

Editorial Legal Services

Susie Uppal

Chief Executive

Press Recognition Panel

Mappin House

4 Winsley Street

London W1W 8HF

08 November 2018

Dear Ms Uppal,

PRP response re: Report on the Recognition System 2018

Thank you for your letter of 16th October 2018.

Thanks too for confirming that the PRP does not have legal standing to assess Guardian News & Media (GNM) against the criteria listed in Schedule 3 of the Royal Charter. As you note the *"criteria apply to press regulators and an assessment can only be undertaken following an application for recognition from such a body."* However, I am confused by your response in the following paragraph, in which you suggest that *"the Board will wish to report on any system of complaints or arbitration that GNM operates."* I am still not clear why the PRP "will wish" to do this, or why it believes it has the power to do it. You will appreciate there is a significant difference between setting out, via the publicly available material we have referred you to, what the GNM system is, and "assessing that system".

I note in this context, that in the correspondence section of the PRP website, that on 9th May 2018¹, the PRP responded to a request for information from a

¹ <https://pressrecognitionpanel.org.uk/wp-content/uploads/2018/06/Response-to-requests-for-information.pdf>

number of MPs, addressing whether IPSO is compliant with the criteria set out in the Royal Charter. My apologies for repeating the questions from my letter dated 8th October, but on what legal basis does the PRP feel it is appropriate to *"give a view on whether (in particular) the complaints (and any arbitration) systems operated by some news organisations meet the Charter criteria?"*

Furthermore, in a letter to Fiona Onasanya MP², the Chair of the PRP gave an interpretation of how s.40 of the Crime & Courts Act would be interpreted by the courts, as well as calling for the commencement of that section of the Act. At the end of that letter, the Chair wrote that *"Decisions made by the PRP are entirely independent, however they are informed by the perspectives of others."* Given the PRP was explicitly established by the Royal Charter on the basis that it was independent from Parliament and political pressure, could you please set out who the 'the others' are that are referred to in the Chair's letter?

For the record, it is hard to imagine any other agency of the state acting in a manner comparable to the PRP in the relation to the direct lobbying of politicians.

In your letter of 16th October you say that *"Section 41 of the Crime and Courts Act 2013 provides a definition of 'relevant publishers' and the Charter requires the PRP to take a view on which are 'significant relevant publishers' when we report. **The Board did this when it identified a small sample of organisations to review as part of its 2018 report on the recognition system.** Clarification of these definitions, however, is a matter for the courts."* This statement appears to conflict with your earlier comment that the *"criteria apply to press regulators and an assessment can only be undertaken following an application for recognition from such a body"*. I'd be grateful therefore if you could let me know:

- *On what basis did the PRP choose publishers to review as part of this report?*
- *What is the legal basis of the PRP conducting any assessment of the internal complaints handling of a newspaper that has not voluntarily applied to be regulated by the PRP?*

² <https://pressrecognitionpanel.org.uk/wp-content/uploads/2018/06/PRP-to-Fiona-Onasanya-24-May-2018.pdf>

Unanswered questions in your letter of 16th October

In addition to clarifying your responses provided in your letter, I would be grateful if you could provide responses to the following questions from my letter of 8th October.

1. *You state that the review will look at "the extent to which the public safeguards intended by the post-Leveson system of regulation are in place on a voluntary basis." What are the public safeguards of the post-Leveson system of regulation to which the PRP refers? Given the objective of Parliament was for membership of a recognised regulator to be on a voluntary basis, what is the metric by which the PRP will judge success?*
2. *You state that you are "often asked to give a view" about the complaints systems of news organisations that have decided not to volunteer to join a recognised regulator? Often asked by whom, and on what legal basis can they direct you to perform this review?*

Finally, you asked if we "could provide further information on the basis of your concern regarding Article 10. Can you please provide this?"

As you are aware, the issue of the settlement on press regulation was and remains highly contentious. Any mechanism that directly or indirectly impacts on or has the potential to chill freedom of expression amounts to a potential interference with Article 10 (1). United Nations General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights: Freedoms of opinion and expression³, notes that "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."

³ <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

Any form of state regulation of journalism or those organisations that carry it out impacts on Article 10(1) rights. Statutory regulation of the press is a hallmark of authoritarianism and risks undermining democracy.

For example, it has been well established that mandatory licensing or registration of journalists is incompatible with the right to freedom of expression⁴. Similarly, under international standards, accreditation schemes (if needed) must be specific, fair and reasonable, and their application must be transparent⁵. The United Nations Special Rapporteur has made it clear that while journalists may register for the purposes of obtaining an identification card to allow them to have access to certain events and certain privileges, *"under no circumstances should such conditions be imposed by State authorities as preconditions to practice journalism, given that journalism as a profession can only fulfil its role if it has full guarantees of freedom and protection."*⁶

In November 2012, the then Prime Minister David Cameron, after agonising for 24 hours since he received the report of the Leveson Inquiry he had set up 16 months previously, expressed "serious concerns and misgivings" in principle to any statutory interference in the media, in response to the publication of the Leveson Report and in particular the proposal to underpin a new independent press regulator with legislation. He warned: *"It would mean for the first time we have crossed the Rubicon of writing elements of press regulation into the law of the land...We should think very very carefully before crossing this line... We should be wary of any legislation that has the potential to infringe free speech and the free press."*

Those concerns have never receded. As a Guardian editorial, published in October 2013, setting out our concerns about the use of a Royal Charter as part of the "settlement" stated:

⁴ see eg United Nations Human Rights Committee, Concluding observations on Lesotho, 08/04/1999, UN Doc. No. CCPR/C/79/Add.106

⁵ See eg HRC, *Gauthier v. Canada*, 7th April 1999, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, [13.6]

⁶ [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Frank La Rue), 4th June 2012, A/HRC/20/17, [6]. IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion, OC-5/85 (1986).]

"The idea of using a medieval instrument to recognise regulation of newspapers was the idea of Oliver Letwin, the famously clever minister at the Cabinet Office. Its intent was to avoid more direct statutory underpinning of regulation but, in reality, it merely channelled things through the back door of Buckingham Palace rather than the front door of Westminster. The use of this obscure device has done enormous damage to the process of finding a better system of press regulation. Because the privy council's role in such matters is effectively no more or less than that of the government of the day, it has introduced an element of political influence – no matter how distant – into the control of the press. The proposal that it should require a two-thirds majority in parliament to amend the charter was intended as reassurance; it has failed in that. The beguiling idea of a charter – and it was initially welcomed by some of the newspapers which have since turned against it – has gone horribly sour. Nonetheless, by Wednesday evening we may well have one."

The fact that publishers were and remain concerned about the role of a body established, financed and preserved by the state, such as the PRP, assessing the regulation of journalism in any capacity should, I would have thought, immediately demonstrate to you - and the board - why there are significant concerns about the impact of the sort of exercise you now appear to be proposing to undertake. For any agency of the state to investigate or assess any of the journalistic limbs of the work of newspapers, requiring them to submit (at their own expense) to oversight of their operations, is a prima facie interference with their Article 10 rights. The fact that the PRP in doing this appears to be acting without any power to do so, is therefore, of even more fundamental concern.

As we questioned in our letter of 8th October, *"what is the legal basis for the PRP to determine whether definitions in the Crime & Courts Act 2013 can be applied to social media companies? Even if social media companies do fall within that definition of a relevant publisher, given that compliance with the*

⁷ <https://www.theguardian.com/commentisfree/2013/oct/28/media-regulation-royal-charter-press>

London N1 9GU
+44 (0)20 3353 2000
info@theguardian.com
theguardian.com

Royal Charter process is voluntary, what is the purpose of including social media companies within the ambit of the review? What is the legal basis on which the PRP believes it has the right to establish what is effectively a standing inquiry into the practices and ethics of the press?" The choice as to whether a publisher, social media platform, search engine or blog submits itself for assessment and inspection by the PRP is entirely voluntary and up to that individual business. It is not for the PRP to assess any body, whether a relevant publisher or not, if it has not submitted itself to do so. That amounts to a worrying interference by a state underpinned organisation with the inner workings of an organisation that has exercised its right to remain outside of that system.

I'd be grateful for clarification of your letter of 16 October, and for your further response on the questions outlined above.

Yours sincerely



Gill Phillips
Director of Editorial Legal Services
Guardian News & Media

+44 20 3353 4126
gill.phillips@theguardian.com