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MAINTAINING FREEDOM WITH RESPONSIBILITY

The evolving role of non-statutory press councils in a changing media landscape

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There are several fundamental reasons why the state should not involve itself in the regulation of the press. However, there are also more practical reasons why self-regulation can be a preferable alternative, benefitting journalists and the public alike. It is flexible, non-bureaucratic and highly effective at delivering practical solutions to problems. Ultimately, self-regulation can raise standards and provide effective redress to those who are wronged by the press. But it does so by working with journalists, not against them.

What follows is an examination and analysis of the origins and practices of the press regulatory bodies of the United Kingdom and the Republic of Ireland, together with an exploration of current issues and solutions adopted, and the identification of future issues deriving from convergence, accountability and effectiveness.

KEYWORDS: accountability; convergence; flexibility; newspapers; media; self-regulation.

Introduction

Self-regulation hardly has the best of reputations. Whether it relates to lawyers, MPs or the press, there is inherent suspicion about any group that appears to regulate from within. Scepticism, however, is perfectly healthy and should ensure that those who oversee such regulatory frameworks do not rest on their laurels. Equally, critics of self-regulation should take care that calls for change don't risk throwing the baby out with the bathwater.

Press self-regulation has had a chequered history in both the jurisdictions that are the subject of this paper. The outline of the long and ultimately successful campaign to set up a press council and press ombudsman in Ireland offers a useful check-list of the major issues that will arise in relation to any initiative of this kind. In the United Kingdom, the old system of self-regulation, embodied in the Press Council, foundered in the late 1980s amid serious doubts about its ability to rein in the worst excesses of an excessively intrusive press. And since its inception in 1991 the Press Complaints Commission has – from time to time – been the subject of cynical debate in certain quarters.

Nevertheless, press self-regulation is now regarded as more acceptable, both nationally and internationally, than at any previous time. Press councils exist in most European countries and have experienced particular growth in the new democracies of Eastern Europe. Across Canada, Australasia and increasingly in Africa and South America, self-regulation of the press – and indeed, the media – shows its worth.

The case of the United Kingdom

The importance of flexibility

The characteristic which most enables self-regulatory systems to be successful is also the one that means they are not all alike – flexibility. No two press councils are the same and even in the context of a converged and globalised media, it is entirely proper that this should be the case.

Indeed, regulatory structures can be so different that ‘self-regulation’ is not necessarily a helpful way of describing them all. What if a press council is funded by government on a “no-strings attached” basis – can that be self-regulation? What if the staff of a press council are all non-journalists? And what if the majority of those who make decisions on individual cases are unconnected to the newspaper industry? All councils perform similar functions but they would not all recognize each other’s constitutions.

In the case of the UK, it is well-known that the funding of the Press Complaints Commission comes fully from the press, via the Press Standards Board of Finance. And the Code of Practice, which the Commission administers, is written and updated by a committee of editors, albeit taking account of submissions from the public, pressure groups and the PCC itself. However, the make up of the Commission’s board is the least industry oriented of any European equivalent – 17 members, of whom 10 (including the Chairman) effectively represent the public (Bertrand, Claude Jean, 2003 pp1-5). The situation in Ireland is similar, as noted later.

Whatever the name (and ‘self-regulation’ will have to do for now), the basic make up of these regulatory structures makes them singularly well-suited to providing the kind of service that members of the public want in reality: one that is straightforward, speedy and successful at obtaining useful outcomes to complaints. Additionally, systems of non-statutory regulation tend to be collaborative rather than confrontational and can also, therefore, be beneficial from the point of view of journalists and publishers.

The work of the PCC

It is in order to fulfil the public’s desire for useful solutions that the Press Complaints Commission focuses much of its work on mediation: arranging apologies; negotiating corrections; settling disputes by private deals and so on. But this is not to say that the Commission neglects its role as adjudicator, for that is just as crucial. Indeed, it is precisely because editors are fearful of an adverse adjudication that they will generally take steps to remedy mistakes at an early stage. Without the threat of a public ruling against a newspaper or magazine, many complainants would not get a speedy apology or correction, which is generally what they want. The mediation and adjudication functions work hand in hand.

It is sometimes suggested that Ofcom, the statutory broadcast regulator is a more effective body than the PCC because it rules on a higher proportion of complaints. The truth is that the organisations are comparable on this measure. In 2008 the PCC made 1,420 rulings, having received 4,698 complaints (Press Complaints Commission, 2008 Annual Review pp26-28). Ofcom, which received 67,742 programme complaints, made 12,532 (Ofcom, 2007-08 Annual Review p42). Because one ruling may deal with a number of complaints about the same item, the number of rulings will always be smaller than the grand total of cases. Overall, however, the PCC makes a decision on every case that falls within its remit and that includes enough information to make a judgment possible – just like Ofcom.

True, the PCC does not levy fines, which arguably do not benefit the public anyway, but that is because it operates a system which seeks to incentivise amicable settlements to complaints and which aims to be as unlegalistic as possible. Given that the Commission does not act as a protector of public morals by dealing with matters of offensiveness, the complaints it investigates are almost always about personal issues. Consequently, the people who use the PCC want an outcome that actually means something – a correction, an apology, an assurance about future reporting, sometimes an ex gratia payment. For an editor, there is the knowledge that – extreme cases aside – a ruling by the Commission will not be made (or might be less critical) if he or she makes prompt and genuine efforts to make amends for an inadvertent breach of the Code. In 2008, over 550 complaints were settled to the satisfaction of complainants or, in PCC jargon, ‘resolved’ (Press Complaints Commission, Newsletter February 2009). Ofcom – with which, it should be said, the PCC has an excellent relationship – managed 25.

Some have suggested that the Commission should rule on these ‘resolved’ cases instead. But that manifestly ignores the interests of the parties involved in the complaints, especially where speed of corrective action is crucial. Indeed, it is unlikely that people would demand that a libel trial proceed even when the parties have come to an out of court settlement – yet it is fundamentally the same process which the PCC oversees.

Self-regulation and the law – choice is good

Comparisons between the PCC and the law are made often but rarely well. Indeed, it is not unusual for the two institutions to be considered as competitors and yet that is a long way from the truth. The distinction between inaccuracy and defamation is generally obvious enough. But even in privacy cases, where the Commission and the courts are dealing with similar material and principles, the services they offer are complementary, not confrontational. And the fact that potential complainants therefore have a choice when it comes to seeking relief or remedy is surely beneficial.

For those who wish to make a splash or seek compensatory damages, following publication of an intrusive story, the courts may be attractive. Similarly, a formally binding injunction is, of course, only achievable via the legal route.

But for many others the PCC is a more attractive option. It is free; rulings are obtained in an average of 36 days; the approach is non-adversarial; and details of complaints can be kept confidential. When a person wishes to restrict further invasions of their privacy, a much-publicised court hearing may not be the ideal way to proceed.

And increasingly, the Commission has developed a pre-publication role that can have a very real impact on the way a story appears – if, indeed, it appears at all. Available 24 hours a day, the PCC’s staff will pass on legitimate concerns to newspapers and magazines and work quickly with both parties to try and resolve matters before a situation gets out of control. Last year, for example, a national newspaper intended to publish a story about a dentist who was infected with HIV and Hepatitis C. The individual made clear that he was following established protocol in terms of handling the difficult situation and that there was no public interest in the wider dissemination of details of his illness. After discussion, the newspaper agreed not to proceed with publication.

The service can also be used to deal with harassment or potential harassment. The television newsreader Natasha Kaplinsky used the PCC to circulate concerns she had about the likelihood of media attention on her and her newborn child. She said afterwards:

“When I had my baby I didn’t want to be followed around by photographers every time I left the house. We asked the PCC to issue a

private request to photographers to stop following us, and to newspapers and magazines not to use pictures of me taken when I was with my family in private time. The degree of compliance was very impressive..." (Press Complaints Commission, 2008 Annual Review, pp 6-9)

During the course of the year, the PCC helps many dozens of people with concerns about as yet unpublished material. And in terms of privacy complaints about published material, the Commission made 327 rulings in 2008, a 35% increase on 2007. The predictions of people ten years ago who said that the PCC's privacy work would wither away as people turned to the courts have simply failed to materialize (Toulmin, Tim 2009).

Moving with the times – in the UK and elsewhere

The fact that press councils are most popular at a time when the media is changing most rapidly is not, perhaps, a coincidence. The flexibility of non-statutory systems assists in the day-to-day resolution of specific cases. But their non-legislative, unbureaucratic basis also allows most press councils to respond effectively to wider changes in technology or cultural attitudes.

In the United Kingdom, the Code of Practice overseen by the PCC is a constantly evolving document. In 1998, following the death of Diana, Princess of Wales, it was substantially rewritten in light of concerns about protection from unjustified intrusion. In 2006, after the submission of evidence from the Samaritans, a new section on suicide reporting was introduced (Press Complaints Commission website, 'The Evolving Code').

The Commission itself has changed considerably since its establishment in 1991. In 2003, to improve accountability, the proportion of public members on the board of the Commission was increased. Open advertising for lay Commissioners was also introduced. And to improve accessibility, the PCC introduced a 24-hour a day emergency helpline. More recently, the Commission has developed its system of pre-publication 'advisory notices' to deal with problems before they arise. And it has acted to close what could have become a loophole in its regulatory reach – namely, audio-visual material on newspaper and magazine websites.

Press councils elsewhere have also been able to respond flexibly to changing circumstances. In Bosnia, in 2006, the self-regulatory Press Council was disbanded and immediately re-established with a new, more suitable management and funding structure. The absence of foreign input, which had been necessary when the Press Council was first set up in 2000, allowed the building of foundations that took into account the peculiarities of the Bosnian situation.

In Switzerland, the Press Council has worked for years to bring publishers into the fold, realising that it would be far more effective if newspaper management co-operated with the system, rather than fighting against it. In Germany, the Deutscher Presserat has expanded its jurisdiction to include material on newspaper websites that has not appeared also in print editions. And in Canada, state-based councils have agreed to work more closely together in order to develop a more collaborative approach (Gore, William 2008).

The case of the Republic of Ireland

Background and structure

The question of establishing a regulatory authority for the print media in Ireland has been under discussion since the early 1980s, in part as a response to the decision of the Irish government in 1976 to set up a Broadcasting Complaints Commission for the broadcasting sector. The media sector itself, however, evinced little interest in demands from external pressure groups, notably trade unions, and concentrated its reformist energies on a campaign to update the country's defamation legislation, which by then had remained unchanged for over two decades. The latter campaign gained an impetus with the publication of a report by the Irish Law Reform Commission in 1991 which recommended that defamation law be modernised, but the question of independent or self-regulation by the media was not addressed institutionally until the Report of the Commission on the Newspaper Industry (1996), on which Commission major newspaper interests were represented. The Report of this Commission balanced its demands for preferential VAT treatment for newspapers and reform of the defamation laws with acceptance of the idea of a Press Ombudsman. The Commission's view was that Ireland, as a small jurisdiction with fewer than four million inhabitants, did not need the panoply of a full Press Council.

Nothing further happened until the appointment of Michael McDowell as Minister for Justice in 2002. The minister's enthusiasm for media regulation - not unusual among politicians - suggested to media interests that the inauguration of a system of media regulation independent of government might be an acceptable *quid pro quo* for reform of the law on defamation, and this was implicitly accepted by the government. The Defamation Bill that was introduced into parliament in 2006 empowers the Minister to "recognise" a Press Council and Press Ombudsman. The effect of such recognition is to afford both parts of the structure qualified privilege in relation to any statements or decisions they may make, and in relation to its documents and internal proceedings. The State has no role in relation to the funding, appointment or membership of the Press Council or of the Press Ombudsman, although it may withdraw recognition, and the associated legal protections, if, in its opinion, the conditions specified for recognition are no longer being met. Only one Press Council and Press Ombudsman may be recognized at any time.

Although the Bill's progress was interrupted by the 2007 general election, it was re-introduced in 2008 and is currently in its final stages. In advance of its enactment, as an earnest of good faith, the media industry took the necessary steps to establish the Press Council in July 2007, and the Council appointed its first Press Ombudsman with effect from September 2007. The new structure began to handle complaints on 2 January 2008.

This model was devised over a four-year period by a Press Industry Steering Group under the chairmanship of Professor Thomas Mitchell, former Provost of Trinity College, Dublin, which included individuals representing the public interest, media managements, and the National Union of Journalists. It studied different models in different countries, and decided against the adoption of any pre-existing template, but created an innovative structure which has visible antecedents in the structures operating in Britain and in Sweden. Its major similarity with the British system is in the fact that the Council has a lay, or public interest, majority. Its resemblance to the Swedish system is in its provision for appeals to the Press Council from decisions of the Press Ombudsman, although the relationships between the Press Ombudsman and Press Council in each country, and the two appeals mechanisms, differ substantially. In the Irish model, designed to reduce the possibility of duplication and overlap between the work of the Press Ombudsman and that of the Council, appellants must

first of all satisfy the Council that they have adequate grounds for their appeal (dissatisfaction with the Ombudsman's decision is not sufficient) before the Council will consider it in detail.

The Press Council of Ireland, and its chairman, are appointed by an Appointments Committee that does not include any industry representatives. The Press Council consists of six members nominated by the industry (three from national newspapers, one from regional newspapers, one from periodicals, and one from the National Union of Journalists), and seven members representing the public interest, chosen by the Appointments Committee following public advertisement. All are part-time. Its operational procedures require that public interest members must be in a majority when decisions are being taken. It meets monthly.

A feature of its membership is that it includes members from UK-based newspapers circulating in Ireland. It is legally constituted as a company under the Companies Acts, and has two committees, a Code Committee and an Administration Committee. The Code Committee, composed of editors, the Press Ombudsman, and a representative of the National Union of Journalists, has oversight of the Code of Practice. The Administration Committee comprises senior executives of the member publications: its function is to agree an annual budget with the Press Council and to organize the funding of the Council through annual subscriptions from member publications. Its Chairman is a public interest member of the Press Council.

The Press Ombudsman is appointed by the Press Council, but is independent in the performance of his functions. His primary function is to hear complaints about the press, to conciliate such complaints where possible, and to make decisions on complaints that have not been successfully conciliated. He also has the right, at his discretion, to refer some significant or complicated cases directly to the Press Council for a decision.

These details raise the issue of whether the Irish model ought to be described as self-regulatory or as an independent regulatory mechanism. The fact that it has been set up and is financed by the media industry itself lends support to the idea that it is self-regulatory, but the fact that the public interest members of the Press Council are in a majority, the independence of the Press Ombudsman, and the non-involvement of the funders in management, are strong arguments for describing it as independent. The fact that the Appointments Committee, rather than the industry itself, not only made all the original appointments, but will continue to exercise that role in the future, is a further guarantee of the independence of the structure.

The state of play

The publicity that greeted the official launch of the new structures in January 2008 generated a substantial volume of complaints, but some of these, inevitably, related to articles published before the starting date and could not be considered. There was a brief public issue caused by the resignation of one of the public interest members of the Press Council, who disagreed with the Council's adoption of a policy that its published decisions on complaints or appeals should not include the text of any dissenting opinions by Council members. However, the first full year's activities demonstrated growing public confidence in and goodwill towards the new structures, as evidenced by the growing success of the conciliation procedures. In relation to complaints involving formal decisions by the Press Ombudsman, 37.2% were upheld or partially upheld, and 51.4% were not upheld (Annual Report 2008: Press Council of Ireland and Office of the Press Ombudsman). The two complaints referred directly to the Press Council for investigation and decision were each upheld in part. A relatively small proportion of complaints are lodged by lawyers on behalf of the complainants, but – given the adversarial approach implicit in this – they have tended to account for a disproportionate share of the workload. The total number of complaints

(including those ineligible for investigation, withdrawn, or not proceeded with for other reasons) was 372, not far behind the 500-odd complaints received by Ireland's Broadcasting Complaints Commission.

In its first year of operation, 25 of the 35 formal decisions made by the Press Ombudsman were appealed to the Press Council. Only five appeals were admitted for full consideration and, of these five, three were turned down, one was upheld and one was partially upheld. The prime form of redress for complainants is, where complaints have been upheld by the Press Ombudsman or on appeal by the Press Council, that the publications concerned have to publish the decision in full and with due prominence. The experience of the Office is that this sanction, contrary to some public perceptions, is keenly felt by the publications concerned.

One important aspect of the work of the new structures is that it encompasses all major daily and weekly newspapers circulating in the country, regardless of whether they are Irish or UK-based publications. It was widely recognized at the outset that restricting the scope of the structures to Irish-originated publications would defeat the whole purpose of the exercise: roughly one in every four daily newspapers bought in Ireland are Irish editions of UK-based papers such as the *Daily Mirror*, *The Star*, the *Sun* and the *Daily Mail*, and roughly one in three of Sunday papers bought in Ireland comes similarly from a UK stable, including the *Sunday Times*. These Irish editions carry substantial coverage of Irish affairs and are not merely 'badged' for the Irish market.

The involvement of the UK-based papers in membership of the new Irish regulatory system was initially problematic because the structure envisaged was one in which the Press Council and the Office of the Press Ombudsman would be formally mentioned in the proposed defamation legislation. This went against the grain of UK press sensibilities, long opposed to State or political regulation of the sector in any shape or form. However, this potential objection was removed as it became clear that no Irish government would have any input into the new structures, in terms of membership, policy or financing, and that the statutory recognition to be afforded by the proposed legislation would be solely for the purpose of affording greater protection than hitherto, not only to newspapers, but also to the Press Council and the Press Ombudsman.

Questions of confidentiality also arose in relation to the publication of decisions. Under data protection legislation, complainants are entitled to maintain anonymity in any published decision, and this right was frequently availed of. On occasion, complainants who had given permission for publication of their name, and whose complaint had subsequently not been upheld, decided to withdraw this permission in the interval between the original decision and the hearing of an appeal.

As might be anticipated, developing the public outreach of the new structures has been a feature of much of the early activity of the Press Council and the Press Ombudsman. An initial public meeting on the issues connected with the reporting of crime in the press took place in Limerick, a city much associated with gangland crime, and was preceded by a surgery or clinic in which the Press Ombudsman and members of his staff were available to members of the public generally. Towards the end of 2008, the Press Council carried out an extensive public consultation on the reporting of suicide in the media as part of another initiative aimed both at making the public more aware of the Council and its activities, and promoting public discussion about the issues and sensitivities involved.

Conclusions

The major challenges and opportunities

No matter whether a self-regulatory regime is young, as in Ireland, or longer-established, as in the UK, none can stand still. Future challenges and opportunities need to be considered in the light of a number of developments, all of them inter-related to some degree.

1. Technological Change

Technological change is affecting the print media with dramatic suddenness, and with consequences that few can at this stage foresee. Some things are obvious: the growing web presence of newspapers themselves, and the increasing availability of media websites (including newspaper websites) for user-generated content. The former objective runs the risk of putting a premium on entertainment-related content and on rapidity of delivery, brevity, and celebrity. The risk from both is that rumour rather than verifiability becomes the default mode, with content providers being ranked more in terms of their reliability as purveyors of rumour than in terms of the verifiability of the information or the depth of analysis they provide. On the other hand, there may – in this scenario – be an opportunity for trustworthy outlets to promote themselves on the basis of their accountability to a system of self-regulation. The definition of journalism itself, and of journalists, is also becoming more porous.

2. Economic Change

The migration of readers and advertisers to the web, although apparently not as pronounced as some doom-sayers believe¹, has substantial implications for the economic model of traditional print journalism, which is responding by (a) attempting to find ways to monetize their web presence or secure additional revenue streams for their print products, and (b) attempting to cut costs so as to maintain profit levels and shareholder satisfaction. The latter objective has serious implications for quality control in newspapers, as older and more experienced (and more expensive) newspaper staff members are replaced by less well trained younger staff. Taken together, these trends also create a risk that the costs of regulation will become less acceptable to media managements, and that regulation of any sort will be seen by owners and managers as an optional extra and not a particularly welcome one at that.

3. Accountability

There is a growing political trend towards greater accountability, and media regulators are no more immune to it than other social institutions. Many media accountability systems – generally voluntary, such as those that make up the Alliance of Independent Press Councils of Europe (AIPCE) – may increasingly have to combat the allegation that they have been set up merely to prevent the introduction of state (i.e. political) regulation, or as a front-of-house initiative by the industry designed to deflect criticism and curb the press's major excesses but without making any fundamental change. If these criticisms cannot be satisfactorily countered, the only form of accountability with any real muscle will be the marketplace – which cannot be relied on to guarantee quality in this complex and socially significant area – or, ultimately, statutory measures, with the attendant risk to press freedom.

4. Effectiveness

Independent assessment of the work of press regulatory systems – their effectiveness, responsiveness, and power to maintain standards and enforce desired change will increasingly become an issue. Several European institutions (OSCE, Council of Europe, EU Agency for Fundamental Rights) have already taken steps in this direction. But assessment which has a political agenda can only be so useful and it is important that press councils themselves are alive to finding and monitoring measures of effectiveness. Although the composition, structures and remits of different regulatory structures vary considerably, it may be possible to promote, perhaps within an organization like AIPCE, a continuous exchange of views and experiences as they develop in the context of local circumstances so that a model of best professional practice for regulatory bodies can begin to emerge.

The final word

Convergence forces everyone involved in journalism, including media regulators, to face up to new challenges. But non-statutory regulation is ideally suited to reacting quickly to a changing and rather fluid environment. Relationships between press councils will become closer, although there will still be differences between national regulatory regimes. Regulators will become increasingly accountable – there has, indeed, already been significant movement in this direction². And they will also have to strive constantly to raise levels of effectiveness. The UK PCC regularly surveys those who receive a decision from the Commission and in 2008, out of 228 people who returned their feedback forms, 83% thought their complaint had been dealt with ‘thoroughly’ or ‘very thoroughly’. That’s good but there is clearly room for improvement. The Irish Press Council will shortly be commissioning an independent external review of its first period of operations.

But overall, when it comes to providing effective results for complainants – within a framework that does not have the potential to damage press freedom – non-statutory, independent regulation, of the type seen across Europe, is the most desirable way ahead.

Notes

1. The establishment of the Charter Compliance Panel, for instance, and the position of the Charter Commissioner to scrutinise the work of the PCC. For more information see www.pcc.org.uk/about/whoswho/index
2. See the mildly optimistic prognosis at <http://www.pwc.com/images/em/NewsPaperOutlook2009.pdf>

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BIOGRAPHIES

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Will Gore has considerable experience of press regulation, having worked with the Press Complaints Commission (PCC) since 2000. After several years as a case officer, Will was appointed an Assistant Director of the Commission in 2004. In September 2008 he was promoted to Public Affairs Director, being given responsibility for the development and delivery of the PCC's public affairs and public relations strategy. He oversees the Commission's international work and represents the organisation externally. In addition, he continues to keep his hand in with complaints work, handling some of the Commission's high-profile cases. Will has acted as an adviser to the press councils of Ukraine, Bulgaria, Sri Lanka and Bosnia & Herzegovina among others.

Before joining the PCC, Will read for a degree in modern history at Oxford University.

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Professor John Horgan was appointed as the first Irish Press Ombudsman in 2007. Born in 1940, he worked for the Evening Press, the Catholic Herald (London) and The Irish Times, between 1962 and 1976, as well as for radio, television, and as a free-lance journalist. He was elected to the Irish Senate in 1969, to Dáil Éireann (Parliament) in 1977, and served briefly in the European Parliament (1981-83). He lectured in journalism in Dublin City University 1983-2006, and was appointed Professor of Journalism there in 2001. He is the author of *Irish Media: A Critical History since 1922* (Routledge, London, 2001), and *Broadcasting and Public Life: RTE News and Current Affairs* (Four Courts, Dublin, 2004) as well as a number of journal articles and three political biographies.