



Ministry of
JUSTICE

**The Right Honourable
Kenneth Clarke QC MP**

Lord Chancellor and
Secretary of State for Justice
102 Petty France
London
SW1H 9AJ

T 020 3334 3555

F 020 3334 3669

E general.queries@justice.gsi.gov.uk

www.justice.gov.uk

The Rt Hon Lord Justice Leveson
The Leveson Inquiry
Royal Courts of Justice
Strand
London
WC2A 2LL

26 July 2012

Dear Baron,

THE FUTURE REGULATION OF THE PRESS

When I appeared before you in May, I endeavoured to set out my personal thoughts on what a new regulatory body for the press might look like. I have had time now to consider some, if not all, of the issues and questions we face in considering the nature and scope of a new regulator. I have also had the considerable benefit of being able to read the views of Lord Hunt, although you will appreciate that time pressures have prevented me from reading more widely the other Module 4 evidence submitted to you. I stress from the outset that the views below are my own: I have not discussed them with colleagues in Government.

The first point to make is that I believe we do need a new regulator – one with substantially more power and independence than the PCC, which failed in its previous incarnation, and no longer commands the confidence of the public. I also share what appears to be the consensus view that a new body should be independent both of the industry and of political influence.

I am not convinced, though, that a statutory underpinning of some kind would amount to state control of the press. You have pointed out the statutory duty of the Lord Chancellor to uphold the independence of the judiciary. I would note as well that press organisations have a legal obligation to register with Companies House and HM Revenue and Customs as businesses; this doesn't appear to me to amount to political interference in their work. This is not my endorsement necessarily for a statutory backing, but simply an observation that it would not be the freedom of expression Armageddon some commentators would have you believe. I am attracted to the idea of contracts, with the possibility (hopefully never used) of civil litigation if the contracts are broken.

The issue of some kind of backstop, statutory or otherwise, is important because a very difficult question that goes to the heart of the effectiveness of a new body is how you ensure membership of all powerful media voices. I entirely agree with Lord Hunt that participation of all the big players is highly desirable if the new system is to have meaning. I am more sceptical than Lord Hunt though in thinking that publications would wear membership as a badge of honour; I can distinctly see the opposite being true. At the other extreme, I am troubled at the notion of membership of the body being a 'hard' requirement of the right to publish. I cannot see how we could reasonably have a system that forced bloggers and suchlike to sign up, nor licensed gadflies like *Private Eye* facing legal action and possible closure because they have not complied with a set of pre-agreed requirements.

So a key question is what carrots and sticks one might deploy to bring the big hitters in (in which I would include all national papers) while ensuring that organisations that choose not to belong are penalised, but not prohibited. Lord Hunt mentions the Irish model, allowing the court to take into account whether a member of the body has complied with its standards of behaviour in defamation (and perhaps privacy) cases. This could, however, create complications and satellite litigation if the court had to give detailed consideration to how the body member had acted in relation to those standards in addition to considering other factors which could be relevant. There is also the real possibility that this could create an unlevel playing field, given that defamation cases are not exclusive to the media; indeed, the debate in this country has equally centred on scientific controversies in recent years. Where would that system leave those cases?

A different kind of answer may lie with the advertising agencies and media buyers. If they could be encouraged to support only those publications who were members of the body and who had signed up to the Code, the attractions of joining would be readily apparent. This perhaps has parallels with the Advertising Standards Authority, albeit in the other direction, with banned adverts being pulled by broadcasters and media owners. Again, though, I concede that the same questions of enforcement arise.

When I gave evidence to the Inquiry, we had an interesting discussion on the mediation and arbitration functions of a new Regulator. I am always keen to explore and encourage the resolution of disputes at an early stage, ideally before reaching the courtroom, and without the rapidly escalating costs of litigation. So I am sympathetic to the objective of strengthening the place of alternative dispute resolution in a new regulatory system.

But I am cautious about the creation of an arbitration arm to decide libel and privacy disputes and award compensation. As I said to you when I was before the Inquiry, I am very wary of the notion of creating a small claims service for complaints against media, which I fear would encourage a flood of activity. My general view is that in the vast majority of cases, the appropriate remedy for those upset by media behaviour or reporting is an apology, not cash compensation. The minute money gets commonly brought into the picture, I fear we will see lots of people developing rather thinner skins and newspapers spending even more of their time than they currently do in dispute.

An additional risk of this route is that participants simply fall back on the courts where a ruling goes against them. In extremis the arbitration arm would become a pre-litigation fishing expedition for lawyers seeking to bolster their case for "the main event". I recall that the NHS operates its arbitration system on the basis that participants agree beforehand that they will not seek to pursue civil litigation in future. If you were to proceed with this proposal, a similar requirement should be a feature of the new system. But I repeat the point I know I made repeatedly when I was before you: if there is any suggestion that public money be used for this arbitration system, we must remember that this is in short supply, to put it mildly.

I have already alluded to sanctions, and my belief that the most important action for most complainants is swift apology. Where appropriate, this should be combined with retraction and an undertaking not to repeat the breach.

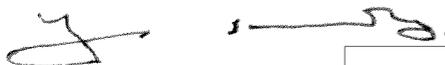
At the moment, the PCC can publish its adjudication; negotiate an agreed remedy (an apology, published correction, amendment of records or removal of article); send a letter of admonishment to the editor; follow up to ensure that changes are made to avoid repeat errors and to establish what steps have been taken against those responsible for serious breaches of the Editors' Code of Practice, and formally refer an editor to their publisher for action. It cannot fine the editor/ publisher or award compensation.

I believe that these are broadly the right kinds of powers, but the successor body to the PCC should be able to impose them as remedies, rather than negotiate them. In addition, fines should be available for serious or systemic breaches of the Editors' Code. I would also go further than Lord Hunt in saying that the prominence and content of apologies should sometimes be set unilaterally by the regulator, generally pursuing the principle that it should attract 'similar prominence' as the offending article.

Finally, I would like to set out my thoughts on the very thorny issue of the public interest. We are all familiar with the distinction between what is in the public interest and what the public are interested in. I am nervous of producing a detailed definition of the public interest in statute. Indeed, as my evidence set out, I try to avoid public interest defences being written into criminal law, given that the public interest in prosecuting is the business of the prosecutor.

Nonetheless, I agree with Lord Hunt that this goes to the heart of the work of the new regulatory body. The current situation of a non-exhaustive list of considerations set out in the Editors' Code seems acceptable: indeed, I broadly agree with the matters the current code lists specifically (detecting or exposing crime or serious impropriety; protecting public health and safety; preventing the public from being misled by an action or statement of an individual or organisation). The matter of exposing and highlighting misdemeanours carried out by those in public life, or with public influence, is clearly in the public interest. That extends to exposing hypocrisy, and, somewhat reluctantly, I admit that this could sometimes cover sportsmen and women and celebrities if they affect to publicise the supposed virtues of their private life. But towards the end of that scale, it clearly becomes irresponsible to justify the breaches of privacy and cases of harassment of celebrities who have made no public pretence of particular virtues that your Inquiry has heard about as being somehow in the public interest.

I hope that the above views are helpful. I have copied this letter to Lord Hunt, to Lord Black and to the Secretary of State for Culture, Media and Sport.



KENNETH CLARKE