inquiry by the Media Standards Trust in response to questions arising from oral evidence.

It deals with two specific issues: firstly, why our proposed system allows for more than one Self-Regulatory Organisation (SRO) to be overseen by the Backstop Independent Auditor (BIA); secondly, how one might solve a growing problem posed by converging media – the expansion of “TV-like” on-demand service provision by traditional news publishers. It also clarifies the legislative precedents that have been drawn on to create the Media Standards Trust’s proposal for a two-tier system of media regulation.

1. Why allow for more than one Self-Regulating Organisation (SRO)?

Part 4 of the Media Standards Trust Submission proposed that:

Large news publishers would be required to be a member of an approved independent SRO.

An SRO should be created by publishers and approved by the BIA. Each SRO would need to satisfy the BIA that it met certain basic criteria. These criteria should incorporate the successful aspects of the PCC, as well as addressing its weaknesses.

We expect that, initially, there would only be one SRO. The costs of establishing and running a new SRO will discourage multiple SROs. However, our model provides the opportunity for there to be more than one SRO. We see this as a strength, rather than a drawback, of the proposed system.

1.1 Rationale

There are three compelling reasons for allowing for more than one SRO:

A. Protection from the risk of ‘licensing’

Some members of the press argue that the use of statutory mechanisms to bring media organisations into the system of regulation represents a form of licensing and, on that basis, they suggest they may refuse to participate. At the same time, these organisations accept that a new system will only work if relevant news organisations are all members.

Though they are right to consider carefully the impact of statutory self-regulation, in our view (a) statutory underpinning is essential to an effective system (see Part 1 of our Report), and (b) the statutory provision we have envisaged constitutes neither licensing nor state interference. It envisages imposing certain minimum obligations on large news organisations without restricting their ability to publish.

The Media Standards Trust proposal cannot be construed as licensing because:

1. It allows anyone to publish anything within the law
2. It gives media organisations the freedom to set up their own SRO, subject to meeting the approval requirements
3. It focuses the role of the statutory auditor on the approval and audit of SROs, rather than sanctioning a publisher on the basis of content.

The freedom of choice in relation to an SRO offers an important protection against an assertion that the SRO membership obligation constitutes licensing. If a large news organisation is dissatisfied with the initial SRO (for example because it does not agree with its approach or because it believes its publishing role is materially different from that of other members), it has the ability to establish a new SRO subject to the safeguards we mention. The system only applies to large news publishers – questions of content are overseen by the chosen SRO, not by the BIA. However, the system cannot be voluntary.

It follows from this that any other proposal which requires for its effectiveness that news publishers become members of a single self-regulatory body risks attack as a form of licensing.

B. Preserving the freedom to self-regulate

Giving eligible publishers the freedom to choose how they are regulated and alongside whom (subject to the minimum approval criteria) recognises the inherent advantages of self-regulation – it recognises that, with appropriate checks and balances (primarily BIA oversight) the industry is best-placed to evaluate the course of action for regulation to take, to react quickly when problems occur, and to evolve as circumstances change and technologies emerge. The freedom to choose also engages publishers more fully in the evolution of the new system. The potential for competition is important to maintain an incentive for positive change.

C. A way to enable the system to evolve in an era of convergence

The capacity for more than one SRO acknowledges that while a single SRO to cover all regulated publishers may be adequate to begin with, it may not remain so in coming years. Given the rapid pace of change in the news publishing industry, it is highly likely that new and unforeseen publishing platforms and distribution mechanisms will emerge. Any new regulatory system has to be able flexibly to accommodate these developments.

1.2 Preventing a ‘race to the bottom’

It has been argued that, in a system of more than one SRO, there may be no common standards and a race to the bottom. The BIA is intended to prevent this.

We suggest that the approval of an SRO by the BIA might follow the models of the Financial Services Authority (FSA), the Securities and Investments Board (SIB) and the Office of Qualifications and Examinations Regulation (Ofqual). Each requires a clear and adequate rationale for a new SRO. SROs will not proliferate if the BIA does not approve them.

The BIA would be expected, through its statutory objectives, to set a high bar for the creation of a new SRO. The requirement for a viable business plan, a demonstrated ability to maintain the minimum outcomes expected by the BIA, and an adequate rationale for another SRO, together with the cost of setting up a new SRO to meet the required standards, should combine to ensure that the process would only be undertaken for good reason.

If structured properly, such a system could, rather than leading to a race to the bottom, harness the power of competition to incentivize organisations to aspire to the best standards. It may also be supposed that improved standards will result in lower costs of regulation.

1.3 Ensuring simplicity and accessibility for the public

The Inquiry raised questions about whether a system composed of more than one SRO would be unnecessarily confusing for the public. There are three reasons why it would not.

1. Contact information provided at the point of interface between news and consumer

As part of their obligation to provide adequate internal complaints and compliance mechanisms, large news organisations would have to make the public aware of how to access those mechanisms.

Just as financial services providers are required, when they have contact with consumers, to provide information about who they are regulated by and how to initiate a complaint, large media organisations would have to provide the same information.

2. Dedicated staff to deal directly with complaints

The obligations placed on large media organisations (minimum complaints and compliance mechanisms, and SRO membership) will ensure that, as a matter of course, publishers will have a named individual within the organisations explicitly to deal with complaints or queries from the public, in the form of mandatory internal complaints and compliance mechanisms.

3. Consistent service levels across SROs

If there is more than one SRO, the BIA will oversee consistent minimum service levels across large media organisations and their SROs. If, for example, a member of the public makes a complaint to a large media organisation and it is not dealt with within a clearly specified period (e.g. seven days), he or she will be entitled to escalate it to the SRO. It will be for the BIA, as part of its audit and public reporting duties, to seek to ensure that these procedures are appropriately consistent across the industry.

2. The Backstop Independent Auditor as backstop for ‘TV-like’ services

The Secretary of State for Culture, Olympics, Media and Sport, in his submission to the Inquiry suggested that a converged ‘news’ regulator in place of the PCC could take over the regulation of “TV-like” on-demand services, for news only.¹

The European AVMS Directive requires that on-demand content that falls within this category should be regulated by a statutory body (most countries in Europe have chosen to do this through an existing statutory body) but it also allows for what is known as co-regulation. The UK chose to take up this option. Under this model Ofcom takes formal responsibility for the AVMS role, but has devolved the work of regulation to a body called the Authority for Television On Demand (ATVOD). This Authority was created by the on-demand content industry but has independent governance.²

If it were to be decided that a new press regulator which succeeded the PCC should take over this task from ATVOD in the case of ‘news’, there would appear to be three options to meet the AVMS requirement.

1. A new press regulator could be made a full statutory regulator for this one area of content whilst remaining ‘self-regulatory’ for its main role. This would not seem an attractive option because of confusion it will create about whether the regulator is statutory or not.
2. A new press regulator could be designated by Ofcom as a co-regulator in the same way that ATVOD already is, and indeed the ASA is for broadcast advertising. This seems a better model because it creates some distance between the regulator and Ofcom, but it would establish a formal relationship between the two in which the press regulator was the junior partner to Ofcom.
3. The BIA, as a statutory body, could take over Ofcom’s responsibility for designating co-regulators under AVMS. It could then designate an SRO to carry out the function. This appears to be attractive for three reasons:
 - i. It would make a better fit with what would be the BIA’s main relationship with an SRO than creating the first and only relationship between Ofcom and a press SRO;
 - ii. As the BIA would be a process regulator not a content regulator (unlike Ofcom), it avoids confusion about whether Ofcom is regulating newspaper-created content in some way;

¹ <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-from-Jeremy-Hunt-MP.pdf>

² <http://stakeholders.ofcom.org.uk/binaries/consultations/vod/statement/vodstatement.pdf>

- iii. It creates a model for the way in which other converging content areas could be regulated in future, especially those within the scope of future European directives.

3. Statutory precedents for the Backstop Independent Auditor (BIA)

The BIA would be set up by statute, which would also set its powers and functions.

These would include the regulatory objectives of the BIA; the BIA's powers of approval over SROs; and the power to impose sanctions. The legislation would also need to deal with the structure, funding and composition of the BIA.

When devising the BIA, our proposal drew on precedents from existing legislation that recognise and empower regulatory bodies and define the scope of their operations.³ These precedents illustrate how a two-tier system could be put in place.

Statutory Underpinning

Defining the existence of the BIA in statute would be straightforward and could be modelled on the various clauses establishing statutory regulators. For instance, Section 1 of the Office of Communications Act 2002 establishes the existence of Ofcom,⁴ while Ofqual, the regulator covering various qualifications and awarding bodies in England and Northern Ireland, is established in Section 127 of the Apprenticeships, Skills, Children and Learning Act 2009.⁵ Similar provisions exist in the Financial Services and Markets Act 2000⁶ and the Legal Services Act 2007.⁷

Boundaries of Regulation

The proposed two-tier regulatory system requires that precise definitions are given to those within the scope of regulation and to the powers and duties of the organisations representing the two regulatory tiers.

Regulated organisations

Organisations that will be subject to the new regulatory system will satisfy two criteria: they will be above a certain size, using a definition such as that contained in the Companies Act 2006; and they will perform news publishing activities.

We have suggested that an organisation would meet the applicable news publisher test if:

1. A significant proportion of its publishing activities involve the generation of news, information and opinion of current value;
2. It disseminates this information to a public audience;

³ All page references for the Media Standards Trust's proposal are drawn from the version published on the organisation's website at <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/06/MST-A-Free-and-Accountable-Media-21-06-12.pdf>

⁴ <http://www.legislation.gov.uk/ukpga/2002/11/section/1>

⁵ <http://www.legislation.gov.uk/ukpga/2009/22/part/7/chapter/1>

⁶ <http://www.legislation.gov.uk/ukpga/2000/8/section/1>

⁷ <http://www.legislation.gov.uk/ukpga/2007/29/part/2>

3. It publishes regularly.⁸

This definition is closely modelled on the New Zealand Law Commission's suggested legal definition of 'News Media'.⁹

SROs

Section 8 of the Financial Services Act 1986 sets out a useful definition of an SRO:

- (1) In this Act a "self-regulating organisation" means a body (whether a body corporate or an unincorporated association) which regulates the carrying on of investment business of any kind by enforcing rules which are binding on persons carrying on business of that kind either because they are members of that body or because they are otherwise subject to its control.¹⁰

Regulatory Objectives

Recent legislation has employed varied levels of precision in defining the objectives of the regulatory body in question. We have proposed the following six core objectives for the BIA:

- To protect and promote the individual interests of the public and the public interest;
- To define basic minimum standards for SRO codes of conduct;
- To define adequate and proportionate complaints and compliance mechanisms within large news publishers;
- To ensure the independence and effectiveness of self-regulatory organisations for large news publishers;
- To provide mechanisms for the public and journalists to report bad practice;
- To protect and promote reporting in the public interest.

In suggesting these objectives we looked at those adopted for existing regulatory organisations. For example: the general duties of Ofcom, set out in Section 3 of the Communications Act 2003.¹¹

Wider objectives for the Financial Services Authority are set out in Sections 3-6A of the Financial Services and Markets Act 2000,¹² and the greater complexity adopted for the Legal Services Board is contained in Section 1 of the Legal Services Act 2007.¹³

⁸ <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/06/MST-A-Free-and-Accountable-Media-21-06-12.pdf>, p61

⁹ <http://ip27.publications.lawcom.govt.nz/uploads/files/downloads/LC-IP27-ALL.pdf>, p8

¹⁰ <http://www.legislation.gov.uk/ukpga/1986/60/part/1/chapter/III/crossheading/members-of-recognised-selfregulating-organisations/enacted>

¹¹ <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

¹² <http://www.legislation.gov.uk/ukpga/2000/8/part/1>

¹³ <http://www.legislation.gov.uk/ukpga/2007/29/section/1>

An important function of the BIA is to set the criteria by which SROs are approved and audited. Our reading of similar legislation suggested that, once the objectives and constraints of the statutory body were set out, it was left to that statutory body to set these criteria, rather than detail them in the legislation.

Power of Approval

Through the power of approval the BIA is able to maintain minimum outcomes and prevent the proliferation of unnecessary SROs. An appropriate statutory precedent for the approval of SROs is that set out in relation to Ofqual in Sections 132 and 133 of the Apprenticeships, Skills, Children and Learning Act 2009.¹⁴

Power to Reject or Withdraw Approval

The BIA must also have the power to withdraw approval to ensure that it can disband an SRO that fails to uphold the minimum outcomes required of effective self-regulation, for example, if an SRO has demonstrated a frequent inability to deal with wrongdoing by its members.

Similar powers have been set out for the Securities and Investments Board,¹⁵ the Legal Services Board,¹⁶ and Ofqual.¹⁷

Sanctions

In addition to the power to withdraw approved status, an important aspect of effective press regulation is the ability to impose financial sanctions. The Media Standards Trust proposed that the BIA would have no ability to fine publishers on the basis of their publishing activities (limiting statutory regulation to ‘process’, rather than ‘content’). Instead, fines would be imposed on SROs on the basis of their failure to pass an annual audit. Section 37 of the Legal Services Act 2007 provides a useful precedent under which failure to comply with certain requirements can subject an approved regulator to financial penalties.¹⁸

The BIA would need to be able to levy fines on those Large News Publishers who fail to join (or maintain membership of) an SRO. Section 63A of the amended Financial Services and Markets Act 2000 provides an example of a provision empowering a regulator to levy fines on the ‘performance of controlled functions without approval’.¹⁹

Limitations of powers

Given that it is of fundamental importance that any powers of a regulator underpinned by statute must not extend to news content, legislation must reflect this.

¹⁴ <http://www.legislation.gov.uk/ukpga/2009/22/section/132>,

<http://www.legislation.gov.uk/ukpga/2009/22/section/133>

¹⁵ <http://www.legislation.gov.uk/ukpga/1986/60/part/1/chapter/III/1997-01-06?timeline=true>

¹⁶ <http://www.legislation.gov.uk/ukpga/2007/29/section/45>

¹⁷ <http://www.legislation.gov.uk/ukpga/2009/22/part/7/chapter/2/crossheading/recognised-bodies-monitoring-and-enforcement>

¹⁸ <http://www.legislation.gov.uk/ukpga/2007/29/section/37>

¹⁹ <http://www.legislation.gov.uk/ukpga/2000/8/section/63A>

Any piece of legislation that defines the powers of the BIA must, therefore, also stipulate that these powers are restricted to the regulation of process only.

Statement of Truth

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

Signed



(Dr. Gordon Neil Ramsay)

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