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Press regulation after Leveson

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Inside:

Contents

Summary

In November 2012, Lord Justice Leveson, now Sir Brian Leveson, published his report on the "culture, practices and ethics of the press". The report covered only part 1 of his inquiry. The current system of press regulation is a response to this report.

Part 2 of the inquiry proposed to look at relationships between newspaper organisations and the police, politicians, prosecuting authorities, and relevant regulatory bodies during the "phone hacking" scandal of 2002-2011, as well as failures of corporate governance at newspaper groups. It has not started.

Press regulation – the current system

A Royal Charter on press regulation was granted on 30 October 2013. This incorporated key recommendations from the Leveson Report, allowing for one or more independent self-regulatory bodies for the press to be established. Any such body would be recognised and overseen by a Press Recognition Panel. Publishers who joined a recognised regulatory body might expect to receive more favourable treatment if action was taken against them in the courts. The Press Recognition Panel (PRP) came into being on 3 November 2014.

Two press regulators are now in existence. Most newspapers have signed up to IPSO, the Independent Press Standards Organisation, which has no intention of applying for recognition. A small number of publications have joined IMPRESS. This body is "Leveson-compliant" and was recognised by the PRP on 25 October 2016 as an "approved" regulator.

Other publications, for example the *Guardian*, have held back from joining any regulator and have appointed their own internal readers' ombudsmen.

Two legislative changes arising from Leveson were designed to provide financial incentives to newspaper publishers to join a regulator recognised by the PRP:

- section 40 of the *Crime and Courts Act 2013* would make it easier for the public to challenge illegality by news publishers who chose not to subscribe to an approved regulator because it would mean publishers having to pay both sides' legal costs, whether they won or lost a case. This section has not been brought into force.

- sections 34 to 39 of the 2013 Act offer protection from the risk of "exemplary damages" in certain civil litigation claims to those "relevant publishers" that sign up to the Royal Charter framework and make exemplary damages available in those claims for the courts to award as a punitive measure against "relevant publishers" who have not signed up. These sections are in force.

Leveson 2, section 40, and the Data Protection Bill

In November 2016, the Government published a consultation on whether to proceed with part 2 of the Leveson inquiry and whether to commence section 40 of the 2013 Act.

In a statement on 1 March 2018, Matt Hancock, the then Secretary of State for Digital, Culture, Media and Sport, announced that the Government was formally closing the Leveson inquiry. He also said that section 40 would not be commenced and would be repealed at the "earliest opportunity".

Amendments to the *Data Protection Bill [HL] 2017-19* tried, unsuccessfully, to:

- establish a Leveson 2 type inquiry on data protection breaches committed by or on behalf of news publishers

- incentivise media operators to sign up to an independent press regulator in respect of data protection claims – to be achieved in a similar way to section 40.

As a result of Government amendments to the Bill, the *Data Protection Act 2018* requires:

- the Information Commissioner's Office (ICO) to publish a data protection and journalism code (section 124)

- the ICO to produce guidance about how individuals can seek redress where a media organisation fails to comply with data protection legislation, including guidance about making complaints and bringing claims before a court (section 177)

- the ICO to review the processing of personal data for the purposes of journalism (section 178)

1. Introduction

In November 2012, Lord Justice Leveson, now Sir Brian Leveson, published his report on the "culture, practices and ethics of the press".[1] The report covered part 1 of his inquiry.

Part 2 of the inquiry proposed to look at relationships between newspaper organisations and the police, politicians, prosecuting authorities, and relevant regulatory bodies during the "phone hacking" scandal of 2002-2011, as well as failures of corporate governance at newspaper groups. It has not started.

The current system of press regulation is a response to part 1 of the inquiry.[2]

1.1 Press regulation – the current system

A Royal Charter on press regulation was granted on 30 October 2013. This incorporated key recommendations from the Leveson Report, allowing for one or more independent self-regulatory bodies for the press to be established. Any such body would be recognised and audited once every three years by a Press Recognition Panel. Publishers who joined an "approved" regulatory body might expect to receive more favourable treatment if action was taken against them in the courts. The Press Recognition Panel (PRP) came into being on 3 November 2014.

Two press regulators are now in existence. Most newspapers have signed up to IPSO, the Independent Press Standards Organisation, which has no intention of applying for recognition. A small number of publications have joined IMPRESS. This body is "Leveson-compliant" and was recognised by the PRP on 25 October 2016 as an "approved" regulator.

Other publications, for example the *Guardian*, have held back from joining any regulator and have appointed their own internal readers' ombudsmen.

Two legislative changes arising from Leveson were designed to provide financial incentives to newspaper publishers to join a regulator recognised by the PRP:

- section 40 of the *Crime and Courts Act 2013* would make it easier for the public to challenge illegality by news publishers who chose not to subscribe to an approved regulator because it would mean publishers having to pay both sides' legal costs, whether they won or lost a case. This section has not been brought into force.

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Press regulation is a devolved area. The sections of the 2013 Act discussed in this paper only extend to England and Wales. The Royal Charter has been adopted in Scotland, but differences between the legal systems may lead to divergent outcomes.

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1 Leveson Inquiry, *An inquiry into the culture, practices and ethics of the press*, HC 780 [report, 4 vols] and HC 779 [executive summary] 2012-13

2 For background see the Library Papers: *Leveson Report: implementation* (March 2014) and *What next for press regulation?* in *Key Issues for the 2015 Parliament* (May 2015).

2. Leveson part 2?

2.1 Terms of reference

The Terms of reference for part 2 of the Leveson inquiry were:

> To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.
>
> To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with News International, the review by the Metropolitan Police of their initial investigation, and the conduct of the prosecuting authorities.
>
> To inquire into the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation, and how this was allowed to happen.
>
> To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International
>
> In the light of these inquiries, to consider the implications for the relationships between newspaper organisations and the police, prosecuting authorities, and relevant regulatory bodies – and to recommend what actions, if any, should be taken.

In May 2012, Lord Justice Leveson released a statement on the "Application of Rule 13 of the Inquiry Rules 2006". He explained the reasons for splitting the inquiry into two parts:

> (…)
>
> 3. The reason for the Inquiry being split into two parts is well known. There is, at present, a substantial police investigation into the subject matter of the Inquiry which has led to many arrests and may, in due course, lead to prosecutions. Public concern about revelations in connection with the interception of mobile telephone voicemails and the approach to such issues by the News of the World, the police and the Press Complaints Commission (in addition to concerns about the relationship between the press and politicians) required review and reconsideration much more urgently than would be possible if it were necessary to await the outcome of the existing police investigation and any prosecution. On the other hand, it is very important that any Inquiry does not prejudice either the police investigation or any potential prosecution to such extent as thwarts the investigation or renders a prosecution so unfair as to constitute an abuse of process…
>
> 4. Thus, the tension which has run through Part 1 of the Inquiry as it has proceeded is between obtaining a sufficient narrative account of what has transpired to provide a basis in the evidence for conclusions which address the requirements of the terms of reference (which I have always insisted was essential) while, at the same time, not pursuing lines of inquiry or descending into such detail as potentially causes prejudice…

However, he also questioned the value to be gained from a part 2:

> 65. …The public concern which led to the setting up of this Inquiry is beyond argument or debate. I do not know whether there will be prosecutions but, having regard to the number of arrests and the quantity of material seized (including the 300 m. e-mails which it is said have had to be analysed), if there are, it is likely that the process of pre-trial disclosure and trial will be lengthy so that Part 2 of this Inquiry will be delayed for very many months if not longer. In those circumstances, it seems to me that it is in everyone's interests that Part 1 goes as far as it possibly can. If the transparent way in which the Inquiry has been conducted, the Report and the response by government and the press

> (along with a new acceptable regulatory regime) addresses the public concern, at the conclusion of any trial or trials, consideration can be given by everyone to the value to be gained from a further inquiry into Part 2. That inquiry will involve yet more enormous cost (both to the public purse and the participants); it will trawl over material then more years out of date and is likely to take longer than the present Inquiry which has not over focussed on individual conduct. Obviously, the more restrictive in its analysis that Part 1 has been, the greater will be the legitimate public demand for Part 2. I repeat that this possibility has not affected my approach to what I perceive to be appropriate in law and, when necessary, in the exercise of my discretion but it is undeniably a sensible strategic consideration for those who have participated in this Inquiry.

The Leveson Report covering part 1 of the inquiry was published on 29 November 2012. In a statement to the Commons on the same day, the then Prime Minister, David Cameron, said that the Government fully intended to go ahead with part 2:

> (…) One of the things that the victims have been most concerned about is that part 2 of the investigation should go ahead—because of the concerns about that first police investigation and about improper relationships between journalists and police officers. It is right that it should go ahead, and that is fully our intention.[3]

2.2 Uncertainty over part 2

In January 2015, a parliamentary response said that "a decision on whether to undertake Part 2 of the Leveson Inquiry will not take place until after all criminal investigations and trials related to Part 1 are concluded".[4]

At the end of 2015, the press was reporting that there was "little political appetite for another lengthy and expensive judicial inquiry" and that part 2 had been "shelved".[5] Critics saw this as a retreat from the position taken by David Cameron in 2012. Labour leader Jeremy Corbyn said that part 2 of Leveson has "got to be done".[6]

In September 2016, Karen Bradley, the then Secretary of State for Culture, Media and Sport, denied that part 2 had been "kicked into the long grass".[7]

The Conservative Party 2017 general election manifesto said that part 2 would not be commenced.[8]

The 2017 manifestos of the Labour Party and Liberal Democrats both included commitments to begin part 2.[9]

During debates on the proposed merger of 21st Century Fox and Sky, Tom Watson, the Shadow Secretary of State, repeatedly called for part 2 to begin.[10]

Hacked Off, a group campaigning on behalf of press victims, has been lobbying for part 2 to commence.[11]

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3 HC Deb 29 November 2012 c458

4 PQ 221692 [on the Leveson Inquiry], answered 27 January 2015

5 "Second Leveson inquiry is abandoned", *Times*, 16 December 2015

6 "Labour leader Jeremy Corbyn: Leveson part two has 'got to be done'", *Press Gazette*, 22 December 2015. In February 2016 Maria Eagle (then shadow Culture Secretary) and Andy Burnham (then shadow Home Secretary) wrote to Theresa May (then Home Secretary) and John Whittingdale (then Secretary of State for Culture, Media and Sport), seeking reassurances that part 2 would go ahead: "Labour says government must not be allowed to ditch Leveson part two", *Guardian*, 15 February 2016

7 HC Deb 8 September 2016 cc449-50

8 Conservative Party, *Forward together: our plan for a stronger Britain and a prosperous future*, p80

9 Labour Party, *For the many, not the few*, p97; Liberal Democrats, *Change Britain's future*, p72

10 HC Deb 12 September 2017 c656; see also: HC Deb 16 March 2017 c558 and HC Deb 29 June 2017 cc765-6

11 Bryan Cathcart, "David Cameron and Leveson 2: the promises", hackinginquiry.org, 11 April 2016

2.3 DCMS/Home Office consultation (November 2016)

In November 2016, the DCMS and Home Office announced details of a consultation on whether part 2 of Leveson was "still appropriate, proportionate and in the public interest":

> (…) The terms of reference for Part 2 were drafted before Part 1 had started. Since then, three police investigations, Operations Elveden, Tuleta and Weeting (including Operation Golding) have investigated a wide range of offences at a total cost of more than £43m.
>
> Given the extent of these criminal investigations, the implementation of the recommendations from Part 1 of the Leveson Inquiry, and the cost to the taxpayer of these investigations and Part 1 (£5.4m) the Government is considering whether undertaking Part 2 is still in the public interest. Some consider that the Leveson Inquiry has succeeded in what it set out to achieve and the media and police have made significant changes to their operations. Others however feel that further work through Part 2 is still required.[12]

The consultation document said that it was now "appropriate" to look at the future of part 2 as the last of the relevant criminal cases was entering its final stages.[13] Views were sought on two options:

- to continue with the Inquiry, either on the original terms of reference or with amended terms to reflect developments in the last five years; or
- to terminate the Inquiry, recognising that both police and press have undergone significant change since 2011.[14]

Hacked Off criticised the motives behind the consultation but encouraged the public to respond nonetheless.[15]

The consultation, which also sought views on section 40 of the *Crime and Courts Act 2013* (see section 3.1 below), closed on 10 January 2017.

A judicial review application arising from the consultation was served against the Government on 15 December 2016. Jacqui Hames (a former presenter of the BBC's *Crimewatch*), online news publisher Byline Media, and an anonymous phone-hacking victim jointly filed the claim against the lawfulness of the consultation exercise, claiming to be "particularly affected by any decision to resile from the promises made". The claim against the Government stated that the consultation was "misleading and unbalanced in fundamental ways, which render it plainly unfair".[16]

The Government committed not to take any final decisions on the matters raised in the consultation until the outcome of the judicial review application.[17] The application was rejected by the High Court on 21 March 2017.

Government response (1 March 2018)

In an oral statement to the Commons on 1 March 2018, Matt Hancock, the then Secretary of State, announced that the Government was formally closing the Leveson inquiry. He referred to progress that had been made since part 1 of the inquiry as well as to a "markedly different"

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12 "Government seeks views on press regulation issues", DCMS/Home Office press release, 1 November 2016

13 Department for Culture, Media and Sport/Home Office, *Consultation on the Leveson Inquiry and its implementation: section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry*, 1 November 2016, p5

14 Ibid, p20

15 Hacked Off, "The Government consultation on the press: Amber Rudd and Karen Bradley are trying to deceive the public", 15 November 2016

16 "Claim for judicial review of 'unlawful' Leveson consultation launched", *Guardian*, 22 December 2016

17 PQ 59669 [on the Leveson consultation], answered 19 January 2017

media landscape to the one in 2011. He said that only 12% of direct respondents to the consultation had been in favour of continuing with the inquiry:

> (…) It is clear that we have seen significant progress from publications, from the police and from the new regulator, and the media landscape today is markedly different from that which Sir Brian looked at in 2011. The way in which we consume news has changed dramatically. Newspaper circulation has fallen by about 30% since the conclusions of the Leveson inquiry, and, although digital circulation is rising, publishers are finding it much harder to generate revenue online. In 2015, for every £100 newspapers lost in print revenue, they gained only £3 in digital revenue.
>
> Our local papers in particular are under severe pressure. Local papers help to bring together local voices and shine a light on important local issues—in communities, in courtrooms, in council chambers—and as we devolve power further to local communities they will become even more important, yet over 200 local newspapers have closed since 2005…
>
> (…) There are also new challenges, that were only in their infancy back in 2011. We have seen a dramatic and continued rise in social media, which is largely unregulated, and issues such as clickbait, fake news, malicious disinformation and online abuse threaten high-quality journalism.
>
> The foundation of any successful democracy is a sound basis for democratic discourse. That is under threat from these new forces, and that requires urgent attention. These are today's challenges and this is where we need to focus, especially as more than £48 million was spent on the police investigations and the inquiry.
>
> During the consultation, 12% of direct respondents were in favour of reopening the Leveson inquiry, with 66% against. We agree and this is the position we set out in the Conservative party manifesto. Sir Brian, whom I thank for his service, agrees that the inquiry should not proceed under the current terms of reference but believes that it should continue in an amended form. We do not believe that reopening this costly and time consuming public inquiry is the right way forward, so considering all the factors that I have outlined to the House today, I have informed Sir Brian that we are formally closing the inquiry. But we will take action to safeguard the lifeblood of our democratic discourse and tackle the challenges that our media face—today, not a decade ago…[18]

Tom Watson said that the Government were "capitulating" on Leveson part 2:

> (…) Underlying the phone hacking scandal, we saw one of the biggest corporate scandals and one of the biggest corporate governance failures of modern times. The Secretary of State says that the terms of reference of Leveson 2 have largely been met, but I do not agree. Here are some of the things that Leveson 2 was supposed to investigate: to inquire into the extent of illegality at News International; to inquire into the way the police investigated allegations relating to News International and other newspaper groups; to inquire into whether the police received corrupt payments and were complicit in suppressing the proper investigation of complaints; and to inquire into the extent of corporate governance and management failures at News International and other organisations. None of those questions has been answered, and by betraying the victims of phone hacking in this statement today, the Secretary of State is trying to ensure that they never will be. I ask him this question: if it is revealed that the criminality that took place at the *News of the World* extended to other newspapers, will he reconsider his position?...[19]

The Government's full response to the consultation is available online.

Matt Hancock's statement didn't settle the debate on the future of Leveson part 2. Amendments to the *Data Protection Bill [HL] 2017-19* aimed to establish an inquiry with terms

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18 HC Deb 1 March 2018 cc965-6

19 HC Deb 1 March 2018 c968

of reference broadly similar to those of part 2 of Leveson. These are discussed in section 4 of this paper.

Reaction to the statement

Evan Harris, Hacked Off Director, commented:

> (…) If this was any other industry the press would be demanding that an inquiry must happen immediately, but when it is about them they applaud the cover-up of a cover-up. The Government will find it very difficult to maintain this cover-up for long.[20]

Steven Heffer, head of media and privacy at Collyer Bristow, the law firm that defended over 200 victims of phone hacking said: "It is astonishing that the government is abandoning it promises to victims of the phone-hacking scandal."[21]

Point of order on the statement

On 5 March 2018, Layla Moran raised a point of order on Matt Hancock's statement:

> On Thursday 1 March, in an oral statement on the Leveson inquiry, the Secretary of State for Digital, Culture, Media and Sport said:
>
> "Sir Brian, whom I thank for his service, agrees that the inquiry should not proceed under the current terms of reference"— [Official Report, 1 March 2018; Vol. 636, c. 966.]
>
> Is it in order for the Secretary of State to describe Sir Brian as agreeing with the Government when his actual words, in a letter to the Department on 23 January, were that he "fundamentally disagrees" with the Government's position? Furthermore, the Government acknowledged his view in further correspondence that was released hours after that statement was made.[22]

The Speaker responded:

> (…) The contents of a ministerial statement are the responsibility of the Minister. If the Secretary of State feels that he has been in any way inaccurate in his description of Sir Brian Leveson's views, I have no doubt that he will take steps to put the record straight. He is not obliged to say anything here, although he can if he so wishes… As the correspondence has now been made available, it is a matter on which all Members may take their own view. I think it partly comes down to a question of interpretation and of emphasis, and I know where the hon. Lady is coming from on this subject…[23]

Matt Hancock said:

> (…) I very clearly and carefully described my position and Sir Brian's. Now that his letter is in the public domain, I think it is all very straightforward.[24]

The text of the letter referred to in the point of order is available online.

Allegations of blagging at the *Sunday Times*

On 7 March 2018, Tom Watson tabled on Urgent Question on allegations of blagging at the *Sunday Times* and the relevance of these to the Leveson inquiry. Matt Hancock, the Secretary of State, said:

> (…) The allegations are of behaviour that appears totally unacceptable and potentially criminal. Investigation is therefore a matter for the police, and the House will understand that there is only so far that I can go in discussing the specific details and allegations.

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20 "Government announces suppression of Public Inquiry into police, press and political corruption and seeks repeal of Leveson's access to justice recommendation", Hacked Off Media Release, 1 March 2018

21 "Leading phone hacking lawyer calls Government's closure of Leveson Inquiry an 'astonishing abandoned promise'", *Press Gazette*, 1 March 2018

22 HC Deb 5 March 2018 c72

23 Ibid

24 Ibid

> More broadly, some people have already formed the conclusion that this revelation should require us to change policy on press regulation. Policy, of course, should always be based on all available information. It is worth noting that the activity described apparently stopped around 2010, before the establishment of the Leveson inquiry. Indeed, it was precisely because of such cases that the Leveson inquiry was set up. This sort of behaviour was covered by the terms of reference of that inquiry, and Mr Ford's activities were raised as part of the inquiry.
>
> As we discussed in the House last week, and again on Monday, there have been three detailed police investigations. A wide range of offences were examined; over 40 people were convicted, and many went to prison. Today's revelations, if proven, are clearly already covered by the law and appear to be in contravention of section 55 of the Data Protection Act 1998. As described, they would also appear to be in contravention of the new Data Protection Bill that is currently before the House.
>
> What is more, the fact that this activity stopped in 2010 underlines the point that the world has changed. Practices such as these have been investigated. Newspapers today are in a very different position from when the alleged offences took place. That view is in fact strengthened by today's example, because the behaviour that we have discovered today was from before the Leveson inquiry, and existing law is in place to deal with it. Criminal behaviour should be dealt with by the police and the courts, and anyone who has committed a criminal offence should face the full force of the law.[25]

Mr Watson said that Leveson part 2 could "establish where the truth lies" and asked whether the Secretary of State would reconsider his decision to close the inquiry.[26] Mr Hancock said that he wouldn't reconsider and that allegations of criminal wrongdoing were a matter for the police.[27]

25 HC Deb 8 March 2018 c326
26 HC Deb 8 March 2018 c327
27 Ibid

3. Financial incentives

Two legislative changes arising from Leveson were designed to provide financial incentives to newspaper publishers to join a regulator recognised by the Press Recognition Panel (PRP).

3.1 Award of costs – s40 of the Crime and Courts Act 2013

The first change concerns the award of costs against newspaper publishers.

Section 40 of the *Crime and Courts Act 2013* was intended to coerce or incentivise publishers to become members of a recognised regulator by providing that costs in litigation should be awarded against them unless they are members of a recognised regulator and make use of any arbitration scheme provided by the regulator. It has not been commenced.

Maria Miller, the then Secretary of State, explained the provisions at Report stage to the *Crime and Courts Bill 2012-13*:

> (…) The proposals [in new clause 27A] are designed to give further real and powerful incentives and give effect to Lord Justice Leveson's recommendation that the award of costs should be another tool to encourage publishers to join the regulator. The new clause would provide a clear presumption that where a claimant took a publisher inside the regulator to court, even if the claimant was successful, the normal rule that their costs would be met by a losing publisher would not apply. In other words, a defendant publisher that had joined the regulator should pay a claimant's costs only in limited circumstances—if the issue could have been resolved at arbitration, had the defendant agreed to its being referred, or if it was just and equitable for the defendant to pay the claimant's costs.
>
> (…)
>
> New clause 27A establishes a second presumption—that a relevant publisher that chooses to stay outside the regulator would generally have costs awarded against it in proceedings for media tort, whether or not the claim is successful. In other words, a defendant publisher that does not join the regulator should always pay the claimant's costs, unless the issue could not have been resolved at arbitration if the publisher had been a member of a regulator, or unless it were just and equitable for the defendant publisher not to pay those costs. These provisions deal with defendants and the costs they should or should not pay to claimants. The issue of claimants and the costs they might have to pay to defendants is also important and is addressed in subsection (5).[28]

The clause was passed with cross-party support.

Section 40 of the 2013 Act depends on the existence of an approved regulator in order to have the desired effect:

> (2) If the defendant was a member of an approved regulator at the time when the claim was commenced (or was unable to be a member at that time for reasons beyond the defendant's control or it would have been unreasonable in the circumstances for the defendant to have been a member at that time), the court must not award costs against the defendant unless satisfied that—
>
> (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator, or
>
> (b) it is just and equitable in all the circumstances of the case to award costs against the defendant.
>
> (3) If the defendant was not a member of an approved regulator at the time when the claim was commenced (but would have been able to be a member at that time and it would have been reasonable in the circumstances for the defendant to have been a

[28] HC Deb 18 March 2013 c701

> member at that time), the court must award costs against the defendant unless satisfied that—
>
> (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator (had the defendant been a member), or
>
> (b) it is just and equitable in all the circumstances of the case to make a different award of costs or make no award of costs.

Whether or not an approved regulator exists is beyond Government control. This is because the method chosen by the Government (with cross-party agreement) for implementing the Leveson Report was to establish the PRP by Royal Charter. The PRP is responsible for approving independent regulators that comply with certain recognition criteria. This process depends on the PRP receiving an application from a regulator that wishes to be approved.

Views on commencing section 40

Until October 2016 there was no "approved" press regulator. This rendered discussion up to that point somewhat hypothetical - the section 40 sanction, once commenced, could only be applied if there were an "approved" regulator.[29]

However, on 25 October 2016, the Board of the PRP recognised IMPRESS as an "approved regulator".[30] The majority of newspapers have subscribed to the rival regulator, IPSO, which has not applied for PRP approval.

When the then Secretary of State, Karen Bradley, appeared before the Culture, Media and Sport Committee on 24 October 2016, she was questioned at length about press regulation.[31] She said that while she had not ruled out activating section 40 at some point, she wanted to consider the options for achieving "appropriate levels of robust regulation… outside the PRP". She also reported fears among local newspapers that they could be forced out of business if the Government took an "ideological position" on the issue:

> We expected and hoped that the press would join regulators that applied for recognition under the PRP. That simply has not happened. I could do an ideological position on this, but the implications of being ideological may be that we see a vibrant free local press being affected, and it has been put to me very clearly by a number of editors of local newspapers that the exemplary damages section of section 40 could see them being out of business and certainly would impact on their ability to do investigative journalism. I want to consider those representations, consider them very carefully and then make a determination.[32]

Evan Harris, Hacked Off Director, commented:

> The Culture Secretary's suggestion that the Government might be satisfied by press self-regulation outside of the Leveson criteria if it was, in the Government's view, 'robust enough' would be a return to the wild-west days of the failed PCC [Press Complaints Commission], and decades of political-press back-scratching.
>
> Victims of press abuse, most of whom are ordinary members of the public, do not have the resources to take the press to court, would be being abandoned by the same politicians who set up the Inquiry.
>
> As long as politicians and press owners are judging press regulation, neither freedom of expression nor the public interest is safe.[33]

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29 Section 40(6) of the 2013 Act

30 "PRP Board recognises IMPRESS", Press Recognition Panel News, 25 October 2016

31 *Oral evidence: Responsibilities of the Secretary of State for Culture, Media and Sport*, HC 764, 24 October 2016

32 Ibid, in response to Q44

33 Quoted in: "Culture Secretary Karen Bradley says commencing Section 40 could undermine 'vibrant free local press'", *Press Gazette*, 25 October 2015

In its first annual report, the PRP said that "urgent action needs to be taken if the recommendations of the Leveson Report are to be given a chance to succeed":

> Section 40 should be commenced in England and Wales, and the Scottish Government and the Northern Ireland Executive should consider what further action is required to bring about success as contemplated by the Charter. Until this happens, free speech and the public interest cannot be safeguarded…[34]

The Conservative Party 2017 manifesto included a commitment to repeal section 40.[35]

DCMS/Home Office consultation (November 2016)

The November 2016 consultation sought views on commencing section 40 and set out some of the advantages and disadvantages of doing so:

> (…) some victims of press abuse and their representatives have publicly argued for the immediate commencement of section 40. Their view is that it could bring substantial benefits for ordinary citizens by providing improved access to justice and protections for journalists against the threat of high cost libel claims. They believe it is a vital incentive to encourage publishers to join a recognised self-regulator. Moreover, they argue that non-commencement is a breach of the cross-party agreement…

Conversely:

> (…) representatives of some part of the press have argued that commencement of section 40 would have a chilling effect on the press, particularly local titles, as publishers outside a recognised self-regulator may be threatened with legal action by those wishing to suppress stories that are in the public interest, relying on the presumption they would have their legal costs paid regardless of whether they won or lost. Furthermore, they argue that there was little discussion with publishers when the self-regulatory framework and associated incentives were created and that the system does not have buy-in from the industry, which is crucial for a voluntary self-regulatory system…[36]

The consultation document set out four options:

- keep section 40 under review – according to the consultation, the main argument against this option is that it creates regulatory uncertainty and does not fulfil Parliament's intention following the cross-party agreement.

- fully commence section 40 - this would maximise incentives to join a recognised regulator. However, it could adversely impact on small, local newspapers unless they joined a recognised self-regulator.

- repeal section 40 - if there is no intention to commence it or it is viewed as no longer of practical benefit.

- partially commence section 40 – another option, now that IMPRESS has been recognised by the PRP, is to commence the sub-sections of section 40 that would give protections to members of a recognised self-regulator. The elements of section 40 that apply to those outside a recognised regulator could either remain on the statute book and be kept under review or repealed.[37]

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34 Press Recognition Panel, *Annual report on the recognition system*, October 2016, p26

35 Conservative Party, *Forward together: our plan for a stronger Britain and a prosperous future*, p80

36 Department for Culture, Media and Sport/Home Office, *Consultation on the Leveson Inquiry and its implementation: section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry*, 1 November 2016, para 39

37 Department for Culture, Media and Sport/Home Office, *Consultation on the Leveson Inquiry and its implementation: section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry*, 1 November 2016, pp14-16

In her Commons statement on the launch of the consultation, Karen Bradley said that the Government's position hitherto had been to "wait for a number of elements of the new self-regulatory regime to settle in" before reaching a decision about section 40. However, the approval of IMPRESS by the PRP meant that the time was right to consider section 40 further.[38]

Government response (1 March 2018)

In his oral statement of 1 March 2018 (referred to in section 2.3 above), Matt Hancock said that the Government would seek to repeal section 40 of the 2013 Act:

> (…) During the consultation, we also found serious concerns that section 40 of the Crime and Courts Act 2013 would exacerbate the problems the press faces rather than solve them. Respondents were worried that it would impose further financial burdens, especially on the local press…
>
> Only 7% of direct respondents favoured full commencement of section 40. By contrast, 79% favoured full repeal. We have therefore decided not to commence section 40 of the Crime and Courts Act 2013 and to seek repeal at the earliest opportunity. Action is needed, based not on what might have been needed years ago but on what is needed to address today's problems…[39]

Matt Hancock's statement didn't settle the debate on section 40. Amendments to the *Data Protection Bill [HL] 2017-19* aimed to incentivise media operators to sign up to an independent press regulator in respect of data protection claims. This would be achieved in a similar way to section 40. Section 4 of this paper gives a brief overview of what was said.

Reaction to the statement

The News Media Association welcomed the statement, claiming that commencing section 40 and proceeding with part 2 of Leveson "would have disrupted and destabilised the news media industry at a time when it is already grappling with the huge challenges of funding the provision of high quality journalism in the digital environment".[40]

Hacked Off said the decision would deny access to justice for victims of press abuse.[41]

3.2 Exemplary damages

Sections 34 to 39 of the 2013 Act are in force. Like section 40, they are designed to provide a system of financial incentives for "relevant publishers" to sign up to the Royal Charter framework. They do that by offering protection from the risk of "exemplary damages"[42] in certain civil litigation claims to those "relevant publishers" that sign up to the framework and making exemplary damages available in those claims for the courts to award as a punitive measure against "relevant publishers" who have not signed up.[43]

What is a "relevant publisher"?

Section 41 of the 2013 Act sets out the categories who are expected to join a regulator. There are four cumulative criteria which must be met to satisfy the definition. To be considered a relevant publisher, a person or organisation must:

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38 HC Deb 1 November 2016 cc797-8

39 HC Deb 1 March 2018 c966

40 "Hancock: Leveson Inquiry Officially Closed and Seeking Repeal of S40", News Media Association, Latest News, 1 March 2018

41 "Government announces suppression of Public Inquiry into police, press and political corruption and seeks repeal of Leveson's access to justice recommendation", Hacked Off Media Release, 1 March 2018

42 Exemplary damages are payments awarded by the courts which are higher than the amount the person claiming damages has lost

43 Such punitive measures would be in addition to libel actions where they have been available under the common law

- publish news related material;
- publish material in the course of a business (whether or not carried out with a view to profit);
- produce material written by different authors; and
- produce material which is subject to editorial control (over the content of material, presentation and the decision to publish).

There are, however, specific exemptions for certain publishers – some by name, some by description – from the operation of the system of financial incentives. These are set out in Schedule 15 to the Act and include the BBC, public bodies and charities, company news publications and scientific or academic journals.

A publisher will be at risk of exemplary damages under section 34 in a libel or privacy case if it is not a member of a recognised regulator and shows a "deliberate or reckless disregard of an outrageous nature" for the claimant's rights. In contrast it is protected from exemplary damages if it is a member of a recognised regulator.[44].

When the courts decide whether to award exemplary damages against a publisher they have to consider:

- whether membership of a Royal Charter approved regulator was available at the material time;
- if such membership was available, the reasons for the defendant not being a member; and
- where relevant, whether the publisher had satisfactory internal compliance procedures in place and, if so, the extent to which they were adhered to.[45]

Reaction

Lawyers acting for the large newspaper groups have claimed that the provisions of the 2013 Act relating to exemplary damages potentially constitute a breach of Article 10 (freedom of expression) of the European Convention on Human Rights.[46]

In March 2015, the House of Lords Select Committee on Communications published a report on press regulation.[47] In his evidence to the Committee, Hugh Tomlinson QC (of Hacked Off) refuted claims that the system might be unlawful. He said:

> [146] I have absolutely no doubt that they are lawful. The exemplary damages provisions were designed by the Law Commission in effect to be compliant with Article 10, and are very carefully calibrated. I have no doubt either that the costs provisions, and that kind of incentive, are the proper way in which to encourage people to subject themselves to regulation.

Another witness, Dr Martin Moore of the Media Standards Trust, was sceptical about the likely effectiveness of the new system:

> [139] It is very hard to judge the degree to which there will be financial incentives. We know from what many publishers have said that the reasons for not signing up to the charter are not simply financial. Some of them are ideological…We went back and tried to do an evaluation of the potential savings that publishers would make or not make, which is extremely difficult to do. It is very rare that publishers are subject to legal action on a

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44 Section 34(2) of tbe *Crime and Courts Act 2013*
45 Section 35(3) of the *Crime and Courts Act 2013*
46 "Tory and Leveson plans for exemplary privacy damages 'may be unlawful'", *Guardian*, 21 February 2013
47 House of Lords Select Committee on Communications, *Press regulation: where are we now?* , HL 135 2014-15, 23 March 2015

> regular basis and particularly legal action by large corporations or otherwise…so you cannot figure on an annual basis how much you are likely to save or not save.

Bob Satchwell, Executive Director of the Society of Editors, told the Committee:

> [145] I thought that we were all supposed to be equal under the law but this would create an unequal legal regime. People who for whatever reason had not joined the approved regulator would be treated differently; they could commit the same 'offence', as it were, and it would cost an awful lot more.

Carolyn Pepper, a media lawyer, wrote a commentary piece for the *Press Gazette* in which she observed that "there is still much uncertainty… as to who (if anyone) is going to be affected by these provisions". She posed a number of questions:

> …what will become of these provisions if Impress is not approved as a regulator? Or indeed if it is but has only a small number of publishers on board, or none at all (Impress is yet to announce details of its members)?
>
> Will the courts penalise publishers if there is no approved regulator, or if an approved regulator exists but has few, if any members? And would membership of IPSO be a good reason for not being a member of the approved regulator?

Noting the previous Secretary of State's reluctance to proceed with the section 40 regime because of the effect it may have on smaller publishers, she concluded:

> Will the courts be similarly doubtful about imposing exemplary damages now?
>
> Although it is not yet known whether the exemplary damages provisions will have any teeth, two things are clear.
>
> The first is that publishers without an internal compliance procedure should make sure they have one now (it may just save them later) and the second is that if a claim for exemplary damages is made against any of the major players, we can expect a lengthy legal battle.[48]

[48] "Exemplary damages clause of Crime and Courts Act comes into force: what this means for publishers", *Press Gazette*, 4 November 2015

4. The Data Protection Bill [HL] 2017-2019

In January 2018, when the *Data Protection Bill [HL] 2017-19* was considered at Report stage in the Lords, the Government was defeated on amendments that would:

- require an inquiry with terms of reference broadly similar to those of part 2 of Leveson
- incentivise media operators to sign up to an independent press regulator in respect of data protection claims. This would be achieved in a similar way to section 40 of the 2013 Act

The amendments, particularly on Leveson part 2, remained controversial throughout the Bill's remaining stages where they were successfully resisted by the Government. An overview of what happened is given below.

4.1 Lords Report stage (10 January 2018)

Leveson part 2

At Report stage on 10 January 2018, Baroness Hollins (Cross Bench) moved an amendment to add the following new clause to the Bill:

> "Inquiry into issues arising from data protection breaches committed by or on behalf of news publishers
>
> (1) The Secretary of State must, within the period of three months beginning on the day on which this Act is passed, establish an inquiry under the Inquiries Act 2005 into allegations of data protection breaches committed by, or on behalf of, news publishers.(2) The inquiry's terms of reference must include, but are not limited to,— (a) to inquire, in respect of personal data processing, into the extent of unlawful or improper conduct within news publishers and, as appropriate, other organisations within the media, and by those responsible for holding personal data;(b) to inquire, in respect of personal data processing, into the extent of corporate governance and management failures at news publishers;(c) in the light of these inquiries, to consider the implications for personal data protection in relation to freedom of speech; and(d) to make recommendations on what action, if any, should be taken in the public interest."[49]

Baroness Hollins said that the "spirit" of her amendment "would be fully satisfied by the completion of the second part of the Leveson inquiry".[50] According to Baroness Hollins, there were three reasons why an inquiry should go ahead:

> (…) First, there is the sheer scale of unlawful conduct and the lack of any accountability. Secondly, there are the traumatic consequences for the many ordinary people who are victims. Thirdly, there are the ongoing implications for the conduct of powerful press organisations today…[51]

The amendment was supported by Labour and the Liberal Democrats.

For the Government, Lord Keen of Elie resisted the amendment. He said, among other things, that the Leveson inquiry had not been terminated and that Sir Brian Leveson was now considering responses to the November 2016 consultation:

> (…) Sir Brian has asked to see the results of the consultation, along with individual responses to the consultation that were submitted by core participants in the Leveson inquiry…It is not only right that his views should be canvassed in this context, it is actually necessary. The Leveson inquiry has not been terminated; it proceeds under the Inquiries

49 Amendment 127A, HL Deb 10 January 2018 cc216-7
50 HL Deb 10 January 2018 c217
51 HL Deb 10 January 2018 c217

> Act 2005 and it cannot be brought to an end until the Government have formally consulted Sir Brian and considered his comments with an open mind on how to proceed further. That consultation is in train. When Sir Brian has shared his formal views with us, we will look to publish the Government's response to the consultation. It would be our intention, subject to Sir Brian's views, to publish his response at that time as well, in order that that can be in the public domain.
>
> Amendment 127A in the name of the noble Baroness, Lady Hollins, assumes that the existing inquiry will be brought to an end, but, as I say, that decision has not—indeed cannot—be taken at this stage. If, for example, Sir Brian produces compelling reasons for proceeding with part 2 of the inquiry in some shape or form, the Government would have to give reasonable consideration to those representations and will do so. However, we clearly do not need two public inquiries going on at the same time into the same issues: that is where we would end up, on one view of this process. We have to take events in their proper order and this amendment is plainly not in its proper order; it is plainly premature and cuts across the present statutory process that is being carried on pursuant to the Inquiries Act 2005…[52]

Baroness Hollins noted that a commitment not to proceed with part 2 of Leveson had been included in the Conservative Party manifesto for the 2017 general election.[53] She put her amendment to a vote where it was passed by 238 votes to 209.[54]

Evan Harris, Hacked Off Director, commented:

> This vote reaffirms Parliament's longstanding commitment to get to the bottom of the press misconduct, illegality and corruption scandal, in the face of waves of press pressure and misinformation, and Government equivocation.
>
> The victims of press corruption, from the McCanns to the Hillsborough families, deserve to know the truth about the illegal and corrupt practices which occurred, as do the thousands of ordinary victims of data breaches committed by or on behalf of newspapers – not to mention the many more individuals alleging hacking at The Sun newspaper in a civil case beginning next week.
>
> We urge the Government to proceed with the second part of the Leveson Inquiry immediately, having heard the will of Parliament over this matter yet again…[55]

The clause added by Baroness Hollins' amendment became clause 142 of Bill 153 (as introduced in the Commons). It was not supported by the Government.[56]

Section 40

Also at Report stage on 10 January, Earl Attlee (Conservative) moved amendments that "would incentivise media operators to sign up to an independent press regulator in respect of data protection claims"[57]. The amendment would "protect publishers while also providing the public with the protection from press abuse that they need and deserve".[58] It would be "achieved in the same way as the yet-to-be-commenced Section 40 of the Crime and Courts Act 2013".[59]

Lord Keen of Elie resisted the amendment and again said that the Government would publish its response to the November 2016 consultation "shortly":

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52 HL Deb 10 January 2018 cc240-1
53 HL Deb 10 January 2018 c243
54 HL Deb 10 January 2018 cc244-7
55 "House of Lords vote to keep Parliament's promises to press abuse victims", Hacked Off media release, 11 January 2018
56 Para 363 of the Explanatory Notes to Bill 153
57 Amendment 147, HL Deb 10 January 2018 c220
58 HL Deb 10 January 2018 c250
59 HL Deb 10 January 2018 c220

> (…) we do not believe that at this time it is appropriate to advance a provision similar to Section 40 but only in relation to data protection. There is a much wider issue at stake here and that is the issue that needs to be properly addressed and bottomed out. At the end of the day it would not be appropriate simply to carve out one provision on data protection for the purposes of this Bill in order to replicate the sorts of provisions that we see in Section 40 of the 2013 Act.
>
> Of course we have to cast our minds to the abuses of the past but if we are going to make effective policy we have to look to the future and determine how the balance of interests is going to be achieved between the right to data protection, the right to privacy and the need to maintain a free and vibrant media and free expression. These amendments cut across the proper process that we are now following regarding part 2 of the Leveson inquiry and Section 40 of the 2013 Act…[60]

Earl Attlee put his amendment to a division where it was passed by 217 votes to 210.[61]

Hacked Off welcomed the vote. Deputy Chair Natalie Fenton said:

> (…) This is good news for freedom of expression, as it encourages the press to sign up to a genuinely independent regulator, free from state and industry interference, and gives local publishers the protections they need from wealthy individuals seeking to avoid negative coverage with expensive claims.
>
> These reforms will be welcomed by the victims of press abuse, who have asked for no more than what was promised to them: access to justice for future victims, so that no one again must suffer powerlessness and the deprivation of justice after illegal press abuse.[62]

In contrast, the News Media Association said:

> Legislation intended to make our data protection laws fit for the digital age is being used as a backdoor route by peers to enforce state-backed press regulation and obstruct investigative journalism, diminishing the public right to know.
>
> Hundreds of national and local news media editors and publishers across the UK are united in their fierce opposition to these cynical attempts to establish a costly and unnecessary taxpayer-funded statutory public inquiry into the wider media industry and to introduce another punitive version of crippling section 40 costs sanctions, enforcing state licensing of newspapers and inflicting huge damage on a free press.[63]

The clauses added by Earl Attlee's amendment became clauses 168 and 169 of Bill 153 (as introduced in the Commons). They were not supported by the Government.[64]

4.2 Commons second reading (5 March 2018)

The Bill had its second reading in the Commons on 5 March 2018. Much of the debate focused on the Lords amendments. Tom Watson said that Labour would seek to retain the amendments on Leveson part 2[65] and section 40.[66] At the end of the debate, Margot James, Minister of State at the DCMS, said that the Government would "attempt to defeat" the amendments.[67]

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60 HL Deb 10 January 2018 c242
61 HL Deb 10 January 2018 cc252-4
62 "House of Lords vote to keep Parliament's promises to press abuse victims", Hacked Off media release, 11 January 2018
63 Quoted in "Government will seek to overturn Lords vote on newspapers, says May", *Guardian*, 11 January 2018
64 Para 489 of the Explanatory Notes to Bill 153
65 HC Deb 5 March 2018 c87
66 HC Deb 5 March 2018 c85
67 HC Deb 5 March 2018 c131

4.3 Commons Public Bill Committee (20 March 2018)

At Committee stage, there was lengthy debate on the clauses relating to press regulation.[68] For Labour, Liam Byrne spoke in support of clause 142[69] and clauses 168 and 169.[70] He said that amendments to put the clauses back into the Bill would be tabled at Report if the Government defeated them in Committee.[71]

For the Government, Margot James referred to the Secretary of State's statement of 1 March 2018. She said that she would not repeat his arguments but did state that the "Government's firm focus is on the problems faced by the media right now".[72]

The Committee voted to remove clause 142 from the Bill.[73] It also voted to remove clauses 168 and 169 from the Bill.[74]

4.4 Commons Report stage (9 May 2018)

At Report stage on 9 May 2018, Ed Miliband moved new clause 18 to establish an inquiry "into allegations of data protection breaches committed by or on behalf of national news publishers and other media organisations".[75] He did so "for one overriding reason: to keep a promise that everyone in this House made to the victims of phone hacking and other unlawful conduct:

> (…) I well remember the day when I, David Cameron and Nick Clegg went to meet the victims—the McCanns, the Dowlers and all the others. You know what we said to them? We said, "This time it will be different. This time we won't flinch. We promise you we'll see this process through." Painstakingly, with the victims, we designed a two-part Leveson process—let us be under no illusions about that. The first part was to look at the general issues around the culture and ethics of the press and the relationship with politicians, and the second part, promised back then, was to look, after the criminal trials were over, at, in the words of Sir Brian, who did what to who and why it happened. Who covered it up? Did the police? Did politicians? Did other public servants?
>
> Leveson was to be a two-part process, and here is what David Cameron said, when part 1 of Leveson was completed in November 2012:
>
> "One of the things that the victims have been most concerned about is that part 2 of the investigation should go ahead…It is right that it should go ahead, and that is fully our intention."— [Official Report, 29 November 2012; Vol. 554, c. 458.]
>
> No ifs, no buts, no maybes—a clear promise to victims of the press. And here we come today, and we have the Government saying, "Let's dump this promise. It's too expensive—it's a distraction." How dare they? How dare they say that to the McCanns, the Dowlers and all the other victims? How can we be here? I say to Members across the House, in whatever party, that this is about our honour—this is a matter of honour, of a promise we made…[76]

On section 40 of the 2013 Act, Tom Watson tabled new clauses 20 and 21 that would:

> provide that court costs of non-abusive, non-vexatious, and non-trivial libel and intrusion claims would be awarded against a newspaper choosing not to join a Royal Charter-

68 Public Bill Committee 20 March 2018 cc198-215
69 Public Bill Committee 20 March 2018 c201
70 Public Bill Committee 20 March 2018 cc207-8
71 Public Bill Committee 20 March 2018 c208
72 Public Bill Committee 20 March 2018 c212
73 Public Bill Committee 20 March 2018 c215
74 Public Bill Committee 20 March 2018 cc228-9
75 Amendment paper 9 May 2018, pp4-5
76 HC Deb 9 May 2018 cc723-4

> approved regulator offering low-cost arbitration, but that newspapers who do join such a regulator would be protected from costs awards even if they lose a claim.[77]

The Government moved three new clauses:

- new clause 19 would require the Information Commissioner's Office (ICO) to publish guidance on how to seek redress against media organisations that failed to comply with data protection legislation[78]

- new clause 22 would require the ICO to carry out a review of, and report on, the extent to which the processing of personal data for the purposes of journalism complied with the data protection legislation during the first 4 years of its operation[79]

- new clause 23 would require the ICO to prepare a code of practice giving guidance about the processing of personal data for the purposes of journalism[80]

When introducing the Government's new clauses, Matt Hancock spoke against those tabled by Labour:

> (…) I wish to address new clauses 20 and 21…These new clauses are essentially the provisions contained in sections 40 and 42 of the Crime and Courts Act 2013, although they would apply only to breaches of data protection law and only in England and Wales.
>
> Let me first set out exactly what these new clauses would mean and then our approach to them. They would set new cost provisions for complaints against the press, which means that any publication not regulated by Impress would have to pay the legal costs for any complaint against it, whether it won or lost. Many would object to that and say that it goes against natural justice. It is grounds enough to reject these new clauses on the basis that the courts would punish a publication that has done no wrong, but that is not the only reason. Let us consider the impact of these new clauses on an editor. Faced with any criticism, of any article, by anyone with the means to go to court, a publication would risk having to pay costs, even if every single fact in a story was true and even if there was a strong public interest in publishing…[81]
>
> (…)
>
> New clause 18…requires the Government to, in effect, reopen the Leveson inquiry, but only in relation to data protection. I want to say something specific and technical about the new clause. Even on its own terms, it would not deliver Leveson 2 as envisaged. It focuses on data protection breaches, not the broad question of the future of the press. The new clause, therefore, is not appropriate for those who want to vote for Leveson 2…[82]

After a lengthy debate, new clause 18 was defeated by 304 votes to 295.[83]

New clauses 20 and 21 were not put to a vote. In the Commons on 15 May 2018, Tom Watson acknowledged that "section 40 has gone…we recognise that there is no majority in the House for it".[84]

The Government's new clauses were added to the Bill.

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77 Amendment paper 9 May 2018, pp5-7
78 Ibid, pp1-2
79 Ibid, pp2-3
80 Ibid, p3
81 HC Deb 9 May 2018 c704
82 HC Deb 9 May 2018 cc708-9
83 HC Deb 9 May 2018 c741
84 HC Deb 15 May 2018 c174

4.5 Ping pong

On 14 May 2018, when the Lords considered the Commons amendments, Baroness Hollins' amendment 62B requiring Leveson 2 was agreed by 252 votes to 213.[85]

On 15 May 2018, the Government tabled amendments disagreeing with Baroness Hollins' amendment and proposing amendments to the new clause added at Report requiring an ICO review of processing of personal data for the purposes of journalism. Matt Hancock said:

> (…) [Lords amendment 62B] would require the Government to establish a statutory inquiry into data protection breaches by national news publishers. It is essentially similar to new clause 18, which was proposed and defeated in this House last week. During the course of the Bill, we have repeatedly acted to take into account amendments made in the other place and to directly address concerns expressed by Members of this House. We have gone out of our way to offer concessions at every stage to make sure that the system of press regulation is both free and fair. On Report last week, we gave the Information Commissioner the powers that she needs so that those who flout the law are held to account for their actions. We introduced a data protection code of practice for the press; guidance on how to seek redress, which fits with the Independent Press Standards Organisation's new system of binding low-cost arbitration; and a review by the Information Commissioner's Office of how the new system is working.
>
> I listened to the entire debate in the other place yesterday, and I understand some of the concerns raised there, both from those who essentially want to reopen the Leveson inquiry and those with deep concerns about its impact on the sustainability of the free press. Today, I am proposing further amendments to try to strike this vital balance and ensure that in future we have a press that is both free and fair. I hope that hon. Members will agree that this action can bring matters to a close.
>
> I am proposing five further amendments to strengthen the system. First, we will strengthen the ICO's review. Amendments (a) and (f) give the commissioner stronger powers to compel evidence to ensure that the review that she will undertake is both robust and comprehensive. Secondly, we will widen the ICO's review. Amendment (za) broadens the remit to include looking at good practice in the processing of personal data for the purposes of journalism. Thirdly, we will make the review permanent. Amendment (zd) will ensure that unlike the inquiry proposed in their Lordships amendment, the ICO-led review will not be a one-off, but part of the media landscape, with a review every five years thereafter.
>
> Fourthly, we are determined that there can be no backsliding on the media's commitment to low-cost arbitration, which we welcomed the introduction of a few weeks ago. Amendment (c) will ensure that a report on the use and effectiveness of that arbitration is laid in Parliament at least every three years and that a copy is supplied to the devolved Administrations so that they can take action in areas of devolved competence. Fifthly, amendments (d) and (e) bring all these matters automatically into force without the need for a commencement order in order to show good faith. I think that this significant set of amendments is a better approach than amendment 62B—proposed by the other place—which is unnecessary for a number of reasons.

During the debate, Ed Miliband and Tom Watson continued to argue for part 2 of Leveson. Brendan O'Hara said that the SNP also supported Baroness Hollins' amendment.

The Government's amendments were agreed on division by 301 votes to 289.[86]

In the House of Lords on 21 May 2018, Baroness Hollins "reluctantly accept[ed] the decision of the other place that it does not wish to proceed with and complete a public inquiry".[87]

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85 HL Deb 14 May 2018 c468
86 HC Deb 15 May 2018 cc185-88
87 HL Deb 21 May 2018 c887

Lord Stevenson of Balmacara (Labour) said there was "no doubt that we have to know more about who did what to whom in the period running up to the Leveson inquiry."[88] However, he acknowledged that the Bill had to be passed by the 25 May - in time for the General Data Protection Regulation coming into force – and that, for the moment, Labour "wish[ed] the Bill well".[89]

The Commons amendments of 15 May were agreed without division. The Bill received Royal Assent on 23 May 2018. The Government's clauses added to the Bill at Report stage (p22 above) are now sections 124, 177 and 178 of the *Data Protection Act 2018*.

Section 124 requires the ICO to publish a data protection and journalism code.

Section 177 requires the ICO to produce guidance about how individuals can seek redress where a media organisation fails to comply with data protection legislation, including guidance about making complaints and bringing claims before a court.

Section 178 requires the ICO to review the processing of personal data for the purposes of journalism. The Explanatory Notes to the Act give the following summary:

> 516 This section requires the Commissioner to carry out a review of, and report on, the extent to which the processing of personal data for the purposes of journalism complied with the data protection legislation and good practice.
>
> 517 Subsection (2) sets the first review period to cover the first 4 years of the operation of the new data protection legislation (May 2018 to May 2022). Subsection (3) requires the review to start within 6 months of this period ending and subsection (4) requires the review to conclude within 18 months of it starting. The Commissioner can therefore be expected to report by May 2024.
>
> 518 The review will then be repeated on a 5 year cycle. The second review period will cover the period May 2022 to May 2027.
>
> 519 Subsection (5) requires the review to cover all parts of the United Kingdom, including Northern Ireland.
>
> 520 Subsection (6) requires the Secretary of State to lay the Commissioner's report before Parliament, and send a copy of the report to the Scottish Ministers, the Welsh Ministers, and the Executive Office in Northern Ireland.
>
> 521 Subsection (7) gives effect to Schedule 17 which provides the Commissioner with further powers to conduct the review.

88 HL Deb 21 May 2018 c891
89 HL Deb 21 May 2018 c892

5. Scotland

Press regulation is a devolved matter. After publication of the Leveson Report, the then Scottish First Minister, Alex Salmond, invited Lord McCluskey, a former high court judge and Solicitor-General, to chair an expert group looking into the implications for Scotland. In his March 2013 report, Lord McCluskey proposed that:

> (…) statute would provide a basic underpinning to ensure (a) that, in future, news-related material would be regulated, but only to the limited extent proposed by Leveson, by an independent, non-statutory, Regulatory Body of a character to be proposed by the press; and (b) that there would be created a separate independent body (the Recognition Body) with responsibility for ensuring that the independent Regulatory Body complies at all times with the Leveson principles and essential recommendations.[90]

The report accepted, but built upon, the Leveson conclusion that the Regulatory Body must have guaranteed jurisdiction over "all significant news publishers":

> (…) The principal difference between what we advise and what others have proposed is that the jurisdiction of the Regulatory Body must extend by law to all publishers of news-related material. No publisher of news-related material should be able to opt out of that jurisdiction… [91]

This Scottish regulator could have had the power to censure newspapers, magazines and websites, including "gossip" sites, while the expert group said that further regulation of social media might also be required. The report's findings were criticised by the other major parties at Holyrood, who described the proposals as "draconian."[92] Lord McCluskey defended his proposals, which commentators argued went even further than those in the Leveson Report, but Mr Salmond said that they did not represent Scottish Government policy.[93]

In the event, opinion in the Scottish Parliament swung behind a UK-wide royal charter. The text of the draft charter was fine-tuned to make it compliant with Scots law.[94] Having secured the agreement of the Scottish Government, the charter as finalised by the Privy Council in October 2013 therefore extends to Scotland.[95]

However, the provisions in the *Crime and Courts Act 2013* (discussed in section 3 above) do not extend to Scotland. Therefore, although the new press regulation system applies in Scotland as a result of the Royal Charter, the extra incentives to join the system would not.[96]

There are arguments that this difference currently has little practical relevance since most of the UK and Scottish press has signed up to IPSO which is not recognised by the PRP and so would, in any event, not be covered by the incentives in the 2013 Act. A more obvious divergence between Scotland and England might emerge now that IMPRESS (the alternative regulator) has been recognised by the PRP since its members would be covered by the incentives in England but not in Scotland. However, IMPRESS's current members are primarily small, independent publishers, few of which have major activities in Scotland.

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90 Scottish Government, *Expert Group on the Leveson Report in Scotland*, 15 March 2013, p1

91 Ibid, p1

92 "Press regulation: call to detail royal charter deal's impact on Scotland", *BBC News Scotland*, 18 March 2013

93 "Press regulation: McCluskey defends new law plan", *Scotsman*, 22 March 2013

94 "Leveson Inquiry: MSPs to vote on UK-wide regulation", *BBC News Scotland*, 25 April 2013

95 "Press regulation in an independent Scotland 'subject to royal charter'", *Guardian*, 7 January 2014

96 When the SNP's John Nicholson raised this point with the then Secretary of State, Karen Bradley, in the context of the 2016 consultation, Ms Bradley replied: "I am due to speak to Fiona Hyslop [her opposite number in the Scottish Government] this afternoon to discuss exactly how we make sure it [section 40] works across the whole country": HC Deb 1 November 2016 c801

There are other differences between Scots and English law that have relevance to press regulation. For example, exemplary or punitive damages are not recognised in Scots law. Aggravated damages (which compensate for mental distress caused by the manner or motive with which a wrong was committed) are also unavailable in Scotland. The general function of damages in Scots law is compensatory or restorative.[97] Where a litigant has a choice of jurisdictions, there might therefore, in any event, be incentives to bring an action in the English, rather than the Scottish, courts.[98]

97 Secretariat to the Expert Group on the Leveson Inquiry in Scotland, *Briefing Note – "Carrots and sticks"*, February 2013, para 20

98 Colleagues in the Scottish Parliament Information Centre provided advice on this section

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