

Submission to the Leveson Inquiry

By Rt Hon Harriet Harman QC MP, Shadow Secretary of State for Culture, Media and Sport on behalf of the Labour Party

This Inquiry provides an historic opportunity to settle longstanding problems of press complaints and media ownership. We offer the suggestions below as a contribution to shaping the solution. They do not represent an absolutely final view of Labour policy but hope they can inform your thinking.

We offer them in the full knowledge that any settlement will await the findings of this Inquiry, whose recommendations will provide a framework for the future. Following that, we know we will need to work with other political parties, the industry, victims of press abuse, media reform campaigners and the public to secure the change that is needed.

Change has long been necessary. Since 1947, there have been:

- three Royal Commissions on the press (1947-9, 1961-2, 1974-7)
- a succession of Private Member's Bills in the 1980s
- the two Calcutt reports in the early 1990s
- a period of reflection after the death of the Princess of Wales
- select committee reports in the 21st Century following phone-hacking at the *News of the World*.

On every occasion, the press has been exhorted to reform itself, but has only done so when threatened with government action. Even then, the reforms have fallen short of what was recommended and what was needed. The lock in at the 'Last Chance Saloon' has lasted for 65 years.

The problem – impunity and invincibility

Two deep-rooted problems lie behind the malpractice and illegality which has been exposed by the evidence given to your Inquiry, and we must address them:

- the lack of redress for press complaints which lead to a sense of impunity; and
- the concentration of media ownership which lead to a sense of invincibility.

Proposals for reform of press complaints

Below are three options that have emerged during the debate and our views on their strengths and weaknesses.

1. A contractual system

Efforts to develop this option have been led by Lord Hunt, chair of the Press Complaints Commission (PCC), and Lord Black, chair of the Press Standards Board of Finance (the industry body that funds the PCC). It is the PCC's attempt to create a stronger version of itself.

Newspaper and magazine proprietors would be asked to sign a five-year contract with the new PCC. By entering into a contract, they would commit to fund the body, undertake to abide by the Editor's Code of Practice (and the law), respond positively to complaints, abide by compliance and standards mechanisms, and pay fines. Any publications breaching the contract could be sued for not fulfilling its terms.

The proposed new PCC would have two arms: a complaints and mediation arm (which is what the PCC already does) and a standards and compliance arm, where member publications could be investigated if a serious breakdown in standards were suspected. A named individual at each publisher would be responsible for an ongoing audit of standards at their publication. A publisher found not to have complied with the PCC's standards could be fined.

In favour of this proposition, it is argued:

- A binding contract would strengthen the system of self-regulation without requiring statutory intervention
- An investigatory arm could have examined the phone-hacking scandal
- Online news publications would be able to join

Our concerns are:

- The system would remain voluntary – newspapers would be free to choose whether to opt in or not. Members of the public who wanted to complain about non-members would have no redress
- It is by no means certain that all publications will sign the contract, whether new entrants to the market would sign in future, or whether signatories would renew any contract
- There would be a chilling effect on the system as adverse adjudications could deter proprietors from signing the contract or renewing the contract
- The system would not be independent – it would still be run by the industry, for the industry
- Contracts would be between the press itself – they would not necessarily help the public.

2. A voluntary system with incentives for the press to join

This proposal envisages a system that incentivises publications to join a voluntary body by offering benefits to those who join, denied to those who do not. There are a number of proposals along these lines, with a range of incentives to join and disincentives to stay outside the body.

Under some proposals, the body itself would be empowered by statute but nobody would be forced to join – the hope is that they would choose to do so because of the benefits on offer (many of

which would require statutory intervention). The models on offer propose incentives and disincentives including the following:

INCENTIVES

- **Libel arbitration** Newspapers have long complained about the cost of libel cases, even cases they have won. Incentives could include a quicker and less expensive libel arbitration process, which would keep costs down; damages could be capped for member organisations or be higher for non-members; and there might be stronger legal defences for members. Hugh Tomlinson QC's proposal includes some of these ideas. Members of the Irish Press Council are allowed to mount a defence of 'fair and reasonable publication' under the Irish Defamation Act 2009, though this has not yet been tested.
 - Supporters say: this would lead to quicker and cheaper libel cases
 - Our concern: would it be acceptable for a victim to receive less compensation because they were libelled by a publication signed up to a regulatory body?

DISINCENTIVES

- **Removal of accreditation** Publications refusing to join the new system could be denied accreditation giving them advance access to reports, access to closed events (such as press conferences), access to facilities, and access to Press Association copy and freelance agencies.
 - Supporters say: continued access to information would be a powerful incentive to join and comply
 - Our concerns: citizens and bloggers could be excluded from public information; private organisations, such as sports clubs holding press conferences, and the PA might not want to be a part of this; many news outlets operate fine without accreditation; journalists could be 'struck off' when a wider culture within a publication is to blame; it is akin to licensing and could inhibit a free press
- **VAT exemption** Newspapers and magazines are currently zero-rated for VAT purposes. Publications outside of the new system would not be eligible for the zero-rating.
 - Supporters say: this would be a strong financial incentive
 - Our concerns: this would still require legislation; under European law, it is not clear whether this would be possible
- **Advertising** In his Fulbright Lecture of September 2011, Lionel Barber suggested that publications that were not part of a new system should have to pay a levy on the adverts they carried. There have also been discussions that advertisers might agree to withhold adverts from non-members.
 - Supporters say: this would be a strong financial incentive
 - Our concern: it is indirect, relying on a third party to make redress work

Supporters say:

- A voluntary system is likely to have greater support from the press, and therefore compliance from the press
- It is flexible enough to accommodate online news publications now and in the future
- There is less suggestion of government interference in the press – it could be independent of press and government

Our concerns:

- The system would remain voluntary – newspapers would be free to choose whether to opt in or not. Members of the public who wanted to complain about non-members would have no redress

- It is by no means certain that all publications will sign up, whether new entrants to the market would sign up in future, or whether signatories would renew any contract. Whatever the incentives on offer, a publication could make an apparently perverse decision not to sign up
- There would be a chilling effect on the system as adverse adjudications could deter proprietors from joining or renewing their membership
- Statutory intervention would still be required
- The system could be difficult to understand and to use
- If incentives for journalism in the public interest are being offered, why should they only be offered to members? There might be, for example, individual bloggers working in the public interest

3. Statutory support

A recent YouGov poll for the IPPR found that 62% of people thought a body legally established by parliament should be responsible for the press (compared to 19% in favour of self-regulation and 3% for no regulation)¹. The idea of some form of statutory support has also been espoused by members of campaign groups for media reform, media commentators, and the NUJ.

We are not in favour of statutory regulation of content or enforcement of balance.

We have been exploring a particular form of statutory support:

Key elements

- The new body would have statutory support in only two specific areas:
 - It would be independent of government and the industry through its appointments process. Members of the new body would be appointed by an entirely independent process set out by the Commissioner for Public Appointments.
 - It would have the power to enforce its decisions across all newspapers. Online news outlets or foreign-based news outlets would be able to 'join' and could display a kitemark.
- Ideally, editors would come forward with proposals for a tightly-defined 'Editors' Bill'. Given the constitutional importance of a free press, this could be passed with cross-party agreement, with front benches voting down any amendments. A possible draft of such a Bill is included as an appendix.
- It is widely acknowledged by editors, journalists, campaigners, and academics that the current Editors' Code of Practice is broadly fit for purpose – the key issue is its enforceability. The Code – which covers fairness, accuracy, the difference between reporting and comment – could continue to be used.

How this new system would work for a member of the public

- A member of the public wanting to complain against any publication would be able to go to the new body. The body would be able to mediate and arbitrate between the member of the public and the publication, and hopefully agree a resolution that would avoid having to go through the court process which can be very expensive and time-consuming.
- If the publication was found to have breached the Code, the new body would order the publication to print an apology with the appropriate prominence and wording. At present,

¹ IPPR and YouGov, May 2012, http://www.ippr.org/research-project/44/9179/next-generation-media-policy?showupdates=1&layout_type=updates#update9180

the PCC is not able to do this and many victims of inaccuracy and intrusion feel that their apologies are buried away.

- If the publication refuses to comply with the body's decision on an apology or correction, the adjudication could be commuted into a fine to be enforced by a County Court or the High Court.
- The new body could also mediate between the two parties and suggest an award of compensation by the publication to the member of the public. If this were accepted as a full and final settlement by the member of the public, it would avoid the need for court action at a higher level (e.g. under defamation law). This would be cheaper, quicker and simpler for the member of the public and for the newspaper. The member of the public would not have to accept this settlement, and would still be free to go to the courts (for example, under defamation laws).
- The body could have a further investigation or standards arm, which could be voluntary and set up by the industry.

Funding

- The body would be funded by a levy on publications, based on their circulation.

Our view:

- This system would apply to all print publications, so members of the public would always be able to get redress
- This system would be independent of the press and of government
- This system would be able to enforce its decisions
- This system would be easy for the public to understand and to use
- Online publications could sign up
- It would require minimal legislation

Possible concerns:

- This could be seen as a 'slippery slope' if the 'Editors' Bill' were amended, but this risk would be lessened by cross-party support
- This doesn't take account of rapid future change. The position of online news websites that are not simply online versions of newspapers is clearly an issue that needs to be addressed. But while this may be true, it is not a reason for inaction now. Newspaper sales may be declining, but they remain influential.

The Freedom of the Press

A free press is essential in a democracy to hold power to account. We believe that any Bill establishing a new system should also include constitutional safeguards for the freedom of the press.

One option would be a statutory public interest defence that would give proper protection to investigative journalism. At present, the public interest is taken into account when deciding to prosecute under the Code for Crown Prosecutors. The public interest can also be taken into account at the end – in sentencing. But there is a gap in the middle: there is no general public interest defence to a criminal charge. The Data Protection Act has a public interest defence, but the Regulation of Investigatory Powers Act, Computer Misuse Act, Official Secrets Act, Bribery Act and others do not.

Proposals for reform of media ownership

Background

Monopoly and media ownership

Monopoly inhibits a diversity of views, competition and new entrants to the market. Monopoly is bad for our democracy and bad for the consumer.

The BSkyB bid focused attention on media ownership, especially cross-media monopoly. But we should not only focus on owning different types of media: owning too much within one sector – for instance, owning too many newspapers – is also a problem.

Although people acquire their news from different media platforms, newspapers still wield significant political influence and set the daily news agenda.

Rupert Murdoch owns too many newspapers. 37% of national circulation before the *News of the World* closed – owning *The Times* and *The Sun*, two of our most influential dailies, and the *Sunday Times* and the *News of the World*, two of our most influential Sunday papers – was too much. Murdoch's dailies had 35% of national readership, over 9 million readers, between them – his Sunday papers had 40% of national readership, over ten million readers².

This is too many newspapers and too much political power for one person to have and has proved to have had a corrupting effect on British public life.

Had it not been for the hacking scandal and Murdoch dropping his bid, the Government would have waved through his bid for the whole of BSkyB. This would have resulted in Rupert Murdoch wielding extraordinary power across British broadcasting, newspapers and publishing.

It is important that our rules on cross media ownership are changed, but rules on how much of the newspaper market one company is allowed to own must also be changed.

Proposals to tackle the problem of media monopoly

Cross media

- There could be a cap on the percentage of revenue of the UK's total cross-media market that a single person or company would be allowed to own. (There are a number of proposals on this being circulated – for example, Enders Analysis has proposed 15%³.)
- The Communications Act could be updated to include satellite broadcast channels as well as Channel 3 licences in its cross-media ownership rules.

Newspapers

- No single person or company would be allowed to own more than a certain percentage, perhaps 30%, of the UK's national newspaper circulation.

² <http://www.mediauk.com/article/32696/the-most-popular-newspapers-in-the-uk>, figures for 2010

³ <http://www.ahrc.ac.uk/About/Policy/Documents/EnderspapermediaownershiprulesDec2011.pdf>

- If a single person or company wanted to own a percentage of UK newspaper circulation below the maximum but above another percentage – perhaps between 20% and 30% – the transaction would have to be approved by Ofcom and could be subject to specific conditions set by Ofcom.
- If a single person or company owned below a particular percentage, perhaps 20%, of circulation of UK newspapers, there would be no plurality issues.

Regular review of the media market by Ofcom

Ofcom would be required to conduct a regular review of the media market to assess the issue of monopoly. The review would be laid before Parliament.

- Where it was evident that the market had changed such that a particular company was moving towards a monopoly, but was below the ownership thresholds, Ofcom would be able to issue a warning notice, setting out its concerns.
- Where it was evident that a threshold had been exceeded, this would be an automatic trigger for Ofcom to ask the Competition Commission to launch an inquiry.
- Following the results of the Competition Commission inquiry, the decision would fall to Ofcom as to whether any action needed to be taken and what that action would be including divestiture of assets.
- Any decision made by Ofcom following an inquiry would have to be reported to the Culture, Media and Sport Select Committee and Ofcom would be required to give oral evidence.

Give Ofcom the power to intervene if the market changes

- Ofcom would be able to intervene on grounds of plurality not just where there was a merger or acquisition proposal but also where market change might cause a company to exceed the limit.
- That means that if at any time between its regular reviews, it appeared to Ofcom that there was a monopoly issue arising which could exceed the set limit, Ofcom could ask the Competition Commission to instigate an inquiry on the grounds of plurality.
- Following the results of the Competition Commission inquiry, the decision would fall to Ofcom as to whether any action needed to be taken and what that action would be, including divestiture of assets.
- Any decision made by Ofcom following an inquiry would have to be reported to the Culture, Media and Sport Select Committee and Ofcom would be required to give oral evidence.

Fit and Proper Person Test

- Clarify the ‘fit and proper person’ test for holding a broadcast licence, provided for by the Broadcasting Acts of 1990 and 1996, so it includes not just criminal convictions but also any failure of good governance or history of impropriety, such as non-payment of taxes.
- Amend section 58 of the Enterprise Act 2002 to allow the Secretary of State to intervene on a merger on the grounds of propriety, as well as plurality, so a ‘fit and proper person’ test could be applied at the start of any merger proceedings.

Political involvement in mergers

- There is a public interest which means politicians must continue to be able to take a view on issues of media ownership. But they should be guided by the informed and independent advice of the appropriate regulatory body in ensuring that the public interest is upheld.

There could be a higher bar before a politician wishes to depart from the advice of a regulator.

Preventing deliberate frustration of the work of the regulator

- Large companies can abuse the process of litigation as a tactic to frustrate the regulator. This is undesirable – it is a misuse of the court process, wastes public money, and undermines the work of the regulator by causing delays.
- A way to address this needs to be sought:
 - One way could be for the regulator to have a specific version of the cost-capping procedure, building on part 44 of the Civil Procedure Rules, which would allow them at the start of a case to apply for a cost-capping order which would set out a maximum amount that could be reclaimed in costs.
 - Another could be – as Ofcom has itself argued – to reform the standard of appeal under section 192 of the Communications Act, to make actions based on trivial causes more difficult.

Appendix: Draft Editors' Bill

A Bill to give statutory recognition to a Press Complaints Commission to adjudicate on complaints of breach of the Editors' Code of Practice; to provide for redress for breaches of the Code; and to provide for a defence of public interest reporting.

Establishing a Press Complaints Commission

1. A Press Complaints Commission ('the Commission') will adjudicate on complaints against a newspaper that the Editors' Code of Practice ('the Code') has been breached and provide redress.
2. The press is defined as
 - (a) Newspapers: these are issued at least once a week in a continuous series under the same title. Each issue is usually dated and/or serially numbered. They usually consist of several large sheets folded rather than bound together, and contain information about current events of local, national or international interest. Publications which do not contain a substantial amount of news are not newspapers.
 - (b) Magazines: these are issued in a series at regular intervals, more frequently than once a year, either in newspaper format or as paper-bound publications. They may contain information of a specialised nature (for example legal, medical, financial, commercial, fashion or sporting) or be of more general interest. They are normally a mixture of articles and stories with the content changed for each edition. Although they consist essentially of reading matter, they may also consist mainly of illustrations or advertising matter.⁴
3. The members of the Commission will be appointed by a process laid down and overseen by the Commissioner for Public Appointments.
4. 6 members will be appointed to the Commission, of which 2 will be nominated by the newspaper industry. There will be one chair and 2 vice chairs – of which one vice chair will be nominated by the newspaper industry. Half of the members of the Commission will be women.
5. The Commission will be financed by a levy on newspapers proportionate to their circulation.
6. The Commission will have responsibility for reviewing the Code once every 5 years.
7. The Commission will publicise to the public the contents of the Code and how to make a complaint against a newspaper for breach of the Code.
8. The Commission will set out the time:
 - (a) within which a complaint must be made
 - (b) within which the newspaper will be notified of a complaint.

⁴ From HMRC Notice 701/10 (December 2011),
http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000102&propertyType=document#P83_7543

9. The Commission will publicise the time limit within which a complaint must be made.
10. The Commission will notify the newspaper of any complaint and require them to respond in writing within a certain time.
11. The Commission will consider each complaint and decide whether the complaint is justified – the adjudication will be decided by no fewer than 2 members of the Commission.
12. The Commission can, if it so decides, or is requested so to do by the complainant or the newspaper, mediate the complaint to achieve an informal settlement which can include compensation in full and final settlement of any claim in the civil courts.
13. Where there is a justified complaint, the Commission will decide whether the remedy is a correction and/or an apology.
14. Where a correction or an apology is ordered, the Commission will decide the terms and the position in the newspaper where it will appear.
15. The Commission will report their adjudications in writing and make them public
16. If the newspaper fails to comply with the adjudication, the adjudication will be commuted to a fine to be enforced in the County Court or the High Court, depending on the amount.
17. Those not included within the definition of the press in (2) will be permitted to 'join' the Commission on payment of a fee and on undertaking to accept the Commission's adjudications.

Public interest defence

18. Press reporting in the public interest will be available as a defence to a charge under the Officials Secrets Act, the Bribery Act, the Regulation of Investigatory Powers Act and the Computer Misuse Act.
19. The Lord Chief Justice will issue guidance to judges on what constitutes press reporting in the 'public interest' which will include:
 - revealing or detecting crime
 - protecting public health or safety
 - exposing misleading claims made by individuals or organisations
 - disclosing incompetence that affects the public.⁵
20. When sentencing, a judge will consider as a mitigating factor any public interest in press reporting (following a report and guidance by the Sentencing Council).

Review

21. As a body recognised by statute, the Commission will be will be subject to judicial review and the Freedom of Information Act.

⁵ From the Ofcom Broadcasting Code,
<http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf>