

## **MST Response to PCC submission to Select Committee**

Thursday 13<sup>th</sup> March, 2014

We are grateful for the opportunity to respond to the PCC submission to the Culture, Media and Sport Select Committee regarding IPSO.<sup>1</sup> Establishing whether IPSO complies with Leveson's Recommendations for independent and effective self-regulation is critical to understanding if IPSO will work for the public.

Therefore we welcome this first chance to engage with the PCC on this issue. Despite what Lord Hunt said to the Select Committee, the PCC has not previously sought to rebut the MST assessment of IPSO, published on 15<sup>th</sup> November 2013. Lord Hunt has publicly made his support of IPSO clear and, prior to November, we have discussed regulation in general terms with Lord Hunt and Michael McManus.

However, for clarity and for the record, from the publication of our IPSO assessment on 15<sup>th</sup> November 2013, until the Select Committee hearing on 28<sup>th</sup> January 2014:

- We did not meet Lord Hunt or Michael McManus to discuss press regulation or debate with them on a public platform;
- We did not receive any correspondence from Lord Hunt or Michael McManus regarding the IPSO assessment (with the exception of an acknowledgment of receipt of the assessment from Michael McManus);
- We did not see any response to our IPSO assessment from the PCC, published or unpublished.

We would be happy for the Select Committee to view any relevant correspondence on this (and have already sent correspondence to the Chairman) and we have written to Lord Hunt making that clear.

Also for the record, our IPSO assessment does not, as Lord Hunt told the Select Committee, assess IPSO against the Royal Charter.<sup>2</sup> It assesses it against Leveson's Recommendations. This has, we hope, been corrected separately by the PCC.

The PCC submission to the CMS Select Committee is all the more welcome since it is the first published response to our assessment of IPSO, which found that IPSO only satisfied 12 of Leveson's 38 Recommendations for an independent and effective self-regulator. All the conclusions in this document that relate to IPSO and the Leveson Recommendations are drawn from the research and evidence laid out in detail in our previous report.

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<sup>1</sup> Further supplementary written evidence submitted by the Press Complaints Commission [CAP0004], <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/6055>

<sup>2</sup> "do not forget the Media Standards Trust analysis is based on the criteria set out in the Royal Charter", Lord Hunt oral evidence to CMS Select Committee, 28/01/14, <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5929>

The PCC submission is, however, deficient on a number of levels:

1. The submission does not engage with the MST analysis with regard to the overwhelming majority of Leveson Recommendations:
  - It only refers to the MST analysis in relation to Recommendation 10 (complaints handling) and Recommendations 1-5 (independence of appointments)
  - On Recommendation 10, the MST concluded that IPSO *did* satisfy Lord Justice Leveson's Recommendation on complaints handling (it was one of the 12), so it is not clear why the PCC document should choose to take issue with that point
  - On Recommendations 1-5, the MST analysis demonstrates (pp.26-27) that the role of the Regulatory Funding Body is substantial and necessarily represents 'influence from industry'
  - In addition, the MST analysis lists a further 21 Recommendations not fulfilled by IPSO, or where there is insufficient information to judge whether it will be fulfilled. The PCC submission makes no attempt to dispute these assessments.
2. The submission stops at Recommendation 24:
  - The response ignores 14 of the relevant Leveson 38 Recommendations after Recommendation 24
  - We therefore must assume that it agrees with the MST's IPSO assessment of these. The assessment found that IPSO failed 4 of these 14.
3. The submission claims that IPSO adheres to 'Leveson principles' that the judge himself never used, and which feature nowhere in his report:
  - Leveson never defined any 'Leveson principles'. As with any public inquiry report, Leveson made 'Recommendations'
  - One therefore has to assume that the PCC has either subjectively and selectively defined these itself for the purpose of its response, or that it is basing them on five "key requirements" suggested by the Prime Minister on 29<sup>th</sup> November 2012:

"In volume IV of the report,' the Prime Minister said, 'Lord Justice Leveson sets out proposals for independent self-regulation organised by the media. He details the key "requirements" that an independent self-regulatory body should meet, including **independence of appointments and funding, a standards code, an arbitration service, and a speedy complaint-handling mechanism. Crucially, it must have the power to demand up-front, prominent apologies and impose up to million-pound fines. These are the Leveson principles.** They are the central recommendations of the report.'" (David Cameron, Hansard, 29 Nov 2012, Column 448) [emphasis added]

This was shorthand for the purposes of an address to the Commons rather than a reinterpretation of the Leveson Report. It is significant that, when it came to the

implementation of the Leveson report, the Prime Minister did not restrict himself to these five 'principles' but used Leveson's Recommendations.

Yet even based on the PCC's undefined 'principles', using the Prime Minister's shorthand, it is clear that IPSO comprehensively fails to achieve even these:

- **Independence:** the system is deeply compromised by the degree of control exercised by the largest publishers through the funding body – the Regulatory Funding Company
  - **Standards code:** the IPSO board, independent or not, will not be responsible for the Code as Leveson recommended. Moreover, code breaches will in many cases remain unrecorded and undisclosed to the public even when they are proven or admitted, thus undermining the foundation of an effective regulatory system
  - **Arbitration:** an arbitration system may – if it passes the RFC veto – exist at some future point in time. But even if it does, it will be optional for each publisher as a whole and, even for participating publishers, at the discretion of such publishers on a case-by-case basis. So in practice complainants will be denied fair access to affordable legal redress.
  - **A speedy complaint-handling mechanism:** IPSO retains the PCC approach to resolving complaints through mediation and institutes a process that will, if anything, take longer than the PCC took.
  - **Power to demand up-front apologies and impose up to million-pound fines:** IPSO has no power to demand up-front apologies. There is no process for imposing any fines on a newspaper for systemic failure, or for serious failure as Leveson recommended. IPSO sets the threshold higher – at serious *and* systemic failure – and even in that case the process by which 'million-pound fines' would be levied is constructed such that the likelihood of proportionate financial sanction is minimal
4. The submission admits that IPSO does not satisfy at least five of Leveson's Recommendations but does not acknowledge that this compromises IPSO's adherence to the Leveson report. It admits that:
- IPSO does not guarantee to provide an arbitration service (and even if it does, will allow publishers to opt in and opt out whenever they choose)
  - IPSO will significantly raise the bar to some third party complainants ('representative group' complaints)
  - IPSO will not have the power to direct apologies
  - IPSO will not have responsibility for writing or changing the Code of Practice
  - IPSO will have to negotiate its budget with the industry (via the RFC) on an annual basis and not, as Leveson recommended, on a 4-5 year basis

The four areas cited above demonstrate major failings. Together these mean that IPSO cannot be an independent and effective regulator on behalf of the public and that, in practice, it will be little different from the failed and discredited PCC.

In the rest of this response we individually address each of the PCC's points regarding IPSO. We conclude that:

- There is no need to change any of the assessments made in the original MST report
- IPSO still only satisfies 12 of Leveson's 38 recommendations
- The PCC insistence on referring to 'Leveson principles' is unhelpful and misleading, based as it is on their subjective reading of the Leveson report. However, IPSO does not even satisfy those limited criteria

Table 1: IPSO and the Leveson Recommendations  
As published on 15 November 2013

Leveson Recommendation	Status
1	Not satisfied
2	Not satisfied
3	Not satisfied
4	Not satisfied
5	Not satisfied
6	Not Satisfied
7	Not Satisfied
8	Not satisfied
9	Satisfied
10	Satisfied
11	Not satisfied
12	Satisfied
13	Not satisfied
14	Satisfied
15	Not satisfied
16	Not satisfied
17	Satisfied
18	Not satisfied
19	Unclear/insufficient information to date
20	Not satisfied
21	Not satisfied
22	Not satisfied
23	Satisfied
24	Unclear/insufficient information to date
25	Relates to the Information Commissioner – not relevant here
26	Relates to court costs – not relevant here
27	Relates to the Recognition Panel – not relevant here
28	Relates to the Recognition Panel – not relevant here
29	Relates to the Recognition Panel – not relevant here
30	Relates to the Recognition Panel – not relevant here
31	Relates to the Recognition Panel – not relevant here
32	Relates to the Recognition Panel – not relevant here
33	Relates to the Recognition Panel – not relevant here
34	Unclear/insufficient information to date
35	Satisfied
36	Not satisfied
37	Satisfied
38	Not satisfied
39	Unclear/insufficient information to date

40	Not satisfied
41	Satisfied
42	Not satisfied
43	Unclear/insufficient information to date
44	Satisfied
45	Unclear/insufficient information to date
46	Satisfied
47	Satisfied

## *Independence*

In its submission to the Select Committee the PCC has chosen to ignore the scale and extent of powers of the Regulatory Funding Company (RFC), the successor to PressBoF. It is the breadth and depth of the RFC's powers that so compromises the independence of IPSO.

The PCC has, for example, chosen to ignore the fact that:

- The RFC has a veto over any changes to the IPSO regulations **(IPSO Contract, Clause 7.1)**
- The RFC has a veto over any changes to the Code - variations to the Editors' Code, 'must first be approved by the Directors [of the RFC]' **(RFC Articles 10.11)**
- The RFC has a veto over the arbitration service **(IPSO Contract, Clause 5.4.3)**
- The RFC controls the voting arrangements of its members **(IPSO Contract, Clause 6.1)**
- The RFC determines the size of the investigations fund, and payments to it **(IPSO Contract, Clause 10)**
- The RFC writes the financial sanctions guidance which determines the scale of fines, in consultation with the IPSO Board **(IPSO Contract, Clause 1.1)**
- The Editors' Code Committee is not even a subcommittee of the IPSO board but of the RFC **(RFC Articles 2.2)**
- The RFC, rather than the IPSO board, determines the pay of members of the Complaints Committee **(IPSO Articles 27.9)**
- The RFC, rather than the IPSO board, determines the pay of the 'independent' members of the Appointment panel **(IPSO Articles 26.8)**

In addition to this range of powers, and the role it may be expected to play in gathering and distributing funding for the Regulator, the RFC has influence over appointments. Yet the PCC submission ignores the full range of powers, and focuses only on the RFC's role in appointments. Even then, the PCC seeks to downplay the role of the RFC as set out in IPSO's own documents.

The Regulatory Funding Company is, as its name suggests, the body that organizes the funding of self-regulation by the industry. As such it performs a similar role to the Press Standards Board of Finance (PressBoF), which organized the funding of the PCC. However, for reasons that are not clear, given the usual role of funding bodies in comparable regulatory systems, the RFC has powers that go far beyond raising and allocating funds.

Leveson could not understand why PressBoF – or an equivalent industry funding body – needed wide-ranging powers, or indeed why it was even necessary:

*'In my opinion' he wrote in his report, 'there is no need for such a body [as PressBoF] to exist at all' (p.1,761-1,762).*

Yet the RFC is as powerful as PressBoF, if not more so.

With respect to appointments, it is unclear why the funding body should have any part to play at all. Yet, as the original MST assessment stated, the RFC has a 'substantial role'. The IPSO documents state that, when it comes to the appointment of certain members ('industry members' – a distinction which Leveson did not endorse) of the Board, IPSO '**shall** take account of the views of the Regulatory Funding Company'. The documents do not say that that IPSO 'may' take account of the views of the RFC, they say that it 'shall'. This means that IPSO is constitutionally required to take account of the RFC's views in respect of these appointments. IPSO is not required to take anyone else's views into account in respect of these appointments or the other appointments. This is, as the original MST assessment of IPSO states, 'a substantial role'.

The PCC submission fails to mention that IPSO also has to take account of the views of the RFC when appointing the 'industry representatives' - again a term rejected by Leveson - of the complaints committee. Further, it fails to mention that the RFC determines the pay of the members of the Board of IPSO, the pay of the members of the complaints committee, and the pay of members of the Appointment Panel.

It is hard to see how this adheres to the words or the spirit of Leveson who said in his very first Recommendation that appointments should be made '*without any influence from industry or Government*' (Leveson Recommendation #1).

The PCC also fails to acknowledge that the RFC cannot help but be dominated by the largest publishers, further undermining its independence, and the independence of IPSO.

Due to the way that voting is structured, even many publishers – as members of the RFC – will have little or no power over any of the key decisions made. Indeed even when the smaller publishers are all in agreement, their votes can be overruled by the RFC Directors. If the RFC is intended to be a 'membership body' for publishers, there is no clear reason why the Directors of the RFC should have a separate, decision-making power co-equal to that of its members.

Under the IPSO system, a 'Majority Vote' is deemed to be 66% of eligible votes of all members, and 66% of eligible votes cast by eligible members in two or more of the different sectors designated by the RFC (National newspapers, Regional newspapers, and Magazines) (**RFC Articles, Schedule 1.15; IPSO Contract, Clause 6.2**). The percentage of votes any publisher has (in total or in its sector) is determined by the percentage of the total subscription that the publisher contributes (**IPSO Contract, Clause 6.1.4**). The subscription is set by the Directors of the RFC, and the method for determining who pays what is also set by the Directors (**RFC Article 24.6**).

The subscription formula, though opaque, is based on a combination of revenue and circulation. Therefore, where the 'majority' voting threshold of 66% applies,

it will be impossible for any vote to proceed without the agreement of the largest publishers.



## *Code of Practice*

On the Code, the PCC submission is misleading, and fails to address either Leveson or the MST assessment.

It is not correct to say, as the PCC submission does, that ‘The Editors’ Code of Practice, in its existing form, received nugatory criticism, if any, from witnesses before the Leveson Inquiry or in the Report’. Leveson made clear that it was not his role to seek to re-draft the Code, which is why he did not list the faults in the existing drafts, even though a number of witnesses drew attention to them:

‘I have made no attempt during the course of this Inquiry to conduct a full scale evaluation of the Code of Practice. ...Where comments on, or criticisms of, the Code have been made in evidence I have reflected them in this report, but that should not be read as an analysis of the Code’ (p.1,762)

‘The Inquiry has not undertaken a full systematic examination of the existing Editors’ Code but it has identified some deficiencies that have been identified in evidence presented to the Inquiry. Many witnesses have maintained that it is a good Code; others have argued that it has weaknesses... Overall, there is room for improvement of the current Code’ (p. 1,588).

Leveson did, however, focus considerable attention on who had responsibility for writing and making changes to the Code of Practice. An issue the PCC submission chooses to avoid. Leveson wrote that giving responsibility to serving editors to set standards would be ‘quite wrong’:

‘Whilst I recognise the importance of having a strong editorial voice advising on standards, it seems to me quite wrong that editors should actually be responsible for setting standards’ (Leveson Report, Volume 4, p.1,624).

‘It is a clear flaw in the self-regulatory system that the Editors’ Code of Practice Committee, the body with sole authority to amend the Editors’ Code of Practice, is made up exclusively of serving editors and executives. This gives rise to at least the perception that rules are being made which suit the editors themselves and not the public’ (page 1,529).

For this reason he was clear that responsibility for the Code should lie with the Regulator, and that any proposal that gave those in charge of the regulated publishers control of the code should not be accepted:

‘[The] suggestion that those in charge of the regulated entities should be responsible for the code pursuant to which they are regulated is not one that would (or should) command support’ (p.1,627).

This did not preclude an advisory committee on the Code, with serving editors on it, which was “desirable”:

'I do not accept that the concept of 'self-regulation' requires the presence of serving editors either on the body that sets the standards, although, as I have indicated, I recognise that it would certainly be desirable that serving editors should have an advisory role in standards setting' (p.1,625).

Yet IPSO's rules give the code committee, explicitly called the 'Editors' Code of Practice Committee', responsibility for writing the Code:

The Code is 'written by the Editors' Code of Practice Committee, approved in accordance with the articles of association of the Regulatory Funding Company and adopted by the Regulator's Board;' (IPSO Articles of Association, Interpretations, 1.22).

This directly contravenes the Leveson Recommendation that a Code Committee be advisory, and that the Board be responsible for the Code:

'The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which may comprise both independent members of the Board and serving editors' (Leveson, Summary of Recommendations, Recommendation 7, p.32).

Therefore, as stated in the original MST assessment of IPSO, responsibility for writing the Standards Code is given to the Editors' Code of Practice committee, as with the PCC. This committee is itself a subcommittee of the RFC. This contravenes Leveson's Recommendation that the Code should be the responsibility of the Board.

The PCC submission to the Select Committee chooses to ignore this significant Recommendation of the report.

## ***Complaints***

The PCC submission chooses to critique one element of the MST assessment of the IPSO complaint system – the time that a complaint can be dealt with by the relevant publication. This is despite the fact that the MST assessment concluded that the IPSO plans *fulfilled* Lord Justice Leveson’s recommendation on this aspect of complaints (Recommendation 10, p.29).

Yet the submission ignores the substantive failure of the IPSO complaints system. Namely that the complaints service outlined in IPSO mirrors the existing PCC complaints service (p.16). As such it represents a continuation of mediation, not regulation, and will continue to fail to make transparent the scale of code breaches by publications.

Moreover, since under IPSO the complainant is required to go to the publication first, and there is no regulatory incentive to resolve it there quickly, then complaints are almost certain to take longer to resolve than at present.

The PCC submission does not seek to rebut these findings.

The MST assessment also found that, in the IPSO regulations, obstacles are deliberately put in the way of complainants that are contrary to Leveson’s recommendations and would prevent almost all complaints from representative groups (p.17). Indeed it finds that the bar is set even higher than currently exists at the Press Complaints Commission.

The PCC accepts that IPSO makes it more difficult for representative groups to make complaints, claiming that the industry was concerned ‘IPSO would be swamped by complaints from lobby groups’. This despite the fact that Leveson (and therefore the Royal Charter) specifically make allowance for this:

‘The Board [of any regulator] will need to have the discretion not to look at complaints if they feel the complaint is without justification, is an attempt to argue a point of opinion rather than a code breach or is simply an attempt to lobby’ (p.1,765).

Even the PCC’s claim that ‘IPSO will set a 28-day time limit on the publication’s internal complaints process’ is not accurate. According to the Regulations, there is no automatic obligation for IPSO to take over the complaint after 28 days. If this is the intention of the Regulations then that should be made clear and would be welcome. IPSO Regulation 13 states:

“In the case of any complaint which is not rejected by the Regulator or which has been re-opened following a review, in each case pursuant to Regulation 12, the Regulator shall notify the Regulated Entity of the complaint. Consideration of such complaint by the Regulator will not begin until the earlier of: (i) the exhaustion of the Regulated Entity’s internal complaints process; (ii) a request by the Regulated Entity for the Regulator to consider the complaint; or (iii) 28 days after the Regulated

Entity has received notice of the complaint from the Regulator pursuant to this Regulation 13, unless the Regulator determines that its earlier involvement is essential” [underlining added]

To avoid ambiguity the underlined wording needs to say “will begin at the earlier of”.

Although, even were it to be made clear, it still ignores the fundamental issue: that there is no incentive for a publication to resolve the complaint internally. Whatever time period elapses before the complaint is ‘taken over’ by IPSO, once it is taken over the process of mediation starts again. There is no obligation on the regulator to rule whether or not the publication has breached the code. There is, therefore, no downside for publications should they fail to resolve a complaint before it is taken up by IPSO.

So from the perspective of the public, the obligation to go to the offending publication first simply extends the potential time to resolution. In this respect the process is worse than that operated by the PCC where a complainant can go straight to the PCC. Whether by more or less than 28 days, it adds to the length of the complaints process and could exacerbate what Leveson termed “complaint fatigue” (p1,558).

If IPSO were to have the power to record and report on all code breaches that occur in the complaints it handles once it is obliged to intervene, this would be a powerful incentive for publishers to resolve complaints quickly. As IPSO does not have that power, no such incentive exists.

## ***Powers, Remedies and Sanctions***

With respect to powers, remedies and sanctions, the PCC submission fails to address most of the questions raised in the MST assessment.

The MST assessment of IPSO found that the investigations process was not 'simple', as Leveson proposed it should be (see IPSO regulations 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 62, plus more on application of sanctions). Nor is it 'credible' – as Leveson also stipulated – given the number of opportunities provided to publishers to delay and obstruct the investigation, and given that those members of the public who were subject to the 'serious and systemic' breaches do not have a formal role in the process.

The publisher is, in the IPSO process, given six opportunities to intervene. These are spelt out in the Regulations:

1. Board [of IPSO] decides to start [an] investigation and writes to regulated entity(s) with reasons and remit – **PGRE (Publisher Group Regulated Entity – a member of the regulatory scheme) has 14 days to respond** (IPSO Regulation 42)
2. Investigations panel invites representatives of PRGE to a meeting at which **PGRE can make oral representations** (IPSO Regulation 46)
3. At any point during the investigation the **PGRE can dispute the scope of the investigation** or the need for documentary evidence, which is then referred by the panel to the Board (IPSO Regulation 48)
4. Draft report is sent to **PGRE who then has 28 days to respond** (IPSO Regulation 50)
5. When a decision is made **the PGRE can request that the decision be reviewed** (IPSO Regulation 53)
6. The review panel will then prepare a note of its review of the decision and send it to **PGRE which will have 14 days to comment on the draft** (IPSO Regulation 60).

In addition, if, following the investigation, the Board decides to impose a fine on the publisher, then there has to be another hearing with the publisher (IPSO Regulation 64). After this the publisher can apply for judicial review.

The PCC submission does not address these failings, but simply restates IPSO's ability to investigate.

With regard to apologies, Leveson was quite clear the regulator should have 'the power to direct the nature, extent and placement of apologies'.

'It is', Leveson wrote, 'frankly absurd that the regulator should not have the power to determine the location of an adjudication or apology' (p.1,633).

IPSO, as the PCC submission acknowledges, does not have such power.

## ***Reporting***

On reporting, IPSO will not be implementing, or indeed 'surpassing', the Leveson report, as the PCC submission claims.

Based on the documents it has published, IPSO will not record complaints – whether or not the code has been breached:

1. where the complaint is not pursued by the complainant;
2. where the complaint is rejected on the basis of not being received in time (IPSO Regulation 11);
3. where a complainant and Regulated Entity reach agreement (IPSO Regulation 31); or
4. where the Regulator decides that the Regulated Entity's remedial measure is sufficient, whether or not the complainant agrees (IPSO Regulation 32).

As the MST assessment said, this will substantially reduce the recording of instances of actual code breaches, and hamper public understanding of the effectiveness of the system and the performance of the Regulated Entities.

## Conclusion

The MST has always been open to responses from the PCC, from the industry, from IPSO, and from others, and ready to amend our IPSO assessment where necessary. For this reason we were disappointed with the lack of response when the assessment was first published.

Now that the PCC has finally responded, its submission does not succeed in refuting any of the specific judgments made in the MST assessment about whether IPSO satisfies Lord Justice Leveson's 38 recommendations for an independent and effective self-regulator, and indeed it fails to contest most of them.

Therefore the conclusion of the original MST assessment – that IPSO only satisfies 12 of the 38 recommendations that Leveson made for an independent and effective self-regulator – must remain unchanged. The original MST assessment makes clear the full evidence from which that conclusion was formed (pp.26-41).

IPSO only represents a change from the PCC insofar as it suits the industry to change. As such, the IPSO plans continue a tradition, over the past seven decades, of the newspaper industry selectively implementing those reforms it is prepared to accept, and rejecting those that it does not.

Following each of the three Royal Commissions (1947-9, 1961-2, 1974-7) and the Calcutt Committee Report (1991), the industry simply ignored those recommendations that it did not like. Those establishing IPSO have followed a similar path by ignoring or diluting those recommendations that they do not like.

The substitution by those writing the PCC submission to the Select Committee of 'Leveson principles' for the Recommendations of the Leveson report appears to be a convenient way in which to bypass those Recommendations the industry does not wish to implement, and follow the familiar pattern of selective implementation.

The end result is a deeply compromised system, in which the public is left without access to fair legal redress, a complex complaints mediation system which favours the publisher over the individual, and a regulator that cannot regulate on the basis of code breaches. Should IPSO go ahead as it is, the parallels with the aftermath of every previous Inquiry into press standards and regulation will be striking. It will follow the 'pattern of cosmetic reform' that Leveson cited as characteristic of the legacy of each previous inquiry.