THE LEVESON INQUIRY

Supporting a free press and high standards – approaches to Regulation
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What redress should be available for breach of standards ?

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I have been given ten minutes, so let me plunge straight in. My brief is to examine the question what redress should be available to a victim of a breach of standards. Obviously there are two routes: (1) through the courts, and (2) through a regulator.

I start from the premise that litigation is expensive, tends to delay the resolution of legitimate complaints and should be avoided at all cost – not least, because there is invariably inequality of arms as between claimants (unless represented on a conditional fee agreement) and national media conglomerates. My second premise is that self-regulation for professions is the best medicine. But it requires to be effective if it is to avoid the Shavian jibe that all professions are conspiracies against the laity.

In what follows I shall be concentrating on how regulation might be reformed to be effective and, at the same time, provide a cheaper course than litigation. Nonetheless, there are ways in which litigation could be made quicker and cheaper. For example, clause 8 of the new Defamation Bill proposes that libel actions be tried not by jury, but by judge alone, unless the court orders otherwise – which, on present authority is unlikely, unless the defendant is the state or a public authority such as the police.

This reform is much to be welcomed, since the current uncertainty as to whether the case will ultimately be tried by a jury prevents judges from resolving the all-important question of the meaning of the words as a preliminary issue. Experience has shown that in the majority of cases, if you resolve meaning, you resolve the whole dispute.

There are, of course, other ways of resolving meaning, such as mediation, early neutral evaluation and arbitration, but each of them require the consent of both parties, and co-operation cannot be compelled. I have long regarded early neutral evaluation as a more likely way of achieving resolution of a dispute than simple mediation. Naturally it would require an experienced judge or generally respected senior practitioner for the process to be effective. The evaluation needs to be authoritative, as well as neutral.

As regards arbitration, the facilities are available through *Early Resolution*, the body set up by Alistair Brett, formerly of *The Times* and the former High Court judge, Sir Charles Gray.

Turning to regulation, the first question is whether we should be reading the last rites over the corpse of the Press Complaints Commission. It has certainly been an unconscionable time a-dying. As long ago as 1993 Sir David Calcutt concluded that self-regulation had failed and recommended statutory regulation to Government. In July, the former Lord Chancellor, Jack Straw, told us in his Gareth Williams Memorial Lecture that the Commission's failure had been abject.

So why is it that the PCC universally fails to command the same authority and respect as, say, the Advertising Standards Authority ? Tim Bratton, general counsel for the *Financial Times,* has suggested that the problem is not an ethical one, but rather

that the PCC cannot recover from the public's perception of it as ineffective to regulate the media's big beasts.

It is certainly true that too often the PCC's adjudications have been so feeble as to create the impression of partisanship towards its media paymasters. One successful claimant in a libel action (the hypnotist, Paul McKenna) only brought his proceedings for damages, because the PCC had ruled that the article about him in a tabloid paper had not been defamatory. At the ensuing trial it was conceded that the words actually alleged dishonesty.

All the same, the PCC needs to be given credit for some areas in which it has been reasonably effective:

• Claimants' solicitors acknowledge the assistance it has provided in dealing with harassment.

• Sometimes, too, particularly in cases involving children, its warnings in advance of a threatened publication have been heeded.

But it is quite impossible to share the view of its former Chairman, Sir Christopher Meyer, who when asked by the *Guardian* on his departure in March 2009 what was wrong with the PCC replied: "Not a lot".

Much too often in this debate, the argument has turned on a false dichotomy: statutory regulation as against self-regulation. Graham Mather was right this morning: it is not a binary choice. It is possible to have self-regulation within a statutory framework.

That is precisely how the legal professions have regulated their affairs in the aftermath of the Legal Services Act 2007. It is

quite different from the GMC model for doctors, and in my own profession the Bar Standards Board under Lady Deech has proved acceptable to the Bar, imaginative and effective as a regulator, and wholly independent of government.

As Paul Dacre has rightly gone some way to acknowledging this morning, some form of statutory underpinning is inevitable, for the simple reason that otherwise there is no power to require all the country's national and regional newspapers and magazines to participate in a system with a binding Code of Conduct. Disengagement from the PCC is not just deplorable; it is the very opposite of that responsibility without which a system of voluntary self-regulation cannot work.

Of course, it is the very essence of self-regulation that it must never become self-serving. How, then, is this to be achieved ? Let me try to answer what Shami Chakrabarti has called the Richard Desmond question.

1. Firstly, I do not believe that a direct statutory regulator, along the lines of the Financial Services Authority, would be desirable. It is sometimes argued that since Ofcom very successfully regulates our high-quality broadcast media, its jurisdiction should be extended to the print media. But this is an analogy which fails to persuade – radio and TV require licensing to prevent anarchy on the air-waves. There cannot be many who want to see print journalists licensed.

Having said that, Ofcom might have a role as an over-arching regulator, just as the Legal Services Board supervises the independent Bar Standards Board and Ofcom itself supervises the ASA.

2. Next, the new regulator (let's call it the Press Standards Commission) must be properly funded and better staffed.

Michael Smyth, much admired from his time at Clifford Chance and a newly appointed Commissioner, has rightly commented that it is not difficult to see why the PCC should have been unanimously identified as a patsy, when it has a workforce of fewer than 20 and an annual budget of less than £2m – ironically, the very sum which News International are said to be paying the Dowlers.

3. Thirdly, the new regulator will need to be given statutory jurisdiction over all the nation's media with a substantial readership. It will also, as Paul Dacre has said, need the power to raise its running costs from those it regulates.

4. I would not go as far as Paul Dacre and advocate the power to fine, any more than I support the rationale of awards of punitive or exemplary damages. But I do strongly believe that the Press Standards Commission should have the power to award compensation up to a fixed ceiling of say, £20,000 or £25,000.

In the long run, this will be cheaper for the media than litigation.
As the Strasbourg court pointed out in the ***Peck*** case in 2003, an effective remedy is required by Article 13 for the breach of a Convention right.

This proposal would ensure the access to justice required by Article 6 in the light of the continuing non-availability of legal aid, and the threatened abolition of effective conditional fee agreements. A lack of effective access to justice all too easily breeds a culture of media impunity.

The Dowler family were right to remind the Prime Minister that they could not have reached their settlement with News International without a "no-win, no-fee agreement". Having said that, the current CFA regime with ATE premiums is

indefensible, and regrettably Lord Justice Jackson has not found the solution.

Let me add two qualifications as regards compensation–

(i) It should only be awarded, in cases where the publication was tortious. It should not be awarded merely because a story was inaccurate. A published correction should be sufficient in such circumstances.

(ii) Costs should not be awarded, save in the most exceptional circumstances. In this way the workings of the Press Standards Commissions should not get bogged down in legal argument.

5. I would not discourage the new body from pursuing the practice adopted by the PCC of pre-publication warnings to the media, but it should have no power to restrain a publication. That should continue to be left to the Courts.

6. The Press Standards Commission should not be given the power to order the publication of apologies. Remember that the Courts have never had that power, even under s.9 Defamation Act 1996. There is no point in an apology if it is forced and insincere. Richard Ingrams once said that the only knowing falsities he had ever published in ***Private Eye*** were some of its apologies.

However, the new Commission *should have* the power to order the publication of its findings with equivalent prominence to the original publication. If that means a front-page correction for a front-page article, then so be it, no matter how great the editorial reluctance.

7. Finally, as an aid to its investigations, the Commission should have the power, enforceable if necessary by court order, to call for documents (subject to legitimate claims under the current law to protect sources).

We do not yet know why the Metropolitan Police failed to get to the bottom of the hacking scandal. The failure of the PCC in November 2009 is easier to explain, however unwise its jibe that the Guardian's stories of July that year did not live up to their billing. The Commission simply lacked the necessary inquisitorial powers.

Having said that, I would not personally set up a separate Ombudsman, as suggested by Paul Dacre. If a power to summon journalists to give evidence is really necessary, it should be given to the new Commission.