

Media Regulation Roundtable:

**A PROPOSAL FOR FUTURE REGULATION OF THE MEDIA:
A MEDIA STANDARDS AUTHORITY**

Introduction

1. This proposal outlines a model for media regulation which is independent, voluntary and effective. It is a proposal for a regulator covering the full range of non-broadcast media publishers. We have called it the Media Standards Authority. It seeks to provide a balance between the expression rights of journalists and publishers, the rights of individuals to privacy and reputation and the sometimes neglected rights of the public to accurate information which does not mislead on matters of public concern. It also seeks to provide greatly enhanced rights of access to justice for both the general public and the media.
2. The proposal is the product of a series of meetings and discussions between a diverse and independent group of academics, journalists, lawyers and others brought together by the Reuters Institute for the Study of Journalism and the Media Standards Trust to discuss issues of Future Media Regulation. The participants in the discussion are listed in the Appendix. The proposal, drafted by Hugh Tomlinson QC after the discussions, represents the views of a number of those who took part in the Round Table. It is not a unanimous or collective proposal and all were taking part as individuals rather than as representatives of any organisation. However, all those listed in the Appendix believe that this is a proposal which deserves serious consideration by the Leveson Inquiry.

Outline of the Proposal for a Media Standards Authority

3. The proposed Media Standards Authority ("MSA") has a number of key elements:
 - The MSA would be entirely independent of both government and the media but its governing council would include a minority of former editors and some working journalists;
 - Participation in the MSA system of regulation would be voluntary but there would be substantial incentives for those who become participants; these would include an adjudication scheme for complaints which anyone wishing to bring proceedings against a participant would have to use before going to Court and enhanced defences in legal proceedings. These incentives would have legal force.
 - The MSA would be established by statute and several of the incentives for participation would likewise be statutory. However the MSA would not have the power to impose statutory sanctions on the media. Sanctions would be imposed under the terms of the "membership contract" between the MSA and the participants.
 - The MSA would regulate participants - it would draw up a Code of Media Ethics and Responsibility ("the Code") and carry out regular audits to ensure that participants were complying with it. The Code would be designed to provide a set of clear principles for ethical journalism and media practices, with specific examples and clear guidance adapted to the developing needs of the modern media.

- The MSA would have investigatory powers (deriving from the contract of participation). Participants who were found to have failed to comply with the Code would be subject to directions and sanctions, including increased subscriptions where there were repeat breaches of the Code or fines in the most serious cases.
- When approached by a member of the public, the MSA would be able to issue “desist notices” on an advisory basis to participants and other publishers where representatives of the media and/or the paparazzi were harassing an individual or threatening to infringe their Article 8 rights.
- The MSA would provide pre-publication advice and assistance in privacy cases – both to participants and to claimants. If a complaint was made about a publication which it was claimed would constitute an invasion of privacy, the MSA would require a participant to state whether it was going to rely on a public interest defence. If there was publication and no such defence was in fact relied on, the participant could be sanctioned by the MSA.
- The MSA would provide mediation and adjudication in disputes between the public and the media and would have the power to award compensation or order the publication of fair and accurate summaries of its rulings. It would also publish recommendations in order to encourage continued adherence to the Code.
- The medium term aim could be for the MSA to form part of a comprehensive system for regulation of all types of media - a "second tier" in between the “first tier” of strict regulation of those who use public resources (along the lines of the present Ofcom system) and a "third tier" subject only to “regulation” by the criminal laws against offensive speech, incitement of violence and so on. A worked-through version of such a scheme can be found in Lara Fielden's recent publication *Regulating for Trust in Journalism: Standards Regulation in the age of blended media* (Reuters Institute, 2011).

The Proposal in more Detail

Independence

4. It is obviously fundamental that a body which regulates the media should be wholly independent of government and politicians. Government and politicians should play no role in its appointment or in setting the rules of its operation. However, it is also important that a regulator should be independent of the media - working editors should not be involved in regulating their competitors. Nevertheless, those responsible for media regulation should have practical experience of operation of the media - should understand the demands and pressures placed on working journalists and the practical obstacles which they face. The governing body of a regulator should, therefore, have a substantial minority of former editors, and also of journalists and others with experience of all forms of media publication.
5. The independence of the MSA would be established and recognised by statute. The statute would be "enabling" - setting up the body, setting out the process for the appointment of its governing council and “Code

Committee" and for the drawing up of the Code. In addition, the statute would provide for "incentives" for participation - the advantages which would accrue to participants and the disadvantages for non-participants.

Voluntary Participation

6. Participation in the MSA would be voluntary: no one would be compelled to join. Any media organisation outside the statutory system of broadcast regulation could join – publishers of newspapers and magazines, website publishers or bloggers. There are two fundamental reasons for proposing such a voluntary system.
7. First, any system of "compulsory" regulation of the media gives rise to serious issues of principle and practicality. There is a strong argument that compulsory regulation is objectionable in principle and it may now be difficult to justify under Article 10(2) of the European Convention on Human Rights. Such regulation would have to be backed by "compulsory registration" as a media organisation: so that, in the case of regulated professions, the ultimate sanction would be "striking out". This would, in turn, have to be backed by legal sanctions: either criminal prosecution or proceedings for injunctive relief (with committal for contempt of court as the ultimate sanction). The prosecution or committal of media organisations or individual publishers for a refusal to take part in a system of compulsory regulation or for "publishing whilst not being registered" is too high a price to pay for the advantages of comprehensive regulation.
8. Furthermore, compulsory regulation would be extremely difficult to enforce in practice. Although UK based newspaper or magazine groups would doubtless join up, in the absence of international agreements, internet and foreign publishers would be able to avoid the regulation requirements. Any publisher could avoid the regulation requirement by operating offshore.
9. Second, voluntary regulation itself has substantial positive benefits:
 - A voluntary system would have to be designed to obtain the fullest cooperation of the media, both in drawing up and enforcing the Code. This would be more likely to be effective in practice.
 - By actively involving the media in its operation a voluntary system would assist in promoting changes in the journalistic culture which has led to recent abuses.
 - If the system is voluntary, media organisations other than newspaper publishers (including those based offshore) could become participants. Participation could be open to individual publishers (such as bloggers) who were prepared to subscribe to the Code (insofar as it applied to them). This would assist in promoting the culture of responsible and ethical journalism across all platforms.

Incentives

INTRODUCTION

10. The crucial feature of the proposal is a system of incentives - advantages accruing to participation and disadvantages arising from non-participation. These incentives would be established by law.
11. Various possibilities have been discussed in the context of other regulatory models. These could be both "commercial" and "legal".

COMMERCIAL INCENTIVES

12. The following "commercial" incentives could be available to participants in the MSA:
 - The ability to display the "MSA Kitemark". This could be of particular value to smaller publishers and bloggers. It would also be of value to consumers, providing a transparent system allowing consumers to navigate the range of media with a democratic purpose.
 - "Journalistic accreditation" - this would cover matters such as court reporting (including live text reporting) and access to confidential official briefings.
 - Exemption from VAT - this currently applies to all newspapers and magazines. The exemption could be restricted to the newspapers and magazines whose publishers participated in the MSA (the exemption would remain in place in relation to books, music, maps and other "Group 3 items" which are presently VAT exempt).
 - Membership of collective commercial partnerships such as participation in industry standards.
13. Although such incentives would be of commercial value to publishers they would not, of themselves, guarantee participation. For example, the availability of the PCC "kitemark" has not, of itself, provided a sufficient incentive to persuade major publishers to remain participants. A key aspect of the MSA proposal is the incentives offered in relation to legal proceedings.

INCENTIVES IN RELATION TO LEGAL PROCEEDINGS

14. Three types of "incentives" to participation in the context of legal proceedings are proposed:
 - (1) Efficient and cost effective dispute resolution mechanisms – providing access to justice to complainants and saving legal costs for participants;
 - (2) Enhanced defences in legal proceedings in the Courts for participants;
 - (3) Additional damages payable in legal proceedings in the Courts by non-participants.

DISPUTE RESOLUTION: INTRODUCTION

15. First and most importantly, central to the advantages of participation would be a system for resolving individual complaints and claims brought against media organisations which would substantially reduce legal costs whilst providing access to justice to both complainants and participants.

16. The MSA would seek to resolve all complaints and claims without recourse to the Courts through using three methods of dispute resolution, depending on the nature and scale of the complaint. The MSA system for dealing with complaints and claims would have three elements:
- a "mediation" process (modelled on the present approach of the PCC)
 - an "adjudication" process (modelled on the statutory adjudication scheme which applies to construction industry);
 - an arbitration process (under Part 1 of the Arbitration Act 1996).

MEDIATION

17. In relation to the "mediation" process, a person who claimed that the Code had been breached could make a complaint to the MSA. This would, in the first instance, be referred to the mediation process. This process would not normally involve lawyers or hearings. The mediation process would be designed to achieve a resolution agreed by the complainant and the publishers. Resolution of a complaint could include the payment of compensation and the publication of a correction or agreed apology. If a complaint could not be resolved within a short set time-frame the complainant would have the option of referring it to the more formal MSA arbitration process which would lead to a binding determination of the complaint.

ADJUDICATION

18. A statutory adjudication process would be central to the incentives provided for MSA participation. It would provide swift and effective resolution of legal disputes for participants.
19. Under the terms of the adjudication scheme, any legal complaint relying on a cause of action arising out of publication (defamation, misuse of private information or breach of confidence) could be referred to MSA adjudication by the claimant. If the claimant did not take this course but, instead, issued Court proceedings, the participant could apply for a stay and an automatic referral of the claim to adjudication (save in relation to claims for interim injunctive relief). In other words, every participant would be able to require complainants, in the first instance, to use the MSA adjudication system.
20. A reference to adjudication would not prevent claims being finally determined by the courts in due course but would mean that such claims would be stayed pending the decision of the adjudicator. A party who was dissatisfied with the adjudicator's decision would still have a right of recourse to the courts.
21. The MSA adjudication process would have the following features:
- The adjudicators would deal with claims against MSA participants for defamation, misuse of private information or breach of confidence arising out of publication by participants. Such claims could be brought directly (without the need to commence court proceedings) or would be dealt with after court proceedings had been stayed.

- MSA adjudicators would be wholly independent, selected from a list of legally qualified individuals with experience and knowledge of media issues.
- The MSA adjudicators would consider the claim and, if it was found to be established, make an award of compensation or of other remedies (such as an order for the publication of a fair and accurate summary of the adjudication or a correction or an order restricting future publication of specific material). This could be done on paper or, if the adjudicator decided this was appropriate, after an oral hearing.
- The adjudicator would be paid by the MSA. A participant would not, ordinarily, be entitled to recover legal costs from the complainant but the adjudicator could award costs against the publisher.
- The adjudicator's award would not be final or binding and either party could bring proceedings in the High Court to obtain a final determination of their rights. In this case, any of existing proceedings could be lifted. However, as with the construction adjudication process, it is anticipated that in the large majority of cases both parties would be content to accept the conclusions of the adjudicator.

It should be noted that “adjudication” in this form is fundamentally different from arbitration. “Adjudication” involves a speedy non-binding decision. “Arbitration” leads to a final determination but can only take place if the parties both agree to refer their dispute to arbitration. The parties cannot be forced to use arbitration (this would be a breach of their rights under Article 6 of the European Convention on Human Rights to have “access to court”).

ARBITRATION

22. Arbitration is a system of “consensual” resolution of disputes – where both parties agree that a suitably qualified arbitrator or panel of arbitrators can provide a definitive resolution of their dispute. Participants would be required to use the MSA arbitration scheme to determine legal claims if a claimant wished to have a claim determined in that way.
23. In addition, a complainant who wished to make a complaint of violation of the Code would be obliged to use the MSA dispute resolution system – that is, mediation and (if that was not successful) arbitration.
24. In other words, the MSA arbitration process would have two aspects:
 - It would deal with claims that the Code had been breached where mediation had not succeeded. These are dealt with in the section headed “Dealing with alleged breaches of the Code” below.
 - It would deal with claims for defamation, misuse of private information or breach of confidence where the claimant agreed to MSA arbitration.

In both cases, the arbitrator's award would be final, subject only to limited review by the High Court. The arbitrator could award compensation in respect of breaches of the Code, order the publication of a fair and accurate summary or a correction and give directions as to the future actions of the participants. MSA arbitrators would be wholly independent, selected from a list of legally qualified individuals with editorial or journalistic experience.

ENHANCED DEFENCES TO LEGAL PROCEEDINGS

25. Second, any participant in the MSA would have enhanced defences available in libel and privacy proceedings:
- In libel proceedings there would be a new defence of "regulated publication" - a participant who was sued for libel who published a prompt suitable correction and sufficient apology and paid compensation and gave other redress as ordered by the MSA would have a complete defence unless the material was published maliciously.
 - In privacy proceedings, there would be a "public interest publication" defence for participants who could show that they had adhered to the public interest requirements of the Code. The determination of the MSA on this point in the individual case would be of persuasive effect (though not binding on a court).

ADDITIONAL DAMAGES

26. Third, non-participants in the MSA could be required to pay statutory "additional damages" if they published defamatory allegations or private information in breach of the provisions of the Code or by flagrantly disregarding a desist notice issued by the MSA. Those damages could be limited by statute with reference to the "non-pecuniary" damages which a court would otherwise award in accordance with established principles, depending on the seriousness of the breaches.

Pre-Publication and Privacy

The contract of participation would not include a pre-publication power for the MSA to order participants not to publish. The MSA would, however, provide pre-publication advice and assistance to both participants and claimants.

27. In relation to participants, the MSA would provide a confidential advice service on public interest issues. If a participant was in doubt as to whether the publication of particular private information was in the public interest, it could seek confidential guidance from MSA advisors. If the MSA advisors expressed the view that the publication would be in the public interest then this would be taken into account if a subsequent complainant was made of a breach of the Code and it could also be taken into account by an adjudicator or Court if a privacy claim was brought.

28. In relation to claimants, if a claimant became aware that a participant was intending to publish private information, he or she could refer the matter to an MSA advisor who could express a provisional view as to whether the information was private. If the information was private the participant would be asked whether or not it intended to rely on a "public interest" justification for publication. It is likely that a publication where no such reliance was intended would be a breach of the Code and, if the participant proceeded to publication, the MSA would itself commence an investigation (see paragraph 38 below). If the participant did not, in the event, rely on a public interest defence this would also be a breach of the Code and would be the subject of a sanction by the MSA. If the participant did, indeed, rely on a public interest defence then its validity would be the subject of adjudication and, if necessary, resolution by the Courts (taking into account any pre-publication views expressed by the MSA advisor).

THE CODE

29. The central function of the MSA would be to draw up and administer the Code. A broadly representative "Code Committee" could be established – including editors and journalists as well as independent figures. The Code would then be drawn up after the widest consultation with the media and other interested parties.
30. It could be based on the present Editors' Code (and draw on others used by broadcasters and newspapers) – but could also set out the principles which constitute best practice in the industry and underpin responsible and ethical journalism. These principles could be supplemented by examples of what happens in specific cases (as is done in many "Codes of Practice"). The intention would be to provide clear practical guidance to journalists and editors.
31. The "public interest" section of the Code would be of particular importance. The central principle is likely to be that of proportionality: the intrusion must be warranted by and proportionate to the public interest served. Examples of public interest would include:
- revealing that a criminal offence has been committed, is being committed or is likely to be committed;
 - revealing that a person has failed, is failing or is likely to fail to comply with any legal, obligation to which he is subject;
 - revealing a potential miscarriage of justice;
 - protecting public health or safety;
 - revealing that the environment has been or is likely to be damaged;
 - exposing misleading public claims made by individuals or organisations;
 - disclosing incompetence that affects the public.
32. The "Public Interest" section of the Code should also deal with process as well as content: the processes by which editorial approval is obtained for potentially intrusive investigation and the processes whereby prior notification is given to the subject of potentially intrusive publications. Prior notification should be the norm - save in cases in where a countervailing public interest could be clearly established (where, for example, notification might involve "tipping off" a wrongdoer).

33. The Code would also contain a "procedural" section which would deal with matters such as the following:
- The systems which participants should have in place for ensuring compliance with the Code and for investigating and dealing with breaches.
 - The "audit" process – it is anticipated that after the first two or three years of operation of the MSA, participants should be able to do this themselves through their internal Code compliance mechanisms with occasional "visits" by the MSA to check.
 - The way in which complaints are dealt with by the media and by the MSA (with appropriate short time scales).
 - The remedies which could be granted by an adjudicator – including non-monetary remedies for breaches of the Code.

Promoting Ethical and Responsible Conduct

34. One of the MSA's most important functions would be the promotion of ethical and responsible journalism. The basic principles would be contained in the Code which would be consulted on and promoted and the relevant parts of which would be incorporated into the employment contracts of journalists.
35. In addition, the MSA could be involved in:
- Organising and accrediting relevant training for journalists and editors;
 - Publicising the findings of adjudicators and the results of investigations and audits;
 - Issuing annual and "issue specific" reports, including "league tables" concerning Code compliance.

Dealing with alleged breaches of the Code

36. As already mentioned, the MSA would provide a dispute resolution process to deal with alleged breaches of the Code. The MSA would have power to order the publication of a fair and accurate summary of a ruling or a correction and, in appropriate cases, to award compensation to complainants and make orders restricting future publication of specified material.
37. In addition, the MSA would have the power to investigate apparent breaches of the Code by participants without a specific complaint having been made by members of the public. The MSA would have a power to appoint an investigator - and participants would be obliged to cooperate with him or her in investigating breaches of the Code including by the provision of documents and, if necessary, oral evidence.
38. If there was a dispute about the findings of the investigation, the MSA could refer the matter to arbitration and it is likely that a hearing would be required. If the arbitrator determined that there had been a breach, the MSA would have the power to give appropriate directions to participants. Such directions could involve changes in procedures, further training and other remedial measures. In very serious cases - or

cases of persistent breaches - the MSA would have the power to require the payment of enhanced subscriptions or to impose "fines". The power to do so would derive from the contract of participation.

Governance and Funding

39. The MSA would be established by statute with a "governing council", independently appointed, with a substantial minority of former editors journalists and others from the full range of media.
40. The intention would be that the majority of the funding of the MSA would come from subscriptions from participants. These would be based on an agreed funding formula. Complainants and respondents to complaints could be charged a "handling fee" in appropriate cases. An element of state funding may also be required – in particular, to cover start up and transition costs. The MSA would, however, enable substantial savings to be made on publishers' legal costs as a result of the use of adjudication.

Conclusion

41. In this document we have provided the basic outline of the proposal for an MSA. If the proposal attracts interest and support then we will provide a fuller document dealing with the practical details of the proposal. All comments and suggestions should be sent to regulationroundtable@gmail.com by 12 March 2012.

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