

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's submission to the Department  
for Culture, Media and Sport on two  
Royal Charter proposals for the future  
regulation of the press**

**May 2013**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Executive Summary

- The Leveson Report contained a welcome blueprint of the properties and functions of effective press self-regulation and there is apparent agreement between the press, politicians and the Report about the basic structure of such a scheme and the characteristics of decent self-regulation.
- However in almost six months since publication there has been no headway in the establishment of new press self-regulation bodies. Attention has instead focussed on competing Royal Charters and mechanisms of recognition. We believe that such diversion does not best serve the vital public interest in ensuring effective self-regulation, nor past victims of press intrusion. It should be noted that there is no need for the press to wait in setting-up a self-regulator.
- A Royal Charter – more tied to Government than any Act of Parliament - is constitutionally inappropriate, undemocratic and opaque and in no way fit for this purpose. Indeed, the Privy Council’s own advice to those applying for a Royal Charter is rightly that where there is opposition to an application for a Charter, it is unlikely that one will be granted: *“The fact of a formal Charter application will be published by the PC Office, to allow other interested individuals or organisations to comment or to lodge counter-petitions. Any proposal which is rendered controversial by a counter-petition is unlikely to succeed.”*
- A “recognition body” has an important role in judging whether a self-regulator is providing fair, effective and credible regulation so it must have irreproachable independence and transparency. However both Royal Charters create an overly complex and bureaucratic system – which fails to achieve genuine independence and instead reflects the interests of the author. For example, the press model would have the body funded by the press, whereas the politicians’ version would be funded from the Exchequer.
- If it is accepted that the core features of a recognition body are independence from both the press and the politicians, transparency, application of due process, and institutional capacity and expertise to adjudicate (on the basis of facts and evidence) as to whether an organisation meets specified criteria, a

judicial body would be the best suited to performing the role. It is not necessary for a new recognition body to be established; this function can be ably performed by the Courts. This would remove the need for a Royal Charter and the bureaucratic and undemocratic contortions contained therein.

- One option is for a self-regulator to apply to the Courts for a declaration that it met the prescribed recognition criteria. The application process could be held in public session, in much the same way as a Court hearing, providing for transparency and due process. Judicial oversight would not end there as it would remain open to litigants to argue that a body which had previously secured recognition, no longer met the prescribed criteria. This would provide a continuing incentive for self-regulators to maintain standards. The other option is to leave self-regulators to apply prescribed criteria to their own formation and functions. Under this model, as and when a dispute between a publisher and individual arises, and the individual seeks legal redress, the Courts will determine whether a regulator meets the recognition criteria.
- Liberty's preferred model requires just two core elements to be formally prescribed: the basic criteria which a recognisable self-regulator must meet and provisions to allow for exemplary damages for breach of confidence and accompanying judicial discretion to impose or decline to impose such damages. This could be done simply, through legislation.
- Liberty believes recognition criteria should set out broad rules about the basic characteristics of a regulator including: a standard setting arm; a complaints body responsible for enforcement; an investigatory function to ensure systematic failures to meet the standards are addressed; and an arbitration arm to ensure quick, effective and low cost resolution of disputes around alleged breaches of the civil law. In addition there is value in setting out broad principles that should guide the discharge of effective self-regulation such as effectiveness, fairness, objectivity, independence, transparency, credibility of powers and remedies, reliability of funding and accountability. We were surprised at the level of detail set out in the recognition criteria contained in both Royal Charters. Complex and detailed stipulations in a sensitive area such as this inevitably give rise to disagreement, add layers of bureaucracy and undermine the flexibility of the scheme. Liberty has always maintained that the diversity of publishers and publications in existence in a modern

democracy is such that a range of self-regulators may be preferable, each adapted to characteristics of its member publishers.

- We support the availability of exemplary damages for breach of confidence cases. Inspired by nominal damages awarded by the European Court of Human Rights, damages in breach of confidence cases are conspicuously low when compared to levels of civil redress for comparable harm. Awards often fail to reflect the scale of suffering caused to the individual; they may also fail to capture the culpability of a defendant. We do not believe that the availability of exemplary damages for breaches of confidence would breach Article 10 European Convention on Human Rights. Further, exemplary damages for tort actions are well established at common law including for the purpose of addressing conduct which intentionally causes hurt to make a profit. There is also no reason why good faith – which could be demonstrated by membership of an effective regulatory body – should not be recognised when damages are being considered. Indeed this would usefully incentivise decent self-regulation. However, failure to join an effective regulator should not lead automatically to an award of exemplary damages; we fully support the need for flexibility and judicial discretion when it comes to assessing the level of damages or costs awarded in any particular case.
- Liberty believes that recognition criteria and provision for exemplary damages both lend themselves to legislative prescription. We are aware that concerns exist about the ease of future amendment of legislation (via a simple majority in both Houses of Parliament) hence the motivation for the respective Royal Charters and section 96 of the *Enterprise and Regulatory Reform Act 2013*, requiring changes to any rules to be made in prescribed and constitutionally unorthodox ways. However such constitutional contortion is neither necessary nor justified. While section 96 attempts to tie the hands of future Parliaments, in reality it will not, as section 96 can simply be repealed or amended by a new Act of Parliament. The uncomfortable reality is then, that making provision for approval of Charters by super-majority gives the appearance of constitutional unorthodoxy, but will not actually prevent future generations of politicians from changing the rules.
- Liberty believes that a greater degree of honesty and transparency is needed in this debate. The only real obstacle to including a few broad recognition

criteria in legislation is the misconceived perception that implementing any aspects of the Leveson proposals through statute will amount to statutory regulation of the press. The reality is that this simpler way of setting out recognition criteria for decent self-regulation, is also better and no more a hostage to fortune (or future Parliaments) than a Royal Charter backed by convoluted, unconstitutional and un-British procedural requirements.

## Overview

1. On 13<sup>th</sup> July 2011, the Prime Minister announced an Inquiry to examine the culture, practices and ethics of the press in the wake of the phone hacking scandal. The Inquiry was chaired by Lord Justice Leveson advised by a panel of six independent assessors, including Liberty's Director. Hearings were opened on 14<sup>th</sup> November 2011 and a wide range of witnesses gave evidence. On 29<sup>th</sup> November 2012 Lord Justice Leveson published his Report.<sup>1</sup>

2. Following several months of political negotiation, on or about 18<sup>th</sup> March 2013 cross-party talks reached agreement on a proposed system of press self-regulation. The same day, the Prime Minister called an emergency debate in the House of Commons to discuss the publication of a draft Royal Charter that would establish a body responsible for recognising a press regulator and the criteria that a recognised regulator would be required to meet. Amendments were inserted into the Enterprise and Regulatory Reform Bill and the Crime and Courts Bill to implement aspects of the agreement. In particular, the amendments require a two-thirds majority in Parliament before the proposed Royal Charter can be amended. They further set out costs provisions and allow for exemplary and aggravated damages in breach of confidence cases. The Crime and Courts Act was passed on 23 April 2013<sup>2</sup> and the Enterprise and Regulatory Reform Act was passed the following day on 24 April 2013.<sup>3</sup> Both received Royal Assent on 25 April 2013.

3. On 30<sup>th</sup> April 2013 the Press Standards Board of Finance (PressBof) submitted a petition for a Royal Charter which, like that agreed by cross-party consensus, would establish the body with responsibility for recognising a press regulator(s) and the criteria for recognition.<sup>4</sup> Protocol requires that the relevant Government department, in this case the Department for Culture, Media and Sport, consider this Charter, and before this review commences comments may be submitted to the Department in a consultation process closing on 24<sup>th</sup> May.

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<sup>1</sup> Leveson Inquiry Report: Culture, Practices & Ethics of the Press, available at: <http://www.levesoninquiry.org.uk/about/the-report/>.

<sup>2</sup> See section 34 -42 *Crime & Courts Act 2013* available at: <http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>.

<sup>3</sup> See section 96 of the *Enterprise & Regulatory Reform Act 2013* available at: <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>.

<sup>4</sup> The Humble Petition of the Press Standards Board of Finance Limited available at: <http://privycouncil.independent.gov.uk/wp-content/uploads/2013/05/Press-Standards-Board-of-Finance-Ltd-Petition-and-Draft-Charter.pdf>.

4. Liberty is disappointed that in almost six months since the Leveson Report was published there has been little progress in the establishment of a new system of press self-regulation. We believe that the Leveson Report contained a welcome blue-print of the characteristics necessary for an effective self-regulator. However such bod(ies) have yet to emerge and attention has instead focussed on Royal Charters and mechanisms of recognition. We believe that such diversion does not best serve the vital public interest in ensuring effective self-regulation, nor past victims of press intrusion. We urge the press to act swiftly to set up a system of decent self-regulation.

5. This paper will consider approaches taken by the press and the politicians to creating a scheme of press self-regulation and consider an alternative way of implementing the Leveson recommendations to ensure effective industry self-regulation which preserves the free press. Save in the area of recognition and the last-ditch backstop alternative (which was the subject of disagreement as identified in the Report) Liberty remains supportive of Lord Justice Leveson's recommendations for future self-regulation of the press.

### **Consensus on the structure of regulation**

6. There is apparent agreement between the press, the politicians and Lord Justice Leveson about the basic structure of a scheme designed to facilitate effective self-regulation of the press. The three component parts of the scheme are (i) a 'recognition body' with responsibility for judging whether a self-regulator meets a number of criteria, (ii) a series of 'recognition criteria' designed to set out the minimum standards a regulator will need to meet to be recognised and (iii) the creation of one or more independent self-regulators which set and enforce standards for those publishers which choose to join up. At a more fundamental level, Liberty believes there is also wide-spread agreement about the purpose of the scheme: to preserve a thriving, free press, but hold it accountable where it breaches individual rights.

7. There are, however, a number of disagreements within these broad areas of consensus. Who should have responsibility for recognising the regulator(s)? Should it be an existing body, or one created for the purpose? If it is a body created for the purpose, how should it be created, who should be eligible and ineligible for

involvement and what roles should it perform? What criteria should an effective self-regulator have to meet and where should this be set out? Who should be eligible to sit on the Board of a self-regulator? Whilst all agree that the preferred scheme of regulation should be voluntary, what incentives, if any, should attach to membership of the scheme and who should be covered by it? Finally, what provision should there be for amending or dissolving any instruments designed to implement aspects of the scheme?

### **The role of prescription**

8. Much of the reaction to the Leveson report has focused on concerns about 'statutory regulation of the press'. Little attempt has been made, however, to articulate what statutory regulation amounts to and which aspects of any scheme should or shouldn't find legislative expression and explain why. The suggestion seems to be that any role for legislation, no matter how peripheral, would cross a Rubicon. Given the widespread concern expressed about the role of legislation in the scheme, it is surprising that both the press and the politicians have chosen to implement their vision for a regulatory scheme through Royal Charter, a vehicle more closely tied to Government than any Act of Parliament. We discuss the relative merits of legislation and Royal Charters in the following section, but before considering the appropriate vehicle for implementing aspects of the scheme, we must identify which of those aspects should be susceptible to any sort of formal prescription.

9. In our view it would never be acceptable for a Charter or a piece of legislation to actually establish a regulator. To create a statutory body with direct regulatory responsibility would carry serious implications for press freedom by bringing the press under the control of Parliament. Worse still for press freedom would be to give statutory force to any code of ethics governing the conduct of publishers. Whilst the press, like every other institution and individual in this country must abide by the civil and criminal law, ethical standards over and above the requirements of the law must be drawn up and overseen independent of the state. Giving the force of law to ethical professional prescription could accurately be described as statutory regulation of the press, but that is not what was proposed by Lord Justice Leveson nor by the press or the politicians. Both Royal Charter models, however, do accept a significant role for the State in establishing the body with responsibility for recognising the regulator. Whilst Liberty does not set itself against such an

approach on principle, creating and prescribing the features and functions of a recognition body, whilst presenting advantages in terms of certainty, carries risks for the structural independence of the scheme which are well illustrated by a close analysis of both Royal Charter models.

*Creating a recognition body: the Royal Charters*

10. A recognition body will have no responsibility for regulating the press, but it has an important role in judging whether any regulator is providing fair, effective and credible regulation: for this reason its most important features must be unimpeachable independence and institutional transparency. Liberty is concerned about the inherent limitations involved in the use of either a Royal Charter or a statute to create a body with responsibility for recognising the Regulator(s). The construction of a body in this way necessarily involves the creation of a complex appointments structure, prescriptions about features and functions and requirements around eligibility. It is hard to achieve a truly independent recognition body in this way, as illustrated by the attempts made in both Royal Charters. Each model creates an overly complex and bureaucratic system, which reveals the inevitable institutional interests of its author. One obvious divergence between the press model and the cross-party Charter, is that in the former case, funding for a recognition body would come directly from industry through an Industry Funding body. The politicians, by contrast, would provide for the whole of the funding for the regime to come from the Exchequer, with applications for additional funding made on an ad hoc basis to the Lord Chancellor. Liberty does not believe that either approach is conducive to a truly independent scheme.

11. Similarly, built into the cross-party Charter is significant provision for Parliamentary oversight of the functions of the Recognition Panel, including a requirement that its accounts be audited by the Comptroller and Auditor General (both independent of Government, but officers of the House of Commons) and a number of requirements that reports of the Recognition Panel be laid before Parliament. Of particular concern is the requirement to report on the fact that there has been no regulator for a continuous period of three months, or that a regulator does not have full or substantial coverage. Requirements like this don't sit comfortably with a flexible, voluntary system lying firmly outside of the political sphere. Just as some concerns exist around the extent to which the cross-party model would involve political interference, the press model incorporates industry

influence at various stages of the process. Under the press Charter, for example, the Press Standards Board of Finance would be the first board of the recognition body. Whilst the Charter makes provision for the Board to resign on appointment of a new panel, it is far from clear why a body so closely linked to the industry should have any role - for any time - in a body which must be independent of both politicians and the press. The press model further reserves a role, on the Committee responsible for appointing the Board of the recognition body, to an individual appointed by the Industry Funding Body. This individual would be appointed to represent the interests of the industry. In a similar vein the press model only excludes serving and not former editors from membership of the Board of the recognition body; would require the Board's membership to have knowledge and experience of the newspaper industry, give the industry a veto over changes to the Charter; and allow party-political members of the House of Lords to sit on the Board of the recognition body.

12. Provisions like this in both Charters reveal, not only the preoccupations of their authors, but some fundamental confusion about the purpose of a recognition body in a scheme of regulation. The recognition body, as opposed to the regulator itself, does not need industry experience; in fact, such considerations are liable to distort its deliberations. Similarly it should not be overseen by and accountable to politicians. The extent of the role of a recognition body is to assess whether a regulator has a number of core features which it needs in order to perform its functions in an effective, fair, transparent and independent way. The recognition body will, on no model currently put forward, be responsible for formulating these basic criteria, its function is rather to make a fact-based assessment as to whether certain criteria have been met by bod(ies) holding themselves out as providing self-regulation of the press.

#### *Alternative models of recognition*

13. Lord Justice Leveson did not favour an approach involving the creation of dedicated body responsible for recognition. He foresaw challenges for the independence of such a body along the lines of those explored above. Whilst, like Liberty, he does not set himself against the creation of a Commission or Commissioner with responsibility for recognition, he considered that this role would be better performed by an established body less vulnerable to outside influence. His preferred option was that this role be carried out by broadcast regulator Ofcom.

Amongst the virtues of such an approach, he listed the established nature of the body and its experience and expertise in the related field of broadcast media. Liberty has taken a different view about the appropriateness of Ofcom to perform the recognition function and this difference of opinion was noted in a footnote to the Leveson Report. Our concerns stem both from the role of Ofcom as a *content* regulator for the broadcast industry and its lack of formal independence from Government, as a body whose board is appointed by the Secretary of State for Culture, Media and Sports.<sup>5</sup> Liberty does not believe that Ofcom is institutionally suited to performing a recognition role.

14. If it is accepted that the core features of a recognition body are independence from both the press and the politicians, transparency, application of due process, and institutional capacity and expertise to adjudicate (on the basis of facts and evidence) as to whether an organisation meets specified criteria, a judicial body would be the best suited to performing the role. Lord Justice Leveson acknowledged a backstop role for the judiciary where dispute arises about the decision of a recognition body to recognise, or decline to recognise a regulator. However, Liberty believes that the judiciary, constitutionally independent of the Executive and Parliament, and similarly entirely independent of the press is best placed to perform the recognition function itself.

15. Liberty's preferred approach is to leave the role of assessing whether a regulator meets prescribed criteria to the Courts. This would eliminate the need for bureaucratic appointments panels and recognition bodies. It would not require the Courts to be nominated as a body with responsibility for recognition either in legislation or Charter, it would quite simply be the natural result of setting out a few basic recognition criteria in statute. This would be a completely orthodox approach and would involve none of the contortions apparent in the Royal Charter models. The recognition function is akin to the role the courts perform day in day out: assessing, in all the circumstances and on the basis of all available evidence, whether criteria and legal stipulations are met in a particular factual situation.

16. If we accept that the judiciary are the most suitable body to perform this role, a question still remains around the stage at which this assessment should be carried out. One option would be a prior judicial recognition process, created for the

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<sup>5</sup> Under section 1 of the *Office of Communications Act 2002* available at: <http://www.legislation.gov.uk/ukpga/2002/11/section/1>.

purpose of granting early recognition of regulators. A self-regulator could apply to the Courts for a declaration that it met the prescribed recognition criteria. To ensure robust scrutiny, any such application could also be served on the Attorney-General who would have standing to attend a hearing and test the self-regulator's claims in the public interest. The application process could be held in public session, in much the same way as a Court hearing, providing for transparency and due process. Applications made to the judiciary could be assessed and granted or denied with an appropriate process for appeal to the higher Courts. The advantage of early recognition is public certainty and clarity about the quality of regulators, and similar certainty and clarity for publishers who would know at the outset whether a regulator meets core criteria. Judicial oversight would not end there; as it would remain open to litigants to argue that a body which had previously secured recognition, no longer met the prescribed criteria. This would provide a continuing incentive for self-regulators to maintain standards.

17. The other option is to leave self-regulators to apply prescribed criteria to their own formation and functions. Under this model, as and when a dispute between a publisher and individual arises, and the individual seeks legal redress, the Courts will determine whether a regulator meets the recognition criteria. This judicial decision would be made fully insulated from political or industry interference. The most obvious time at which such a decision would be required is where an individual seeks to bring a civil action against a publisher. The Courts will already be the body with ultimate responsibility for determining that claim. Liberty believes that there is no obstacle to a decision being made about the existence or otherwise of an effective regulator at that stage. For the reasons explained below, this decision may be a factor in determining good or bad faith on the part of the publisher and determinations about the level of damages or costs awarded in a case. The potential criticism of the second approach is that it will create some level of uncertainty at the outset, about the status of particular regulators. We understand that this may generate concerns, but believe these will quickly dissipate as a body of case-law develops, both around the status of individual bodies and the application of the recognition criteria in general. If a body is found to fall short, the imperative will exist for it to step up efforts to meet the basic criteria for recognition in the future. In order to retain the confidence of its member publishers a regulator will have to demonstrate it is capable of consistently meeting the recognition criteria. The remedy for those publishers which believe their regulator falls short is to form a new one, fully committed to meeting the recognition criteria.

18. The virtue of these approaches is that an assessment of whether an effective regulator exists will not be a decision made at the beginning of a body's life and reviewed periodically, it will be an assessment made throughout the life of a body, whenever the conduct of a member publisher is called into question. Further it will be in the interests of the industry to create a body or multiple bodies which fully meet the standards described in recognition criteria: if a regulator is found to be inadequate, liability may more readily be found and/or higher costs and damages may be awarded against member publishers. In this way the impetus for ensuring that standards are met will come from the industry itself.

19. Liberty believes this is what effective self-regulation looks like. It is effective regulation imposed by industry on industry, never compulsory but with sufficient incentives to make voluntary take up likely and ultimately accountable to the rule of law, rather than to politicians. If this model of self-regulation were to be adopted, just two core elements require any formal prescription. First, provisions setting out the basic criteria which any recognisable self-regulator must meet to guide the courts in their assessment; secondly provisions as to the effect of regulator membership on costs and damages decisions, also to guide the courts.

#### *The recognition criteria*

20. It is a common feature of the models of press regulation envisaged by the press, the politicians and Lord Justice Leveson that a set of criteria must be set down, whether in statute or Royal Charter, with which a self-regulator must comply in order to be recognised. Liberty agrees that this is an appropriate area for formal prescription, but whilst there is consensus around the existence of a series of criteria, Liberty believes that the approach taken in both Royal Charters is overly prescriptive and inflexible.

21. Recognition criteria must clearly include some broad rules about the basic structure of a regulator. A regulator could not conceivably perform its role without a standard setting arm with responsibility for creating a code of ethics. Similarly vital is the existence of a complaints body, whose responsibility it is to enforce the code where an allegation of violation is made. An investigatory function is necessary to ensure systematic failures to meet the standards set out in the code are investigated and remedied and an arbitration arm is necessary to ensure quick,

effective and low cost resolution of disputes around alleged breaches of the civil law. Aside from the role of an arbitration body, which would under the press model be optional, there is apparent consensus between Lord Justice Leveson, the press and politicians about the need to for a regulator to have these formal components if it is to be recognised as a regulator. We further see no issue with basic stipulations about eligibility for membership of a regulator, an obvious example would be to exclude serving editors and politicians alike from the boards of regulators. Finally, Liberty believes there is value in setting out some broad principles designed to guide a Regulator in the exercise of its functions. Lord Justice Leveson envisaged a series of principles, comprising effectiveness, fairness, objectivity, independence, transparency, credibility of powers and remedies, reliability of funding and accountability. Liberty believes that these criteria capture, very well, the essence of effective regulation. These are principles capable of shaping regulation, without being overly prescriptive.

22. Liberty was surprised at the level of detail set out in the recognition criteria contained in the proposed Royal Charters, which in both cases go significantly further than these few core prescriptions. Complex and detailed stipulations in a sensitive area such as this inevitably give rise to disagreement, add layers of bureaucracy and undermine the flexibility of the scheme. Liberty has always maintained that the diversity of publishers and publications in existence in a modern democracy is such that a range of self-regulators may be preferable, each adapted to characteristics of its member publishers. To this end, overly prescriptive criteria risk creating a strait-jacket and preventing tailored models of regulation from emerging. Liberty believes that, rather than creating appointments bodies, making ever more intricate requirements about membership and quibbling about peripheral functions, a regulator should be formed in conformity only with basic structural requirements and general principles designed to safeguard the integrity of its core functions. It would then ultimately be for the Courts to determine whether a particular regulator is constituted in a fair way, whether its processes are transparent and its responses and remedies effective. It is true that differences of opinion will exist about how best to satisfy these principled requirements, but as best practice is rewarded and ineffective or unfair regulation identified and then disregarded by the Courts, a clear and coherent understanding of the requirements of effective regulation will quickly develop, facilitated by those members of the press who wish to benefit from membership of a body with the status of regulator. Where regulators wish to have further guidance, they would do well to consult Lord

Justice Leveson's recommendations around the criteria which an effective regulator should meet.

### *Costs and damages*

23. Inspired by nominal damages awarded by the European Court of Human Rights, damages in breach of confidence cases are conspicuously low when compared to levels of civil redress for comparable harm. Awards often fail to reflect the scale of suffering caused to the individual; they may also fail to capture the culpability of a defendant. Yet in contrast to the consensus which exists around the decision to create basic rules governing recognition, there seems to be a degree of controversy about the recommendation to provide for the possibility of exemplary damages for breach of confidence.

24. We are confused about the level of objection to this aspect of the scheme and were, in particular, surprised at reports that a legal opinion from three leading and highly respected QCs had cast doubt on the lawfulness of a regime of exemplary damages.<sup>[1]</sup> Unfortunately we have been unable to obtain a full copy of this legal advice and are therefore not in a position to respond to its reasoning. However, we do not believe that the availability of exemplary damages for breaches of confidence would breach Article 10. Further we note that among the aims and justifications of the law of damages are compensation, punishment, deterrence, the reversal of unjust enrichment and the symbolic establishment of the vindication of rights. Just as the law is rightly concerned to protect such matters as personal dignity, autonomy and integrity so damages for such an infringement may include distress, hurt feelings and loss of dignity. Exemplary damages for tort actions are well established at common law<sup>[2]</sup> including for the purpose of addressing conduct which intentionally causes hurt to make a profit.

25. It is hard to see why there should not be a regime of costs which recognises good faith on the part of defendants. One possible way in which a publisher can demonstrate good faith and a commitment to ethical conduct is to join a regulator. We also find it difficult to escape the conclusion that if a voluntary scheme of minimal standards is not realistically incentivised it is liable to collapse under the

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<sup>[1]</sup> See *Tory and Leveson plans for exemplary privacy damages 'may be unlawful'* The Guardian 21 February 2013, available at: <http://www.guardian.co.uk/media/2013/feb/21/tory-leveson-exemplary-privacy-damages>.

<sup>[2]</sup> The award of exemplary damages in tort actions has been considered by the House of Lords and the principles are laid down in *Rookes v Barnard* [1964] AC 1129.

weight of collective industry apathy. We believe that is one of the reasons why a current system of regulation under the PCC has proved inadequate. However, whilst we firmly support the decision to create incentives for voluntary effective self-regulation in good faith, we fully support the need for flexibility and judicial discretion when it comes to assessing the level of damages or costs awarded in any particular case.

26. Liberty has never suggested that failure to join an effective regulator should lead automatically and without more to an award of exemplary or aggravated damages. We have not and would not conclude that membership of a regulator should always attract costs benefits, regardless of the conduct of claimant and defendant in all the circumstances of a case. However we see no issue with setting out provisions stipulating that membership of an effective regulator is a factor to be taken into account by a judge when assessing costs or damages. The important point to make is that any such provision should provide ample room for consideration of the conduct of the parties in all the circumstances of a case, the rationale presented for not joining a regulator and wider considerations going to the interests of justice. Membership of a regulator is a relevant consideration, but judicial discretion must not be unduly curbed.

### **Legislation or a Royal Charter**

27. The section above discusses the areas where Liberty believes it is both useful and acceptable to make some formal prescription implementing aspects of the scheme. There is significant agreement between Lord Justice Leveson, the press and politicians as to the areas where formal prescription should be made, but there is apparently no consensus over the Royal Charter vehicle as supported by the politicians and certain sections of the press. The Leveson Report made no reference to the possibility of establishing a recognition body through a Royal Charter, rather the idea appeared to emerge in response to concerns expressed about implementing any part of the Leveson recommendations through statute. It is easy to understand those concerns, particularly in a climate where confusion reigns about the role legislation would play in the scheme. The assumption seems to be that as politicians are responsible for passing Acts of Parliament, legislation means undue control for politicians in press regulation. We believe these concerns can be addressed by ensuring that legislation is confined to certain discrete areas of the Leveson proposals. This consideration aside, however, we are at a loss to see why

those who fear undue political influence through statute prefer a Royal Charter negotiated between the three main political parties, in a deeply non-transparent and undemocratic way, granted by the Privy Council which is formally an arm of Government. Liberty was surprised when first the Government and then tri-partite consensus reached the conclusion that a Royal Charter was the best way to implement Leveson's proposals; we were even more surprised when the press adopted this model. Further and as explained below, a Royal Charter is constitutionally unsuited to the task at hand, a fact amply demonstrated by the contortions performed by both the press and the politicians in establishing their respective schemes.

*A recognition body is neither established nor a regulator*

28. In the normal course of things, it is bodies that are already in existence and which have a track record of success in, for example, regulating their industry, that then apply to have their status underpinned by a Royal Charter. The established body consults informally with the Privy Council Office before making a formal petition. This is then public and open for comment and counter petition, before a decision is taken by the Privy Council. Royal Charters are not usually used to create new bodies, or even to accompany their creation, but come much later when the body is established. The Privy Council's own criteria for assessing whether a Royal Charter should be granted are:

- (a) the institution concerned should comprise members of a unique profession, and should have as members most of the eligible field for membership, without significant overlap with other bodies;
- (b) corporate members of the institution should be qualified to at least first degree level in a relevant discipline;
- (c) the institution should be financially sound and able to demonstrate a track record of achievement over a number of years;
- (d) incorporation by Charter is a form of Government regulation as future amendments to the Charter and by-laws of the body require Privy Council (ie Government) approval. There therefore needs to be a convincing case that it

would be in the public interest to regulate the body in this way; and

(e) the institution is normally expected to be of substantial size (5,000 members or more).

29. A new body designed to recognise independent self-regulators does not meet any of these criteria. It is not an established body and has no financial history, but more fundamentally than that, it is not a regulator and would have no responsibility for regulating an industry. Its membership would not be made up of members of a profession, suitably qualified or otherwise, but under both proposed Royal Charters would just be a small panel of eligible people with relevant expertise. If anything, the use of a Royal Charter in this context is liable to create confusion about the extent of a recognition body's role.

#### *Contested proposals*

30. As the Charter process is usually used to grant a Charter to an existing body, there is little scope for debate about the merits of its particular structure. The question is simply whether the Privy Council should or should not grant it a Charter. The draft Charter and bye-laws are all drafted by the body applying for the Charter, with drafting advice from the Privy Council Office. The Privy Council decision is ordinarily limited to a rubber stamp or an outright rejection. The idea that the Privy Council debate the merits of two competing and hotly contested Royal Charters in a sensitive area of public policy, and either pick one or craft some sort of compromise is entirely inconsistent with current practice. Indeed, the Privy Council's own advice to those applying for a Royal Charter is that where there is opposition to an application for a Charter, it is unlikely that one will be granted: "*The fact of a formal Charter application will be published by the PC Office, to allow other interested individuals or organisations to comment or to lodge counter-petitions. Any proposal which is rendered controversial by a counter-petition is unlikely to succeed.*"<sup>6</sup>

#### *Independence from Government*

31. The body with responsibility for granting (and, ordinarily, approving amendment to) a Royal Charter, is the Privy Council. The Lord President of the

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<sup>6</sup> See Privy Council Website, *Applying for Royal Charter* - <http://privycouncil.independent.gov.uk/royal-charters/applying-for-a-royal-charter/>.

Privy Council is the Deputy Prime Minister and the Council's day to day business is carried out by Ministers, most of whom are members of the Cabinet. Before amendments to Charters are granted, the normal process is for them to be put to the relevant Government department. Indeed, in the present case, the Department for Culture Media and Sport has been called upon to review the Charter submitted by the PressBof under standard Royal Charter procedures.<sup>7</sup>

32. In their competing Royal Charters, both the politicians and the press have attempted to try and avoid the obvious dangers of Royal Charter amendment by the Privy Council itself. The cross-party Charter, read together with section 96 of the *Enterprise and Regulatory Reform Act 2013* provides for prior Parliamentary approval of a Royal Charter amendment or a decision to dissolve by super-majority. Super-majorities are a concept alien to the British model of Parliamentary democracy, built as it is on the notion of perpetual Parliamentary sovereignty, but putting this consideration aside for a moment, there appears to be a flaw in the model adopted by Charters, which would afford the Privy Council an effective veto. The cross-party model would require first the approval of the recognition body and then the backing of 2/3 of the members of both Houses of Parliament before an amendment could be approved, but it appears it will still require the approval of the Privy Council. This analysis is supported by the wording of section 9.5 of the cross-party Charter, which provides that changes meeting the requirements outlined above will take effect 'when approved by Us, Our Heirs or Successors in Council'. It may be argued that this is just a technicality and that the Privy Council will approve as a matter of course, but, as worded, the Privy Council (and thereby the Cabinet) has an effective veto over future changes to the Charter.

33. The model proposed by press raises the same difficulties. As under the cross-party Charter, a number of requirements must be satisfied, namely the unanimous agreement of members of the Recognition Panel, the Boards of any regulator(s)

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<sup>7</sup> See Privy Council website, Petitions for Royal Charters, "*The Press Standards Board of Finance Limited (Pressbof) has submitted to the Privy Council Office a petition for a Royal Charter. As with all Charter petitions, the relevant Government department, in this case the Department for Culture, Media and Sport (DCMS), will be considering this Charter, drawing in views from other Government departments as required. Prior to DCMS' consideration of the Charter, comments may be provided on its contents. Any comments on the petition should be sent to DCMS at the following address: [pressbofcharter@culture.gsi.gov.uk](mailto:pressbofcharter@culture.gsi.gov.uk) before 24 May. Following this period, DCMS will consider the Royal Charter, before reaching a view on whether it should proceed to the next stage. The fact that Her Majesty has referred a Petition for a Royal Charter to a Committee of the Privy Council for consideration and report is published by this office in the relevant Gazette.*" Available at: <http://privycouncil.independent.gov.uk/royal-charters/petitions-for-royal-charters/>.

and members of the Boards of all of those trade associations represented on an Industry Funding Body, before an amendment can be approved, but the Privy Council must still ultimately approve after, it would seem, consulting with the relevant Government department. The difficulty stems, again, from the inherently unsuitable nature of the Royal Charter process for implementing these proposals.

34. A further, pressing difficulty is also apparent in the press model. In addition to apparently requiring the approval of the Privy Council, the press model would also give the industry a veto over any changes to the Charter, which is difficult to square with the structural independence of the scheme.

#### *A role for legislation*

35. Liberty believes that, rather than twisting and contorting the Royal Charter model, the best way to implement those aspects of scheme where the need for formal prescription has been agreed between press and politicians is through a few short, simple legislative provisions. Liberty believes that setting out a few broad criteria for recognition of a regulator in an Act of Parliament is a sensible and appropriate way to facilitate the system. Legislative provisions setting out recognition criteria need not be overly prescriptive or inflexible. We are aware, however that concerns also exist about the ease of future amendment (via a simple majority in both Houses of Parliament) and fears that over time Parliament could amend to exert undue political control over recognised standards of press regulation. This is clearly the motivation for the respective Royal Charter provisions, requiring changes to any rules to be made in prescribed and constitutionally unorthodox ways. Whilst we accept that this anxiety arises from genuine concerns about the way in which future Parliaments may seek to change the rules governing recognition, Liberty believes this kind of constitutional contortion is neither necessary nor justified.

36. In this country, as distinct from many comparable democracies, we have closely guarded the principle of Parliamentary sovereignty as central to our constitutional arrangements. Whilst many younger democracies have adopted written constitutions setting out the functions of the respective arms of the State, a core of rights and freedoms etc, the UK remains a constitutional democracy founded on the Parliamentary sovereignty under the Rule of Law. Even our modern-day Bill of Rights - the Human Rights Act - has no special status in law and

is subject to change in the same way as any other statute. This may well seem strange to an American, used to the requirement of a super-majority in both Congress and the Senate before rights set out in the Constitution can be amended. It would probably appear even stranger to a German national – in Germany a commitment to fundamental rights and freedoms is protected by an ‘eternity clause’ meaning those commitments are binding on future Governments. In this country, however, we have never attempted to tie the hands of future Parliaments. Section 96 of the *Enterprise and Regulatory Reform Act*, which requires approval by a 2/3 majority of both Houses of Parliament before a Royal Charter can be amended or dissolved, appears anomalous in this context. In reality, this provision will not tie the hands of future Parliaments, as section 96 can simply be repealed or amended by a new Act of Parliament. The uncomfortable reality is then, that making provision for approval of Charters by super-majority gives the appearance of constitutional unorthodoxy, but will not actually prevent future generations of politicians from changing the rules. Liberty believes this is yet another example of the contortions that have resulted from an attempt to shoe-horn provisions around recognition of press regulators into a patently unsuitable model.

37. Liberty believes that a greater degree of honesty and transparency is needed in this debate. The only real obstacle to including a few broad recognition criteria in legislation is the misconceived perception that implementing any aspects of the Leveson proposals through statute will amount to statutory regulation of the press. The reality is that this simpler way of setting out recognition criteria, is also better and no more a hostage to fortune (or future Parliaments) than a Royal Charter backed by convoluted, unconstitutional and un-British procedural requirements. If we want to remain true to the principle of Parliamentary sovereignty, we have to accept that Parliament can legislate to do anything at any time, and it can repeal or amend any law including the rules which govern the recognition of press regulators.