MEDIA REFORM COALITION

Small publishers, online journalism and the new system of press regulation

The Royal Charter, agreed by Parliament on 18 March, lays the groundwork for a new system of press regulation in the UK. News publishers are now expected to establish their own self-regulator, and if this self-regulator meets a set of criteria based on Leveson's recommendations it will be recognised by the independent "Recognition Panel" set up by the Charter.

To be recognised a self-regulator must:

- have a standards code which protects the public interest and privacy
- operate an effective complaints-handling and investigations arm
- provide a cheap or free arbitration system for complaints
- be able to enforce its decisions by directing apologies and corrections and by levying appropriate fines (limited to 1% of turnover)

Members of a recognised self-regulator will receive legal and financial benefits, while some publishers who stay outside will face legal and financial penalties.

Both the Leveson Inquiry and Report were focused on the mainstream national press. The implications of this system for small publishers, online journalism and blogging have received less attention and have been the subject of some highly misleading reporting in mainstream media.

This document attempts to clarify the current situation, and is intended to accompany a short consultation that can be accessed by clicking on this link. The responses to the consultation will be used to advise the Government on the clauses going through Parliament after the Easter recess that will affect small news organisations.

The legal situation

Alongside the Charter are two pieces of statute. The first is an amendment to the Enterprise Regulation and Reform Bill ("the ERR Bill") which states that this kind of Royal Charter can't be changed by government ministers in the Privy Council, but would need a two thirds majority in both Houses of Parliament to be altered. This is the 'statutory underpinning' that has been so hotly debated. The Royal Charter is now not open to further change before it comes into effect next month. The ERR bill is also unlikely to be amended again before it receives Royal Assent.

The second piece of statute is a set of amendments to the Crime and Courts Bill ("C&C Bill")[1]. Some parts of this Bill are open to amendment after the Easter recess and so this is where our attention should be focussed. The Bill lays out:

1 the incentives for joining a recognised self-regulator,
2 the disadvantages for publishers who remain outside, and
3 who is a "relevant publisher" for the purposes of the C&C Bill i.e. who the measures above should apply to

[1] The full list of these "Leveson clauses can be found here – look for Commons amendments 11-19, 38, 46 and 131.

Clauses 17 and 131 of the C&C Bill are still open to change[2]. Clause17 defines the carrots and sticks while clause 131 defines who these apply to. They can be read in full here.

Carrots and sticks

The amendments to the C&C Bill are intended to incentivise news publishers to set up a self-regulator that meets the recognition criteria, and to deal with the problem of large newspaper groups refusing to join a self-regulator.

Leveson did not recommend compulsion: if joining a self-regulator is compulsory then those who refuse to sign up might eventually have to be prevented from publishing, which would amount to state licensing and place unjustifiable restrictions on free speech.

But because joining a self-regulator is voluntary, there needs to be some incentive for joining, and those who remain outside of a self-regulator need to be put at a relative disadvantage if they act unethically. The C&C Bill amendments creates a system of sticks and carrots for this purpose.

The sticks
The first stick is the power to award exemplary damages against a publisher who could reasonably have joined the regulator and didn't, *and* who has shown "deliberate or reckless disregard of an outrageous nature for the claimant's rights". Although much has been made of this in the press, in practice this is such a high bar to be reached that exemplary damages would only apply in the most serious cases. (For example, if a national newspaper was not a member of the self-regulator and then published dozens of front pages falsely accusing a couple of murdering their daughter.)

The second stick will have much more of an effect on the day-to-day running of a news organisation, and this relates to the costs of court action. If a publisher is a member of the self-regulator, then someone making a complaint will have access to a cheap and quick arbitration service which can adjudicate on their claim without having to go to the expense or hassle of using the courts. If the publisher is outside the regulator then this arbitration service isn't available, so if somebody makes a legal claim against the publisher then, in the ordinary course of events, the *publisher* will be required to pay the legal costs, *whether they win or lose the case*.

When deciding if either exemplary damages or cost penalties should apply, the reasons why a "relevant publisher" (defined below) is not a member of a recognised self-regulator will be taken into account. For example, if the joining fee is a significant sum then it wouldn't be reasonable for a small news organisation to be a member.

The carrots
Alongside these sticks are the carrots. Firstly, a "relevant publisher" who is a member of a recognised self-regulator is immune from having to pay exemplary damages – a valuable carrot but not one which will have much effect on the day-to-day running of a news organisation as these exemplary fines will rarely be awarded. The second carrot is more significant, providing benefits in relation to the costs of court action – the flipside of the costs penalties above.

[2] The C&C Bill amendments were first added in the Commons after the Royal Charter was agreed, and on 25 March the Bill went back to the the House of Lords to consider these amendments. Two further changes were made at this point. One was to correct an error in the new clause dealing with the incentives and penalties on court costs, which means that the House of Commons can now re-amend this clause if it chooses to. The second change was to add a "holding amendment" to the list of exceptions to the definition of "relevant publisher", which again allows the House of Commons to re-amend this part of the Bill after the Easter recess. This was done deliberately when issues were raised about the position of small publishers, online journalists and bloggers.

If somebody wants to make a complaint against a publisher who is a member of a recognised regulator, they should go to the arbitrator. If they skip over this and launch straight into court proceedings, it is the *complainant* who will have to pay the publisher's costs, *whether they win or lose the case.* This could be of significant benefit to publishers because, if the arbitration system is quick and cheap as promised, it will greatly reduce the cost of legal actions and providing a cheap mechanism for dealing with legal threats. This aspect of the arrangement has been down-played but could be hugely advantageous to serious news organizations and investigative journalism by protecting members of a recognised self-regulator from vexatious court action or intimidating claims from “libel bullies”.

Who is a "relevant publisher"?

The carrots and sticks above are derived from the Leveson Report and may provide an effective solution to the 'Desmond problem' of mainstream press organisations who refuse to join the regulator. But an important issue has arisen in relation to the C&C Bill amendments concerning the definition of "relevant publishers" – that is, those to whom the “sticks” should apply.

(N.B. The definition of a "relevant publisher" in the C&C Bill *is not the same* as the definition of a "relevant publisher" in the Royal Charter – this is the source of a lot of the confusion surrounding the amendments. In this document, the term "relevant publisher" refers to the C&C Bill definition.)

The current definition of a "relevant publisher" in the C&C Bill amendments is an organisation that meets *all four* of the following criteria:

- publishing news-related material
- being written by different authors
- being subject to editorial control
- being published in the course of the business

In addition, there are the following exemptions:

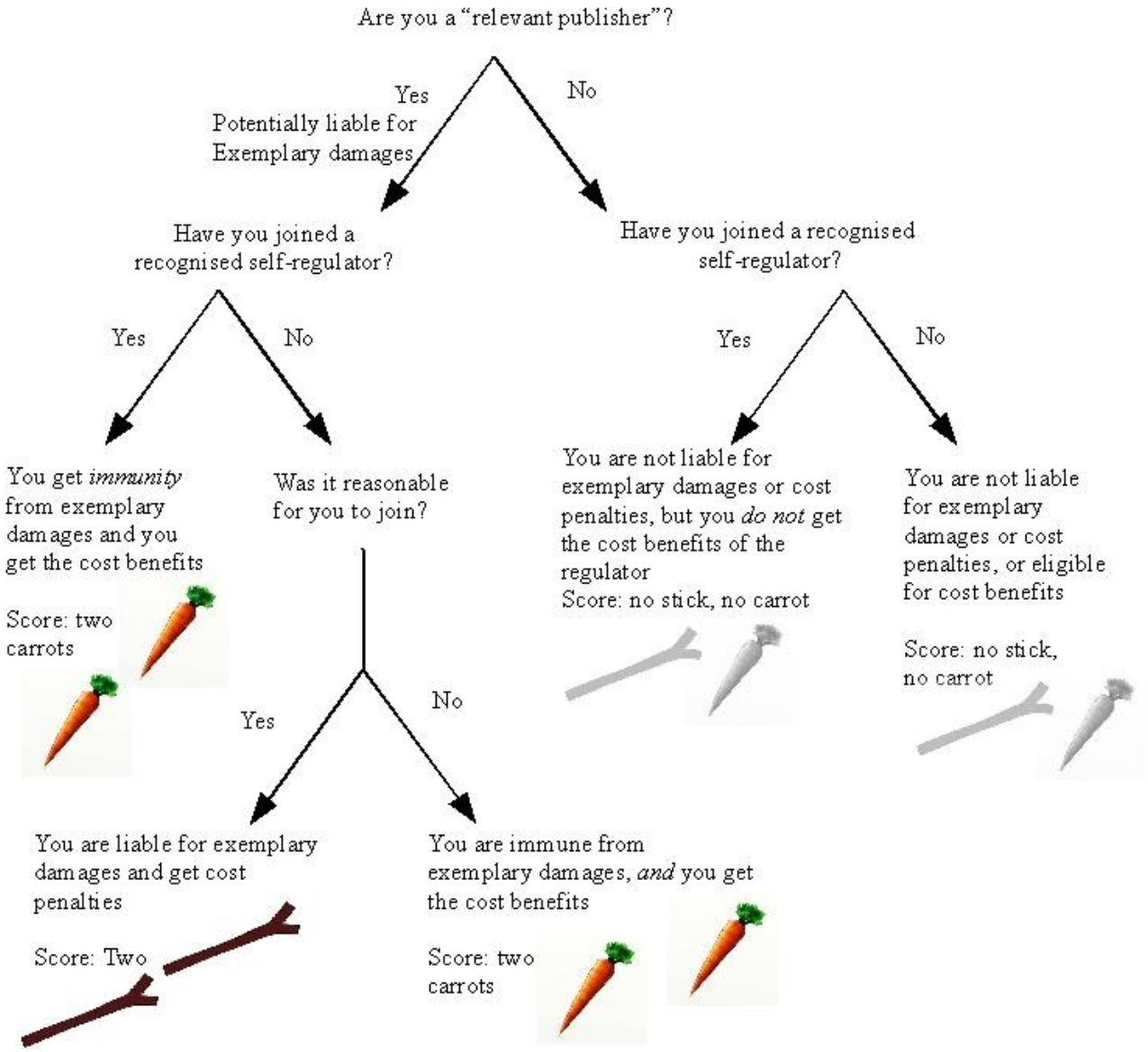
- broadcasters
- special interest titles relating to hobbies or professions, which don't primarily contain news
- scientific or academic journals
- public bodies or charities
- company news publications
- book publishers

We want your views on this:

There is also a “holding amendment” which exempts "a person who publishes a small scale blog”. This was left undefined so that MPs can debate this part of the Bill again. The aim of this exemption is to ensure that small news organisations that could not reasonably be expected to pay membership fees to a regulator would not be penalised for failing to join. A number of suggestions have been made as to how these exemptions should be clarified, such as having a turnover threshold. Part 1 of the consultation asks for your opinions on these suggestions.

When do the carrots and sticks apply?

When determining whether the carrot or sticks in the C&C Bill amendments as currently drafted apply to a news publisher there are three factors to be taken into account a) whether they are a "relevant publisher" b) whether they are a member of a recognised regulator and c) if not a member, whether it would be 'reasonable' to have joined a recognised regulator. (For example, it wouldn't be reasonable for someone to join a regulator where the fees were higher than your annual turnover.) The flow chart below shows how the incentives and disadvantages would apply if the amendments as they currently stand became law:



What is noteworthy here is that, while the stick only applies to "relevant publishers", so does the carrot: if an exempted publisher chooses to join a recognised regulator, abides by their Code and uses the arbitrator, they *do not* get the cost benefits in court. This is NOT what Leveson recommended. He made clear that any publisher who joins a recognised self-regulator, and subscribes to low cost arbitration, *should* receive the carrot of costs benefits, even if they are not "big enough" to be liable for the sticks.

We think this is a mistake. The Royal Charter reflects Leveson, which is why its definition of who should be eligible for benefits is wider than the definition of a "relevant publisher" in the C&C Bill.

We want your views on this:

If you are part of a small news organisation, you will probably want to be exempted from exemplary damages and cost penalties, but you may also want to have the option of accessing the cost benefits of a recognised self-regulator. Part 2 of our consultation asks for your opinions about who these benefits should be available to.

What happens now

Parliament returns after the Easter recess on 15 April, and the C&C Bill will return to the House of Commons. It will have to be finalised by the end of the Parliamentary session at the end of April so time is short. The Secretary of State for DCMS, Maria Miller, has made noises about consulting with the 'newspaper industry' over the Easter recess, but there does not seem to be a formal attempt to engage with other kinds of news organisations. Ideally, a number of small publishers, online news sites and bloggers will get behind a particular proposal and lobby all three parties over the next few weeks – this is what our consultation is intended to facilitate. Our politicians are aware that they have made mistakes in the drafting of these amendments, and if a workable proposal appears to have widespread support there is every chance it will be adopted.

Who are we?

The Media Reform Coalition was founded in autumn 2011 to bring together academics and civil society groups in the context of the Leveson Inquiry and Communications Review. We are particularly interested in measures that will increase the plurality of voices within our media, and have always argued that small publishers, online news sources and blogging provide a valuable diversity of views and are a vital source of quality journalism. Our recommendations for media reform which were submitted to the Leveson Inquiry can be read on our website. This document was written with additional input from Hugh Tomlinson QC, Carl Gardner and Evan Harris.

Respond to our consultation now