May 2013

# Report

**to Her Majesty's Most Honourable Privy Council and the Department of Culture, Media and Sport on the subject of the Regulation of the Media, as required by the Royal Charter of the Chartered Institute of Journalists**

*Presented by the President on behalf of and with the authority of the Governing Council of the Chartered Institute of Journalists and delivered under its seal*

**The Chartered Institute of Journalists**

**At the heart of international newsgathering since 1884**

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## Introduction

The Chartered Institute of Journalists, incorporated by Royal Charter in 1890 by Her Majesty Queen Victoria, is the oldest professional body for Journalists in the world. Our Charter, which was confirmed in 1990 by Her Majesty Queen Elizabeth II, requires us to uphold ethical and professional standards in the journalistic profession and amongst other obligations charges us with the following:

2. THE objects and purposes for which the Institute of Journalists (hereinafter and in the Schedule to these Presents called "the Institute") is hereby constituted are the following:

> *(b) The promotion of whatever may tend to the elevation of the status and the improvement of the qualifications of all Members of the Journalistic profession;*
>
> *(c) The ascertainment of the law and practice relating to all things connected with the Journalistic profession and the exercise of supervision over its Members when engaged in professional duties;*
>
> *(e) Watching any legislation affecting the discharge by Journalists of their professional duties and endeavouring to obtain amendments of the law affecting Journalists, their duties or interests;*
>
> *(l) Securing the advancement of Journalism in all its branches and obtaining for Journalists as such formal and definite professional standing;*
>
> *(m) The promotion by all reasonable means of the interests of Journalists and Journalism.*

Members of the Institute are expected as a condition of membership to abide by its code of conduct (Appendix 1) which stresses the importance of ethical behaviour and which incorporates in full the Editors' Code of Practise.

In accordance with the terms of our Charter, the President and Governing Council, on behalf of the membership of the Chartered Institute of Journalists, have prepared this Report, examining the competing Charters for a proposed independent regulatory body for the media, which seeks to implement the conclusions of the recent Leveson Inquiry. At the current time there are two competing Royal Charter proposals before the Privy Council: one submitted by the Government (the Government Charter) and one submitted by the Press Board of Finance (the Pressbof charter). These have some similarities in structure, and both rely upon statutory underpinning in the form of amendments and insertions to the Enterprise and Regulatory Reform Act 2013 (ERRA) as enacted, Section 96 of which states:

> *"Royal Charters: requirements for Parliamentary approval*
> *Where a body is established by Royal Charter after 1 March 2013 with functions relating to the carrying on of an industry, no recommendation may be made to Her Majesty in Council to amend the body's Charter or dissolve the body unless any requirements included in the Charter on the date it is granted for Parliament to approve the amendment or dissolution have been met."*

Further statutory guidance with regard to exemplary damages and the award of costs is contained within Sections 34 to 42 of the Crime and Courts Act 2013 and including Schedule 15 of the same act, which limits the effects on certain publishers.

The position of the Institute is clear. We do not support these proposals as we do not believe the state has a role to play in the regulation of the media. The Institute believes that a free and independent media play a vital role in a democracy and that it should be self-regulated within the constraints of existing civil and criminal law, with no requirement for statutory regulation, however disguised. With that proviso, the Institute makes the following observations.

## Journalists and their duty of care

The Institute recognises a number of problems which, in its opinion, have not been adequately addressed by the Leveson Inquiry and the subsequent debate. In the case of the wrongdoing which led to the Inquiry, it remains unclear whether the criminal acts committed by a small number of journalists were as a result of top-down corporate pressure, bottom-up journalistic ambition, or some combination of both.

The composition of the regulatory body has largely been framed as being between publishers and independent members, and yet it is journalists in the first instance who have to make the decisions. Frontline journalists are best placed to recognise corporate wrongdoings, ethical failings or any fall in journalistic standards and yet they are not offered a seat at the table. Almost uniquely in self-regulation, the proposed Charters carry no requirement for frontline representation, yet it would be inconceivable that other professions - for example engineering, medicine or the law - would have as a regulatory body a group which did not include those technically, medically or legally qualified and actively practising their profession.

The Institute further feels that insufficient thought has been given to the prevention of ethical failures, a subject which is not addressed by the Charter proposals which centre on punishment for wrongdoing rather than preventing its causes. As a Chartered Institute, we expect our members to abide by our Code of Conduct. We deal with those who fail to live up to the standards - ethical, moral and legal - expected of them, but can also offer guidance and advice to those who may feel in danger of losing their way. The Institute acts in a resolute manner should breaches of journalistic ethics - or indeed breaches of the law - by others be brought to its attention via its members. It remains within the power of other organisations which represent journalists to act collectively as both a sword and a shield in a similar fashion for members of the profession, and the Institute's view is that such factors are better represented within the regulatory body than without.

The Institute would argue that it was the primacy of corporate interests over journalistic responsibility which led to the scandal from which the proposed Charters have ultimately sprung, and that the formation of a regulatory body in a way which entrenches corporate power is to ignore the lessons of the past. The Institute strongly recommends that representatives of journalists organisations are present on the regulatory body for the dual purpose of representing the profession and its interests and to assist journalists who wish to report breaches of the regulatory code, journalistic ethics or a repeat of past criminal behaviour.

## The Pressbof Charter

Stripped of semantics, the Pressbof charter seeks to replace or recreate the Press Complaints Commission with a more robust body, embracing a Chartered Body which in turn appoints the Regulator, but still with strong industry representation. Membership of the scheme would be voluntary. Pressbof currently exacts a levy upon publishers which pays for the PCC, and the Chartered Regulatory Body would perform the same function. In a practical operational sense, the Institute views the function of this body as similar to the existing system but with the names changed. In which case the Institute finds this the least objectionable of the options currently available, but this should not be taken as support for the proposal.

The Institute feels that the idea that the scheme is voluntary is misleading. Whilst publishers are free to not belong to the Regulator, the provisions of the Crime & Courts Act 2013 in forcing publishers to meet the costs of unsuccessful claims if they are not a 'voluntary' participant in the regulatory process could be considered coercion. The Institute is concerned that the impact of such provisions would act as a disincentive for publications and their journalists to engage in a proper scrutiny of public affairs if any complaint, whether justified or not, incurs a large bill for costs, against which being correct offers no protection. This is a particular concern for smaller publications with limited means.

In addition to this point the Institute opposes the imposition of exemplary damages where the defendant has not signed up to the "voluntary" regulatory regime. For the courts to punish a defendant for choosing not to do something that the law does not require him to do offends profoundly against a basic principle of English law and tenets of natural justice.

Even putting aside matters of principle, the concept of punitive damages will probably prove unworkable, given that some judges have indicated that they would refuse to apply them in the circumstances set out in the Government's Charter; that a number of senior lawyers, including QCs, have condemned the idea, and that it would not survive a challenge before the European Court of Human Rights. Indeed, the very provision seems to fly in the face of the European Charter on Freedom of the Press, Article six of which states:

> *"The economic livelihood of the media must not be endangered by the state or by state-controlled institutions. The threat of economic sanctions is also unacceptable…"*

In addition, punishing a defendant for failing to do something there is no legal obligation to do would be impossible in the Scottish jurisdiction where exemplary/punitive damages are unknown.

The Institute is further concerned by the proposed structure. The absence of formal representation for rank-and-file journalists and the heavy representation proposed for publishers - particularly national publishers - will create an imbalance of interests in regulation where only corporate and independent voices are heard, with no formal input from those responsible for news gathering.

Beyond these operational problems, the Institute has two further concerns which it considers to be of overwhelming gravity.

The first is a tacit acceptance that the state has some role to play in media regulation. The Institute notes that the situations which led to the current position were in the main situations which involved criminal acts by individuals and bodies corporate which represented a failure of detection and enforcement by the state. They were not a failure of ethics *per se*. It is not the duty of a regulatory body to investigate or punish criminal acts such as phone hacking, e-mail interception, corruption of public officials or bribery. These are the duties of an agency such as the police, with the judiciary enforcing the criminal law. Nothing in this proposal will alter that.

The second is the extent to which the Regulator will remain free of political interference. The Institute notes that restrictions on political members of the Regulatory Board have been relaxed, and notes also the cautionary advice on the website of the Privy Council, who would be responsible for granting and then supervising the charter:

> *"...once incorporated by Royal Charter a body surrenders significant aspects of the control of its internal affairs to the Privy Council..... This effectively means a significant degree of Government regulation of the affairs of the body, and the Privy Council will therefore wish to be satisfied that such regulation accords with public policy."*

The Institute is not convinced that such regulation does accord with public policy given that the intention is to create an independent Regulatory Body, and is further concerned at the precedent that would be set by the creation of this body. It might be argued that the amendments to the ERRA would permit this or future governments to incorporate other regulatory bodies by Royal Charter. Such bodies might sidestep any requirement for Parliamentary scrutiny, and could be outside the scope of the Freedom of Information Act. The Institute believes that there is a significant danger that this and future potential Charters might amount to a form of secret justice beyond the abilities of the media to scrutinise, and as such we oppose the implicit constriction of general freedoms.

## The Government Charter

With regard to the Government's Charter, the Institute's objections are similar to those mentioned above in relation to the Pressbof proposal. In addition, the Institute notes the following:

The proposed safeguard that the terms of the Charter could be altered only by a two-thirds majority in the House of Commons is not sustainable on several grounds. Parliament may not bind its successors, and thus such a safeguard would only have validity between the date of the proclamation of the Charter and the first general election to follow such a date, and even then only if Parliament chose not to alter it.

The Institute also notes that the provisions of the Royal Charter would increase the likelihood of 'group actions' against publishers. The Institute is concerned that this would have the effect of 'grinding down' publishers - particularly small publishers - in the face of concerted action by one group of people, whether justified or unjustified. The Institute points out that there are several organisations where such an approach to criticism is not just likely, but demonstrably frequent; for example some 'churches' with 'cult' status would fall within this category, amongst others.

It should also be noted that the proximity of Government to the Charter, and its ability to change it, may have the effect of acting contrary to the European Charter on the Freedom of the Press, Article two of which states that:

> *"…Independent journalism in all media is free of persecution and repression, without a guarantee of political or regulatory interference by government. Press and online media shall not be subject to state licensing."*

This may potentially lead the Privy Council into the awkward situation where a Crown doctrine is at odds with the country's position in Europe.

## Constitutional Issues

The Institute has further problems with the concept behind such a 'voluntary' scheme underpinned by both statute law and Royal Charter.

The dictionary definition of 'voluntary' is "by one's own free will, without coercion". The provisions of the Crime and Courts Act, however, have a powerful coercive effect by threatening to inflict upon publishers considerable costs even if they successfully defend a complaint. It would open the door to unspecified exemplary damages, clearly beyond those which the Regulatory Body would be able to levy else there would be no requirement for the word 'exemplary'.

If membership of the Regulator is thus coercive rather than voluntary, it raises some difficult constitutional points. At what point would a voluntary Regulator begin to take on the aspects of a court or tribunal if membership of the voluntary scheme is subject to a threat of worse punishment to those not participating voluntarily? If the Regulator acts as a form of tribunal, and participation is coerced by statute, then to what extent do the proposed Charters run the risk of breaching the Bill of Rights, which prevents the creation of new courts by the Crown? In effect, the proposals create a Regulator with quasi-judicial powers which operates outside the will of Parliament, in parallel with the existing court system but outside the scope of the Freedom of Information Act. The provisions of the ERRA could set a precedent for regulators in other professions to be run along similar lines.

There is a further constitutional issue. Parliament has approved the Government's Charter, including the provisions binding Parliament to require a two-thirds majority to alter the terms. The Charter itself is a Royal Prerogative, and the terms of the Charter require approval by the Privy Council, and not Parliament, which has no formal role in the grant of the Charter and no legal standing to intervene and alter the Charter. If Parliament may not bind its successors in such a way, it is constitutionally certain that the Crown through the Privy Council may not do so either, as it is Parliament which is supreme and not the Crown. If this is the case, then it further raises the question as to whether approval by Parliament of the Government's Charter has any legal standing with the

Privy Council in its exercise of the Royal Prerogative. Such a thicket of constitutional issues is beyond the remit of the Institute, but there has been little debate about wider constitutional issues in the relative haste to introduce the principle of media regulation.

## Conclusion & Summary

The Institute is opposed in principle to state participation in media regulation, regardless of whether that is by charter or statute. The Institute finds the Pressbof proposal the least offensive, but does not support it because it concedes the principle of statutory underpinning. With that in mind, the Institute notes the following points

- That the regulatory body should include representatives of the journalistic profession;
- That a voluntary scheme which relies on statutory coercion cannot properly be regarded as voluntary;
- That little in these proposals would have prevented the behaviour which led to the Leveson Inquiry;
- That the primacy of corporate interests over journalistic ethics were what created the problems which led to Leveson, and nothing in these proposals would alter that imbalance;
- That there is a risk through proposed costs regimes that the standards and rigour of investigative journalism would decline as publishers sought to minimise risk;
- That there remains a risk of political interference in regulation;
- That the use of a Royal Charter will set a precedent for future bodies which evade Parliamentary scrutiny and remain outside the provisions of the Freedom of Information Act;
- That the idea of exemplary damages is unlikely to survive contact with the European Court;
- That the possibility of group actions is against the interests of a free press;
- That Parliament cannot be bound by requirements for a two-thirds majority;
- That there are several constitutional issues which remain unclear.

**Annex 1**

## The Chartered Institute of Journalists

## CODE OF CONDUCT

### What do we expect of our Members

Professional journalists want to sign up to, and be held to, high standards in the way they work.

The CIoJ expects all its members to adhere to the following Code of Conduct. We expect all our members to agree to be bound by these rules.

These incorporate the Editor's Code of Conduct, which many staff journalists sign as part of their contract.

### Editors' Code of Practice

There is also a responsibility by Members to maintain vigilance over the Code and if any member fails to meet these standards they can follow the complaints procedure.

### CIoJ Code of Conduct

All members of the Chartered Institute of Journalists (CIoJ) are required to read and abide by this Code of Conduct.

It covers all editorial staff by guiding them on conduct which befits membership of this professional body. Any member who is involved in allegations of professional misconduct and fails to demonstrate that his or her actions complied with this Code may be asked to resign and hand back their Press Card.

Publication refers to all work that is undertaken by editorial staff, during the course of their professional duties, regardless of the means of dissemination or their status as contract, freelance, contributors or staff. Specifically this excludes private correspondence but includes contributions made in online activities.

### As a member:

1. You have a duty to maintain the highest professional standards of accuracy and clearly distinguish between fact, conjecture or opinion in all your work.

2. You will comply with the Editors' Code of Practice. You will co-operate fully with any enquiry held by the Press Complaints Commission except where sources are compromised, and, subject to any legal advice you may receive.

3. You will behave in a transparent way. This will include declaring your professional status in any publication in which you operate. You are not required to maintain the same professional name, but must seek not to practise deception on the reader or viewer at any time.

4. If a factual inaccuracy is discovered in your work, you will seek to have it corrected at the first available opportunity, in the same format of publication, and with due prominence so that similar readership will be aware of the correction.

5. You will not request or accept payment for the publication of editorial matter under whatever guise, including costs relating to colour separation of pictures or other devices, which compromise your editorial independence.

6. You will not accept money, or any other inducement whatsoever, to manipulate editorial comment unless it is clearly identified.

7. You will maintain the confidences you agreed with any contributors.

8. You will respect the work of other media professionals and will not seek to undermine exclusive stories submitted by freelance contributors.

9. You will check sources and understand that previously published material may not always have been created using the exacting standards of a professional journalist and will independently seek to verify that the information is accurate.

10. You will defend the principles of a free press and freedom of speech and will do nothing to damage these principles.