

The 12 February Royal Charter (Conservative, DCMS published) *Material differences from Leveson recommendations*

Closeness to Leveson: not close

This charter is more detailed but considerably weaker than the version distributed (but not published) on 31 December. The specific aspects that have been diluted relate mainly to the recognition criteria, and correspond closely to those aspects that were objected to by Peter Wright, on behalf of the industry, in his letter to Oliver Letwin (4th January 2013).

Independence

From political influence

Amendment: there are three hurdles that have to be surpassed to make amendments to the Royal Charter: unanimous resolution by the Recognition Panel, confirmation in writing by leaders of the three main parties, approval by a two-thirds majority of each House (Article 9.1 and 9.2).

However, there is no legal protection from interference by Ministers or other Privy Councillors. Legal advice to the press (from Lord Pannick) said that the Charter was not adequately protected from Ministerial interference.

Funding: would be granted to the Recognition Panel from the Exchequer to set up the Panel and for its first three years of operation (Article 11). After that it would be expected to recover its funds from the regulators who make applications. For the first three years (and potentially after) it would be responsible for providing budgets to the DCMS and, if it needed more funding, applying to the Exchequer.

Appointments: there is no bar on Party Political peers on the appointments committee, on the Recognition Panel or on the Board of the regulator itself. This Charter also proposes that Lord Brown of Eaton-under-Heywood be chair of the appointments committee (to the Recognition Panel), even though Leveson said the chair and panel should 'be appointed by another process independent of the press, independent of the government and independent of the legislature'.

From press influence

Appointments: this Charter further states that one of the members of the appointments committee to the Recognition Panel should 'represent the interests of the press' despite Leveson's stipulation about independence.

There is the potential for a press veto on appointments to the regulator (Schedule 3, Clauses 2-5). In the recognition criteria, the appointments panel only now has to be a nominations panel. Since there is no indication as to who will appoint the nominees or how many nominees will be put forward, then it provides an opportunity for the industry to veto nominees.

Funding: on independence of funding, there is also an addition to clause 1 of the recognition criteria which reads: 'For the avoidance of doubt, the industry's activities in establishing a self-regulatory body, and its participation in making appointments to the Board in accordance with criteria 2 to 5, or in financing the self-regulatory body shall not constitute influence by the industry in breach of this criterion.' This could allow an industry funding body, such as PressBoF to exercise as much influence as it sees fit. Historically, the industry has used its funding body to control the PCC (see evidence of Baroness Buscombe to Leveson Inquiry).

Arbitration (Schedule 3, paragraph 22)

This Royal Charter requires that a regulator provide an arbitration scheme, but does not, as Leveson recommended, provide free access to that scheme for the complainant, only 'inexpensive'.

Powers

Of the Recognition Panel

Decision making: under this Royal Charter there is no leeway for the Recognition Panel to use its judgment when deciding whether a regulator is independent and effective. The process of recognition is a tick box exercise: 'The Board of the Recognition Panel shall grant recognition to a Regulator if the Board is satisfied that the Regulator meets the recognition criteria.' (Schedule 2, Clause 1).

Ad hoc reviews: the Charter changes Leveson's recommendation for ad hoc reviews to 'exceptional reviews'. However, it also states that such a review can be made where 'there have been systemic breaches of the Standards Code'.

This is counter to Leveson's recommendation in his report that reviews be restricted to 'specially defined circumstances' and only when the recognition criteria are breached by the self-regulator, as opposed to when the Standards Code is breached by individual publishers (p.1,773). The wording in this Charter gives the potential for the Recognition Panel to intervene on issues of content, not of process.

Reporting on failure: the Recognition Panel would be obliged to lay a report before Parliament each year, though is not obligated to report on the success or failure of the scheme.

Of the regulator

Corrections and apologies: the recognition criteria in this Charter say that, when it comes to corrections and apologies, the regulator should only have the power 'where appropriate' to 'require' remedial action (Schedule 3, paragraphs 15 and 16). This is, according to legal advice, considerably weaker than Leveson's recommendation that the regulator should have 'appropriate power' to be able to 'direct' corrections and apologies.

In addition, the recognition criteria say that the regulator would only have such power after negotiation between the complainant and the newspaper has failed. This would allow for a further weakening in the power of the regulator.

Investigations: the recognition criterion is the same as in Leveson, though brief and unspecific. In conjunction with the lack of flexibility in the recognition process this would allow for investigations to be complex and lack credibility. This was an issue Leveson highlighted in his report with respect to the industry plan:

‘This aspect of Lord Black’s proposal [investigations] is so weighed down with process that it is difficult to see how the investigative powers could ever be used successfully.’

Investigations should, Leveson said, be ‘simple and credible’ (p.1,766). The Black proposal had seven stages with many opportunities for appeal or interruption. Although Leveson was clear that this plan was unacceptable, it would pass the criteria in this Charter as it gives no consideration to the simplicity or credibility of the investigation system.

Fines: the recognition criteria give the regulator the power to impose financial sanctions up to £1m, though constrains it to ‘up to 1% of turnover of the publication concerned with a maximum of £1,000,000’. It is not made clear how the turnover of a publication would be established when it is part of a larger news group.

The Standards Code

The recognition criterion in this Charter regarding the code reverses Leveson. Leveson was clear about how a standards code should be set and who should set it:

‘A new system must have an independent process for setting fair and objective standards. In my opinion, this proposal fails to meet that test by leaving the setting of standards in the hands of the industry, albeit with a check by the Trust Board. A relatively small change to the proposal [submitted by the industry], making it clear that the Code Committee is advisory and that the Trust Board is responsible for establishing and altering the code, would go a considerable way to deal with this concern’ (p.1,649).

Leveson was even clearer about the role of serving editors in setting the Code:

‘The continuation of the Code Committee with a majority of serving editors, acting in more than an advisory role, does not allow for independent setting of standards’ (p.1750).

Yet this Charter’s recognition criteria remove responsibility from the Trust Board and give it to the Code Committee, which would be composed of a majority of serving editors (Schedule 3, Clause 7):

'The standards code must ultimately be adopted by the Board, and be written by a Code Committee which is comprised of both independent members and serving editors. The Code Committee must conduct an annual public consultation on changes to the code.'

This would allow editors to be the ultimate authors and owners of the Code, rather than advisers to the independent Board.

Complaints

Third Party Complaints

In this Charter third party complaints are possible about accuracy but under other parts of the Code only:

'b) where an alleged breach of the code is significant and there is substantial public interest in the Board giving formal consideration to the complaint, from a representative group affected by the alleged breach'

This makes it extremely hard for third parties to complain. A 'significant' breach and a 'substantial public interest' are, necessarily, very high and subjective tests that ensure the exclusion of all but a fraction of third party complaints. The 'formal' test adds yet another hurdle (given, for example, that the PCC formally considered around 28 out of 7,500 complaints in 2011, and the ASA formally decides on a similarly small proportion).

Moreover, third party complaints are already subject to the safeguards in Leveson, notably that: 'In the case of third party complaints the views of the party most closely involved should be taken into account.' Also, that 'The Board will need to have the discretion not to look into complaints if they feel that the complaint is without justification, is an attempt to argue a point of opinion rather than a standards code breach, or is simply an attempt to lobby.' Although this second is not within the summary of recommendations but within the report itself.

Open Access to Publishers

Leveson recommended that a regulatory system ought to allow for different arrangements for different types of member (Schedule 3, paragraph 23). This was an important recommendation for future-proofing the system (so bloggers and other online news outlets would be able to sign up), and ensuring the widest possible membership. It also benefits the regional press.

In the recognition criteria of this Charter this recommendation is removed. A version of the omitted text appears in Schedule 2, paragraph 5, but moving it here means that it is no longer a recognition requirement.

The text of the criterion reads: 'The membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms.' vs (text of Leveson's recommendation 24): 'The membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms,

including making membership potentially available on different terms for different types of publisher' [emphasis added].

Other recommendations

Other Leveson recommendations are reduced to optional extras (Schedule 2, Clause 4), and not published in the Charter itself:

'The Board of the Recognition Panel, in determining an application by a Regulator for recognition, **may but need not, take into account** any of recommendations 34 to 47 in the Summary of Recommendations of the Leveson Report. Where the Recognition Panel is satisfied that a Regulator meets the recognition criteria it shall not refuse to grant recognition to that Regulator by reason of a failure to comply with any of recommendations 34 to 47' [emphasis added]

This includes recommendations regarding:

- Provision of a whistleblowers hotline
- Allowing a complaint to be brought prior to commencing legal proceedings
- Establishment of a ring-fenced enforcement fund for the purpose of funding investigations
- Providing advice to the public in relation to issues concerning the press and the Code along with a service to warn the press, and other relevant parties such as broadcasters and press photographers, when an individual has made it clear that they do not welcome press intrusion
- Making it clear that newspapers will be held strictly accountable, under their standards code, for any material that they publish, including photographs (however sourced)

Nor is there need the Recognition Panel take into account criteria Leveson said it should *consider*, including: the publication of compliance reports; the establishment a kite-mark scheme; the holding of an early review of the Code; Code amendments giving the recognised regulator the power to intervene in cases of allegedly discriminatory reports, having regard to the need to protect freedom of speech and the need to reflect the purpose of equalities legislation; the need to be explicit in its work that where public interest justification will be used; the provision of an advisory service to editors in relation to public interest considerations; encouragement of its subscribers to be transparent with stories' sources (subject to the condition that such transparency does not undermine the protection of confidential sources); and a conscience clause in journalists' contracts.