

Submission to the Leveson Inquiry

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Beyond Self-Regulation - Possible Models following the Phone Hacking Scandal

1. Following the phone hacking scandal one aspect being examined by the Leveson Inquiry is the possible development of new regulatory approaches to address the shortcomings identified in the Press Complaints Commission.
2. Although the PCC's Code on the whole been supported, the workings of the PCC itself have been much criticised.
3. These criticisms have included:
 - a. Overrepresentation of press representatives in drawing up the Code of Practice.
 - b. Non-compliance with the Nolan Principles in member appointments.
 - c. Inbuilt conflict of interest in the PCC's financing.
 - d. Weak or non-existent sanctions.
 - e. A failure to keep up with developments in regulatory best practice.
4. The PCC's perceived shortcomings compare with the characteristics of Britain's **economic regulators** such as Ofcom, Ofgem, Ofwat, Office of Rail Regulation and others.
5. A series of recent reviews and inquiries has broadly validated the success of the economic regulators model. The Secretary of State for Culture, Olympics, Media and Sport recently praised the utility of Ofcom as an independent source of expertise (Royal Television Society speech); a review by David Gray supported the way in which Ofwat works with relatively modest recommendations for improvement; and Ofgem has received a supportive review from the Department for Energy and Climate Change.
6. The success of the model arises from a number of factors:
 - a. The economic regulators are seen to be expert with highly skilled staff.
 - b. They are demonstrably independent.
 - c. They have developed high standards of regulation including the use of sophisticated consultation, research and technical skills.
 - d. Board structures and appointment procedures provide collegiality and oversight and comply with Nolan Principles.
7. By comparison with these bodies the PCC's structures have not been seen as independent enough, the incentives to allow publication have been too strong, its sanctions and compensation machineries have been weak or non-existent and the system has lacked statutory backup.

No bi-polar choice

8. Recent debate about strengthening self-regulation of the press has tended to assume that there is a bipolar choice between a self-regulatory system broadly along the lines of the PCC and a much more intrusive and heavy system of statutory regulation, possibly including registration or licensing.
9. In fact the choice is much broader. On the one hand self-regulatory models have in recent years proved unsatisfactory in large part because of the conflicts of interest which they struggle to overcome. This has been the case even in professions where it may be thought that the existence of higher duties or advanced qualifications may have mitigated the conflict of interest risk.
10. At the same time statutory regulation has come to recognise that it can suffer from rigidity, bureaucracy, legalism and a lack of flexibility. It has been searching for means of securing the maximum buy-in from those it regulates.
11. These phenomena have been seen in a number of sectors. Self-regulation has changed its nature or disappeared altogether in, for example, parts of the insurance markets following scandals at Lloyds of London; in the accounting and auditing professions; for lawyers; in a number of areas in the retail sector where codes are now supervised by the Office of Fair Trading; and in parts of the advertising and healthcare markets.
12. In many of these fields new bodies have grown up in recent years. They have endeavoured to capture the best of self-regulation while operating with some form of statutory underpinning or back-up, which provides a safeguard in the event of failure of the self-regulatory system and a reassurance that the conflicts of interest which exist when providers regulate themselves have been addressed and guarded against.
13. The European Policy Forum's Regulatory Best Practice Group held a roundtable to look at the work of some of these bodies on 31 October 2011. This background note is designed to provide a quick summary of the way in which six bodies operate. Some or all of these may provide useful models for the on-going discussion in the Leveson inquiry and more generally.
14. It is not suggested that the six bodies featured in this note are the only relevant comparators or that they all necessarily can provide a model for looking at future work in the area of the press. At first sight, however, it does seem useful to examine their structure and operation. The bodies are listed in alphabetical order.

Advertising Standards Authority

15. The Advertising Standards Authority operates in two areas, self-regulation of non-broadcast advertising with some legal back-up; and co-regulation of broadcast advertising.
16. The advertising industry itself writes advertising codes, helps advertisers comply with the rules and pays for the system. The Committee of Advertising Practice which drafts the British Code of Advertising Practice was established in 1961 and the Advertising Standards Authority followed in 1962.

17. Complaints that **non-broadcast advertisements** breach the code are submitted to the Advertising Standards Authority Council which discusses the complaint, drafts the recommendations and votes whether or not to uphold the complaint. An independent reviewer provides an appeal mechanism.
18. The ASA's sanctions include the publication of adjudications on its website. It can also order advertisers not to advertise unless the CAP Copy Advice Team has seen the advertisement first and allowed it to go ahead. The CAP Compliance Team can contact media owners requesting them not to take advertisements from problematic advertisers without such pre-vetting.
19. The ASA has legal backup through the Office of Fair Trading. It is able to refer advertisers who persistently make misleading claims or carry out unfair trading practices to the Office of Fair Trading which has legal powers under the consumer protection from unfair trading regulations 2008 and the business protection from misleading market in regulations 2008. The OFT's powers are seen very much as a backup and to be used in a last resort. According to the ASA, around thirty advertisers have been referred to the OFT since 2000, whilst it has dealt with around 200,000 complaints over the same period.
20. For **broadcast advertising** the ASA has a co-regulatory partnership with Ofcom under the Telecommunications Act 2003. It is underpinned by a statutory instrument, the Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004) and a Memorandum of Understanding.
21. The regulatory system for advertising is funded by the advertising industry via a 0.1% levy on the cost of advertising space. The money is collected at arm's length from the ASA to maintain its independence.

Council for Healthcare Regulatory Excellence

22. The Council for Healthcare Regulatory Excellence was established in April 2003 by the National Health Service Reform and Healthcare Professions Act 2002.
23. It was given additional powers of scrutiny by the Health and Social Care Act 2008. Its Council comprises of seven non-executive members and up to two executive members. Non-executive members are appointed, in the Chair's case, by the Privy Council and the other members by Ministers in England, Scotland, Wales or Northern Ireland.
24. The CHRE oversees nine regulators of healthcare professionals: The General Chiropractic Council, The General Dental Council, The General Medical Council, The

General Optical Council, The General Osteopathic Council, The General Pharmaceutical Council, The Health Professions Council, The Nursing and Midwifery Council and the Pharmaceutical Society of Northern Ireland. The regulatory bodies concerned are in many cases long-established and familiar to the public. Nonetheless, as they are operated by the professions themselves, they have been seen to be subject to conflict of interest problems. This gave rise to the establishment of the CHRE which has powers to supervise, audit, assist and report on the way in which they operate. In particular it has powers to:

- “Audit the initial stages of fitness to practise cases and report on our findings in relation to each regulator.
- Review the outcome of final fitness to practise cases and to refer them to the Council if we consider that the outcome is duly lenient and fails to protect the public.
- Investigate, compare and report on the performance of each regulatory body. We are specifically required to report to Parliament on how far each regulatory body has complied with any duty imposed on it to promote the health, safety and wellbeing of patients and members of the public.
- Give directions requiring the regulatory body to make rules and any power the body has to do so.
- Provide advice to the Secretary of State, National Centre for Wales, Scottish Ministers or the Department of Health, Social Services and Public Safety Northern Ireland on any matter connected with the health profession”.

25. Additionally the CHCE seeks to identify good practice and areas for improvement. It conducts research, shares learning and holds events to explore better ways to manage new challenges. It keeps abreast of European and international practice to improve policy decisions on UK regulation on healthcare professionals and advises colleagues in other countries of the methods adopted for better regulation of UK healthcare professionals.

26. The Council is funded by grant-in-aid funding which in 2010-11 comprised £2.1 million from the Department of Health and £0.435 million for the devolved administrations.

Financial Reporting Council

27. The Financial Reporting Council is a body which brings together seven organisations whose aim is to promote high quality corporate governance and reporting to foster investment.

28. The FRC is a company limited by guarantee and within its umbrella are the:

- a. Accounting Standards Board which issues UK accounting standards and is active in influencing the setting of international standards by the IASB.

- b. Auditing Practices Board which issues standards and guidance for auditing, for the work of reporting accountants in connection with investor circulars and for auditors' integrity, objectivity and independence. The APB is also active in influencing the setting of international standards on auditing of the IAASB.
 - c. Board for Actuarial Standards, the UK's independent setter of technical actuarial standards.
 - d. Financial Reporting Review Panel, which aims to improve the quality of financial and corporate reporting. It reviews the reports of publicly traded and private companies for compliance with the law and other reporting requirements, and where appropriate, seeks corrective action from directors.
 - e. Professional Oversight Board, which provides statutory oversight of the regulation of the auditing profession and independent oversight of the regulation of accountants and actuaries by their respective professional bodies.
 - f. Auditing Inspection Unit, as part of POB, monitors the quality of the audits of economically significant entities.
 - g. Accountancy and Actuarial Discipline Board, which is the UK's independent investigative and disciplinary body for accountants and actuaries. It is responsible for operating and administering disciplinary schemes for these two professions.
29. The FRC is funded by levies on publicly traded companies, large private entities and public sector organisations, an insurance levy allocated to insurance companies and a pension levy, allocated to pension schemes.
30. The Chair and Deputy Chair are appointed by the Secretary of State for Business, Innovation and Skills.
31. In the 2010-11 annual report, Baroness Hogg, the Chairman, has referred to the FRC's belief that "the time has come to improve our own effectiveness by streamlining the FRC."
32. She referred to the FRC "having been patched together out of a series of organisation, some still with elements of self-regulation that leave them vulnerable to challenge and a series of responsibilities for which successive governments have sought to find a home, the FRC today consists of seven different bodies to do one job: promote high quality corporate governance and reporting to foster investment".
33. Baroness Hogg said that the aim for the coming year will be to weave the disparate activities of the FRC "into two functional strands: one concerned with the setting of codes and standards, the other with the conduct of companies and professionals".

Legal Services Board

34. The Legal Services Board was established by the Legal Services Act 2007. The Legal Services Board is an executive non-departmental public body, with a duty to promote the regulatory objectives defined under that Act:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers of legal services;
- Promoting competition in the provision of legal services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence to the professional principles;

35. The Professional Principles, referred to in the legislation are:

- Authorised persons should act with independence and integrity;
- Authorised persons should maintain proper standards of work;
- Authorised persons should act in the best interests of their clients;
- Persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- Affairs of clients should be kept confidential.

36. The LSB provides cross sector oversight regulation of eight legal regulators, namely

- a. The Law Society
- b. The Solicitors Regulation Authority
- c. Legal Complaints Service
- d. Bar Council
- e. Bar Standards Board
- f. Institute of Legal Executives
- g. Professional Standards Board
- h. Council for Licenced Conveyancers
- i. Chartered Institute of Patent Attorneys

- j. The Institute of Trademark Attorneys
 - k. Intellectual Property Regulation Board
 - l. Association of Law Costs Draftsmen
37. The board's powers where regulators fall short or fail to comply with the 2007 Act include:
- Issue directions to the regulator to correct the deficiency (ss. 32-34/ Sch. 7);
 - Publish a public censure (ss. 35-36);
 - Impose a financial penalty (ss. 37-40);
 - Make an intervention direction whereby the regulatory function is performed by a person nominated by the Board (ss. 41-44);
 - Recommend that the Lord Chancellor cancel the regulator's approval (ss. 45-48).
38. The Legal Services Board is appointed by the Lord Chancellor. The Board has a consumer panel which represents the interest of individual business consumers and operates independently of the LSB.
39. The Legal Services Board is funded by levy income which was £4.734 million in 2010-11.

Lending Standards Board

40. The Lending Standards Board took over in 2009 from the Banking Codes Standards Board.
41. It monitors and enforces the Lending Code, a voluntary code of practice for providers of unsecured personal credit and finance for micro enterprises and small charities, as well as consumers.
42. The LSB has a memorandum of understanding with the Financial Services Authority and works with the Office of Fair Trading.
43. The key objectives of the LSB are:
- a. To assist subscribing firms to interpret and meet the requirements of the Lending Code;
 - b. To monitor and enforce compliance with the Code and take disciplinary action for material breaches; and
 - c. To identify any gaps and deficiencies that could lead to consumer detriment and to advocate change.
44. The LSB's monitoring role and enforcement powers derive from its contract with each subscribing firm.

45. The Lending Code covers all the major banks and those building societies undertaking unsecured lending and a majority of smaller providers of current account overdrafts, personal loans, and credit cards to personal and micro-enterprise customers in the UK.
46. The Lending Code is owned by its three sponsoring bodies - the British Bankers Association, Building Society Associations and the UK Cards Association. The LSB has the power to initiate a review of the Lending Code but in line with the concept of self-regulation the sponsoring bodies control the content of the Lending Code.
47. There are a number of areas of overlap in the responsibilities of the FSA and the LSB. A memorandum of understanding recognises the desirability of promoting an approach to monitoring and enforcement in these areas that is coordinated, transparent, proportionate and responsive to the issue and avoids undue duplication of investigation and enforcement work in areas of mutual regulatory interest.
48. The FSA has said that it will, where appropriate, take account of the work being performed by the LSB and determining what resources to deploy in monitoring and enforcing compliance by lending codes to subscribers with requirements within the FSA's remit.
49. When an issue is identified that could potentially require action by either the FSA or LSB, the two bodies may consult each other to agree which is best placed to take action in the first instance. The memorandum of understanding notes that nothing in it fetters the FSA's discretion to take enforcement action or to exercise any of its powers in areas that overlap.
50. There are provisions to facilitate the LSB providing information confidentially to the FSA.
51. The LSB is a company limited by guarantee. The Board consists of eight directors; three public interest directors, an independent chairman, the executive directors of the three sponsoring trade bodies and the chief executive of the LSB.
52. The turnover of the LSB in 2010 was £1.695 million which consisted of annual subscriptions payable by subscribers during the year.

PhonepayPlus

53. PhonepayPlus is the body which regulates premium rate phone-paid services in the UK. These are the goods and services that consumers can buy by charging the cost to their phone bills and pre-pay phone accounts.
54. Its predecessor, ICSTIS, was founded by Sir Louis Blom-Cooper QC at the request of three network operators, British Telecom, Mercury Communications and Vodafone.
55. It regulates services using a Code of Practice approved by Ofcom. This sets out the rules with which all providers of phone-paid services must comply. Among other things it requires clear and accurate pricing information, honest advertising and service content and appropriate and targeted promotions.

56. PhonepayPlus investigates complaints about phone-paid services. Where its rules have been broken, it can fine the company responsible, bar access to its services and bar the individual behind the company from running other services under a different company name.
57. The sanctions of PhonepayPlus may impose include:
- a. Formal reprimands.
 - b. Making companies come to the regulators for prior approval.
 - c. Ordering companies to pay full refund to complainants.
 - d. Imposing fines.
 - e. Barring access to services.
 - f. Barring named persons from operating services.
58. Following various complaints about the effectiveness of ICSTIS during a period of scams and rackets in the premium call market the organisation changed its name and entered in to a formal framework agreement with Ofcom. Ofcom has overall responsibility for regulating premium rate services under the terms of the Communications Act 2003. PhonepayPlus is the agency appointed by Ofcom to carry out the day to day operations. Under the agreement Ofcom “recognises PhoneopayPlus as its agency, designated to deliver the day-to-day regulation of the market, by approving the PhonepayPlus Code of Practice. Regulatory, strategy, scope and policy are developed in dialogue with PhonepayPlus, but final decisions will rest with Ofcom”.
59. “Ofcom and PhonepayPlus will agree medium term and annual objectives, strategies and related funding arrangements. Final decisions on these matters rest with Ofcom but will be informed by recommendations from the PhonepayPlus Board based on their knowledge of the sector and relevant trends”.
60. According to PhonepayPlus consumer complaints about premium rate services have fallen by 27% in two years.
61. In September 2011 a new Code came into force requiring all premium rate services providers to register their organisations and services with PhonepayPlus.
62. In 2010 PhonepayPlus introduced a new team designed quickly to resolve minor consumer harm including refunds rather than opting for formal investigations.
63. The Board of PhonepayPlus is made up of eight remunerated non-executive part time members and the chief executive. Six board members have no current connection with the premium rate industry. The two members who are acting in it take no part in its adjudicatory function. This is handled by the Code Compliance Panel, made up of nine people operating in bi-weekly tribunals. Members are appointed for their specialist legal and adjudicatory experience.

64. PhonepayPlus is funded by a levy on service providers which is collected by network operators. The budget is consulted on with stakeholders and ultimately approved by Ofcom.

Conclusion

65. The six bodies whose structures and approaches are summarised in this note have adopted essentially similar techniques to preserve industry involvement in maintaining standards, operating codes of practice and providing effective complaint and redress systems.
66. All of them have some form of statutory underpinning, whilst all seek to maximise constructive engagement of sectoral or professional market participants. **PhonepayPlus** is an example of an organisation which while involving representatives of the sector on its board does not allow them to take part in its adjudicatory work. Its budget and strategy are approved by Ofcom, which has the final say under the Telecommunications Act 2003 and for which it acts as an agency.
67. The **Advertising Standards Authority** has a two-fold structure. For non-broadcast advertising it is a self-regulatory body but it has the right, which it has used when deemed necessary, to refer advertisers to the Office of Fair Trading for potential prosecution under general law. In broadcast advertising Ofcom established a co-regulatory partnership with the ASA in 2004, with the ASA responsible on a day to day basis for broadcast advertising content standards. This has been described as self-regulation within a co-regulatory framework and is underpinned by an enabling statutory instrument and a formal memorandum of understanding.
68. The **Legal Services Board** and in part of its work the **Financial Reporting Council** supervise self-regulation of legal accounting and audit professionals carried out by a range of other bodies. Those bodies operate under statute but their systems rely heavily on existing professional structures. Supervision by the LSB and the FRC allows an independent supervisor to act on behalf of the public interest. Additionally, the LSB has a Consumer Panel to ensure that customers' views are fully taken into account.
69. **The Council for Healthcare Regulatory Excellence** is a recent development of this approach. Parliament has given it a remit to supervise and report on the effectiveness of regulatory arrangements across a wide range of medical and dental services, reporting to Parliament on the effectiveness and fairness of the regulators, developing and sharing good practice and with powers to require regulators to change approaches which have been found unsatisfactory.
70. The **Lending Standards Board** is an example of an industry body which has a memorandum of understanding with the Financial Services Authority. Its work to maintain standards has areas of overlap with the FSA, which has statutory powers to act which are not affected by the existence of the LSB. The LSB is also empowered to pass confidential information on service providers to the FSA for potential use under its own powers.

71. Many of these organisations are financed by **levies** on their sector. Some collect these at arm's length from their operation. Others have formally linked to turnover in the sectors they supervise. Some must have their budget approved by the statutory regulator with which they work in partnership. Some are funded by grant in aid from government and devolved administrations. In the operation of their functions it is clearly important that funding mechanisms do not present risks of conflict of interest or impediment to effective use of their powers.
72. The table presents a short summary of the key elements of each of the bodies examined: in terms of legal structure, mode of operation, funding and relationship to statutory regulators or government.

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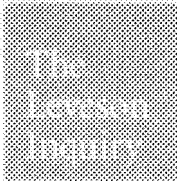
| Name | Role | Structure | Financing | Statutory Underpinning |
|--|---|---|--|--|
| Advertising Standards Authority | <p>Self-regulation of non-broadcast advertising.</p> <p>Co-regulation of broadcast advertising. Day to day function of considering complaints is handled by ASA who can refer advertisers to Ofcom.</p> | Company Limited by Guarantee. | Levy on cost of advertising space. Fee from Ofcom for undertaking broadcast advertising control. | <p>Non-broadcast advertising: can refer advertisers to the OFT under the Consumer Protection from Unfair Trading Regulations (2008)</p> <p>Broadcast Advertising: Statutory Instrument 2004 No. 1975 Contracting Out Broadcasting.</p> |
| Council for Healthcare Regulatory Excellence | <p>Scrutinize nine regulatory bodies for healthcare professionals.</p> <p>Audit and review process and outcomes of regulators fitness to practice proceedings and direct those bodies to change their rules as appropriate</p> <p>Provide Parliament with reports on the performance of regulators and advice the government and devolved administrations</p> | <p>Non-departmental public body.</p> <p>Chair is appointed by the Privy Council with board members variously appointed by the Secretary of State for Health and the devolved administrations.</p> | <p>Grant in aid from Department of Health.</p> <p>Will change to mostly relying on a levy on professional regulators once the Health and Social Care Act is fully implemented.</p> | <p>National Health Service Reform and Health Professions Act 2002</p> <p>Health and Social Care Act 2008.</p> |

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| Financial Reporting Council | <p>Overall aim to promote confidence in corporate reporting, governance, auditing and actuarial practice, and the professionals who work in these sectors.</p> <p>It carries out these functions through operating bodies it oversees</p> | Company Limited by Guarantee. | Levy on preparers of accounts and financial reporting professional bodies. | Complex statutory basis. Some powers are granted directly to the operating bodies the FRC oversees and others are established by statutory requirements on regulated parties to comply with FRC arrangements. Other regulation is voluntary rather than statutory. FRC plans to streamline this system |
| Name | Role | Structure | Financing | Statutory Underpinning |
| Legal Services Board | <p>Overseeing all approved regulators of legal services in England and Wales. This includes promoting the public interest, consumer interest and a competitive, independent strong and diverse legal profession.</p> <p>The body can direct, fine, censure and set performance targets for approved professional regulators.</p> | <p>Non-departmental public body sponsored by the Ministry of Justice.</p> <p>Chair and non-executive board members appointed by the Lord Chancellor.</p> | Levy on approved regulators based on number of practitioners the regulator authorizes. | Legal Services Act 2007. |
| Lending Standards Board | Monitor and enforce the Lending Code - a voluntary code covering providers of unsecured credit and finance to microenterprises and | Company Limited by Guarantee | Subscription fees from regulated industry | Memorandum of Understanding between the FSA and LSB. FSA operates under the Financial Services and Markets Act 2000 |

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| | small charities. The FSA agrees to take into account this function and consult on a shared approach as it see fit. | | | |
| Phonepay Plus | Enforce the Code of Practice (developed with and approved by Ofcom) on a day to day basis. | Company Limited by Guarantee | Levy on service providers collected by network operators. | Ofcom powers over premium rate services under Communications Act 2003. Delegated under section 121 of the Act. |



culture, practice and
ethics of the press

Steps before publication

1. If you are happy for the Inquiry to publish your submission please add and sign the following statement of truth to the end of your submission/statement.

Statement of Truth

I believe the facts stated in this witness statement are true.

Signed

Date 15.2.2012

Please be aware that by signing the statement of truth you are confirming that you agree that the contents of the submission/statement are true. Please take extra time to ensure that you are completely happy with your submission/statement before you sign it.

If you have provided a submission/statement in your private capacity you should state your full name in the submission/statement but should provide in a separate document personal details (e.g. address, contact address, mobile telephone number and e-mail address), which will not be published.

Please remove any personal details such as home address or telephone number before forwarding the final signed submission/statement.

If you have provided the submission/statement on behalf of an organisation, please state this clearly in the first line of the submission/statement.

- 2. Your signed submission/statement, in its entirety, should be returned to us by email.
- 3. Returning your signed submission/statement will confirm that you are content for the Inquiry to publish it on its website in the form you have provided. If this is not the case and you have any concerns or wish for certain sections to be withheld please make this clear in any response.
- 4. Your signed submission, once received, will initially be provided to those groups who have been designated as Core Participants to the Inquiry (a full list is available on our website: www.levesoninquiry.org.uk).
- 5. If the Core Participants do not raise any matters your statement will then be referred to in open session and at that point it will be published, along with your name, on the Inquiry's website.

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