Freedom of the Press, Governance and Press Standards: Key Challenges for the Leveson Inquiry

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1. Introduction

The report of the Leveson Inquiry this autumn is likely to represent a watershed moment for the press and for press freedom in the UK. Its findings and its recommendations on a new system of press regulation, if taken up by the government, will have a major impact on journalism and free expression in Britain and beyond for years to come.

Since last November, the hearings have laid bare the operations of the UK press. In the wake of the News of the World phone-hacking scandal, unethical and illegal behaviour in the print media sector and intrusions into individuals' privacy have rightly come under intense scrutiny. At the same time, the Inquiry and its hearings have opened up a wider discussion about how to protect freedom of expression and the ability of high quality and investigative journalism to hold government and other powerful bodies and individuals to account without allowing shoddy and dishonest journalism to operate with impunity.

The relationship between the press, politicians, officials and the police have also come under the spotlight, challenging the behaviour – and cronyism – of a number of journalists, politicians and police.

In this note, Index on Censorship sets out some key challenges that must be addressed if the approaching watershed moment for the British press is to be a positive one and if it is to set a standard that can impact constructively internationally too.

2. Self-Regulation or Statutory Regulation

The Leveson hearings have exposed a range of inappropriate, unethical and even illegal behaviour by some journalists and media organisations. In particular, the intrusion into the privacy of dozens of individuals through phone-hacking and other methods has been widely condemned. This has led some to demand statutory regulation of the press – with the current system of self-regulation being seen to have failed to rein in this behaviour or offer sufficient protection to those affected.

The need for a better and tougher approach to press regulation is clear. But a rush to statutory regulation in the face of the failure of the current system would risk causing more damage than the problems it sets out to solve.

Statutory Regulation would be a slippery slope

The arguments against statutory regulation are fundamental ones and have been made often but bear repeating. Freedom of the press is a vital component of the wider universal human right to freedom of expression. As article 19 of the Universal Declaration of Human Rights states freedom of expression includes: "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

Any government power or role in regulating the press risks abuse of that power including through chilling effects and potentially through more direct interference. As one of the bedrocks of a democratic society, it is imperative that press freedom is not restricted by a move to statutory regulation. Such restriction would certainly be noted, followed or used as a justification for press control by many undemocratic regimes around the world.

Another serious issue raised by statutory regulation is the question of how one defines a “media organisation” or “publisher”. In our digital world, it is no longer necessary to be a heavily-resourced news organisation in order to publish. Statutory regulation of media could, on the one hand, potentially have a serious effect on the right to free expression of individual bloggers, held to industry standards enforced by law. On the other hand, given the international reach of the web, the ability to enforce such standards would also be an open question.

Strengthened Self-Regulation

But if the risks of statutory regulation are to be avoided, then a new and more effective approach to self-regulation is vital. The failures of the current regulatory system under the Press Complaints Commission have been well documented throughout the Inquiry hearings. Any new system of self-regulation must have sufficient teeth to deal effectively with unwarranted breaches of privacy, false allegations and other issues including poor and inadequate standards and unethical behaviour.

A new regulatory body, set up on a self-regulating basis, must push for a high standard of corporate governance and accountability. And it must have a wide-ranging remit to monitor and address issues of journalistic standards including ethical standards. It must offer a straightforward, effective and fair approach for dealing with individual complainants. This new regulatory system must be able both to defend privacy and to be clear about where, when and why a public interest defence can override privacy.

Such a body will need to include a range of individuals who both have in-depth knowledge of the press and media in the contemporary world and who are figures of trust, independence and the highest ethical standards. The widespread loss of trust in senior figures in the media industry, as a result of the range of scandals, dubious working methods and over-close media-political-police relations that have been exposed, have led some to suggest the regulator should be staffed either from outside and/or by former members of the media sector. While there may well be a role for a more diverse set of regulators, it is not realistic to expect a self-regulatory system in a fast-changing sector (both in business and technology terms) to operate effectively, and with buy-in from the sector, without a significant representation of the current industry.

A tougher, stronger self-regulatory regime will not answer or address all the difficult challenges that have been exposed through the Leveson Inquiry and elsewhere. But nor can such a regime be expected to. There are laws in existence that can and do tackle issues such as phone-hacking and bribery of public officials including politicians. These laws must be applied effectively. And, at the same time, they must include an appropriate public interest defence,

which as case law shows is vital for challenging investigative journalism. Such a defence would not apply to many of the egregious examples of hacking and law-breaking that the News of the World scandal exposed. The vital importance of a public interest defence is explored further in the following section.

Higher journalistic and corporate media standards also depend on the actions and values of those working in media organisations. It has been suggested to the Inquiry that journalists could have a "conscience clause" written into their contracts allowing them to refuse to take part in unethical behaviour – and to report such behaviour. Whether this would substantially add to journalists' normal professional and legal obligations may be questionable. Moreover, what such a clause, if adopted, must not do is replace or in any way undermine the broader rights and structures needed to ensure effective internal complaints procedures, reporting and accountability, including whistleblowing, within organisations.

A strengthened self-regulatory approach also raises the question of how to ensure most of the organisations that fall within its remit join the system. While one future outcome of the Leveson Inquiry will surely be greater scrutiny of the press including journalistic and corporate practices in general, any organisation not joining a tougher self-regulatory body can expect to be the target of greater questioning and challenge whether from politicians, the wider public or others, and may face difficulties in establishing a relationship of trust with its readers and others. This may be one pressure encouraging participation in a regulatory body.

Alternative dispute resolution

A more positive incentive to join such a self-regulatory regime will also lie in the sort of simple, effective procedures for dispute-resolution and dealing with complaints that the system offers. A quick, effective dispute resolution service, available only to members of the self-regulatory body, could attract some waverers into the system.

The Inquiry has repeatedly heard that victims of press wrongdoing desire swift, inexpensive resolution to their disputes. Efficient, accessible and fair dispute resolution would do much to repair the relationship between public and press, and to help safeguard free expression for all parts of society.

A voluntary system overseen by the regulator that offers parties a cheap, fast and fair way of resolving defamation claims and other disputes would be very attractive to potential litigants who have a genuine interest in resolving their disputes. If any complaint continues to litigation, the courts could recognise an application to the press regulator's dispute resolution service as a genuine attempt to resolve the case which can have beneficial effects when costs or damages are assessed and awarded. As newspaper resources are ever-more squeezed, we believe this would be a genuine incentive to join a regulatory body.

3. Public Interest: a vital component of serious journalism

The concept of public interest is at the core of independent, serious and investigative journalism. High quality journalism that uncovers political, corporate and other wrongdoing, as well as exposing deliberately misleading statements and actions, is a vital component of a democratic society. We consider that journalists should have clearer and stronger access to a public interest defence and believe Lord Justice Leveson should make such a recommendation.

Some of the perceived failings of the Press Complaints Commission have occurred around the blurred dividing line between privacy and public interest. As we set out above, privacy should be respected as a right, and a future regulator should offer clear guidelines on the matter. Public interest is, however, a vital component of effective journalism in a democracy too. The balance should not be tipped against the fundamental right to free expression when there is a clear public interest in privacy breaches.
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The PCC includes in its understanding of public interest: detecting or exposing crime or serious impropriety, protecting public health and safety, and preventing the public from being misled by an action or statement of an individual or organisation.

The investigations of stories that cover issues such as deliberately misleading statements by politicians or criminal behaviour can lead reporters into grey areas, legally and ethically. While it may seem unethical and even illegal – and in general undesirable – to pay for information gained through dubious methods, yet without such practices the parliamentary expenses scandal would never have come to light, a story widely accepted as having been in the wider public interest.

A clear approach to public interest means that journalists know what questions they should be asking themselves as they pursue certain stories. Does the report uncover crime or impropriety? Does the story affect public health, safety or security? Does the report prevent the public from being misled by false or hypocritical actions by a public figure or body? These are questions which must also be asked by regulators or judges in assessing any subsequent complaints.

While some elements of the law do contain a public interest defence, other relevant laws do not. There is an inconsistency across different laws that turns public interest into a potential minefield for journalists to know when a public interest defence may and may not apply.

The inclusion of the “Reynolds Defence” for responsible journalism in the Defamation Bill currently in Parliament is an inadequate step and needs strengthening to reflect recent case law. It does not in itself constitute a public interest defence. Crucially, a standalone public interest defence is needed to cover scientific writers, bloggers and others who are not professional journalists.

The recent case of Guardian journalist Amelia Hill provides a good, positive example of a public interest defence for a journalist. The CPS found there was "arguably sufficient evidence" to charge Hill in connection to some of her reporting of the phone-hacking scandal, using

information from confidential sources, under Section 55 of the Data Protection Act, but then found that any alleged misconduct was in the public interest.

However, many laws that may affect news-gatherers offer no such public interest defence. The absence of a public interest defence in the Official Secrets Act, Regulation of Investigatory Powers Act 2000 or Computer Misuse Act creates significant risks for journalists, including imprisonment. These laws should be amended to include such a defence.

4. Relations between the Press, Politicians, Officials and Police: vital for effective journalism or too close by far?

The stories that have unfolded at Leveson, exposing the depth of interaction and "so-called" friendship that some journalists, editors and top politicians considered appropriate and helpful (not least between the Murdochs and a succession of prime ministers and other cabinet ministers), have shocked and surprised many. The potential such close interactions have for inappropriate influence and undermining of democratic processes raises very serious challenges.

A new regulatory body would surely be expected to comment on how such relationships should be handled. But moving beyond that to any formal regulation of access, beyond existing legal provisions, would be dangerous and undesirable and could strike at the heart of effective journalism that holds those in power to account.

Journalists, editors, politicians and officials interact in a wide range of ways and settings. The formal interview – whether on or off the record – is only one of many ways that journalists gather information, pursue leads and investigate stories. Informal discussions, such as politicians briefing journalists on background without telling their party press officers, or officials passing on insights to trusted correspondents, is part of the life-blood of building a decent, well-informed story. Journalism cannot thrive without access to such sources.

The experience of Ireland shows the risks of going beyond standards-setting by an independent regulator to legal regulation. The Garda Siochana Act lays down strict boundaries on contacts between police and outside agencies, including the press. This has led to a situation where investigative reporters claim they are routinely questioned by police after they break stories with the suggestion of a police source. This is a rather Kafkaesque and chilling situation where the police harass journalists when a police source has been used in a story, and have the weight of the law behind them in doing so.

While much of the contact journalists have with officials, politicians and police is part of normal journalistic inquiry (and not of the kind exemplified by the Murdochs and by News International), periodically journalists' sources are particularly sensitive and police (or politicians) attempt to identify these sources. In doing so, the police use various laws in the UK to attempt to find, and potentially to arrest and charge, the sources. Journalists have a right and a duty to protect their sources – a duty which also overlaps with the need to protect whistle-blowers.

In several cases on which Index on Censorship has campaigned in recent years, such as those of reporters Shiv Malik and Suzanne Breen, legislation has been used in attempts by police to force journalists to hand over research materials, equipment and other information. This not only endangers journalism, but, as was found in the case of Breen, could potentially endanger the life of a reporter. Journalists working on crime or terrorism stories could be seen as linked to, or in collusion with, the authorities if there was any compulsion to hand over materials. This would both endanger journalists and also discourage anonymous whistle-blowers from coming forward.

The duty to protect sources including whistle-blowers needs to be recognised by the Leveson report. Protecting sources and recognising the need for public interest defences to be written into all relevant laws are two key requirements of underpinning and supporting challenging investigative journalism. Imposing legal regulation on contacts between the press and politicians, officials and police would do the opposite.

5. Conclusion

The Leveson Inquiry, the phone-hacking scandal, and the wider public discussion around the behaviour of the UK press, journalistic standards, and relations between journalists and those in power, have brought to the fore a number of challenging questions and issues around the role of the free press in a democratic society.

Freedom of expression is a fundamental part of a genuine, active democracy where those with power and in power are held to account, challenged and questioned. A free press is one vital component of that free expression and of effective democratic accountability. The Leveson report must protect and promote press freedom as an essential component of our democracy.

A free press cannot expect to thrive if it does not demonstrate high level professional and ethical standards. Our democracy needs high quality, high standard journalism. But that does not rule out our media also sometimes being irresponsible, scurrilous, even cruel: that is the price we pay for a free press. Promoting high quality journalism, while recognising we will always have a range of approaches and attitudes, means the role of the independent regulator is crucial.

We need to see a strong, effective and independent regulator that can monitor, set standards, and provide effective, fair and rapid complaint resolution. It means respect both for the right to privacy and for the need for a clear and strong public interest defence for serious investigative journalism. It means clear independent standards on relations between media, politicians and others without falling into the trap of any legislative regulation of the relations between journalists and their sources beyond existing criminal law.

Ensuring freedom of expression and a free press in the UK while promoting high standards of professionalism, including high ethical standards, is the challenge at the heart of the Leveson

Inquiry. This autumn we will see whether the UK will become a model for press freedom and high standards internationally or whether it will risk becoming the opposite.

This note is Index on Censorship's concluding submission to the Leveson Inquiry and is endorsed by the Index on Censorship Board of Trustees. It was written by Kirsty Hughes (CEO, Index) and Padraig Reidy (News Editor, Index)