

Seminar 3: : Supporting a free press and high standards - Approaches to Regulation – 12th October 2011

The future for self regulation?

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I have been asked to present to the inquiry about self-regulation. I speak to you as the Chair of two self-regulatory bodies: the Internet Watch Foundation, an organisation set up by the internet industry in 1996 to tackle online indecent images of children, and as chair of the regulatory board of RICS, the professional body for Chartered surveyors. In addition, until earlier this year, I was a Press Complaints Commissioner. But I also have a wider background in regulation: I have been a Gambling Commissioner for 8 years and I worked for three statutory broadcasting regulators, the ITC, Radio Authority, and Ofcom. I was a member of the Better Regulation Task Force and Commission, and I have worked all over the world advising governments on the establishment of broadcasting regulatory frameworks. I confess. I am a regulatory anorak.

So, the first message this regulatory anorak has to give to the Inquiry is that self-regulation, when it works, is far preferable to statutory regulation. Why? Because by its nature it suggests a willingness to comply rather than the begrudging obligation that so often comes with statutory regulation. When it comes to the press, self-regulation is even more important. There are well-rehearsed arguments about potential state interference with freedom of expression, which I don't need to repeat. But there is another practical reason: if the press feels coerced into regulation it doesn't want, it will rebel. And it will use the weapon most readily at hand, and which is not available to the regulator – the media. We would end up watching a battle between the armies of the press and the unarmed regulator; the regulator will be slaughtered.

So my second message is: don't impose a new regulatory arrangement which doesn't have the support of the press behind it. If you do, I for one will be standing well back when the onslaught hits. I don't like the sight of blood.

The assumption in the blogosphere seems to be that any new arrangement will have to involve co-regulation. Now, that may indeed be the case, but I don't like to start by thinking about structural solutions without first identifying what problems we are trying to solve. So let us look at the problems.

I don't believe the phone hacking scandal represents a failure of self-regulation any more than it represents a failure of the criminal law. As others have said here before me, no amount of regulation will prevent determined criminals.. However, I do think that self-regulation of the press has failed, and the evidence for this is not so much hacking as the withdrawal of Northern & Shell from the PCC without any consequences.

Let me unpick that. Successful self-regulation doesn't have to be mandatory: there are certainly plenty of kitemark schemes in operation which are successful purely because they differentiate those who are regulated from those who are not. But when it comes to the press, there was no one saying that the value of the Express Newspaper was lower because it was no longer regulated. Why was that? Either because:

- Nobody knew it had withdrawn from the PCC; or
- Nobody thought compliance with the Editors' Code made any difference; or
- Nobody thought the Express ever followed the Editor's Code in the first place.

Richard Desmond said he withdrew from the PCC because he didn't think it represented value for money: he said he *did* follow the Editors' Code but could deal with complaints internally for less money. Now, I don't know whether his calculations were right, but what strikes me as important here is that he saw the PCC as a complaints handling body providing no extra value. And that observation is instructive.

I tend to agree with Desmond's view. Having sat on the PCC for over 7 years, I believe the PCC does what it does extremely well. But what it does is mediate complaints. It has not been, to my mind, very much of a regulator. What a regulator needs is the power to investigate and to consider behaviour. Although it is important to look at outcomes, the ends – particularly in the case of journalism – do not always justify the means.. A new regulatory settlement has to enable the regulator to set clear guidance on best practice and to investigate against such guidance.

Would Desmond have withdrawn from the PCC even if it had had powers to investigate behaviour? Possibly, yes. And the reasons have to do with what I believe are a failure in the two fundamental characteristics of successful self-regulation.

First, there has to be a good reason to join, either because there is a penalty associated with not joining, or a perceived benefit in being part of the regime. Stick or carrot. Many commentators, especially lawyers and existing statutory regulators, tend to think that self-regulation of the press can only work if there is a genuine threat of statutory regulation, so they want to introduce a statutory backstop through co-regulation. Now, I am a lawyer, and a statutory regulator, so I understand those arguments. But what is missing from the picture is the carrot.

I chair two self-regulatory bodies where the carrot is much stronger than the stick. In the case of the IWF, it is true to say that if we didn't exist, the State would have to provide the service we do, possibly through the police. No internet company in the world wants to be associated with child sexual abuse content; as soon as they are aware they are hosting it, they take it down. They don't need a statutory threat in the background to do it. And in the UK, the State doesn't want to do it, and the police don't want to find the additional resources to do it. Everybody is more than happy for the IWF to take care of this nasty problem, so we do it.

RICS offers a more useful example for the press. I regulate about 100,000 surveyors in the UK and about 40,000 in the rest of the world. Joining is completely voluntary; unlike with solicitors, you don't need a practicing certificate from RICS to be a

surveyor. Would the State step in if we didn't exist? I doubt it. But surveyors join – and in such large numbers – because they see a real commercial advantage in doing so. Now, this virtuous circle works because RICS – and our members – have made sure consumers and potential clients know the benefits of using an RICS' regulated firm.

I lay down a challenge to newspapers: if you want self-regulation, why haven't you advertised to your readers why reading a regulated newspaper is better than an unregulated one? If RICS can do it without the media resources you have – and on a global scale, then why can't you? Given the competition faced in the online world, shouldn't being part of a respected regulatory regime support your brand?

I understand that developing value in regulation will take time, so perhaps it will need some sort of statutory stick to kick start it. I suggest something light touch, and here I take as inspiration a regulatory framework for broadcast, print, film and online content – that I helped devise for Dubai as part of the federal, statutory regime in the UAE.

I would suggest setting basic, high level standards for content in the forthcoming amended Communications Act. Not many standards, just two key ones to apply to all content, namely: adequate protection of minors and a prohibition on hate speech. To this I'd add that when it came to news content, there had to be due accuracy, separation of news from comment, a right of reply, and respect for privacy. Additional requirements for the broadcast media would still apply. I'd then say that news media that were not part of the Press Complaints Commission (or its successor body) would be subject to the rules which applied to the broadcasting sector. That, I believe, would provide regulatory choice – and an incentive for a new version of the PCC to become the preferred regulator.

The second key characteristic is trust. Unlike a statutory regulator, where authority is ascribed, a self-regulator has to earn it. And it has to earn it from its members as well as its external stakeholders.

As a former Commissioner, I never had the feeling that the PCC was particularly trusted by its members. The Editors Code – which I would remind you is not written by the PCC but written by a committee consisting entirely of editors – is valued, and we heard support for it last week from both Trevor Kavanagh and Alan Rusbridger. But not the PCC itself. I think part of the reason is structural and has to do with independence.

I was the first Commissioner appointed through an independent process, rather than selected by a tap on the shoulder. During my tenure, I served alongside Commissioners who had been selected and I think their very presence gave the press the impression that the truly independent Commissioners were an unpredictable force that could do untold damage to press freedom. We weren't trusted.

There's also a question of expertise. Other than editors who have climbed the ranks from journalists, there are no working or former journalists on the PCC. There are no academics specialising in journalism or – perhaps particularly important – journalistic

ethics. And there are no Commissioners representing a consumer voice. Perhaps this also leads to a lack of trust.

And why should external observers trust the PCC? There may be an 'independent' majority (but as I have said, until now not all were independently appointed), but the editors have never been independently appointed. They are selected by the industry itself. This is also a weakness of the IWF which I would also categorise as insufficiently independent. And both could learn from the RICS, where there are 5 surveyors out of 11 on the board, but they have to apply and go through the same independent appointments process as my non-surveyor members. As such, they are seen as individuals who bring to the table their industry expertise, rather than representatives who are elected to bring a particular point of view.

In addition, and unlike either RICS or the IWF, the PCC Chair is appointed by PressBof, paid by PressBof, and can be fired by PressBof. Not much independence there.

As to the future, I'd strongly advise working up an enhanced model of self-regulation, one that will give no doubt to the Richard Desmonds of the world that it is better to be in the self-regulatory tent than out. Statutory nudging would help, but the onus is largely on the industry itself to ensure that it supports and promotes its regulator.

And the regulator must be and be seen to be far more independent than it currently is. It must have the powers to monitor and to investigate conduct, not merely to consider output. It should have the ability and expertise to disseminate best practice and to lead debate. It should genuinely be able to raise standards, not simply deal with complaints. And it should help the press better understand that, whilst freedom of expression is a fundamental human right, our law actually acknowledges 13 other rights which often get forgotten in the newsroom.

Thank you.