

## Statutory Underpinning: A Threat to Press Freedom?



*Newspaper bosses are considering their next move following the Royal Charter deal and many maintain their strong objections to the statutory underpinning proposed by Leveson. In an exclusive preview of his remarks at the upcoming **Media Law after Leveson** workshop in Oxford, **Eric Barendt**, Emeritus Professor of Media Law at **University College London**, looks back at the case made for statute and finds it lacking.*

The Leveson Report makes a number of points in favour of statutory underpinning, though it should be said that the positive case is not argued, in my view, as vigorously or clearly as the rejection of the arguments made by the press against any statutory intervention.

- It is desirable to have some form of statutory recognition for the purpose of rewarding membership of, and meeting standards set by, a voluntary system of press regulation – an example is provided by the Irish Press Council, put on a statutory basis by the Defamation Act 2009; compliance with its standards may provide the basis for a defence of fair and reasonable publication to libel actions. (1671, para 6.1.)
- Indeed, statute may be the only way of delivering the goal of comprehensive participation in a voluntary system of press regulation (1756, para 3.27), though Leveson did not recommend legislation (at least initially) to compel membership. (The Expert Group in Scotland did think a statute should provide that the jurisdiction of the new regulator is to extend to all news publishers: paras. 37-39).
- Statutory underpinning is necessary to achieve a ‘satisfactory’ independent regulatory body. Otherwise the public, courts and bodies such as the Information Commissioner could not determine whether the publisher was a member of an *independent* and *effective* regulator of *appropriate* ethical standards – the public needs that assurance to have confidence in the new system, while the courts and other bodies need it to allow a publisher the benefit of any immunity or defence it is to enjoy as a result of that membership (see 1771-72).
- Statute would set out the basic requirements for an independent regulatory body, to be certified by a recognition authority initially and again at periodic intervals (see 1772-1773).

Leveson did not consider the use of a Royal Charter or the Crown’s common law powers as an alternative to statute, nor did the Report consider whether an independent recognition system could be set up by the press itself – by the newspaper bodies asking, say, a retired Supreme Court Justice and one or two other notables to vet the new regulator. Would such a system, however, satisfy the ECHR requirement of ‘prescribed by law’, if decisions of the regulatory body were challenged in the courts by a newspaper unwilling to pay a fine?

Relatively little account in the Leveson Report is taken of comparative experience, though there is some discussion of the Irish Press Council and other comparable bodies in Part K, chapter 5. The following points may be made:

- As Leveson points out, UK publishers have been happy to accept the statutory system in Ireland (1713, para 1.23; 1716, para 1.37, and 1771, para 6.3).
- France has a Press Law, article 1 of which provides that the press and book selling are free, while article 5 prohibits censorship or the compulsory deposit of surety bonds.
- Each Land (state) in Germany has a press law, to which no constitutional objection has been taken as such, though challenges have been made to particular provisions in them on, for example, rights of reply.

The Report makes strongly persuasive arguments against the press fear of statute. It is less convincing on the positive case for statutory intervention. It is not clear that the enactment of a statute is absolutely necessary to bring about an effective system of independent press regulation.

*This post is an excerpt of the paper Eric Barendt will present at the **Media Law after Leveson** workshop organised by the **Foundation for Law, Justice and Society** on Friday 12 April from 09:30 at The Cube in the Law Faculty of the University of Oxford. The event is open to the public and free*

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