ARTICLE 19

UK: Draft Royal Charter on Self-Regulation of the Press and Amendments to the Crime and Courts Bill

March 2013

Legal analysis

Executive summary

In this legal analysis, ARTICLE 19 reviews the provisions of the Draft Royal Charter on Self-Regulation of the Press, recently drafted by the three biggest political parties in the United Kingdom (UK), and the relevant provisions of the Amendments of the Crime and Courts Bill (Amendments), currently pending in parliament. Both legislative documents are analysed for their compliance with international standards on freedom of expression.

At the outset of the analysis, ARTICLE 19 expresses concerns about the process that led to the drafting of the Draft Charter and the Amendments to the Crime and Courts Bill on exemplary damages, in particular the lack of transparency which has undermined it.

We also question whether the UK press was given sufficient time to reform the current model of self-regulation and the Press Complaints Commission (PCC) along the lines suggested by the Leveson report. Unfortunately, the lack of transparency over the PCC reform process, initiated several months ago, makes it difficult to assess whether and why the PCC reform process may have failed.

Consequently, ARTICLE 19 does not believe that the government has explained convincingly the reasons that led to the quick adoption of the Royal Charter, why it was necessary and why it was the least restrictive mechanism available.

The opacity of the process following the release of the Leveson report is particularly problematic in view of the importance of press freedom in a democratic society. We strongly believe that any agreement on press regulation demands broad public participation and agreement between all stakeholders including the press.

ARTICLE 19 also emphasises that self-regulation should always be preferred over a press regulator established by statute since the mechanism is the least restrictive means available by which the press can be effectively regulated.

Statutory regulation or co-regulation of the print press may be compatible with international and European freedom of expression standards if it provides strong guarantees for media freedom and the independence of regulatory bodies.

ARTICLE 19 concludes that the co-regulation established by the Royal Charter and the Amendments to the Crime and Courts Bill do not meet such guarantees and international standards on freedom of expression, and must be revised accordingly.

Summary of recommendations:

1. The UK government should proactively reveal the content of the negotiations of the Royal Charter and the Amendments and nature of the process followed. In particular it should explain why it concluded that the Royal Charter was necessary and why it was the least restrictive mechanism available.
2. The Royal Charter should include provisions stating that the functional, operational and administrative autonomy of the Recognition Panel is fully guaranteed in all matters and that any economic or political interference is prohibited.
3. The structure, functions and procedures of the regulatory body should not be specified in such details in the Royal Charter.

4. The Royal Charter should focus on overall guiding principles for the regulator, such as those regarding the appointment of the members of the Board, its functions, operations and funding.
5. The Royal Charter should stipulate that the mandate of the press regulator extends to advocating for freedom of expression. It should act as both a defender of the rights of members of the profession as well as a guiding force for their conduct and an adjudicator for complaints received from members of the public. Such provisions could also encourage widespread support among the media community and contribute to raising its public profile.
6. For the sake of clarity, the term "independent self-regulatory body" should be omitted from the Royal Charter. The Royal Charter should clarify that it is establishing a hybrid model of regulation of the print media with statutory back up to the press regulator.
7. The membership of the appointment panel and the regulator's Board should ensure, at minimum, an equal representation of members of the media profession, media owners, and the public.
8. Members of the Board of the regulator should be selected according to democratic and transparent procedures with public participation; and the term of membership should be limited in duration.
9. The standards code (or ethical codes) should be developed by the media professionals and owners. Public consultations during the development of the standards code should be encouraged.
10. The role of the Code Committee should be reaching agreement on a national code of minimum standards. The Committee should be comprised of journalists, owners and the public in equal representation.
11. The provisions on group complaints must stipulate that any decision on such complaints must fully comply with international freedom of expression standards.
12. The press regulator should also have powers to refuse to hear group complaints that are vexatious and/or are lacking merit.
13. The possibility of third party complaints should be abolished.
14. The remedy of "publication of correction and apologies" should be clearly specified.
15. The potential for the Board of the regulator to direct the nature, extent and placement of corrections and apologies should be limited as follows:
    - the reply should only be available to respond to statements which breach a legal right of the person involved, not to comment on opinions which the reader or viewer does not like;
    - it should receive similar prominence to the original article;
    - it should be proportionate in length to the original article;
    - it should be restricted to addressing the impugned statements in the original text;
    - it should not be taken as an opportunity to introduce new issues or to comment on other correct facts.
16. The regime of sanctions and remedial actions should be reviewed.
17. All sanctions and remedial actions that can be imposed by the regulator should be clearly specified and the possibility of review of the decisions should be considered.
18. It should be clearly stipulated that the regulator can impose financial sanctions only in cases of the most serious breaches of the standards code and provide other measures – such as correction or reply, issuance of apology or publication of the decision of the regulator - would not be capable of redressing the harm caused to the individual.
19. The level of fine should always be assessed against their potential effect on the right to freedom of expression and they should never be disproportionate to the harm caused.
20. A right of appeal must be included in the provisions.
21. The Royal Charter should ensure that bloggers are not forced to abide by the ethical codes or codes of conduct developed by traditional media, either directly or through incentive schemes.

22. Bloggers should be given the opportunity to follow the ethical standards or voluntarily join regulatory bodies if they choose to do so.
23. The term "reckless disregard of an outrageous nature for the claimant's rights" should be removed from the Crime and Court Bill.
24. The Crime and Court Bill should stipulate that the exemplary damages should only be available as highly exceptional measures, and can be applied only where the plaintiff has proven that the defendant acted deliberately and with the specific intention of causing harm to the plaintiff.
25. The possibility of imposing exemplary damages in cases where financial sanctions are imposed by the regulator should be clearly specified. In particular, there should be no possibility to impose exemplary damages if a maximum financial sanction has already been imposed by the press regulator.
26. The maximum amount of exemplary damages should be stipulated in the Crime and Court Bill.
27. The terms "the course of a business" should be specified. Individual bloggers and small-scale blogs should be excluded from the definition of relevant publishers under Section 131 of the Amendments. Posting hyperlinks should not be considered as "material written by a range of authors."
28. Search engines and social media platforms should be excluded from the definition of "relevant publishers" under the Royal Charter and the Crime and Courts Bill.

Table of Contents

About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year and comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

Introduction

On 18 March 2013, in talks behind closed doors, the largest political parties in the United Kingdom reached an agreement on how to implement the recommendations of the Report of the Inquiry into the Culture, Practices and Ethics of the Press (the Leveson Report) presented to parliament in November 2012.[1]

The agreement produced the Draft Royal Charter on Self-Regulation of the Press (the Royal Charter) that would establish a new body, the Recognition Panel, tasked with certifying a new self-regulatory body (or bodies). The main purpose of the Royal Charter is to guarantee that the successor to the Press Complaints Commission (PCC) is set up, operates in accordance with the proposals of the Leveson Report, and can ensure the maintenance of high standards of journalism.

The agreement of 18 March 2013 also included the House of Commons Amendments to the Crime and Courts Bill[2] which introduced exemplary damages for publishers as an incentive to join the new press self-regulatory body.[3] Hence, the provisions of the Amendments to the Crime and Courts Bill (the Amendments) have to be considered in connection with the Royal Charter. The House of Commons passed the Amendments on 20 March 2013; after which they were considered by the House of Lords on 25 March 2013. At the time of publication, the Bill is travelling between the two Houses, known as the "ping-pong" stage.

In 2012, ARTICLE 19 commented on the recommendations of the Leveson Report. We highlighted that a system of self-regulation with statutory underpinning could comply with international and European standards on freedom of expression provided such a system contained maximum guarantees for the freedom of the media.[4] We also called for a further study on the system of press regulation proposed in the Leveson Report, as well as broad consultations with the industry and the public.

ARTICLE 19's position then and now is that self-regulation of the print press should always be viewed as the preferred model, but that self-regulation must be meaningful. It must not only provide protection for members of the journalistic profession but also hold them accountable to their profession and hold press outlets accountable to the public. As discussed below, the test of necessity that must be satisfied to legitimately restrict the right to freedom of expression means that where the government interferes with the right, it should choose the least restrictive means available.

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[1] Report of an Inquiry into the Culture, Practices and Ethics of the Press, ordered by the House of Commons to be printed on 29 November 2012.

[2] The Crime and Courts Bill, HL Bill 90 2012-13 (Commons Amendments), Session 2012 - 13; available at hhttp://services.parliament.uk/bills/2012-13/crimeandcourts.html.

[3] The House of Commons, 1099, 18 March 2013, Consideration of Bill, New Amendments; available at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0137/amend/137day1803.pdf

[4] See ARTICLE 19, UK: Legislation to provide a statutory basis for self-regulation does not mean state control; available at http://www.article19.org/resources.php/resource/3545/en/uk:-legislation-to-provide-a-statutory-basis-for-self-regulation-does-not-mean-state-control; or ARTICLE 19, UK: Demystifying Leveson's Report and Recommendations; available at http://www.article19.org/data/files/DEMYSTIFYING_LEVESON.pdf.

Self-regulation, which is one of the least restrictive forms of media regulation, has proven successful in a number of countries, such as Norway, Germany, Austria and the Netherlands where it has also promoted a more positive and effective approach to media ethics.

On the other hand, statutory regulations and co-regulation of the printed press exists in a number of European countries, such as Denmark, Finland, or Ireland. These systems have not been found incompatible with international and European freedom of expression standards because they provide strong guarantees for media freedom and the independence of regulatory bodies.

ARTICLE 19 believes that the co-regulation established by the Royal Charter and the Amendments do not meet the standards established by these European statutory models.

At the outset, ARTICLE 19 expresses concerns about the process that led to the drafting of the Royal Charter and the Amendments to the Crime and Courts Bill, in particular the lack of transparency which has undermined it. The political parties made important policy decisions on press regulation behind closed doors and without the full participation of all stakeholders – both the representatives of the press and the representatives of the public, including "victims." The limited participation of campaigners for regulation in the late stage of the talks also casts doubts on the fairness of the process and at least gives an impression of one-sided justice.[5]

The lack of transparency over the drafting of the Royal Charter has been accompanied by an equally opaque process in reforming the PCC, a process that has taken place over several months and involved PCC members and media industry representatives. ARTICLE 19 believes that the feasibility of the PCC reform should have been fully established before consideration of other measures, including a Royal Charter.

The lack of transparency during both sets of discussions is very concerning and testifies ultimately to the malfunctioning of the overall process following the release of the Leveson Report and more generally to the problematic relationships between the media and political parties. The process also augurs badly of the capacities of the media and the regulatory body to offer to the public what is required: a professional, independent and accountable media.

ARTICLE 19 finds that the opacity of the process following the release of the Leveson Report is particularly problematic in view of the importance of press freedom in a democratic society. We strongly believe that any agreement on press regulation demands broad public participation and agreement between all stakeholders, including the press.

Furthermore, having reviewed in detail the Draft Charter and the Amendments, ARTICLE 19 concludes that the regulatory model, currently provided in both documents does not fully meet international freedom of expression standards and must be revised accordingly.

In the following sections, we provide the analysis of the most problematic provisions of the Draft Charter and the Amendments and offer recommendations for their revisions.

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[5] Four members of Hacked Off campaign took part in the final stages of the Royal Charter negotiations.

International standards on freedom of expression

Importance of the right to freedom of expression

The right to freedom of expression is a human right of fundamental importance, in particular because of its critical role in underpinning democracy and the realisation of all other human rights. It is protected in all major global and regional human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR)[6] and the European Convention on Human Rights (European Convention),[7] both of which have been ratified by the UK.

The European Court of Human Rights (European Court) has often stressed the fundamental status of freedom of expression. In one of its first judgments, it stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[8]

The guarantee of freedom of expression applies with particular force to the media. The European Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law"[9] and stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[10]

In nearly every case before it concerning the media, the European Court has stressed the essential role of the press in a democratic society. It also stated that:

> [A]lthough it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'." [11]

Restrictions on the right to freedom of expression

[6] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[7] Adopted 4 November 1950, in force 3 September 1953.
[8] *Handyside vs the United Kingdom*, 7 December 1976, Application No. 5493/72, para 49.
[9] *Thorgeirson vs Iceland*, 25 June 1992, Application No. 13778/88, para 63.
[10] *Castells vs Spain*, 24 April 1992, Application No. 11798/85, para 43.
[11] *Dichand and others vs Austria*, 26 February 2002, Application No. 29271/95, para 40.

The right to freedom of expression is not an absolute right and can be restricted under certain limited conditions. However, any limitations must remain within strictly defined parameters in order to preserve the essence of the right itself.

Article 10(2) of the European Convention outlines the narrowly prescribed circumstances under which freedom of expression may be limited.[12] This translates into a three part test: restrictions must be (i) prescribed by law; (ii) pursue a legitimate aim; and (iii) be "necessary in a democratic society" to achieve that aim. The ICCPR requires a similar test for restrictions on the right to freedom of expression. Each part of the test has specific legal meaning.

The first requirement of legal prescription means that the restriction must not only be based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court has elaborated on this requirement:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[13]

The second requirement relates to the legitimate aims listed in Article 10(2). To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is not acceptable to invoke a legitimate aim as an excuse to pursue a political or other unlisted agenda.[14]

The third requirement, that any restrictions must be "necessary", is often essential to the assessment of alleged violations of the right to freedom of expression. The word "necessary" means that there must be a "pressing social need" for the restriction.[15] The reasons given by the State to justify the limitation must be "relevant and sufficient," and the limitation must be proportionate to the legitimate aim pursued, meaning that the State should use the least restrictive means available for achieving the specific aim.[16] The European Court has also warned that one of the implications of this is that States should not use criminal sanctions to restrict freedom of expression unless this is truly necessary.

The provisions of the Draft Royal Charter and the Amendments to the Crimes and Court Bill are analysed in the view of these international standards.

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[12] Article 10 para 2 of the European Convention reads "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary."

[13] *The Sunday Times vs the United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.

[14] Article 18 of the European Convention; see also *Benjamin and Others vs Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).

[15] *Lingens vs Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

[16] *Ibid.*

Media regulation

Regulation of the media presents particular problems. On the one hand, the right to freedom of expression requires that the government refrain from interference, while on the other hand, Article 2 of the ICCPR places an obligation on states to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that states are required also to take positive steps to ensure that rights, including the right to freedom of expression, are respected.

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently of government control. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

This has important implications for regulatory models of the media. Self-regulation is internationally acknowledged as the preferred means of print media regulation. The special mandates on the right to freedom of expression, appointed by mechanisms within the UN, the OSCE, and the OAS, have warned of the risk of interference in the work of regulatory bodies and emphasised the crucial importance of their independence.[17] Declarations on freedom of expression from intergovernmental regional bodies in other parts of the world, including in Africa, have stated explicitly that "effective self-regulation is the best system for promoting high standards in the media."[18]

Where self-regulation has demonstrably failed, a public authority may be entrusted with some limited aspects of media regulation, provided it does not function as a quasi-judicial organ. With regard to such bodies, it is accepted that, as a general rule:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an *appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*[19] [emphasis added]

Practical guidance on the establishment and guarantee of the independence of media regulatory bodies may be found in recommendations made within the Council of Europe system, although it is important to note that these are restricted in scope to broadcasting.

The 2000 Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector[20] includes a set of Guidelines regarding broadcast regulatory bodies. This provides that states should "guarantee the regulatory authorities for the broadcasting sector genuine independence." Furthermore, "the procedures for appointment of their members and the means of their funding should be clearly defined in law."[21] Stipulating that its membership should be free from any political influence and that rules for dismissal should

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[17] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted 18 December 2003.
[18] Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights, Banjul, October 2002, Principle IX.
[19] The 2003 Joint Declaration of special rapporteurs, op.cit.
[20] Recommendation (2000) 23, adopted 20 December 2000.
[21] *Ibid.*, Guideline 2.

be clearly laid down by law, it recommends that "dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal."[22] These rules apply to regulatory bodies for the print media *mutatis mutandis*.

It should be also noted that statutory regulations of the print press or specific laws on print press exist in a number of countries, including in Europe. These systems – which also provide strong guarantees for media freedom and the independence of regulatory bodies - have not been found incompatible with international and European freedom of expression standards. For example:

- Denmark has a system of "co-regulation" with some key self-regulatory elements.[23]
- Finland has a voluntary system of press self-regulation across media platforms with duties of publishers and broadcasters set out in law. [24]
- Sweden has a self-regulatory system in the Press Council and the Press Ombudsman that is set out in a detailed legal framework.[25]
- Ireland has a voluntary self-regulation system in the Press Council and the Press Ombudsman; however, the Press Council is recognised in the Defamation Act and sets out how the courts may take that membership into account when considering public interest defences in defamation cases.[26]

All these countries regularly feature high on press freedom indexes and their press are recognised higher than the UK on all quality of press freedom indicators.[27] Hence, although

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[22] *Ibid.*, Guideline 7.

[23] In Denmark, the Media Liability Act (Act No. 348 of 6 June 1991) sets the legal powers of the Press Council. It has an authority to enforce its adjudications on matters of "sound press ethics" which are the articles of an ethical code which were agreed by media professional groups and form an annex to the Act. The Media Liability Act recognises the press council as a complaints authority, covering the press and broadcasting. The council rules only on alleged breaches of press ethics and questions on the right of reply. The Media Liability Act is available in English at http://www.pressenaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx.

[24] See the Act on the Exercise of Freedom of Expression in Mass Media (460/2003); available at http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf. Also, the Council for Mass Media regulates news and current affairs in print and in broadcasting and has more recently added regulation of related online media and online-only providers.

[25] The Swedish Press Council was established in 1916 as a self-regulatory body; however, the Freedom of the Press Act contains a number of provisions on journalists. The system is also complemented with the Press Ombudsman who is the public face of the regulatory system and filters complaints. The system also allows for an imposition of financial cost on an upheld complaint (a form of fine or administrative fee) that is imposed as a contribution to the funding of the Press Council and is tiered depending on the circulation of the publication.

[26] The Defamation Act recognises the existence of the Press Council and the Press Ombudsman (who is tasked with adjudicating on complaints). The Press Council is responsible for hearing appeals of ombudsman decisions, oversight of the professional principles embodied in the Code of Practice and with upholding freedom of the press.

[27] For example, in 2013, the Press Freedom Index of Reporters Without Borders, marked the countries as follows: Finland – 1st, Denmark – 6th, Sweden – 10th, Ireland – 15th, while the UK scored as the 29th country on the list; available at http://en.rsf.org/press-freedom-index-2013,1054.html. Similarly, in 2011-2012, the score was Finland – 1st, Denmark – 11th, Sweden – 12th, Ireland – 15th; while the UK was on the 28th place; available at http://en.rsf.org/spip.php?page=classement&id_rubrique=1043.

the statutory regulation of the printed press should be a matter of last resort, it is also possible for such models to comply with international standards, provided that they guarantee the fundamental principles of true independence and freedom of the press.

Analysis

The Royal Charter

The Royal Charter consists of 5 parts:

- Introductory part on the Recognition Panel, a new body to recognise any new press regulator(s);
- Schedule 1 of the Royal Charter deals with the manner in which the initial appointments to the Recognition Panel shall be made, including ensuring the independence of its Board and the terms of the membership of the members;
- Schedule 2 deals with the scheme of recognition of the new Regulator;
- Schedule 3 sets the recognition criteria for a new "independent self-regulatory body," its board, functions and procedures.
- Schedule 4 contains definitions of key terms.

ARTICLE 19 emphasises that self-regulation of the print press should always be the preferred model over and above a press regulator established by statute – or in this case the Royal Charter - since the self-regulatory mechanism is the least restrictive means available by which the press can be effectively regulated.

It is questionable whether the UK press was given sufficient time to reform the PCC along the lines suggested by the Leveson Report before the Royal Charter – a *de facto* co-regulatory approach - was opted for. Unfortunately, the lack of transparency over the process initiated several months ago by the PCC (also held in talks behind closed doors with some representatives of the industry) and its outcomes make it difficult to assess whether and why the PCC process may have failed.

ARTICLE 19 observes that the UK government has not considered improving the system of access to justice for victims, such as through legal aid schemes or through expedient and inexpensive remedial procedures through the courts.

ARTICLE 19 concludes that the government should, as a matter of priority, explain and demonstrate convincingly the failures of the reforms of the PCC and the reasons that forced it to adopt the Royal Charter.

As it stands, ARTICLE 19 does not believe the government has fully and convincingly proven why the Royal Charter is necessary now, and why it is the least restrictive mechanism available.

Recommendation:

- The UK Government should pro-actively reveal the content of the negotiations and nature of the process followed, and in particular it should explain why it concluded that the Royal Charter was necessary and the least restrictive mechanism available.

Further as elaborated below, ARTICLE 19 recommends a number of revisions to the Royal Charter.

Recognition Panel

The Preamble of the Royal Charter explains the rationale for establishing a new body, the Recognition Panel, which will certify that the successor to the PCC is set up and operates in accordance with the proposals of the Leveson Report.

Under Section 4 of the Draft Charter, the Recognition Panel shall review the applications for recognition from regulators, assess whether a recognised regulator shall continue to be recognised, withdraw recognition from a regulator if it ceases to be entitled to recognition and report on the success or failure of the recognition system. The Recognition Panel shall determine whether any new press self-regulatory bodies are independent from the government and the industry and are able to ensure the maintenance of high standards of journalism.

The Royal Charter also establishes a system for the appointment of the members of the Recognition Panel, with the view of ensuring their independence from the media and the government.

ARTICLE 19 has observed over its many years of work promoting and defending freedom of expression that in general the success or failure of press regulators can be measured by the Index of Press Credibility and public opinion surveys of attitudes towards the press and journalism. One vital requirement for the success of a regulation, however, is its independence from sources of power, whether business, political or the press itself. The object of the exercise must be media accountability. If it fails to provide that, then it has failed, however bravely it has fought. Hence, all bodies with regulatory powers over the media must be independent and protected against government, political or economic interference.

The Royal Charter highlights the need to "ensure the independence" of the Recognition Panel and its bodies including by stipulating that its members shall not be members of the government and those holding "official affiliation with political parties." However, it does not contain an explicit guarantee that the members should be free to carry out their work without economic or political interferences. We note that in legislation establishing broadcast regulators, which need to be similarly protected against interference, many national laws provide specific guarantees from such interferences.

Although international law does not prescribe particular wording for this, it does call for explicitly stipulated guarantees of independence.

Recommendation:

- The Royal Charter should include provisions stating that the functional, operational and administrative autonomy of the Recognition Panel is fully guaranteed in all matters and that any economic or political interference is prohibited.

Recognition criteria

Schedule 3 of the Royal Charter sets the criteria under which the Recognition Panel will certify "an independent self-regulatory body." The requirements include:

- Requirements for the Board of the self-regulatory body;
- Criteria for the Chair of the self-regulatory body and for the members of the Board;
- Objectives of the self-regulatory body;

- Powers of the Board of the self-regulatory body;
- Provisions on the standards code that shall be "the responsibility of the Code Committee" and must be approved by the Board or remitted to the Code Committee with reasons.

ARTICLE 19 makes two overall observations in this regard:

Prescriptive requirements for recognition
ARTICLE 19 observes that the Royal Charter is highly prescriptive and detailed as to the requirements for recognition of an "independent self-regulatory body." It sets up explicit requirements on how a "self-regulatory body" should look as well as what its composition, functions, proceedings and remedies should be.

ARTICLE 19 also notes that the proposed approach differs from other statutory regulatory systems in place in Western Europe, which tend to stipulate in far less detail, minimum requirements for the Press Council and Press Ombudsman.

We also observe that the exact form of the regulatory body, its functions and forms of operation should be established in consultative, inclusive and transparent process which ensure a broad sense of ownership among the media community and will encourage support for self-regulation from the bottom up as compared to centrally imposed solution.

"Independent self-regulation"
The Draft Charter repeatedly emphasises that it creates a system of "independent self-regulation" of the print media.

However, ARTICLE 19 points out that these terms are mutually exclusive. Either the industry regulates itself, and the system is therefore not independent of the industry and commercial interests; or regulation is provided through oversight by an "independent" regulator that is insulated from both political and economic interferences.

ARTICLE 19 notes that the model proposed by the Royal Charter is a hybrid model or model of co-regulation, where statutory backup provides a new body, the Recognition Panel, while an actual regulator of the print press shall be set up by the industry in accordance with Schedule 3 of the Charter. There is no reason to pretend that the Royal Charter maintains a full self-regulatory system when it clearly does not. The government must be honest when labelling this new system so as not to misrepresent the character of these new bodies. Indeed, when doing this, the government may identify co-regulatory systems that exist in other states while complying with international standards on freedom of expression.

We reiterate that the system of co-regulation or even statutory regulation does not automatically violate international freedom of expression standards if press freedom and protection from interferences are guaranteed.

Recommendations:
- The structure, functions and procedures of the regulatory body should not be specified in such detail in the Royal Charter.

- The Royal Charter should identify only overall guiding principles for the regulator, such as those regarding the appointment of the members of the Board, its functions, operations and funding.
- The Royal Charter should stipulate that the mandate of the press regulator extends to advocating for freedom of expression. It should act as both a defender of the rights of members of the profession as well as a guiding force for their conduct and an adjudicator for complaints received from members of the public. Such provisions could also encourage widespread support among the media community and contribute to raising its public profile.
- For the sake of clarity, the term "independent self-regulatory body" should be omitted from the Royal Charter. The Royal Charter should clarify that it is establishing a hybrid model of regulation of the print media with statutory back up to the press regulator.

Membership of the appointment panel and the Board

Section 3 and Section 5 of Schedule 3 of the Royal Charter set up criteria for the membership of the appointment panel for the "self-regulatory body" and the Board of the same. The schedules stipulate that the appointment panel should include no more than one current editor and that a substantial majority of the members should be demonstrably independent from the press. Similarly, the majority of the Board's membership should be constituted from "people independent of the press."

ARTICLE 19 wishes to highlight two key issues in this regard.

Lack of equal representation of the press

Both the appointment panel and the Board of the regulator should be comprised of a majority of people "independent of the press."

ARTICLE 19 observes that there are two possible approaches to the Board membership of press regulators:

- *Press only representatives*: some press councils are comprised solely of the representatives of the press.[28] The rationale behind this approach is to protect the independence of the journalistic process. However, it is also argued that such councils render themselves open to charges of hypocrisy as the industry members would be biased in judgment of their own colleagues. It is argued that such bodies may find it hard to gain public trust.

- *Mixed councils:* give representation to the wider community. These either have a form of tripartite arrangements, along the social partnership model, made up of representatives of journalists, of publishers and those of the general public;[29] or have a majority of their

[28] For example in Germany, the press council membership is selected from delegates of the publisher and journalist associations. The four media professional groups establish two complaints committees elected from a 28-member plenary: the general complaints committee with two chambers and 8 members each and the complaints committee for editorial data protection with 6 members. There are no public representatives.

[29] For example, the Constitution of the Australian Press Council (APC), founded in July 1976, called for balanced representation of publishers, journalists and the public, with an independent chairman.

members nominated from within the industry mixed with a number of public representatives usually selected by independent and non-political groups within civil society.[30] At the same time, some critics argue that these models might compromise the notion of "self-regulation" since the members of the press can only nominate a limited number of persons from among themselves.[31]

The Royal Charter proposes a model of minority representation of the press in the Board of the regulator. ARTICLE 19 observes that this goes beyond the tripartite model of representation and is unlikely to support stronger media professionalism, responsibility and accountability.

Accountability to the public

ARTICLE 19 observes that the process of the nominations for the members of the appointment panel and the regulator's Board does not envision or require the public consultations. It only requires the process to be "independent." Equally, there is no mention that membership of the Board should be of a limited duration.

ARTICLE 19 believes that the process of nominations for the members of the appointment panel and the Board should provide for public participation. Such a process would help to ensure the fundamental objectives of accountable regulation; that is not only the accountability of members of the profession to their peers but also an accountability of media outlets to the public.

Further, in order to avoid domination by any individual or interest group and to enable fresh experience and insight to be brought to the activities of the regulator, the term of membership should be limited in duration.

Recommendations:

- The membership of the appointment panel and the regulator's Board should ensure, at minimum, an equal representation of members of the media profession, media owners, and the public.
- Members of the Board of the regulator should be selected according to democratic and transparent procedures with public participation; and the term of membership should be limited in duration.

Standards code

Section 7 of Schedule 3 of the Royal Charter stipulates that the standards code will be "the responsibility of the Code Committee." The Code Committee will be comprised of "equal proportions of independent members, serving journalists … and serving editors." The Code Committee will organise biennial public consultations.

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[30] For example, in Denmark, under Section 41 of the Media Liability Act the Council consists of eight members: a Chairman and Deputy Chairman, appointed the President of the Supreme Court, two members to be appointed by the Journalists´ Union, two members appointed by media managements, and two public representatives recommended by the Danish Council for Adult Education.

[31] ARTICLE 19, Freedom And Accountability: Safeguarding Free Expression Through Media Self-Regulation, March 2005; available at http://www.article19.org/data/files/pdfs/publications/self-regulation-south-east-europe.pdf.

ARTICLE 19 notes that in order to ensure that members of the media profession adhere to the ethical standards, the ethical codes should always be elaborated by media professionals and media owners themselves. They should ultimately be adopted by the unions or associations of journalists and the owners/publishers if they are to be fully integrated in day to day work, the object of training and of regular review. On the other hand, many aspects of these codes are of direct importance to members of the public and constitute a key tool for building trust and accountability. The involvement of the public in reviewing and public consultations during the development of the codes and their regular review is encouraged.

As there might be different journalist associations and/or associations of owners, the role of the Code Committee should consist primarily in reaching an agreement over a national code of minimum standards. The Committee should be comprised of journalists, owners and the public in equal representation.

Recommendations:

- The standards code (or ethical codes) should be developed by the media professionals and owners. Public consultations during the development of the standards code should be encouraged.
- The role of the Code Committee should be to reach agreement over a national code of minimum standards. The Committee should be comprised of journalists, owners and the public in equal representation.

Group and third party complaints

Section 11 of Schedule 3 of the Royal Charter stipulates that the Board of the self-regulatory body shall "have a power (but not necessarily the duty) to hear, *inter alia*, complaints in case there is "an alleged breach of the code and there is public interest in the Board giving consideration to the complaint from a representative group affected by the alleged breach" or "from a third party seeking to ensure accuracy of published information."

These provisions are problematic for the following reasons:

- *Group complaints in public interest:* overall, ARTICLE 19 notes that a possibility of group complaints in the public interest may promote the right to freedom of expression of marginalised and disadvantaged groups in the society. It can provide a tool to assist minority and marginalised groups to voice their perspectives and concerns against negative stereotypes and misrepresentation in the media. However, we are concerned that the interpretation of these provisions might be misused for complaints such as "group defamation" or "defamation of religions". Hence, if the possibility of group complaints is maintained, all decisions of the press regulator on group complaints must strictly comply with international freedom of international standards and should never go beyond what is permissible under these standards.

- *Third party complaints*: the possibility of any third party filing complaints regarding accuracy of published information is extremely broad. ARTICLE 19 is concerned that this can lead to large numbers of complaints from the general public and might damage the efficiency of the press regulator and could result in self-censorship. We also note that in other countries, for example in Denmark, Sweden or Ireland, only the person affected by a publication may bring a complaint to the regulator.

Recommendations:

- The provisions on group complaints must stipulate that any decision on such complaints must fully comply with international freedom of expression standards;
- The press regulator should also have powers to refuse to hear group complaints that are vexatious and/or are lacking merit.
- The possibility of the third party complaints should be abolished.

Publication of corrections and apologies

Under Section 15 of the Schedule 3 of the Royal Charter, the Board of the Regulator shall have powers to "direct appropriate remedial action for breach of standards and the publication of corrections and apologies" in the absence of the negation of such between the complainant and subscriber. Section 16 of Schedule 3 further stipulates that the Board of the press regulator shall have the power to "direct the nature, extent and placement of apologies and corrections."

ARTICLE 19 finds these provisions unclear: there is no explanation of what is meant by "the publication of correction and apologies." It is also not clear whether these provisions amount to a proposal to establish the right to reply and the right to correction in the Royal Charter.

ARTICLE 19 points out that the right to correction and the right to reply – that are best protected through self-regulatory systems - should be distinguished as follows:

- A right of correction is limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material.

- A right of reply, on the other hand, gives any person the right to have a mass media outlet disseminate his or her response where the publication of incorrect or misleading facts has infringed a recognised right of that person and where a correction cannot reasonably be expected to redress the wrong.[32]

ARTICLE 19 recommends that the remedy of "publication of correction" and "publication of apologies" should be clarified and these should be limited to the above definitions.

Additionally, we recommend that the possibility of the Board to direct the nature, extent and placement of corrections and replies/apologies should be limited. Namely:

- the reply should only be available to respond to statements which breach a legal right of the person involved, not to comment on opinions which the reader or viewer doesn't like;
- it should receive similar prominence to the original article;
- it should be proportionate in length to the original article
- it should be restricted to addressing the impugned statements in the original text;

[32] See Principle 7, the Camden Principles on Freedom of Expression and Equality, 2009; available at http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf.

- it should not be taken as an opportunity to introduce new issues or to comment on other correct facts.

Recommendations:

- The remedy of "publication of correction and apologies" should be clearly specified;
- The possibility of the Board of the regulator to direct the nature, extent and placement of corrections and apologies should be limited as follow:
  - the reply should only be available to respond to statements which breach a legal right of the person involved, not to comment on opinions which the reader or viewer does not like;
  - it should receive similar prominence to the original article;
  - it should be proportionate in length to the original article
  - it should be restricted to addressing the impugned statements in the original text;
  - it should not be taken as an opportunity to introduce new issues or to comment on other correct facts.

Sanctions

In addition to Section 15, Section 19 of Schedule 3 of the Royal Charter stipulates that the Board should have powers to "impose appropriate and proportionate sanctions," that can include "financial sanctions" for "serious or systematic breaches of the standards code or governance requirements of the body." The fines can be up to 1% of turnover attributable to the publication concerned with a maximum of £1,000,000 (USD 1.5 million).

ARTICLE 19 has the following comments to these provisions.

Ambiguity about the possible sanctions and remedial measures

ARTICLE 19 observes that the sanctions regime provided in the Royal Charter is too ambiguous – it appears that the envisioned sanctions are publication of corrections and apologies (Section15 of Schedule 3) and fines (Section 19 of Schedule 3). It is not clear what other "appropriate sanctions" or "remedial" action can be imposed beyond these ones. For the sake of legal certainty, ARTICLE 19 suggests that all sanctions that can be imposed by the regulator should be clearly listed.

ARTICLE 19 also points out that typically, press regulatory bodies should have the power to impose only moral sanctions, such as the publication of a correction, a reply or an apology. They should not be entitled to fine or ban media outlets or exclude individual members from the profession. In rare cases, press councils can impose financial penalties for a particularly serious breach of the ethical codes. Usually, the sanction they impose is the public shame of being found to have broken the code and having to admit to this in their own publication.[33]

Amount of fines

ARTICLE 19 notes that disproportionate sanctions can significantly limit the free flow of information and ideas. As a result, it is now well established that sanctions, like standards, are subject to scrutiny under the test for restrictions on freedom of expression.

[33] ARTICLE 19, Freedom And Accountability, *op.cit.*

The right to freedom of expression demands that the purpose of sanctions should be, except for the most exceptional cases, limited to redressing the immediate harm done to the individuals' rights (e.g. for defamation or violation of the right to privacy). Using the sanctions to serve any other goal would exert an unacceptable chilling effect on freedom of expression which could not be justified as necessary in a democratic society.

ARTICLE 19 also highlights that the 'necessity' part of the test for restrictions on freedom of expression precludes reliance on certain restrictions where less chilling but still effective alternatives exist. We note that non-financial remedies often have less impact on the free flow of information and ideas than financial sanctions and may at the same time provide an effective means of redressing any harm done to individuals' rights. Such remedies should, therefore, be prioritised.

It should be therefore stipulated that the regulator can impose financial sanctions only in cases of most serious breach of the standards code and provided other measures – such as correction or reply, issuance of apology or publication of the decision of the regulator - would not be capable of redressing the harm. In assessing the amount of financial sanctions, the regulator should always consider their potential chilling effect on freedom of expression. Financial sanctions should never be disproportionate to the harm done.

Possibility of appeal

The Royal Charter is silent on how and whether the decisions of the Board can be reviewed. The Royal Charter provides no specific appeals mechanism against the decisions of the Board. We note that, for example in Ireland, complaints are adjudicated by the Press Ombudsman, and the Press Council is responsible for hearing appeals of ombudsman decisions. Such a possibility should be considered.

Recommendations:

- The regime of sanctions and remedial actions should be reviewed;
- All sanctions and remedial actions that can be imposed by the regulator should be clearly specified and the possibility of review of the decisions should be considered.
- It should be clearly stipulated that the regulator can impose financial sanctions only in cases of the most serious breaches of the standards code, and provided that other measures – such as correction or reply, issuance of apology or publication of the decision of the regulator - would not be capable of redressing the harm caused to the individual.
- The amount of fines should always be assessed against their potential effect on the right to freedom of expression and they should never be disproportionate to the harm caused.
- A right of appeal must be included in the provisions.

Publishers under the Royal Charter

ARTICLE 19 observes that under Schedule 3, Article 23, membership of the regulatory body is open to "all publishers." Under Schedule 4, Section 1(b) of Schedule 4, these also include "a website containing news-related material (whether or not related to a newspaper or magazine."

Schedule 4 Section 1(e) also stipulates that "*news-related material*" means "i) news or information about current affairs; ii) opinion about matters relating to the news or current affairs; or iii) gossip about celebrities, other public figures or other persons in the news."

ARTICLE 19 observes that opening the membership of the regulatory body to such online publications is not problematic, since many online publications are actually the online versions of traditional media outlets or are the media themselves.

As for individual bloggers, ARTICLE 19 observes that there is no universal definition of the term "blogger." In the most basic sense, a blogger is any person who writes entries for, adds materials to, or maintains a 'blog' – a web log published on the internet. Blogs allow anyone to self-publish online without prior editing or commissioning by an intermediary (e.g. a newspaper editor). They can be immediate and also anonymous if the blogger so desires. They reflect their authors' personal interests and preferences and vary enormously in style, content (from politics to gardening) or length (from short written pieces to longer ones closely resembling 'reportage'). Blogs normally allow readers to post comments and allow authors to engage in virtual, multilateral conversations with their readers.[34] Typically, they also contain a series of hyperlinks that take the reader to other content. Again, ARTICLE 19 finds that opening the membership of a regulatory body to individual bloggers is not necessarily problematic since bloggers may decide to follow the ethical standards of the traditional media of their own accord.

These provisions may become problematic, however, if there is any possibility of coercion or "negative" incentives (i.e. higher sanctions) where an individual blogger has not joined the regulatory body or bodies.

The system of negative incentives has already been created by the Amendments to the Crime and Court Bill, discussed below, for publishers in general. At present, it is not clear whether it will apply to online publications and to bloggers. Although careful reading of the Amendments show that individual bloggers and some publishers might be exempted, the lack of clarity on these issues might fail the test of legal certainty mandated by international standards.

Hence, ARTICLE 19 stresses out that the Royal Charter and any further legislation should make it clear that bloggers should not be forced to abide by the ethical codes or codes of conduct developed by traditional media and they should not be coerced through any incentive scheme to join a self-regulatory body clearly designed by and for the traditional print press. However, bloggers might be given an opportunity to follow the ethical standards or join regulatory bodies that meet international freedom of expression standards if they so choose on their own account.

Recommendations:

- The Royal Charter should ensure that bloggers are not forced to abide by the ethical codes or codes of conduct developed by traditional media, either directly or through incentive schemes;

[34] See Paul Bradshaw, An attempt to define Blogging as a genre, Online Journalism Blog, 13 November 2008; available at http://onlinejournalismblog.com/2008/11/13/an-attempt-to-define-blogging-as-a-genre.

- Bloggers might be given an opportunity to follow the ethical standards or voluntarily join regulatory bodies if they wish to do so.

Analysis of some provisions of the Amendments to the Crime and Courts Bill

As noted above, the Royal Charter was accompanied with the Amendments to the Crime and Courts Bill that is currently being reviewed by both Houses of Parliament.

The Amendments establish that exemplary damages can be imposed for a "Relevant claim" that includes libel, slander, breach of confidence, misuse of private information, malicious falsehood or harassment (Section 19(4)).

In Section 11 and 12, the House Amendments stipulate that exemplary damages may not be awarded by the court if a "defendant was a relevant publisher" and "was a member of an approved regulator at the material time;" they also set up further criteria when the court can disregard the sanctions imposed by the regulator. When deciding about exemplary damages, the courts should also take into account *inter alia* whether "a) membership of an approved regulator was available to the defendant at the material time; and (b) if such membership was available, the reasons for the defendant not being a member."

Under Section 11(6) of the House Amendments, exemplary damages may be awarded only if the court is satisfied that "the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights," "the conduct is such that the court should punish the defendant for it," and "other remedies would not be adequate to punish that conduct."

The Lords Amendment of 25 March 2013 introduced an amended version of Section 17 on "awards of costs" which stipulates further provisions on damages if the defendant (relevant publisher) was not a member of the approved regulator.[35]

Further, Section 18 of the House Amendments stipulates that "relevant publisher" is "a person who, in the course of a business (whether or not carried on with a view to profit), publishes news-related material a) which is written by different authors, and b) which is to any extent subject to editorial control." The Section also specifies that news-related material is "subject to editorial control" if there is a person (whether or not the publisher of the material) who has editorial or equivalent responsibility for a) the content of the material, b) how the material is to be presented, and c) the decision to publish it. Finally, the Section states that an operator of a website is not considered to have "editorial or equivalent responsibility for the decision to publish any material on the site, or for content of the material, if the person did not post the material on the site" and the fact that "the operator of the website may moderate statements posted on it by others does not matter for the purposes" of these provisions.

Finally, Section 131 of the Amendments sets criteria for exclusions from the definition of "relevant publishers" which includes:

- Broadcasters;
- Special interest titles (those who publish materials related to particular pastime, hobby, trade, business, industry or profession, and only contains news-related material on an incidental basis that is relevant to the main content of the title);

[35] The full text is available at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0156/2013156.pdf.

- Scientific or academic journals;
- Public bodies and charities (that publish news-related material in connection with carrying out their functions);
- Company news publications; and
- Book publishers.

The Lords Amendment of 25 March 2013 proposed that Section 131 also provides exception for "small-scale blogs" ("person who publishes a small-scale blog").

As noted above, these Amendments create a *de facto* system of incentives for all publishers to become members of a regulatory body, under the conditions of the Royal Charter, if they want to avoid the possibility of exemplary damages.

ARTICLE 19 finds the provisions on exemplary damages problematic for the following reasons:

- The provisions of Section 11(6) of the House Amendments are vague and do not meet the requirement of legality under Article 10(2) of the European Convention and Article 19(3) of the ICCPR. The meaning of "reckless disregard of an outrageous nature for the claimant's rights" is unclear. We recall that the condition of "provided by law" for limitations on the right to freedom of expression requires more than the mere existence of written legislation. The legislation must meet the standards of clarity and precision, enabling people to foresee the consequences of their conduct on the basis of the law. We also note that the domestic UK courts have previously rejected the criterion of "outrageous" conduct as legally uncertain.[36]

- The system of exemplary damages also goes against the principle of legal certainly, since membership in the regulatory body does not exempt the publisher from the possibility of exemplary damages. Under Section 11(3), the court can disregard the penalty imposed by the approved regulator, *inter alia*, if the regulator was "manifestly irrational in imposing the penalty or deciding not to impose one." We believe that this defeats the system of sanctions that can be imposed by the Regulator as every decision of the Regulator can be challenged and disregarded by the Courts.

- No fixed ceiling for exemplary damages: The Amendments do not set up a maximum amount for the exemplary damages. As a general principle, ARTICLE 19 recommends that the amount of damages for non-material harm (that is harm that cannot be quantified in monetary terms) should always be subject to a fixed ceiling and this maximum should be applied only in the most serious cases. Further, any pecuniary damages which go beyond compensating for actual harm should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted deliberately and with the specific intention of causing harm to the plaintiff.

ARTICLE 19 therefore recommends that the provisions are revised.

Furthermore, as noted above, the incentives for joining the regulators can be even more problematic in the case of certain online publications and individual bloggers that can be

[36] See Rookes v Barnard [1964] UKHL 1.

considered as "relevant publishers." ARTICLE 19 is particularly concerned about the following:

- Bloggers: It is still unclear which bloggers will be considered "relevant publishers" under the Amendments. It appears that they will not be considered as such, unless it is established that:
    - The blog/publication is publishing news-related material in the course of a business;
    - Their material is written by a range of authors;
    - The material is subject to editorial control;
    - The publications goes beyond a "small-scale" blog;
    - The publication cannot benefit from other exclusions (e.g. special interest title, scientific or academic publication or public charities).

  However, it is still not clear what interpretation will be given to the term "course of a business" or whether posting hyperlinks will be considered as "material written by a range of others" or what scale a "small-scale blog" should reach.

  ARTICLE 19 reiterates that as a matter of principle, individual bloggers should not be subject to the same standards as the traditional media. In the interest of legal certainty, the Amendment should clearly specify that individual bloggers are not to be considered "relevant publishers." ARTICLE 19 also supports the House of Lords' Amendment which calls for the exclusion of "small-scale blogs."

- Other "publishers": It is not clear how these provisions will apply to intermediaries, such as search engines and social media platforms that allow publications and exert "editorial control" through their Terms and Conditions. Although Section 18 appears to exclude them, ARTICLE 19 finds that there is a danger that they might fall under the definition of "relevant publisher" in light of recent case law which found that search-engines could be liable as a publisher under common law.[37]

ARTICLE 19 recommends that any such interpretations should be avoided.

Recommendations:

- The term "reckless disregard of an outrageous nature for the claimant's rights" should be removed from the Crime and Court Bill.
- The Crime and Court Bill should stipulate that the exemplary damages should only be available as highly exceptional measures, and can be applied only where the plaintiff has proven that the defendant acted deliberately and with the specific intention of causing harm to the plaintiff.
- Possibility of imposing exemplary damages in cases where financial sanctions were imposed *by* t*he regulat*or should be clearly specified. In particular, there should be no

[37] Court of Appeals, *Tamiz v Google* [2013] EWCA Civ 68; available at http://www.bailii.org/ew/cases/EWCA/Civ/2013/68.html. See also ARTICLE 19, United Kingdom: Ruling on Google's liability is bad news for free speech online, available at http://www.article19.org/resources.php/resource/3611/en/united-kingdom:-ruling-on-google%E2%80%99s-liability-is-bad-news-for-free-speech-online.

possibility to impose exemplary damages if a maximum financial sanction has already been imposed by the press regulator.

- The maximum amount of exemplary damages should be stipulated in the Crime and Court Bill.
- Terms "the course of a business" should be specified. Individual bloggers and small-scale blogs should be excluded from the definition of relevant publishers under Section 131 of the Amendments. Posting hyperlinks should not be considered as "material written by a range of authors."
- Search engines and social media platforms should be excluded from the definition of "relevant publishers" under the Royal Charter and the Crime and Courts Bill.