IN THE LEVESON INQUIRY

CULTURE, PRACTICE AND ETHICS OF THE PRESS

MODULE 4

CLOSING SUBMISSIONS

PRESS STANDARDS BOARD OF FINANCE LIMITED

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1. On 12 March 2012 the Chairman stated that, "*Lord Hunt and the industry must continue to work on what they see as the best way forward… they must expect that the ultimate suggestion will be subject to forensic analysis. That will happen to their ideas, as it will happen to the ideas that have been submitted to the Inquiry by other individuals and groups. I will then recommend what I perceive to be the most effective and potentially enduring system. It will then be for others to decide how to proceed.*"

2. It cannot be doubted that the industry proposal was, during the evidence of Lord Black in particular, subjected to forensic analysis, and to a greater degree than any other proposal. It is PressBof's position that it has not been found wanting.

3. Of course there are changes that can and will be made, as Lord Black was at pains to stress. That is because any proposed model benefits from the type of forensic analysis to which this model has been subjected. It is also because, again as Lord Black said, the industry wants to hear from the Chairman on his recommendations and, finally, because the industry model is not a perfect solution, again, as was made clear by Lord Black in his third witness statement. We have respected throughout the Chairman's wish to undertake an iterative process and sought to proceed within that framework.

4. There is, though, unlikely ever to be a perfect solution for the very difficult problems raised by the Inquiry. There is no ideal model of press regulation. There can be no easy answer to the clashes which often occur between the rights of freedom of expression on the one hand and, for instance, privacy or reputation on the other.

5. It is important to emphasise that the industry proposal is not "more of the same". Nor is it “the least bad option”. It is a completely fresh start. Further, unlike many of the other proposals put forward, it is conceived not in the lofty towers of academia, but by those who have experience and understanding of the industry and by people who have been moved by the revelations over the past year to act and to do so decisively for the benefit of the public and journalism. It is put forward by individuals who work in the industry, who have listened to the evidence from victims of press intrusion, have listened to the Chairman, to the public, to journalists and to editors. They have formulated a proposal which is right in principle and will work in practice.

6. The other proposals are likely to be unworkable in practice and bogged down in legalities and technicalities. That would be so with the Media Regulation Roundtable and the Media Standards Trust, which The Society of Editors is correct to describe as over-complicated and flawed. Mr Suter may want OFCOM to regulate the press but OFCOM itself does not want the job and is not set up to do it.

7. The industry plan, on the other hand, does not look to the state and hard-pressed taxpayers for funding and is workable and understandable. It retains what was of benefit to the public in the past but it is not trapped in the past. It is a major directional and attitudinal change for the industry; and, it should not be underestimated, is a system which is designed to proceed by consensus and, therefore, to produce absolute commitment from those who need to make it work.

8. The Inquiry already has detailed evidence, both written and oral, on the proposed model from Lord Black and Lord Hunt. PressBof’s lawyers have sought to answer legal questions pertaining to the model.

9. For that reason, these closing submissions are brief and are served to highlight a few points PressBof wishes to emphasise.

The Point of Principle

10. Although there are some differences of detail between the proposals put forward by Lords Black and Hunt they are at one on the issue of principle. That is that there should be no form of statute or "statutory underpinning" to establish a new press regulatory body, or to incentivise membership of it.

11. Evidence sessions during Module 4 of the Inquiry have largely revolved around this issue: whether any form of statute or "statutory underpinning" should be recommended. PressBof's position remains that neither could in any circumstances be acceptable to the vast majority of the industry. Nor is it needed.

12. PressBof would emphasise that its position on statutory regulation in any form is genuine and principled. It does not oppose any form of statute for cynical reasons. Its stance comes from a real concern for the future of a free press. If regulation were ever to be decided not by journalists and editors but by politicians and lawyers, the impact this development would have on a free society would be incalculable.

13. In an exchange with Lord Hunt of Wirral, Counsel to the Inquiry made clear his view that statutory intervention in the regulatory system should not cause any alarm:

> *"I must say, juridically, Lord Hunt, I have difficulty with even grasping your fear. If the statutes -- and it would be in the primary legislation -- said in terms that the regulator would expressly have no role over matters of taste, decency and editorial content, save as expressly provided for, and that would be specifically in the areas of correcting inaccuracy, dealing with harassment and intrusions into privacy, then this wouldn't be censorship; it would be merely doing that which your contractual system aims to do in any event. I don't even see how the concern can sensibly be articulated, with respect. Do you see my slight frustration on this? It's tilting at a windmill, frankly, which simply doesn't exist, with respect."*[1]

14. Far from it, PressBof would submit. Concern about the imposition of statute – the first in this country since 1695 – and a passionate commitment to self regulation run deep within the newspaper and magazine publishing industry. We do not believe this to be "*tilting at windmills*" but to be the most serious issue which the Inquiry has been considering. It is worth, therefore, restating some of the arguments.

[1] Day 90am, p10, lines 2-16.

15. Although PressBof has not seen the responses to the Rule 21 notices served by the Inquiry on a number of editors and journalists[2], from its own research it knows that submissions from across the industry and beyond have made the case for self regulation[3]. Self regulation is the only form of regulation which can protect what the Lord Chief Justice has described as the "constitutional principle" of the independence of the press[4]. That principle recognises that journalism is the exercise of a fundamental human right – that of free speech – which no regulated profession exercises. Only self regulation – without any interference from the state – can guarantee the freedom and the independence of the press. No other trade or profession has the responsibility of holding politicians and Governments to account. Limitations on journalists must therefore be self-imposed, rather than imposed by those who are under its scrutiny.

16. To the vast majority of the industry, *any* form of statutory intervention in the regulatory system would eventually end up with legislative controls over the editorial content of newspapers and magazines and that would be unacceptable. We do not believe in principle that there is any qualitative difference between a system of statutory controls and "statutory underpinning": both would require legislative action and open the door to interference by the state in editorial content for the first time in over 300 years.

17. It is also impossible to see how any form of statutory intervention – however apparently narrow or technical - could work without the imposition of some form of licensing. To force publishers into a statutory system against their will would require the state to take sanctions against publishers who refused to do join, otherwise the statute would be valueless. Statutory compulsion of the membership of a regulator is state licensing in all but name. This point was effectively accepted by the Inquiry during Lord Black's evidence[5]. It has not been spelled out by the Inquiry, though, what sanction there would

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[2] It is not known who received the notices but it is known that the responses from the editors of the Daily Telegraph and Sunday Telegraph were requested by 9 July 2012. At the time of settling these submissions, none are on Lextranet. The submission from the Society of Editors is on Lextranet and does "broadly support the proposals put forward by Lord Black and Lord Hunt."

[3] See in particular, "Proposal" document attached to the Third Witness Statement of Lord Black of Brentwood, paragraphs 17-27. Insofar as the NUJ has said that some statutory underpinning may be necessary, it should be noted that as far as PressBof is aware the union has not balloted its members on the proposal put forward. The Inquiry cannot and should not proceed on the basis that the leadership of the NUJ speaks for all its members on this issue..

[4] Speech by the Rt Hon The Lord Judge, 13th Annual Justice Lecture, 19th October 2011

[5] Day 89am, p16, line 25 to p17, lines 1 to 21.

be for publications opposed to forced statutory regulation. Taken to its logical conclusion, it must be the case that the state could ban a newspaper from publishing if it did not join a regulator.

18. Three further points of principle should also be made. It has been suggested that it is illogical for the press to seek government support for an arbitral arm (which would need to be set up under statute) whilst at the same time opposing statutory underpinning for a regulatory system or statutory regulation. There is nothing in this point, which is dealt with in PressBof's legal submissions of 13 July 2012 at 29(b).

19. Further, it has also been suggested that there is no difference between Parliament introducing a statute and Parliament amending an existing statute and hence no justification for the 'slippery slope' argument. But there is a world of difference. Once something is done for the first time it is easier to do again. The experience of university tuition fees is a good example: once that precedent was set, fees have only ever been increased – despite Ministerial assurances to the contrary - and are unlikely to ever reduce.

20. Finally, while the Inquiry has not heard from foreign press agencies or organisations, it is worth highlighting the alarming impact that the introduction of a statute in the UK would have on press freedom in the developing world in particular. In a submission to the Inquiry, the World Press Freedom Committee has said: *"One shudders to think how any recommendations for a statutory or quasi-statutory regulatory regime which your Inquiry might recommend could be exploited in any number of countries with far weaker press freedom records, including the Commonwealth. … The British example does indeed count in the rest of the world*[6]*."* There is a heavy burden on us to set the right example.

The question of practicality

21. In addition to the principled objections PressBof has to statutory regulation in any form, there are practical problems as well.

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[6] Ronald Koven, European Representative, World Press Freedom Committee, to the Inquiry, 17th July 2012

22. The two most recent and exhaustive Parliamentary Inquiries into the regulation of the press have also accepted the case put forward by PressBof. The Joint Committee on Privacy and Super-Injunctions in 2012 said that "*we do not recommend statutory backing for the new regulator*"[7]. The DCMS Select Committee, reporting in 2010 after an inquiry lasting more than two years, concluded that: "*We remain of the view that self-regulation of the press is greatly preferable to statutory regulation, and should continue*"[8]. Parliament's view would seem to be clear. The very least that can be said is that there would not appear to be any consensus amongst parliamentarians for statute, whatever those who gave evidence to the Inquiry said.

23. A number of senior politicians – most notably Lord Wakeham, the former Chief Whip and perhaps the most experienced Parliamentary business manager in recent history – have underlined how difficult a task it would be to get any form of statutory control through Parliament. His letter to the Inquiry of 5th June bears careful study: "*In my judgement even the slenderest of statutes would be amended out of all recognition in a way which seriously eroded free speech... The battle [through Parliament] would be so acrimonious no Government, in my view, would willingly want to push ahead*"[9]. It is worth adding that one of the problems with legislation is that the industry cannot now easily be defined. Definition in the digital age is impossible, unless a statute is so sweeping and so wide that it would fatally undermine freedom of speech.

24. Assuming for a moment that PressBof's view of Parliament is incorrect and a statute could be passed then statutory intervention would make the system of regulation an adversarial one, importing almost permanent legal instability into the system. A system joined voluntarily could not be challenged under Article 10 by those who join. Imposing a system on an unwilling and hostile industry would be likely to produce significant legal challenges from the very start. The question of whether the system was Convention compliant could drag through the courts for years.

25. Ironically, a statutory system might also severely limit the potential coverage of a new regulator. In order to avoid the real dangers of a statutory system, some companies might domicile their web operations abroad where there are significant constitutional

[7] Joint Committee, HL Paper 273, para 187
[8] "Press Standards, Privacy and Libel", para 79, HC 362-1, 9th February 2010
[9] Letter from Lord Wakeham as part of Module 4, Inquiry reference MOD400000783

protections for press freedom. As new entrants into the market would be unlikely to join, and given the speed of the digital transformation within the industry, the base of a new statutory regulator would be liable to shrink: whereas under self regulation there should be no limit to the ability of a new regulator to expand and adapt.

26. If a statutory regulator were eventually established publications would seek constantly to challenge its decisions. The voluntary and co-operative nature of self regulation, which helps deliver quick resolutions to complaints and therefore benefits the public, would be lost.

27. It is PressBof's view that the public certainly would not benefit from any form of statutory system. A new regulator beset by legal challenge could never deliver swift redress to complaints. The complaints handling service of OFCOM, which is slow, legalistic and expensive, underlines this point: full outcomes of complaints often take more than a year to be completed. Statute would also shut the public out from the development of a new regulator. Under self regulation, all the key stakeholders – publishers, editors, journalists and above all civil society – can be involved in the system without external interference: that is an important achievement for civil engagement. However, the state itself should never be a stakeholder in regulation because it is being held to account by the press on behalf of the public.

28. One of the most significant problems with statute is that it would be wholly incapable of keeping up to date with the speed of change within the industry. Statutes have to be based in primary legislation and that will always be inflexible and speedily out of date. The industry is changing by the month, and primary legislation set in a Parliamentary straitjacket in 2013 would be out of date by 2014 (even if, which is highly doubtful, any legislation would be ready to be included in the next Queen's speech). It is likely that new digital players in the market may not even exist now, and certainly the technology on which they are based may not even have been invented. It would be impossible for any statutorily based system to cope with this bewildering speed of change. Only self regulation is capable of doing so. It is worth citing as an example, in this regard, the rise of Facebook. It was only launched in 2005 and opened to everyone over the age of 13 in September 2006. It took a couple of years to gain an audience across the world yet

by March 2010, it had more visitors than Google. By June 2011 it was the most visited website in the world[10].

29. For all these reasons, the imposition of statutory controls – however narrowly defined at the start – would be a moment of enormous constitutional significance to which the vast bulk of the industry is strongly opposed.

Is there overwhelming evidence for statute?

30. For there to be such a significant constitutional shift away from the independence of the press, and the establishment however narrowly of the apparatus of state control over the media, there would have to be overwhelming evidence to justify it.

31. The short answer is that the evidence does not justify it. The Inquiry has been at pains to stress that the vast majority of journalists are honest and decent, doing an excellent job. If that is so then they do not need regulation backed by statute.

32. While the Inquiry has inevitably focused on the bad, and in some cases, the very bad or criminal (which it goes without saying is unacceptable), justification for state regulation has not been made out.

33. True, a number of journalists have behaved wrongly and some witnesses have – in some cases recounting incidents which date back more than twenty years – been badly treated by some members of the press but the new model proposed by the industry can and will address concerns of this kind and will tackle bad practice within newspapers.

34. As the Society of Editors has said – and its view is echoed by many others – '*a sense of proportion is vitally important while the future of press regulation is being considered in such depth. We would certainly not wish to see the Press as a whole penalised, weakened and limited as a result of failings in one very specific part of the industry, or some parts of the police or some politicians*.'

35. To that end it should be remembered that (a) it is only the press which can carry out expensive public interest investigative journalism such as parliamentary expenses and

[10] Figures from http://en.wikipedia.org/wiki/Facebook

phone-hacking and (b) the focus cannot only be on victims of press intrusion. Newspapers and magazines are read by millions of people every day, none of whom have been heard from in their capacity as readers. What motivates readers to buy newspapers has – perhaps surprisingly - not been explored but readers should not be forgotten or ignored.

36. PressBof submits that the case has not been made that a new independently led model of self regulation would be unable to deal with the mischief that the Inquiry has identified.

Conclusion

37. We believe that the proposals put to the Inquiry by the industry offer a robust, flexible and modern system of regulation which will both raise standards across the industry and ensure that there are real benefits to the public. It is also a proposal which is future proof and could, for example, take on in due course some of the issues relating to video on demand identified to the Inquiry by the Secretary of State. By capturing the voluntary and co-operative nature of self regulation, a new system could be put in place swiftly without the need for any form of Parliamentary intervention – which, if necessary, would surely mean that no new system would be in place by 2015 - and begin to deliver real benefits to civil society.

38. The proposals put to the Inquiry are a radical departure for the industry. For the first time we are proposing the establishment of a regulator with a formal but flexible legal basis. The regulator will have real powers of investigation, monitoring and enforcement as well as the power to fine. Independent appointment procedures across the regulatory structure will guarantee the independence of the regulator and will also allow a very real role for the public. This will be a huge change for all newspapers and magazines – all of whom will be putting into place new models of internal governance and compliance - the scale of which should not be under-estimated.

39. The industry takes great pride in the work that has gone into producing such a significant proposal for a wholly new system of regulation. We continue to work on it, taking into account the views expressed during Module 4 and indeed throughout the Inquiry. We

would now like to move ahead to full implementation so that the public can begin to see, and benefit from, the real changes that this Inquiry has brought about.

40. As Lord Hunt said in evidence, "*I just want the voluntary system to move ahead by consensus, by agreement and by contract*." We agree - and we would like to see that sooner rather than later.

PRESS STANDARDS BOARD OF FINANCE LIMITED

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