

Regulation,
Regulators, and
the Crisis of Law
and Government

A Royal Charter for the Press:

How does it measure up to
regulation overseas?

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Policy Brief

The Foundation for Law, Justice and Society

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Regulation, Regulators, and the Crisis of Law and Government

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Executive Summary

- Lord Justice Leveson recommended three key qualities for future press regulation. It should be ‘voluntary’, ‘independent’, and ‘self-regulatory’. These characteristics form the basis of the government’s draft Royal Charter¹ which sets out the criteria for formal recognition of any future regulator. This policy brief seeks to explore each of these somewhat elastic terms, within the instructive context of differing approaches to press regulation in a range of democracies overseas.
- How voluntary is ‘voluntary’? Nothing in the draft Charter makes membership of the new regulatory body mandatory. However the related 2013 Crime and Courts Act contains provisions on publishers who are not members, with the potential for exemplary damages and awards of costs. Overseas regulation reveals a spectrum of approaches ranging from entirely voluntary systems, to those incentivized in statute, through to mandatory requirements.
- How is independence secured? Independence — of the new regulator from the press, publishers, and politicians — is set out in the draft Charter as a core feature. However, for some overseas press councils, it is independence of the press from politicians that is of most importance. For others, regulatory independence is safeguarded through judicial appointments to the press council board, or through governance and accountability criteria set out in statute.
- What is ‘self’ regulation? While the draft Charter sets out the criteria by which a new regulatory body will be recognized, the industry is responsible for setting up a body that meets that criteria and applying for recognition. This appears to be where ‘self-regulation’ meets the demands for ‘independence’. Overseas, self-regulation in its purest form is ‘peer’ regulation, whereby the press council board is composed of industry-only or industry-majority members.
- The draft Charter also sets out three core functions: complaint handling, standards enforcement, and an arbitration service. As is the case in a number of other countries, it does not restrict complaints purely to those personally affected by the published material. However, in introducing the authority to investigate ‘serious or systemic’ code breaches, coupled with the power to fine up to £1 million and an arbitral arm to consider civil legal claims, it extends the reach of the regulator far beyond that of similar bodies overseas.
- Any blurring of the boundaries between standards upheld by a code and rights upheld by the law will be a significant departure from regulatory systems elsewhere. On the other hand, publicly recognizing and independently safeguarding voluntary ethical press standards represents a huge step forward. This may provide a useful starting point, as debate on the next Communications Act, and regulation across media platforms including broadcasting, begins in earnest.

A Royal Charter for the Press:

How does it measure up to regulation overseas?

Voluntary, independent, and self-regulatory. These were the touchstones of the new framework proposed by Lord Justice Leveson in his recommendations for reformed press regulation in the UK.² And these are the core criteria by which the new recognition panel, as set out in the draft Royal Charter,³ will judge whether any new regulatory body is 'Leveson compliant'.

But what does the Royal Charter really mean by 'voluntary', 'independent', and 'self-regulatory'? This paper seeks to explore these qualities, and how far they are reflected in press regulation overseas. It also examines three aspects of the draft Charter's framework — complaints, sanctions and arbitration — and concludes with some words of caution based on international experience of regulating journalism not just in print but across media platforms.

The analysis presented here draws on my report *Regulating the Press: A Comparative Study of International Press Councils* (RISJ, Oxford, April 2012),⁴ which formed the basis for my oral and written evidence to the Leveson Inquiry.⁵

My research was based on interviews conducted with press council chairs and ombudsmen from a range of mature democracies.⁶ Each of the countries I explored has a 'free press' according to press freedom indices, recognizes rights to freedom of expression as well as to privacy, shares a belief in the importance of press standards and accountability, and each has a press council.

The approaches to press regulation in each country are in some ways strikingly different, but all unite in maintaining a separation between the standards and remedies offered by ethical regulation on the one hand, and the enforcement and penalties provided by the law on the other. It is this distinction which may provide the UK with its chief lesson going forward.

How voluntary is 'voluntary'?

All the countries I have considered bar one, Denmark, operate a voluntary system. In Germany, Finland, and Sweden membership is entirely voluntary. Indeed in Germany a major publisher, Bauer Media Group, has recently opted out of its regulatory obligations after refusing to publish Press Council reprimands following its breaches of the German Press Code.

In Sweden and Finland membership is voluntary, but pressure is exerted by the strength of trade associations and journalists' unions, so that individual media companies belong automatically because of their membership of professional organizations. In addition, there is a web of wider legal obligations under which publications are required to register a 'responsible editor' who is liable for published content, and in which media freedoms are enshrined.⁷

Nothing in the draft Charter makes membership of the new regulatory body mandatory. It states simply that membership 'should be open to all publishers'. It is the related 2013 Crime and Courts Act⁸ that contains provisions on those who are not members, with the potential for exemplary damages and awards of costs. The logic appears to be that the option of avoiding exemplary damages will provide a strong incentive for key publishers to join the new scheme, and that costs should be awarded against those who, by sitting outside the new regulatory body, have denied complainants the chance of seeking a free remedy through its arbitration service.

No other press council I have looked at makes this direct link between financial sanctions in the courts and membership of the press council. Indeed, for some, the very thought raises concerns about a 'get out of jail free' card for press council members, whereby a tick box membership could reduce financial penalties. They argue this runs counter to the active ethical behaviour they seek to encourage.

The Irish Defamation Act⁹ does something rather more subtle and light touch, yet wholly effective in persuading all the mainstream publications in Ireland, including UK titles circulating in Ireland, to join its system. The 2009 Act recognizes a number of public interest defences for publishers seeking to argue in defamation proceedings that a statement was ‘fair and reasonable’ publication. One of these defences, which the court can take into account, is that the publisher was a member of the Irish Press Council and adhered by its code and abided by its determinations (or adhered to equivalent standards, which is a useful caveat for overseas providers). Thus, members of the Irish Press Council who are actively compliant can demonstrate their ethical accountability through membership and use this as part of their public interest defence.

In relation to the separate issue of awarding damages, membership of the Irish Press Council is not relevant. Instead, in awarding damages, the Irish courts can take into account any apology, correction, retraction, or offer to make amends. Such remedies are thereby incentivized.

Denmark is exceptional among the countries I have looked at in that the regulation of print, as well as broadcast, journalists is mandatory. All publications circulated more than twice a year, and all broadcasters holding a Danish licence, are subject to compulsory Press Council regulation, which is established in the Danish Media Liability Act¹⁰ together with a right to reply. However, there is no link between the Press Council and awards of damages by the courts, and there is no power for the Press Council itself to fine; the only sanction at its disposal is to order an adjudication or correction to be published. Should a publisher fail to do so, a fine or four month prison sentence could in principle be imposed by the courts.

A mandatory system has also been proposed in Australia, where the government is considering proposals from its Convergence Review (published in April 2012),¹¹ which recommend a new industry-led cross-platform news standards body, membership of which would be compulsory for the largest providers and incentivized for smaller publishers. The Australian proposals call time on regulation according to the mode of delivery (broadcast,

printed, online) and instead link requirements to the size and scope of media enterprises.

How is ‘independence’ secured?

The draft Royal Charter sets out an independent process to recognize and periodically review an independent new self-regulatory body (or bodies). Independence is at the core of both the recognition body and the new regulator; in this, the approach of the draft Charter goes further than any other country among those I have looked at.

The draft Charter sets out the features of a panel to be ‘established for the purpose of determining recognition of an independent regulatory body or bodies, in pursuance of the recommendations of the Report of the [Leveson] Inquiry’. The board of the recognition panel is not to include any politicians, publishers, nor anyone who is, or has been, an editor. Its board is to be initially appointed by an appointments committee chaired by a public appointments assessor and not to include serving editors, publishers, or politicians. After the initial appointments, any new appointments to the board of the recognition panel will be the responsibility of the board itself, and the Commissioner for Public Appointments is to be consulted throughout the process to ensure it is fair and open.

Under the draft Royal Charter, the recognition panel can grant recognition to a regulator if it is satisfied that the regulator meets certain criteria, including effectiveness; fairness and objectivity of standards; independence and transparency of enforcement and compliance; credible powers and remedies; reliable funding; and effective accountability. It must periodically review any new regulator and if it is not satisfied can withdraw recognition. In order to meet the criteria, a new regulator must have an independent board, with a chair appointed by an independent appointment panel (with a majority of members who are independent of the press). Any complaints committee must also have an independent majority, and decisions on complaints are the ultimate responsibility of the board.

These arrangements are a significant departure from those to date under which the powerful industry-only Press Board of Finance has traditionally both set

and levied membership fees for the UK's Press Complaints Commission, besides having a significant role in appointments. Lord Justice Leveson dismissed the role of 'PressBoF' by observing 'there is no need for such a body to exist at all' and indeed none features in the draft Royal Charter.

Overseas, press councils illustrate a wide range of differing approaches to the notion of independence. For some press councils, 'independence' means independence of the press from politicians, and the board is composed of industry-only or industry-majority commissioners (as is the case in Germany and Finland, respectively). For Sweden and Denmark, it is safeguarded through judicial appointments, and the chair and vice-chairs of those press councils are judges.

In Ireland statute does not establish the Irish Press Council (as is the case in Denmark); rather, it establishes the criteria it must meet (in a similar way to the draft Royal Charter), and these criteria are set out in the Irish Defamation Act 2009. By contrast to the draft Charter there is no independent recognition panel; instead it is the Irish Justice Minister who is tasked with deciding whether the Irish Press Council meets the requirements of independence and effectiveness, and the Minister can revoke that recognition if he or she decides the Press Council no longer complies with the criteria set out in the Act.

Funding represents a significant aspect of independence. Funding by the industry can provide independence from the state, however, it can also leave the regulatory body exposed if members withdraw, taking their funds with them, as happened when News Limited withdrew from the Australian Press Council in the 1980s. The German and Finnish regulators get round this by accepting 30 per cent state funding, precisely to avoid over-dependence on major titles. Australia has addressed this issue by establishing that funding commitments should be made three years in advance and backed by legally binding contracts. The draft Charter sets out that 'Funding settlements should cover a four or five year period and should be negotiated well in advance'.

What is 'self' regulation?

With the emphasis on 'independence' set out in the draft Royal Charter, the nature of what constitutes 'self-regulation' is thrown into question. As discussed above, for a country like Germany, self-regulation is regulation of the industry by the industry with no independent members on its board. The Finnish Mass Media Council too is entirely unapologetic about its industry majority, arguing that this 'self-regulation' is a protection against external interference.

The draft Royal Charter sets out these criteria by which a new regulatory body will be recognized, but it is for the industry to set about meeting these criteria and applying for recognition. This appears to be where 'self-regulation' bites, as well as in relation to industry funding as discussed above.

But in an important area self-regulation has been reduced. Hitherto, the 'Editors' Code of Practice'¹² as its name suggests, has been the responsibility of an industry-only panel. This changes significantly under the draft Royal Charter, which sets out that the Code Committee must be composed of equal proportions of independent members, journalists, and editors, and must publicly consult.

The Code itself must include standards on fair treatment, privacy, accuracy (core standards which chime with provisions overseas) and must be approved by the board of the regulatory body. Initially, the draft Charter suggests, the current Editors' Code should be adopted.

Overseas, code committees are industry dominated. In Germany, Sweden, and Finland industry-only panels are responsible for the Codes, although in Finland broad external discussion preceded its recent adoption of new rules for new media. In Ireland there is an industry-only Code Committee, but any changes are made in consultation with the full (independent-majority) Council. In Australia and Denmark the Press Council, which in both countries has an independent chair and lay members, is responsible for the rules.

Three key functions of the ethical regulator

Having established the ‘voluntary, independent self-regulation’ recommended in the Leveson Report as the basis for recognition, the draft Royal Charter also reflects Lord Justice Leveson’s proposals for its three core functions: complaint handling, standards enforcement, and arbitration.

Who can complain?

A broad distinction exists between countries accepting complaints only from those personally affected, and those accepting complaints from any member of the public. The Danish, Swedish, and Irish press councils accept complaints only from those personally affected by the content, most commonly issues of privacy and reputation (although in practice the Irish Press Ombudsman accepts complaints with a fair degree of latitude).

Meanwhile, the Australian, Finnish, and German press invite any member of the public or organization to hold the press accountable by bringing a complaint, for example, regarding misleading information.

The draft Royal Charter adopts the latter position and sets out that the board of the regulatory body should have the power to hear and decide on complaints from any source unless the complaint is, for example, without justification or an attempt at lobbying.

How will standards be enforced?

Secondly, the draft Charter sets out that the board should have the authority to investigate and impose sanctions in the case of ‘serious or systemic’ breaches of the code and failures to comply with directions of the board. This is by no means common practice overseas. Press councils generally confine their main activity to complaint handling, coupled with the issuing of broader statements at times of press excess or concern that press freedom is under pressure. Own-initiative investigations by press councils are very rare. However, the Australian Press Council has been developing its reach in order to address not just individual complaints but the promotion of wider issues of ethical standards. It has, for example, established a National Advisory Panel of eminent Australians to assess the impact of the standards set out in the Press Council’s code on the everyday practices of publishers.

The draft Royal Charter takes the promotion of standards far further and provides the new body with the power to impose financial sanctions of up to 1 per cent of turnover with a maximum of £1 million in cases of ‘serious or systemic breaches of the standards code or governance requirements of the body’. This is a departure from the countries considered in my report, none of whose press councils are able to fine their members in this way.

With respect to sanctions, all the press councils in my report, like the UK at present, mandate publication of their adjudication, or a correction, as the chief sanction. In Denmark this is backed up in statute with a fine or prison term for failure to comply. In Sweden there is a ‘polluter pays’ administrative fee if a complaint is upheld, up to the equivalent of £3,000 depending on circulation. But, significantly, as a first-line sanction all the press councils are clear that they provide an ethical complement to the law, with rules that go beyond what is required by the courts. They are distinct from legal proceedings, fines, and damages; rather, they offer alternative remedies.

How will arbitration work?

The third function is an inexpensive arbitral process for civil legal claims. These claims are distinct from complaints under the ethical code, but the arbitral process would fall within the ambit of the new regulator. The draft Charter states that the new process ‘provides suitable powers for the arbitrator’, arrangements for frivolous or vexatious complaints to be struck out, and is free for complainants. As discussed above, those publishers choosing to sit outside the proposed voluntary regulatory framework could find themselves facing what the Leveson Report described as ‘disadvantageous costs awards and aggravated or exemplary damages in court’, since by declining membership they would have denied complainants the opportunity to take their matter to the related arbitration service.

The press councils I have looked at all counselled against any such blurring between ethical and legal boundaries. But that is not to say that issues of access to justice are ignored. In New Zealand this issue has instead been addressed within the legal system. Communications Tribunals have been

proposed in a draft New Media Bill of August 2012¹³ offering speedy and effective remedies to citizens who can prove they have suffered significant harm, including the issuing of take-down orders for offending websites.

Membership across platforms

The draft Charter takes an inclusive approach and sets out that ‘membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms’. The voluntary framework is open to any provider, new or old media, of any size.

Eligibility for membership of a press council is an increasingly challenging issue across the globe. All the press councils explored in my report have extended the offer of membership to purely online providers (as well as to electronic versions of the traditional printed press). However, all are grappling with definitions of journalism and editorial control across electronic media and some, for example Norway, are now regulating Twitter and Facebook accounts as well as blogs.¹⁴

A key problem is how to reshape their funding and governance framework to include new media. As an interim measure some press councils are charging new media members a nominal flat fee (€250 in the case of Ireland), while in Sweden, charges are only levied on new media members on a ‘polluter pays’ basis if they breach the code. These, however, are short-term solutions and all recognize that the related issue of who should have a seat at the governance table must be resolved.

One answer has been proposed in New Zealand. The starting point of the March 2013 New Zealand Law Commission Report *The News Media Meets ‘New Media’*¹⁵ is not phone hacking, nor relationships with police and politicians, nor even the press. Their starting point is the public and the public interest in journalism. They identify the many ways in which, for democratic ends, the public give the press privileges — access to information (for example, in court proceedings and confidential briefings), exemptions (such as from data protection requirements), rights (to protection of sources and to public interest defences). And they remind us that, in return, the

public has a right to expect those who hold power to account to be held accountable for their power.

The voluntary, ethical regulation they propose is a simple mechanism to demonstrate credibility and accountability in return for privileged access to information, public interest defences, and the right to display a standards or ‘qual’ mark, as they call it in New Zealand, differentiating members’ offerings for the public and advertisers. Under these proposals, the most significant punishment for breaching those standards is not a fine but suspension of membership. The system would be entirely platform-neutral, open to the press, to online providers, and to broadcasters. It has a statutory backdrop in publicly recognizing the criteria which an independent regulator must meet, but no statutory backstop powers. Providers choosing not to participate would lose the ethical, legal, and brand advantages that membership provides and would of course be subject to the law. Most importantly, the public will know who is inside, and who is outside, the regulatory tent and can make their choices accordingly.

In conclusion

The consensus among all the press councils I have looked at is that press regulation is concerned with ethical standards (for example on accuracy, bereavement, and interviewing children) that go far beyond the law, and with a speedy and cheap complaints mechanism that avoids costly litigation. Meanwhile, the courts are responsible for imposing financial punishments and damages when the civil or criminal law is breached. In the future, we will need clarity over the distinction between standards upheld by a code and rights upheld by the law. A blurring of the boundaries between the two will be a significant departure from regulatory systems elsewhere.

Nevertheless, the voluntary and independent framework set out in the draft Charter is a huge step forward in placing the public interest at the heart of regulation, and in publicly recognizing and independently safeguarding and enforcing the ethical standards expected of any provider of content on any platform that chooses to join. Indeed, a House of Lords Select Committee report on Media

Convergence published in March 2013¹⁶ has suggested that non-public service television providers of news and current affairs should fall under the regulator to emerge from the Leveson Report.¹⁷ This is a shot across the bows for the

framing of the next Communications Act,¹⁸ and whatever the regulatory framework — ethical and legal — to emerge, it must be flexible enough to accommodate this next stage of the debate.

Notes

- 1 The draft Royal Charter considered here is the *Draft Royal Charter on Self-Regulation of the Press* published by the UK government on 18 March 2013. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142808/18_March_2013_v6_Draft_Royal_Charter.pdf
- 2 Leveson, B. H. (2012) 'An Inquiry into the Culture, Practices and Ethics of the Press: Report', vol. 4, Part K. Available at http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_iv.pdf
- 3 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142808/18_March_2013_v6_Draft_Royal_Charter.pdf
- 4 http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working_Papers/Regulating_the_Press.pdf
- 5 <http://www.levesoninquiry.org.uk/hearing/2012-07-13pm/>
- 6 My report *Regulating the Press: A Comparative Study of International Press Councils* details press regulation in Sweden, Germany, Finland, Denmark, Ireland, and Australia, and draws on case studies from New Zealand, Canada, and Norway.
- 7 <http://www.notisum.se/rnp/sls/lag/19490105.HTM> and <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf>
- 8 http://www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf
- 9 <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf>
- 10 <http://www.pressnaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx>
- 11 http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf
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- 13 <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media/publication/ministerial-briefing/2012/ministerial-briefing-harmful-digital-communications-adequacy-current-sanctions-and-remedies>
- 14 <http://presse.no/Aktuelt/Facebook-og-twittermeldinger-kan-klages-inn>
- 15 http://www.lawcom.govt.nz/sites/default/files/publications/2013/03/nzlc_r128_new_media_web.pdf
- 16 <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldcomuni/154/154.pdf>
- 17 This idea is developed in my book *Regulating for Trust in Journalism* http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Other_publications/Regulating_For_Trust_in_Journalism.pdf
- 18 http://www.culture.gov.uk/news/news_stories/8121.aspx



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