This briefing provides an introduction to the developments regarding press regulation in the UK and Scotland. It covers background and key aspects in relation to the Leveson Inquiry, the proposals for a Royal Charter, and the Expert Group on the Leveson report in Scotland.

The briefing also provides information on the scrutiny conducted by the Scottish Parliament Education and Culture Committee as well as a summary of recent developments, including the press industry’s proposal for a Royal Charter.
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EXECUTIVE SUMMARY

This briefing provides an introduction to the developments regarding press regulation in the UK and Scotland.

Specifically, it covers background and key aspects in relation to the following—

- the Leveson Inquiry;
- the proposal for a Royal Charter; and

The Leveson Inquiry was commissioned in July 2011 following the exposure of phone hacking incidents. In his report, which was published on 29 November 2012, Lord Justice Leveson set out his vision of a new regulatory system for the press. He recommended that the system should be voluntary, organised by the press industry and underpinned by legislation. In order to encourage all significant news publishers to join, he recommended a series of incentives (carrots and sticks). Lord Justice Leveson also considered the relationships between the press and the police and between the press and politicians. These aspects of his Inquiry are not covered in this briefing.

Following publication of the Leveson report, discussions took place in the UK and Scottish parliaments to consider the implications of Lord Justice Leveson’s recommendations.

In the UK Parliament, discussions between the three main political parties resulted in a joint proposal for a Royal Charter, which was published on 18 March 2013. The Charter sought to implement Leveson’s recommendations without setting out in legislation the title, definition, functions, power, rules or composition of a new system of regulation. The Charter was, however, part of a package that included legislative measures to implement a system of exemplary damages and legal costs that would be used as an incentive to encourage news publishers to join the regulatory system (in the Crime and Court Bill), and to entrench in statute a threshold for changing the Royal Charter (in the Enterprise and Regulatory Reform Bill).

In the Scottish Parliament, an Expert Panel was established to consider the implications of the Leveson report for Scotland. The Expert Panel was led by the Rt Hon Lord McCluskey and his report was published on 16 March 2013. Whereas the Royal Charter avoided the use of legislation to set out the details of the regulatory system, Lord McCluskey proposed a draft Bill to underpin the system in Scotland. He also recommended that, rather than the voluntary systems proposed by Lord Justice Leveson and as set out in the Royal Charter, the regulatory system should have universal jurisdiction over all news-related publishers. In addition, Lord McCluskey recognised that the carrots and sticks recommended in the Leveson report and the Royal Charter had been drawn from English laws and would require substantial modification to be able to operate effectively in Scotland.
There have been a number of subsequent developments in what is a fast-moving debate. In April 2013, the Scottish Parliament Education and Culture Committee heard oral evidence on the various options for press regulation and the implications for Scotland. The Committee concluded that it supported the Scottish Government’s intention to participate in the UK-wide Royal Charter.

Most recently, on 25 April, the press industry rejected the Royal Charter proposed by the three main political parties in London and published its own version. This new version removes entirely the role of the UK Parliament from the process of establishing a press regulator. It also appears to give greater responsibility to the press industry in the process.

It is anticipated that further discussions will take place in the light of the new proposal from the press industry, and the Scottish Parliament intends to hold a debate on press regulation on 30 April.
THE LEVESON INQUIRY

Introduction

In July 2011, following the exposure of phone hacking incidents, the UK Government commissioned an inquiry into the activities of the press to be led by the Rt Hon Lord Justice Leveson. The Leveson Inquiry was UK-wide in its scope. It was set up, and its Terms of Reference were finalised, with the support of the devolved administrations in Scotland, Northern Ireland and Wales. Lord Justice Leveson was assisted by a panel of six expert Assessors with relevant experience in media, broadcasting, regulation and government. (Leveson 2012, Volume I, Part A, Chapter 1)

The Leveson Inquiry was split into two parts (Leveson 2012, Volume I, Part A, Chapter 2). The first part examined the culture, practices and ethics of the press and, in particular, the relationship of the press with the public, the police and politicians. Part 1 was split into four modules—

- The relationship between the press and the public and in relation to phone-hacking and other potentially illegal behaviour.
- The relationships between the press and police and the extent to which that has operated in the public interest.
- The relationship between the press and politicians.
- To make recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards.

Part 2 of the Leveson Inquiry will seek to address the question of “who did what to whom”, and will look at how extensive have been the identified failures in News International, other press organisations, the police, the political class, public servants or others. Part 2 will, therefore, take place after all criminal proceedings relating to phone-hacking and bribery have been concluded. It is not known when this will be although it is expected that the first trials will begin in September 2013.

Key principles

In November 2012, Lord Justice Leveson published his Report of an Inquiry into the Culture, Practice and Ethics of the Press (Leveson 2012). The report set out the findings of the first part of the Leveson Inquiry and reflected oral evidence heard from 337 witnesses and written evidence from nearly 300 others.

In the report, Lord Justice Leveson acknowledged the different legal jurisdictions within the UK and accepted that his proposals may require some tailoring in order to be able to be applied effectively. He stated that—

“I have sought to set out my analysis and conclusions in a sufficiently explicit and reasoned way to enable the experts within the devolved jurisdictions to see as readily as possible how they could be made to fit.” (Volume I, Part A, Chapter 4)
Lord Justice Leveson presented the key findings of his report in public and outlined that the British press had served the country very well for the vast majority of the time. However, he said, there needed to be a change in the way in which the press operated.

“The press, operating freely and in the public interest, is one of the true safeguards of our democracy. As a result, it holds a privileged and powerful place in our society. But this power and influence carries with it responsibilities to the public interest in whose name it exercises these privileges.

“Unfortunately, as the evidence has shown beyond doubt, on too many occasions, those responsibilities (along with the Editors’ Code which the press wrote and promoted) have simply been ignored. This has damaged the public interest, caused real hardship and, also on occasion, wreaked havoc in the lives of innocent people.” (Statement by Lord Justice Leveson, 29 November 2012)

Lord Justice Leveson set out in his report his view that the existing system of self-regulation for the press, carried out by the Press Complaints Commission (PCC), had failed and that a new framework was required. As Lord Justice Leveson stated, his view was shared by the Prime Minister, the Deputy Prime Minister, the Leader of the Opposition, and the Commission itself which had unanimously agreed in March 2012 to enter a transitional phase in preparation for its own abolition and replacement. He considered that the primary reason for the failure of the existing regime was that the PCC suffered from a “profound lack of any functional or meaningful independence from the industry” from the industry that it claimed to regulate. (Volume IV, Part J, Chapter 4)

Lord Justice Leveson also referred to the operation of the criminal law and responded to the suggestion that the inquiry might not have been necessary if the criminal law had operated more effectively. He stated that, in his view, law enforcement could never be the whole answer “because the law-breaking in this area is typically hidden, with the victims generally unaware of what has happened”. In the report, therefore, Lord Justice Leveson concluded that more rigorous application of the criminal law would not provide the solution. (Statement by Lord Justice Leveson, 29 November 2012)

Proposed model for self-regulation of the press

Lord Justice Leveson recommended a model for independent self-regulation that “would protect both the freedom of the press and freedom of speech along with the rights and interests of individuals; it should therefore command public confidence”. In order to achieve this, he envisaged that the press would be invited to propose the creation of a regulatory body, but that it would need to be recognised under law. (Leveson 2012, Executive Summary and Recommendations)

In his report, Lord Justice Leveson set out his vision of a voluntary independent self-organised regulatory system that would provide a degree of independence from the industry. He envisaged that the regulatory system should carry out three key functions—

- to handle complaints;
- to promote and enforce standards; and
- to deal with dispute resolution (Volume IV, Part K, Chapter 7).

In terms of scope, Lord Justice Leveson concluded in his report that the new system of regulation should cover all significant news publishers. This was defined as including “all the major players in the industry … all national newspaper publishers and their online activities, and
as many regional and local newspaper publishers, and magazine publishers, as possible”. Lord Justice Leveson also referred to blogs and highlighted that many had very different processes, audiences and business models to most newspapers and that consequently it could be difficult to establish one set of requirements, for example in respect of internal governance, annual reporting or membership fees, that would be appropriate for all types of publisher. However, he concluded that it was important that all types of publishers should be able to join such a body, and to do so on terms that are not manifestly inappropriate for their business model”. (Volume IV, Part K, Chapter 7)

In order to encourage news publishers to join the regulatory system, Lord Justice Leveson recommended a series of incentives (carrots and sticks) to encourage news publishers to sign up. Specifically, he proposed—

- availability to the press of an arbitration service (carrot);
- beneficial and prejudicial outcomes in terms of legal expenses when sued (carrot and stick); and
- beneficial and prejudicial outcomes in terms of damages when successfully sued (carrot and stick).

Lord Justice Leveson recommended that there should be legislation to underpin the regulatory system and facilitate its recognition in legal processes. He argued that legislation was necessary in order to—

“meet the public concern that the organisation by the press of its regulation is by a body which is independent of the press, independent of Parliament and independent of the Government, that fulfils the legitimate requirements of such a body and can provide, by way of benefit to its subscribers, recognition of involvement in the maintenance of high standards of journalism …” (Leveson 2012, Volume IV, Part K, Chapter 7)

Lord Justice Leveson considered that “the law must identify those legitimate requirements and provide a mechanism to recognise and certify that a new [regulatory] body meets them”. He proposed that this recognition and certification role should be performed by a recognition body, namely Ofcom (as the regulator for the UK communications industries).

During his inquiry, Lord Justice Leveson heard evidence that suggested statutory underpinning – in any way – would go too far. In the report, he stated that he “simply did not accept that these provisions will have a chilling effect on free speech or press freedom” and he rejected the suggestion that it would cause a degeneration of the rights of the press or a descent into state control. (Volume IV, Part K, Chapter 7)

The reaction to the Leveson report

Reaction in the UK Parliament

In a statement to the House of Commons (UK Parliament, 29 November 2012) the Prime Minister welcomed the Leveson report. However, he also expressed some “serious concerns and misgivings” about Lord Justice Leveson’s proposal for statutory underpinning. The Prime Minister described writing elements of press regulation into law as crossing the Rubicon and said that he was “wary of any legislation that has the potential to infringe free speech and a free press”. (Cols 446-9)

In addition, the Prime Minister said that further consideration needed to be given to whether Ofcom should be given further powers as the recognition body. He stated that Ofcom “was
already a very powerful regulatory body” and suggested that “we should be trying to reduce concentrations of power rather than increase them”. (Col 452)

In contrast, the other main UK party leaders indicated their support for the Leveson model of statutory underpinning. The Leader of the Opposition, Ed Miliband, endorsed the proposal that the criteria any new regulatory body must meet should be set out in statute. Without that, he said, “there cannot be the change we need”. (Cols 450-2) Similarly, the Deputy Prime Minister and Leader of the Liberal Democrats put forward his view that “changing the law is the only way to give us all the assurance that the new regulator is not just independent for a few months or years, but is independent for good”. (Cols 470-2)

Despite their differences, all three party leaders agreed to open cross party discussions about how to implement the Leveson recommendations. Those discussions resulted in the proposal for a Royal Charter, the final draft of which was presented to the House of Commons (UK Parliament, 18 March 2013) (see later section on the Proposal for a Royal Charter).

Reaction in the Scottish Parliament

In Scotland, a parliamentary debate on the Leveson report was held in the Scottish Parliament (4 December 2012). There was broad agreement with Lord Justice Leveson’s view that there needed to be a new independent self-regulatory system for the press. There was also agreement that this new system should respect and maintain the freedom of the press and also operate in the public interest. The political parties also expressed strong views about the extent of such a system, i.e. whether it should be UK-wide or if there should be a separate model for Scotland, and if it should be underpinned by legislation.

The First Minister, Alex Salmond MSP, argued that Lord Justice Leveson’s report required “a specific response from Scotland”. To support this, he highlighted that under Scots law, exemplary damages do not exist and the law of defamation differs significantly from the English law of libel. He told the Scottish Parliament, therefore, that the Leveson recommendations required “serious, expert and distinctive consideration within Scotland; they cannot just be left to Westminster”. (Cols 14232-4)

However, whilst the First Minister considered that any system had to adhere to Scots law, he did not rule out Scotland being included within a UK-wide regulatory body. He stated that “a Scottish solution is required for the underpinning – but not necessarily for the organisation – of the self-regulatory body”. (Col 14235)

Scottish Labour, the Scottish Conservatives and the Scottish Liberal Democrats clearly favoured a UK-wide system of self-regulation of the press and were keen to ensure that this option remained ‘on the table’. The Leader of the Scottish Labour Party, Johann Lamont MSP, considered that even though regulation of the press had been devolved since 1999, a unitary authority had existed across Scotland and the rest of the UK. She set out her view that the “problem with that authority was not that the same rules were applied in England and Scotland, but that they were not applied robustly enough”. Ms Lamont also suggested that, in her view, the media across the UK was closely interlinked and so she found it difficult to see how Scotland would be better served by a separate regulatory system.” (Cols 14237-41)

Similarly, the view of the Scottish Conservatives was that a two-system solution – where Scotland goes one way and the rest of the UK goes another – was unrealistic and unnecessary. The Party Leader, Ruth Davidson MSP, believed that neither the newspaper industry nor the public wanted to deal with the practical difficulties of having two competing systems. She was
also concerned about the additional cost of a Scotland-specific system of regulation that would fall upon newspaper publishers. (Cols 14242-4)

The Leader of the Scottish Liberal Democrats, Willie Rennie MSP, supported the establishment of a UK-wide recognition body. He considered that this would still allow the press in Scotland to set up a regulator just for Scotland on the basis that more than one body was able to apply for recognition. Otherwise, if Scotland legislated for a recognition body then that, he suggested, would limit the options available and “would be ruling out the possibility of there being a UK-wide independent body”. (Cols 14245-7)

Patrick Harvie MSP, Leader of the Scottish Green Party, considered that any response to the Leveson proposals in Scotland had to take account of the distinct nature of Scots law. He suggested that the Parliament should wait and see what the press industry brings forward and that, in the meantime, neither side of the debate should rule in or out a single UK body or a separate Scottish body. (Cols 14264-6)

On whether a regulatory system needed legislative backing, there was general agreement with Lord Justice Leveson’s view that underpinning was necessary to ensure that any regulatory body met the public concern that it should operate independently of the press, of parliament and of government. The First Minister referred to the proposal for statutory underpinning – as opposed to statutory regulation – and considered that the principle was “logically sound”. He also noted, as did Lord Justice Leveson in his report, that the system of press regulation in Ireland – whereby the Press Council and Office of the Press Ombudsman is recognised in legislation [Defamation Act 2009] – was an interesting model that merited consideration. (Col 14234)

Patricia Ferguson MSP, speaking on behalf of Scottish Labour, put forward her Party’s view that statutory underpinning did not risk the state taking control of the press, as had been implied by some. On the contrary, she suggested, Lord Justice Leveson’s proposals would “allow a system of regulation that is independent of politicians as well as the press”. The Liberal Democrats also supported legislative underpinning, which Mr Rennie referred to as “a central part of Leveson” and as “something that we should proceed with”. (Cols 14277-9)

In contrast, the Conservatives considered that statutory underpinning was not necessary to give effect to the main findings of the Leveson report. Annabel Goldie MSP stated that—

“My party’s view is that any form of statutory provision that enacted the “requirements” … that a regulatory body must fulfil would inevitably introduce the risk of political interference in the freedom of the press. That cannot be helped. Such statutes control the press. Governments pass statutes, and there is the rub.” (Col 14276)

Margo MacDonald MSP, Independent, referred to her experience as an investigative journalist when she chose not do anything about a story because, she said, “I knew that children were involved who were utterly innocent”. She suggested that such a position was also representative of the press and considered that “we can self-regulate without statutory interference”. (Col 14272)

In closing the debate, the Cabinet Secretary for Culture and External Affairs, Fiona Hyslop MSP, emphasised that Scottish Government wanted “an open and inclusive approach to determine the Scottish response to the Leveson report”. To assist in this process, she said, the Government envisaged that “an expert implementation group, chaired by a past or present Court of Session judge, would consider how best to provide the statutory underpinning and how best to respond to Lord Justice Leveson’s report as a whole”. (Cols 14280-3)
PROPOSAL FOR A ROYAL CHARTER

Following publication of the Leveson report, discussions involving the leaders of the main political parties were held separately in the Scottish and UK parliaments on how to implement Lord Justice Leveson’s recommendations.

In London, the Conservative Party published proposals for a new press regulatory system to be established by means of a Royal Charter, entitled *Draft Operative Provisions for a Royal Charter* (Department for Culture, Media and Sport, 12 February 2013). At the same time, a number of proposals emerged from various other groups and bodies each taking a different approach to implementing the Leveson recommendations (House of Commons Library Note SN/HA/6535).

The continuing cross party discussions between the three party leaders finally culminated in agreement on a proposal for a *Draft Royal Charter on Self-Regulation of the Press* (Department for Culture, Media and Sport, 18 March 2013), which was presented to the House of Commons (UK Parliament, 18 March 2013). Speaking in the Emergency debate, the Prime Minister described the proposal—

“I was determined to try to find a better way of establishing a tough regulatory body to enforce Lord Justice Leveson’s principles, and a different way of establishing the recognition body to check it was doing its job properly. That is what the royal charter does, without the need to write down in legislation the title, definition, functions, power, rules or composition of a new system of regulation—it puts those in place in a royal charter rather than in legislation and, as a result, it does not cross that Rubicon of which I spoke.” (Col 632)

In oral evidence to the Culture, Media and Sport Committee (Culture, Media and Sport Committee, 16 April 2013), the Rt Hon Maria Miller MP, Secretary of State for Culture, Media and Sport described the key elements of the Royal Charter proposal—

“[It] will mean a strong new system of self-regulation of the press with £1 million fines, prominent apologies, free access to arbitration and a tough Code. However, crucially, it is a system of voluntary self-regulation based upon incentivisation not compulsion.” (Q363)

Whilst the Royal Charter itself is not a form of statutory underpinning, the UK political parties agreed that it should be part of a package that included two legislative measures—

1. To establish a system of exemplary costs and damages that would create an incentive for newspapers to take part in the system (in the Crime and Courts Bill [HL] 2012-13).

2. To protect the Charter from amendment by government by entrenching in statute the requirement set out in the Charter for changes to be supported by a two-thirds majority of both Houses of Parliament (in the Enterprise and Regulatory Reform Bill 2012-13).

In her evidence to the Culture, Media and Sport Committee, the Secretary of State confirmed that it was her intention that the Royal Charter “goes forward before the summer”. She confirmed that, if the Charter is granted and sealed, the appointments process to establish the recognition body would follow, and that once the recognition body is in place and operating, then the incentives legislation (the Crime and Courts Bill) would come forward 12 months after that. (Q430)
Exemplary costs and damages

The new provision in the Crime and Courts Bill [HL] 2012-13 was added by the House of Commons (UK Parliament, 18 March 2013) to give effect to the Leveson recommendation to create an incentive for publishers to join the new regulatory body. It proposed that where a “relevant publisher” chose to remain outside the regulatory body, the publisher could be subject to exemplary damages as a result of a libel action taken against it.

In addition, the measure sought to clarify what was meant by a relevant publisher under the Royal Charter. The extent to which bloggers and small news publishers would be captured by the legislation had been the subject of much debate during the period following the publication of the draft Royal Charter, and the House of Lords on 25 March 2013 and 23 April 2013 considered further amendments on this issue. Subsequently, the Department for Culture, Media and Sport published a press notice (23 April 2013) on its website confirming that “small blogs are outside of the [regulatory] scheme”. Alongside the press notice, DCMS published an infographic, Are you a Relevant Publisher?, designed to assist news publishers in determining whether they are included under the definition of a relevant publisher under the Bill.

The UK Parliament website states that “outstanding issues on the Bill were resolved on 23 April” and that “a date for Royal Assent has yet to be set”.

Threshold for amending the Royal Charter

The new provision in the Enterprise and Regulatory Reform Bill 2012-13 was agreed by the House of Lords (UK Parliament, 20 March 2013). The aim of the legislative change was to protect the Charter against amendment by ministers through the Privy Council. The Prime Minister confirmed that the “legislation is to protect the royal charter; it is not legislation to recognise the royal charter”. The new clause entrenches, in statutory form, a provision contained within the Charter itself, namely that the Charter cannot be changed without the support of a two-thirds majority in both Houses of Parliament.

The House of Lords agreed that, in recognition of the Scottish Parliament’s competence in relation to the regulation of the press and the ongoing discussions taking place in Scotland, the Royal Charter should only apply to England and Wales. The House also agreed that the Royal Charter could be extended to include Scotland if that was the outcome of the discussions taking place between the Scottish and UK governments.

The Bill received Royal Assent and became an Act of Parliament on 25 April.

THE MCCLUSKEY REPORT

Introduction

On 13 December 2012, the Scottish Government appointed an Expert Group on the Leveson Report in Scotland, to be chaired by the Rt Hon Lord McCluskey. Lord McCluskey was supported by four other members with expertise in Scots law and who represented journalists and those affected by malpractice.

On 15 March 2013, the Report of the Expert Group on the Leveson Report in Scotland (McCluskey 2013) was published. The report made clear that the Expert Group’s role was not to duplicate or challenge the Lord Justice Leveson’s thinking, but to “take account of how the Leveson proposals and the developments that follow the publication of that report might impact upon Scotland”. (Main report paragraph 1)
In recognition of its specific remit together with the limited timescale within which it had to report, the Expert Group decided not to invite evidence but to rely on the material obtained by the Leveson Inquiry and on the expertise of its own membership.

The Expert Group’s terms of reference were—

“To consider the findings and recommendations made in the Part 1 of the Report of the Leveson Inquiry in respect of Press Regulation, and, accepting the main principles on which those recommendations are made, including in particular the need for statutory underpinning of a newly created, genuinely independent and effective system of Self-Regulation, to offer advice and recommendations as to the most appropriate means of achieving such statutory underpinning in Scotland, in the context of—

- the Scottish legal system;
- any other existing provisions in law that relate to publication by the Press in the UK;
- any developments in Press Regulation elsewhere in the United Kingdom arising out of the Leveson Inquiry;
- experience in regulation of the press outside of the United Kingdom, that might inform consideration of the recommendations made and the mechanisms suggested in the Part 1 Report of the Leveson Inquiry;

and to provide such advice and recommendations to the Scottish Government within 3 months.” (McCluskey 2013, Appendix 2)

The McCluskey report – view on the proposal for a Royal Charter

The first draft of the Royal Charter proposal was published in February 2013, but the Expert Group did not consider the merits of the proposal. The McCluskey report explained the reasons for this—

“On 12 February 2013 the DCMS published a document entitled “Draft Operative Provisions of a Royal Charter”. Its purpose is to provide an alternative legal buttress to support the new regulation system, in place of statutory underpinning as proposed by Leveson. This method of proceeding was not mentioned at the Leveson Inquiry. Accordingly its merits were not discussed there. Our Terms of Reference invite us to consider the Leveson findings, accepting “the need for statutory underpinning of a newly created genuinely independent and effective system of Self-Regulation”. A Royal Charter does not provide ‘statutory underpinning’. A statute is debated and may be amended or even rejected by the Legislature. By contrast, a Royal Charter of the kind proposed is not made and cannot be altered by the Legislature. It follows that we have no mandate to assess either the Royal Charter proposal in general or the detailed proposals contained in the DCMS draft.” (Main report paragraph 4)

The McCluskey report considered that in order to be in a position to offer an expert opinion on the draft Royal Charter it would be necessary for the Expert Group to take evidence and hear submissions on its merits. The report stated that this could not be achieved within the allotted timeframe. (Main report paragraph 4)

However, the report noted that whilst Westminster legislation on devolved matters, including the regulation of the press, was subject to the Legislative Consent Motion procedure (whereby the consent of the Scottish Parliament is sought), such consent is not sought for a Royal Charter with UK-wide effect. (Main report paragraph 4)
The McCluskey report – findings and recommendations

As outlined in the McCluskey report, the Expert Group accepted Lord Justice Leveson’s principles that—

- A free, independent press is a vitally important feature of democracy.
- The regulation of the press, and the regulatory body made responsible for that regulation, should be independent of the political power and of the media.
- The recognition body, underpinned by statute, is to act on behalf of the public to ensure that any regulatory model fits the criteria proposed by Lord Justice Leveson. The recognition body is to be independent and free from influence of government.
- The regulatory system must cover all significant news publishers. (Main report paragraphs 9, 13-15)

Statutory underpinning

The Expert Group took the Leveson recommendation for statutory underpinning as the starting point and sought to examine how this could be achieved in Scotland. The McCluskey report stated that “it is not necessary for us to enter into a debate about the principle of ‘statutory underpinning’: in this particular we take our lead from Leveson”. (Main report paragraph 16)

In considering how statutory underpinning could be achieved in Scotland, the Expert Group concluded that “there would be no great difficulty in drafting legislation that would achieve these objectives without compromising the fundamental freedom of the press”. The Expert Group described statutory underpinning recommended by Lord Justice Leveson as “a comparatively light addition to the legal regulation already applying to the press”. The McCluskey report argued that the press was already subject to a number of rules of law, including the law of contempt and legislation restricting the reporting of cases in courts of law. Therefore, it concluded “any suggestion that, by enacting underpinning legislation on Leveson lines, the legislature would somehow be embarking on an unprecedented exercise in political control appears to be based on a failure to grasp the existing reach of the law in relation to press publications”. (Executive summary paragraph 6, main report paragraph 27)

The Expert Group suggested that if negotiations in London failed to produce the necessary statutory underpinning for a Leveson-compliant regulatory system then Scottish Ministers could consider introducing legislation in Scotland. The McCluskey report stated that “we do not consider that there is anything in our proposals that would prevent the formation of a single UK-wide regulatory body even if there was a distinct Scottish recognition body”. Based on these conclusions, the Expert Group prepared a draft Bill, which it included at Appendix 3 of the report. (Executive summary paragraphs 9-10, main report paragraph 45)

Universal jurisdiction

Although the Expert Group agreed with Lord Justice Leveson’s call for statutory underpinning, it did not share the same view about the manner in which news publishers should be subject to the new system of regulation. Where Lord Justice Leveson envisaged that membership of the new regulatory body would be voluntary (as in the case of the PCC) – based on an incentivised scheme – the Expert Group favoured mandatory membership.
The Expert Group concluded that Lord Justice Leveson’s idea of voluntary participation ran counter to the declared need for all significant news publishers to be part of the regulatory system. It referred to the “history of withdrawals from the PCC” and was concerned that “some titles have already indicated that they will not, or are unlikely to, join a voluntary scheme whatever the advantages and disadvantages”. The Expert Group, therefore, preferred to look at the issue from a different perspective: “we should start with the concept of jurisdiction, not with the notion of encouraging publishers to participate on a voluntary basis in a scheme to which they are most averse”. The report concluded that “the jurisdiction of the regulatory body must extend by law to all publishers of news-related material” and “no publisher of news-related material should be able to opt out of that jurisdiction”. (Executive summary paragraph 3, main report paragraphs 29, 35-36)

In addition, the Expert Group considered that the carrots proposed in the Leveson report were “not sufficiently enticing”, nor the sticks “sufficiently intimidating” to put any real pressure on publishers to join the regulatory scheme. The Expert Group was concerned that it would be possible for publishers deliberately to decline to participate and thus prevent the creation of a system operated by a regulatory body that the recognition body could certify. (Main report paragraphs 32, 35)

The Expert Group was also concerned about what would happen if a significant news publisher chose to resign its membership of the regulatory system. It suggested that, in such a case, the recognition body would have to withdraw recognition from the regulator, thereby causing the whole scheme to cease to function. (Main report paragraph 36)

**Possible incentives**

In examining the impact of Lord Justice Leveson’s proposals in Scotland, the Expert Group considered a briefing, entitled Carrots and Sticks (Expert Group Secretariat 2013), on how the proposed incentives – arbitration, costs and damages – would operate in the context of Scots law. In addition, the briefing outlined the potential for other non-financial incentives. As the Expert Group decided to recommend a system of regulation based on a universal jurisdiction under which incentives would not be necessary and so the McCluskey report did not discuss the matter in any detail.

However, the McCluskey report noted that implementing the Lord Justice Leveson’s carrots and sticks in Scotland could be particularly problematic. The report recognised that the carrots and sticks had been drawn from English laws and were “significantly different from those that would be appropriate in Scotland (e.g. in relation to exemplary or aggravated damages [which do not exist in Scots law])”. The McCluskey report suggested that those procedural mechanisms would require substantial modification to be able to operate effectively in Scotland and, if they are to be taken forward, called for the Scottish Law Commission and others to be consulted on the matter. (Main report paragraphs 19, 30)

Subsequently, the Cabinet Secretary for Culture and External Affairs told the Education and Culture Committee (23 April 2013) that, subject to the outcome of cross party discussions between the leaders of the main political parties on how to implement the Leveson recommendations in Scotland, consideration could be given to a number of the incentives included in the Expert Group’s briefing. The Cabinet Secretary suggested that, for example, members of a regulatory body could be able to use an arbitration system that would avoid the more expensive court proceedings. She also expressed an interest in the carrot whereby only regulated publishers had the right to print Public Information Notices, which was said to be a valued source of revenue particularly for the local press. (Cols 2269-70)
Definition of significant news publishers

The Expert Group also considered the question of how to define significant news publishers, i.e. to whom the jurisdiction set out in the draft Bill should apply. In the report, the Expert Group agreed with the definition used in the draft Royal Charter. However, the Expert Group drew particular attention to the use of social media, such as Twitter, in relation to publicising and circulating news-related publications and the “possible need for further regulation in this regard”. In its report, the Expert Group suggested that legislation could apply to “news-related material circulating in Scotland by any means including electronic publishing” and it would be possible for the Scottish Parliament to legislate in these terms even if, in other legal jurisdictions, the UK Parliament chose to adopt a voluntary scheme thereby allowing some news-related publications to opt-out. (Executive summary paragraph 9, main report paragraph 39)

The McCluskey report concluded that it was for the Scottish Parliament to determine which news-related publications should be subject to the regulatory system. The report emphasised that it was for the Scottish Parliament to ensure that all those who might, in future, perpetrate abuses of the kind identified by Lord Justice Leveson were subject to the jurisdiction of the regulatory body. (Main report paragraph 42)

Subsequently, in evidence to the Education and Culture Committee (16 April 2013), Lord McCluskey suggested that he “would be happy to exclude blogs and so on” on the basis that if they became a problem and began to raise any of the issues considered by the Leveson Inquiry then the jurisdiction could be extended. (Col 2194)

Conflicting interests and protection of journalists

The Expert Group also referred to the different interests that can exist between a newspaper owner and those of the editors and journalists that they employ.

“The freedom of the proprietor is quite different from the freedom of the editor or a journalist. The owner can sack the editor without explanation. Journalists likewise can suddenly find that their services are no longer required. No editor could expect to remain in post if he or she pursued an editorial line and made news selection choices that ran wholly counter to those of the proprietors. Neither the editor, nor indeed the paper itself, is ‘independent’ of the proprietor. The editor’s freedom can be restricted by the proprietor’s political, economic and social philosophies. Thus the perspectives and rights of journalists should not be forgotten or dismissed.” (McCluskey 2013, main report paragraph 10)

The Expert Group supported the Leveson recommendation that the regulatory body should have a whistleblowing hotline for journalists who felt that they were being asked to do things that were contrary to the Editors’ Code. As the McCluskey report stated, “the interests of publishers do not always coincide with those of journalists”, and journalists, therefore, required protection under the regulatory system to ensure that they feel they can operate appropriately without fear of losing their jobs. (Main report paragraph 12)

SCOTTISH PARLIAMENT EDUCATION AND CULTURE COMMITTEE

Introduction

The Education and Culture Committee considered the proposal for a Royal Charter and Lord McCluskey’s proposal for a draft Scottish Parliament Bill. This followed discussions during
**Topical Question Time** (19 March 2013) when the Cabinet Secretary for Culture and External Affairs suggested that a committee of the Scottish Parliament could usefully “look at what checks and balances can be achieved using Scots law and at the implications of the Royal Charter”. (Question 1 (S4T-00283))

The Committee took overall evidence from a range of witnesses on 16 and 23 April 2013, as follows—

**16 April 2013**
- The Rt. Hon Lord McCluskey, Chair, Expert Group on Leveson report in Scotland;
- Campbell Deane, Partner, Bannatyne Kirkwood France & Co.;
- David Sinclair, Victim Support Scotland and member of the Expert Group on Leveson report in Scotland;
- Peter Murray, NUJ Scotland; and
- Dr Eamonn O’Neill, Lecturer in Investigative Journalism, University of Strathclyde.

**23 April 2013**
- Alan Cochrane, Scottish Editor, The Telegraph;
- Andrew Harries, Editor, The Scottish Sun;
- Magnus Llewellin, Editor, The Herald;
- Alan Miller, Commissioner, Scottish Human Rights Commission;
- Margaret Watson, witness to the Leveson Inquiry; and
- Fiona Hyslop, Cabinet Secretary for Culture and External Affairs, Scottish Government.

The views of the Committee

The Committee was aware of the intention to submit the Royal Charter to the Privy Council towards the end of April and therefore conducted its scrutiny with that deadline in mind. The Committee set out its views in a letter to the Cabinet Secretary for Culture and External Affairs (24 April 2013). In the letter, the Committee stated that because of the lack of time available to it, it had “explored only a few of the issues that are extant around regulation of the press”.

The following is an extract from the Committee’s letter—

“The letter sets out the views of the Committee on the limited matters that we have had the opportunity to consider.

The Committee considers that, while it is imperative that the principle of freedom of the press is maintained, with such freedoms come responsibilities. For example, the responsibility to ensure fair reporting and to balance the reputation and rights of others, including the rights of victims and respect for private and family life. The Committee notes that while Lord Leveson concluded that the most serious problems arose from the practices of some in the London-based press, the Scottish press, however defined, has sometimes been involved in questionable activities and reporting and should not in this respect be treated any differently to the wider UK press. The editors from whom we took evidence agreed that the current system of press regulation is not sustainable and they also suggested that, notwithstanding their misgivings about a statutory underpinning to any regulation, it was preferable to have a single system operating across the UK as a whole.

Within the limited time available and having considered the evidence we received the Committee supports participation in a UK-wide royal charter. The Committee notes that
the Scottish Government has been having discussions with the UK Government, agrees the need to make the royal charter Scottish compliant and, in this regard, notes the suggested list of amendments attached to your letter of 19 April [Scottish Government 2013] and subsequent list provided following your evidence session.

The Committee acknowledges the proposed role for the Scottish Parliament should changes to the charter be considered or proposed. From the evidence we received we anticipate that the charter will make very little difference to the ability of investigative journalists who conduct themselves properly.

It was noted with regret by a number of witnesses that the royal charter has been developed without input from or involvement of parliamentarians at either Westminster or Holyrood. However, there appears to be a consensus around the view of Lord Leveson that the press should be given one final opportunity to “put its house in order”. The Committee was interested to note the evidence concerning Ireland, suggesting that near universal participation in the voluntary code was, in part at least, a result of the potential threat of legislation should this not happen. The Committee therefore expects participation by the press, failing which, legislation becomes not only inevitable but should be put in place without further inquiry given the thorough and comprehensive work of Leveson and the Expert Group. The public will expect nothing less of the Parliament.

The Committee notes the suggested approach to addressing press regulation incentives and looks forward to considering the Scottish Government’s proposals in early course. The Committee considers that this work should commence immediately with any necessary legislation being introduced to the Scottish Parliament during the Autumn of this year.

In relation to appropriate respect for the recently deceased the Committee has noted the position of the Scottish Government and its earlier consultation in that regard. The Committee supports the Scottish Government in its attempts to secure appropriate amendments to the royal charter.” (Education and Culture Committee, 24 April 2013)

RECENT DEVELOPMENTS

This is fluid and evolving debate. Whilst the press industry, politicians and the general public broadly agree that a new regulatory system for the press is required in Scotland and the UK, discussions are ongoing to determine the form that it should take.

UK Parliament

As noted earlier, the UK Parliament is currently considering statutory measures as part of its Royal Charter proposal to implement a system of exemplary damages and legal costs that would be used as an incentive to encourage news publishers to join the regulatory system (included in the Crime and Court Bill). (The measure to entrench in statute a threshold for changing the Royal Charter, included in the Enterprise and Regulatory Reform Bill, became law on 25 April.)

Scottish Parliament

In Scotland, a parliamentary debate has been scheduled in the Scottish Parliament on 30 April 2013. The Cabinet Secretary for Culture and External Affairs has indicated that the Scottish Government will continue its dialogue with the leaders of the other political parties in the Scottish Parliament and with the UK Government on the Royal Charter.
Press industry proposal for a Royal Charter

On 25 April 2013, it was widely reported that the press industry had rejected the main UK political parties’ proposal for a Royal Charter. A statement released by the Newspaper Society, with the agreement of the Scottish Newspaper Society and on behalf of a number of national and local newspapers, described the Royal Charter proposed by the three main political parties in the UK Parliament on 18 March as having “no support within the press”.

Alongside the statement, the newspapers published their alternative proposal for a Draft Royal Charter for the Independent Self-Regulation of the Press (Newspaper Society, 25 April 2013). The initiative, the Newspaper Society stated, “completely accepts the need for a new regulator to be recognised by a genuinely independent body – which was a central conclusion of the Leveson Inquiry – and aims to help move the debate about the future regulation of the press to a constructive conclusion”.

The new proposal for a Royal Charter from the press industry made a number of changes to the draft that was agreed by the political parties and more closely resembles the original draft Charter that was published on 12 February.

Some of the key differences between the Charter proposed by the press industry and that proposed by the political parties’ include—

- Amending and dissolving the Charter. The role of Parliament is removed from these processes. Instead, any changes or moves to dissolve the Charter would require the unanimous agreement of the regulator and of all trade associations represented on an Industry Funding Body (the Industry Funding Body is a new body to be “established by the newspaper and magazine industry to collect and provide funding for the regulatory body). (Articles 9 and 10, and Schedule 4)

- Funding. The recognition panel, which is to be established by the Charter, would be funded by the Industry Funding Body rather than by the Government (the political parties’ Charter states that the Exchequer shall grant the recognition panel with such sums as it considers necessary). (Article 11)

- Membership of the appointments committee (the appointments committee is tasked with appointing the initial members of the board of the recognition panel). The appointments committee must include one person who represents the interests of relevant publishers and one person who represents the interests of the public (the political parties’ Charter does not specify who should be represented on the appointments committee). (Schedule 1, paragraph 2)

- Criteria for appointment to the board of the recognition panel. Between them the members of the board must have, among other skills, “experience and understanding of the newspaper and magazine industry”. This replaces the criteria in the political parties’ Charter that “at least one member shall have … experience of public policy making, particularly in the context of consumer rights”. (Schedule 1, paragraph 3.2)

- Criteria for appointment to the board of the recognition panel. The restriction on former editors being ineligible for appointment to the board is removed so that only current editors are ineligible. (Schedule 1, paragraph 3.3)

- Consideration of whether a regulator meets the criteria. The following requirement is removed: the recognition panel, in making its decision on whether a regulator meets the criteria, “shall consider the concepts of effectiveness, fairness and objectivity of
standards, independence and transparency of enforcement and compliance, credible powers and remedies, reliable funding and effective accountability, as articulated in the Leveson Report, Part K, Chapter 7, Section 4”. (Schedule 2, paragraph 1)

- Standards code (the code that is to be established by a regulator that must take account of the importance of freedom of speech; the interests of the public; the need for journalists to protect confidential sources of information; and the rights of individuals). The press industry Charter states that the standards code “must ultimately be adopted by the board” of a regulator, instead of what the political parties’ Charter states whereby the standards code “must be approved by the board or remitted to the Code Committee”. This suggests that, under the new proposal, the board of the regulator would have a reduced role in relation to finalising the code. (Schedule 3, paragraph 7)

- Whistleblowing hotline. The requirement for a regulator to establish a whistleblowing hotline is removed. The inclusion of such a hotline was deemed important by the Leveson and McCluskey reports in order to protect journalists from being asked to do things that were contrary to the standards code. (paragraph 8D has been removed)
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