

Witness Statement for the Leveson Inquiry, Module 4

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Introduction

1. I am responding to the invitation from the Leveson Inquiry to develop further the evidence I gave to the Inquiry in September 2011.
2. My proposal is not limited to a solution for press regulation: instead, it starts from the principle that solving the immediate issue provides an opportunity to recast the nature of content regulation more widely, and to refashion the role played by the statutory body, Ofcom. This would permit greater flexibility – essential if we are to deal effectively with the rapidly changing media landscape – but within a common framework. It would have the benefit of clearly defining, and limiting, the involvement of the state in the regulation of content itself by confining its role to establishing the framework and authorising the regulatory bodies.
3. I share the abhorrence expressed by every witness to the Inquiry of state control of the press. I do not believe, however, that creating a legal framework within which press regulation would operate would necessarily have this effect: instead, I think it would give greater powers to, and obligations on, industry to enforce the rules and standards that it has already signed up to.
4. As the centre-piece of a new approach to content regulation, Ofcom would withdraw from day to day regulation, and instead would oversee the framework of industry-based regulators covering the content services – broadcast, print and on-line – that need to be regulated. This change could be made progressively, with press regulation as the first step: but the overall direction of travel should nevertheless be clear.
5. In this paper, I set out:
 - a possible new framework for content regulation
 - how it addresses the immediate issue of press regulation, and specifically how it addresses the *Criteria for a Regulatory Solution*
 - how it makes content regulation more fit for the future
6. I note that this proposal has some similarity to the approach taken in the legal sector, where the Legal Services Board, as the statutory body, is charged with defining over-arching regulatory objectives, and authorising the self-regulatory bodies that industry develops to deliver them. While the duties and powers of the different regulatory bodies may be very different, the principle – of reserving the state’s role to establishing principles and authorising the independent bodies to carry them out – is broadly similar.

1: A New Framework for Content Regulation

7. My proposal rests on the following four principles:

- 1. Ofcom should be required to establish a framework of Regulatory Outcomes, within which all regulatory bodies must operate, as well as defining the characteristics of services that should be subject to some form of regulation**
- 2. Regulation should be carried out wherever possible by independent but industry-led regulators, authorised and audited by Ofcom’s Content Board.**
- 3. The Content Board’s authorisation and audit should be confined to three essential criteria:**
 - **governance arrangements which guarantee independence from both government and industry**
 - **adequate regulatory scope and powers**
 - **operational and funding arrangements sufficient to fulfil their role**
- 4. The Content Board should have the power to apply whichever code it considers most relevant to any media service or range of services that fail to join, or leave, the independent scheme**

I now deal with each of these principles in turn:

Ofcom should be required to establish a framework of Regulatory Outcomes, within which all regulatory bodies must operate, as well as defining the characteristics of services that should be subject to some form of regulation

8. Ofcom should define the characteristics of media services that should be regulated. They should take into account issues of public policy – for instance, services which occupy a privileged position by virtue of public subsidy or other benefit – as well as the practicability of applying regulation, and the proportionality of regulating services of limited reach, narrow subject matter or modest size.

9. Ofcom currently exercises regulatory control through the licensing of individual services. Licensees must adhere to the Broadcasting Code, which sets out the content rules applicable to all broadcast services. In future, could use a “general authorisation” approach to require services that meet certain definitions to put themselves under the oversight of an independent regulator.

10. As well as defining the media services which should be regulated, Ofcom should also publish a statement of the high level Regulatory Outcomes that citizens have a right to expect from them. I suggest these should be rooted in four principles, applicable to all services:

- respect for privacy;
- respect for the truth and fair dealing in reporting;
- upholding ethical standards of behaviour in news-gathering;
- providing information to allow vulnerable audiences to make informed choices.

11. Ofcom should also identify any specific content requirements, over and above the core principles. As part of their obligation to report accurately, broadcasters might have a requirement for impartial news; as part of their obligation to offer protection to vulnerable audiences, linear, scheduled services could be required to establish an effective watershed policy.

12. Included within Ofcom's Regulatory Outcomes should be a clear and unambiguous statement both of the essential role of a free and vigorous press; as well as a clear definition of the public interest against which all regulatory codes would need to be benchmarked.

Regulation should be carried out wherever possible by independent but industry-led regulators, authorised and audited by Ofcom's Content Board

13. Provided it has sufficient powers, authority and independence, there are real advantages in having the creation of codes and their enforcement undertaken by a "self-regulatory" body. Not only does it offer protection against state interference or control: in a media environment characterised by rapidly changing technology and consumer behaviour, the engagement of the industry itself in interpreting regulatory goals in ways relevant to new services will be increasingly important.

14. It is highly likely that there will be a number of different independent regulators, reflecting different types of service. There would undoubtedly be regulatory bodies for broadcasters, and the press; but, instead of today's position where the broadcasting regulator has no purchase over the on-line content of broadcasters, or where on-demand audio-visual services must be regulated by a separate body, the independent regulator would be able to cover all the services offered by its participating members.

15. In addition to its duty of establishing the Regulatory Outcomes and Service Characteristics for the media sector, Ofcom should also reformulate its Content Board as the body to authorise, and periodically audit, the independent regulators.

16. Giving this role to the Content Board creates distance between Ofcom, whose members are appointed by Ministers, and the independent regulators. The Content Board is appointed directly by Ofcom rather than ministers, and its independence could be further strengthened by creating statutory protection against interference or removal.

The Content Board's authorisation and audit should be confined to three essential criteria:

- **governance arrangements which guarantee independence from both government and industry**
- **adequate regulatory scope, industry coverage and powers**
- **operational and funding arrangements sufficient to fulfil their role**

17. The Content Board would authorise the independent regulators against three principal criteria:

- First, the degree of independence guaranteed by the governance arrangements. Clearly, an objective of industry-led regulation is to ensure not just buy-in from industry but its

active involvement as well. However, experience shows the danger of a self-perpetuating and self-electing body, as well as the risk to effectiveness when either the rule-making or rule-enforcing arm of a self-regulatory body is insufficiently independent.

The Content Board should develop criteria for independence from government, parliament and industry, covering appointments as well as operational arrangements.

The Content Board, in representing the public interest, could be invited by an independent regulator itself to play an active role in making appointments: approving shortlists, or holding pre-appointment hearings (along the lines of the hearings currently held by Select Committees).

- The second element in the authorisation should be the regulatory scope of the authority. Using Ofcom's framework of Regulatory Outcomes and Service Characteristics, the Content Board would assess whether the authority had adequately drawn its remit.

The Content Board would also assess the adequacy of the powers of the independent regulator – whether by virtue of its own Memorandum and Articles of Association, or any contractual relationship it might enter into with the services it regulates – to fulfil its role. At a minimum these should include: complaints handling and resolution; the power to investigate broader or systemic problems and to require changes to process or behaviour; investigations and the upholding of wider standards, and the power to impose effective sanctions.

While the independent regulator should offer some form of appeal against its initial ruling, the Content Board would have no role in reviewing any decision.

Although the Content Board would note the degree to which the authority had secured acceptance among the entities it is proposing to regulate, it would be for services themselves to join a relevant regulatory scheme, rather than a requirement on the independent regulator to secure their membership.

- The third area the Content Board should be required to assess is the adequacy of operational and budgetary plans. They should not approve budgets or operating procedures: but they should be given enough information to be able to assess whether the authority is likely to have the expertise, capacity and resource to fulfil its role.

18. Where the Content Board believes an independent regulator is deficient against these criteria, its authorisation should be withheld until those concerns have been addressed.

19. Having authorised the independent regulator, the Content Board should also be required to ensure that it continues to meet the criteria against which it was authorised. These audits should not be intrusive or heavy-handed: nor should they be so frequent as to undermine the body's authority. To strike this balance, the audits should happen every three years. However, if the Content Board had legitimate grounds for concern, it could bring any audit forward.

20. Although the Content Board would have no role in any regulatory decisions taken by the independent regulator, either in the first instance or as any part of an appeal process, it should nevertheless review the extent to which those decisions, taken as a whole, uphold

the standards it is required to maintain, and the degree of public confidence placed in the independent regulator itself.

The Content Board should have the power to apply whichever code it considers most relevant to any media service or range of services that fail to join, or leave, the independent scheme

21. The under-pinning principle is that all relevant services should be regulated by their own independent regulator. It should be for industry to determine the appropriate scope of their individual bodies, and the services they should cover: the backstop will be that they must operate within Ofcom's framework. But the burden of responsibility lies with any service or group of services to place themselves under a relevant scheme.

22. Should such a service, or group of services, decline to join a relevant scheme, or choose to leave it, the Content Board should have the power to require them to abide by the code it considers most appropriate. In this case, the enforcement body – for as long as the service or services remain outside any industry led system – should be Ofcom itself, which would have the powers to recoup the costs of the activity from the service provider.

23. It may also be that new services emerge which, in Ofcom's judgment, meet enough of the criteria to warrant some form of regulation, but where no industry body yet exists. Pending the creation of such an authority, or the extension of scope of an existing authority, Ofcom would be required to regulate the services against a code drawn up by the Content Board itself.

2: How would this meet the immediate need?

24. Under this system, the press would devise their own body, with the range of powers that they felt necessary to meet its complaints handling, arbitration and wider regulatory duties. This could be established using whatever contractual relationship they chose, and both the membership and scope of their services to be regulated would be for the industry to decide. The new regulator would also define the sanctions necessary to ensure compliance.

25. These arrangements would be authorised by the Content Board, using the framework set by Ofcom of:

- the characteristics of services that require some form of regulation
- the broad regulatory outcomes that ought to be upheld by the new body
- the definition of the “public interest” that must be used when balancing freedom of expression

26. In the case of the press, the **characteristics** would cover:

- editorial scope (to exclude services of narrow, specialised or non-controversial nature)
- circulation or equivalent metric for on-line services
- turnover (to exclude small or emerging services)

27. The **regulatory outcomes** that the code would have to address would be required to include:

- respect for privacy – with intrusions only when warranted
- respect for the truth when reporting matters of importance
- practices designed to maintain the highest ethical and professional standards in the way news is gathered and deployed (so covering issues like the reporting of crime, the use of privileged or sensitive material, the treatment of minors)
- protection for vulnerable audiences from inappropriate on-line content
- adherence to international obligations (for instance, in the case of video on-demand services, abiding by the terms of the European AVMS Directive)

28. The Content Board would authorise the new independent regulator provided it was satisfied that:

- its governance arrangements guaranteed it sufficient independence from the industry it regulates (thus excluding oversight by editors), or any other body including government
- its powers were sufficiently broadly drawn to deliver the relevant regulatory outcomes – including the ability to impose proportionate sanctions
- its financing arrangements and operational procedures were adequate to carry out its duties

29. Following authorisation, the Content Board would then engage with the authority by means of its three-yearly audit – which could nevertheless be brought forward if the Content Board had reasonable cause to believe that the authority was failing to meet the terms of its authorisation.

30. Although the new independent regulator would be required to operate within a statutory framework, and would have to encompass a specified set of outcomes within its code, I believe this still falls far short of state regulation of the press:

- The Content Board would be the only part of Ofcom in contact with the industry authority – and, as a board wholly appointed by Ofcom rather than ministers, it operates at a significant remove from government.
- The regulatory outcomes it sets would be cast at a very high level: the specific ways they are to be achieved would be for the authority to determine.
- Judgements made by the authority would be entirely its own and could not be appealed to, or overturned by, the Content Board.
- There would be no licensing of the press, or of journalists: there would instead be a regime similar to the “general authorisation” regime in telecommunications, based on the characteristics of services that would require some form of independent regulation.

Draft Criteria for a Regulatory Solution

31. The Inquiry has asked me to assess how this proposal would meet the emerging Criteria for a Regulatory Solution.

1. Effectiveness

1.1 Any solution must be perceived as effective and credible both by the press as an industry and by the public:

- a) It must strike a balance, capable of being accepted as reasonable, legitimate and in the public interest by all.
- b) It must recognise the importance for the public interest of a free press in a democracy, freedom of expression and investigative journalism, the rule of law, personal privacy and other private rights, and a press which acts responsibly and in the public interest.
- c) It must promote a clear understanding of 'the public interest' which would be accepted as reasonable by press, industry and public alike.
- d) It must be durable and sufficiently flexible to work for future markets and technology, and be capable of universal application.

Response:

32. I believe my proposal strikes an appropriate balance between the interests of the citizen and the interests of the press. The freedom of the press to express its opinions would be safeguarded, but within a framework – set by Ofcom – which defines the public interest against which that freedom must be benchmarked. That definition would have been subject to careful consultation and would be maintained by the body responsible for the whole of the communications and media sectors.

33. I also believe this approach would be both durable and flexible: a system of authorisation of industry led regulators, but with externally defined characteristics of services that require some form of regulation, gives the best chance to ensure that regulation can keep pace with, and remain proportionate to, a fast- changing media environment.

2. Fairness and objectivity of Standards

2.1 There must be a statement of ethical standards which is recognised as reasonable by the industry and credible by the public. This statement must identify enforceable minimum standards as well as articulating good practice that should be aimed for.

2.2 All standards for good practice in journalism should be driven by the public interest

and must be benchmarked in a clear objective way to the public interest.

2.3 The setting of standards must be independent of government and parliament, and sufficiently independent of media interests, in order to command public respect.

Response:

34. These criteria would be met through the authorisation process, and its requirement that each independent regulator should have a credible and enforceable code, which balances freedom of expression with the public interest.

3. Independence and transparency of enforcement and compliance

3.1 Enforcement of ethical standards, by whatever mechanism, must be operationally independent of government and parliament, and sufficiently independent of media interests, in order to command public respect.

3.2 In particular all relevant appointments processes must be sufficiently independent of government, Parliament and media interests to command public support.

3.3 Compliance must be the responsibility of editors and transparent and demonstrable to the public.

Response:

35. These important elements would all form part of the authorisation process by the Content Board, as well as of their regular audit.

4. Powers and remedies

4.1 The system must provide credible remedies, both in respect of aggrieved individuals and in respect of issues affecting wider groups in society.

4.2 The regulatory regime must have effective investigatory and advisory powers.

4.3 The system should also actively support and promote compliance by the industry, both directly (for example by providing confidential pre-publication advice) and indirectly (for example by kitemarking titles' own internal systems).

4.4 The system should be a good fit with other relevant regulatory and law enforcement functions.

Response:

36. The requirement to meet the Content Board’s criteria for effective regulatory and investigative powers, backed up by realistic and proportionate enforcement, should satisfy these criteria. I have not made a formal recommendation as to the scope of the sanctions that the regulator should be able to impose: it seems to me that this is best left to a detailed discussion between the Content Board and the new body. I recognise there is much discussion about whether or not the new body should be able to impose fines, in addition to requirements to publish prominent apologies and corrections; but I do not believe that the establishment of a new framework is dependent on the outcome of those deliberations.

37. Equally, I recognise there is also discussion about the relationship between the new regulatory body and any “privacy tribunal” that might be established. It seems to me, however, that any such arrangements could be safely accommodated within the framework set out above.

5. Cost

5.1 The solution must be sufficiently reliably financed to allow for reasonable operational independence and appropriate scope, but without placing a disproportionate burden on either the industry, complainants or the taxpayer.

Response:

38. The cost of the independent regulators – or, in the case of a service or group of services that have chosen not to be part of any industry led scheme, the cost incurred by Ofcom – would fall on the regulated services themselves, as today. The Content Board would, however, be required to assure itself that the funding is sufficient to fulfil its functions.

39. However, funding would need to be found for the Ofcom and Content Board element. Ofcom’s activities in relation to content regulation are currently funded by a levy on licensed, and therefore regulated, services. These costs would be significantly lower, since Ofcom would not itself be regulating industry: but there would still be cost which would need either to be recouped from industry (via a portion of the funding of the independent regulatory bodies) or directly from government.

3. Towards a longer term approach to content regulation

40. The previous section tested my proposal against the immediate issue of press regulation. However, I believe the principles on which it is based – industry-led regulation, operating within a broad framework overseen by a statutory body, flexible enough to accommodate a diverse range of services and authorities – would be a better a model for the future of content regulation more generally.

41. Media services will become increasingly diverse: traditional methods of distributing content with their easily regulated points of access will be supplemented, and to some degree replaced, by services characterised by long and complex value chains, considerable individual personalisation, as well as high degrees of interactivity and participation.

42. No doubt many of these services will require no regulation over and above the general provisions of the criminal and civil law. But evidence already suggests¹ that some services will share enough of the characteristics of “conventional media” – by virtue of their pervasiveness, or because of the content they distribute – for the public to expect them to come under some sort of regulatory oversight. And the Inquiry has heard copious evidence about the current imbalance of regulation between traditional media and emerging media services – social network sites such as Twitter or Facebook and their ability to break stories that the regulated press would not be able to publish (often for legal rather than simply regulatory reasons).

43. Ofcom’s current statutory approach for broadcast services, with rules designed for linear, scheduled services, is widely acknowledged to be both inappropriate and unenforceable for these new services. Future regulation will depend upon a much more sophisticated balance of approaches: technological filters, agreements to remove material once notified, user moderation, labelling and certification, audience and consumer information and education.

44. For any regulatory system to work effectively, there will need to be a more varied set of responsibilities than is currently the case, shared by a wider group of players – service providers, network operators, moderators, and audiences. It is therefore important to broaden and strengthen Ofcom’s role in supporting this potentially much larger set of regulatory bodies.

45. Recasting Ofcom’s role in the way I propose will allow it to play this role more effectively in future. No longer constrained by the requirement to regulate intensively one subset of media services, but required instead to secure some regulatory outcomes across the media as a whole, it will be better placed to ensure that audiences and consumers are offered more effective protection.

¹ See for instance “Protecting Audiences in a converged world”: Ofcom / Ipsos MORI, January 2012; or YouGov IPPR poll May 2012