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Rowena Collins Rice
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COLETTE BOWE
Chairman

Direct line:

Dear Ms Collins Rice

Introduction

Thank you for providing us with the opportunity to set out how we believe our submission on the future of press regulation meets the draft criteria detailed in your letter of 24 April 2012.

Having reviewed our Submission to you of 2 April 2012 (the "Submission"), we consider that it meets the criteria and provides detail on many of the key elements you have proposed. We are therefore not providing an additional detailed submission at this stage.

You also invited us to comment on the draft criteria themselves. We have reviewed these and we believe that there are some areas where the criteria for effective regulation we set out in our Submission are not fully reflected. We therefore set out below the key areas where we believe further emphasis could be required in your draft criteria.

Membership

Your draft criteria do not address the issue of membership of the new regulatory system. As we set out in our Submission, promoting full relevant membership of a regulatory system for the press would be fundamental to establishing public trust, credibility and consistency.

Whilst a licensing or authorisation model, as used in audio-visual regulation across Europe, is likely to raise potential concerns in relation to preserving the independence and rights of free expression of the press, for a new press regulation system to be effective significant efforts will need to be made to ensure that all relevant parties participate in the regulatory system.

We believe it will be necessary, in the absence of a licensing or authorisation approach, to build as strong a set of incentives as possible to ensure participation. We set out in our Submission a range of non-statutory incentives and we suggested that an enabling statute

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might be needed to create a stronger package of incentives to ensure long-term and committed industry participation in regulation.

Committed participation by the whole of industry would be fundamental to a successful new regulatory regime and you may therefore want to reflect it in your criteria.

Accountability

In our Submission we stressed the importance of accountability and suggested that a wide-ranging initial review of effectiveness could be required, probably within 3 years of establishment, to ensure that the effectiveness of the new regulatory regime could be verified. We note that this area is not covered by your draft criteria.

Given the circumstances of your current review and the findings of previous reviews, such as the Calcutt Inquiry, we believe it would be extremely important to have an early assessment of the efficacy of the new regulatory regime.

Such a review will need to be carried out by somebody who is sufficiently independent and who is supported by an independent secretariat. It would need to cover both the structuring and the operation of the new regulator, assessing success against the established public purposes of regulation. We believe that a strong accountability regime would be extremely important in establishing the credibility of a new regulator because periodic scrutiny will ensure continuing high standards of regulation. This would sustain public trust over time.

Funding

Your draft criteria say *"the solution must be sufficiently reliably financed to allow for reasonable operational independence and appropriate scope, but without placing a disproportionate burden on either industry, complainants or the taxpayer"*.

Ensuring reasonable operational independence and appropriate scope could be best achieved through the application of fixed term funding settlements. It would be sensible to align the period of funding settlements with the periodic reviews of effectiveness.

A further protection in relation to funding could be through the securing of independent governance arrangements. This was one of the considerations that led us in our Submission to suggest that a minimum enabling statute could be needed to ensure independent governance arrangements.

In relation to complainants, we consider that it is important that individual financial circumstances are not a pre-requisite to securing redress, essentially requiring the system of regulation to be free at the point of use. This would mean securing a funding model which ensures that complaints are investigated at no cost to the complainant. This is how the broadcasting model of regulation operates.

Sanctions

The draft criteria say *"the system must provide credible remedies, both in respect of aggrieved individuals and in respect of issues affecting wider groups in society"*.

In our experience of broadcast regulation, sanctions are extremely important to a successful regulatory regime and are subtly different to remedies. First, the sanction acts as a punishment. Second, it acts as a deterrent and provides incentives against industry wide bad behaviour, ensuring that all regulated parties understand what the regulator considers to be unacceptable behaviour.

Ofcom has a range of sanctions that it can impose, ranging from a simple report of a Code breach to a financial penalty and, in the most egregious cases, licence revocation. It is unlikely that a new press regulator would have as strong a range of sanctions. However, we believe it would be advisable to extend the draft criteria from simply referring to remedies, to include the need for effective sanctions.

In particular, based on our experience of broadcast regulation, we would highlight the importance of a systematic approach to publishing decisions, which establishes precedent and ensures a wider understanding across industry of acceptable standards. This could be coupled with cross platform equal prominence corrections and an annual report on industry compliance. Such measures would help to create a culture of compliance.

We have previously set out to the Inquiry¹ the importance of financial sanctions in establishing standards in broadcasting.

Public interest

Your draft criteria refer to the need to *"promote a clear understanding of 'the public interest', which would be accepted as reasonable by press, industry and public alike"*.

This is an area that we did not cover in our Submission, but where Ofcom has considerable experience in relation to broadcasting regulation. The Ofcom Broadcasting Code permits warranted infringements of privacy, explaining that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case it is warranted. If the broadcaster seeks to rely on the public interest, they must be able to demonstrate that the public interest outweighs the right to privacy.

The Ofcom Broadcasting Code gives examples of what the public interest would include, such as revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence. It is not an

¹ Please see our Witness Statements dated 22 September 2011, 31 January 2012 and 2 April 2012, and our oral evidence to the committee on 1 February 2012.

exhaustive list, as considering whether any infringement is warranted depends on an intense focus on the competing rights and facts in every case. Therefore, whilst we would support the intention of the draft criteria, based on our experience we would suggest that the regulator will need both flexibility and time to define the public interest through precedent, deciding each case on its particular facts.

Digital Media

The draft criteria state that the new system of press regulation *"must be durable and sufficiently flexible to work for future markets and technology, and be capable of universal application"*.

As we stated in our Submission, we agree that this is an extremely important area for consideration.

The new system of press regulation will need to work effectively within the context of an increasingly blurred line between "press" and "audiovisual" material, as companies increasingly focus on digital cross media content to meet the expectations of their customers.

There is already a significant level of commonality between existing regulatory Codes: the current PCC Code and the Ofcom Broadcasting Code share many of the same objectives, principles and requirements. As digital convergence continues, it could be necessary for regulators to work further together to ensure that there are common and consistent minimum standards that stretch across all digital media.

We hope that these observations assist you in finalising your criteria for a regulatory solution for the press. We look forward to hearing whether you wish to invite us to present our views orally to the Inquiry.

Yours sincerely



Dr Colette Bowe



Ed Richards