

## English PEN asks 'Who joins the regulator?'

*Today, English Pen released a report on the impact of the Crime and Courts Act on publishers, looking in particular at the definition of a 'relevant publisher.' The report's author, Helen Anthony, explains the key findings here. Anthony is a qualified, non-practising solicitor who works as a freelance policy consultant and has advised English PEN on issues relating to the Leveson Inquiry, free speech and access to justice since 2012.*

The new system of press regulation, introduced in the wake of the Leveson Inquiry and underpinned by statute, came one step closer to being this week, with the formal establishment of the **Recognition Panel**. The Panel's role is to formally recognise press regulators set up by the industry, if they meet the criteria set out in the Royal Charter.

The Panel is not currently ready to receive applications from regulators, but expects to be in a position to do so by late next year. The legislation underpinning the system of regulation is found in **the Crime and Courts Act 2013**. Once there is a recognised regulator, 'relevant publishers' who are not members may be liable for punitive costs in court cases. The legislation also states that 'relevant publishers' who are not members of a recognised regulator may be liable for exemplary damages, one year after the establishment of the Recognition Panel.

Yet while the practical mechanisms needed for the new system of press regulation are being put in place, the question of who actually joins the regulator remains highly unclear. The term 'relevant publisher' is defined in the Crime and Courts Act, but, just like the other provisions concerning press regulation, the definition received very little scrutiny and minimal debate.

**English PEN**, which works to defend and promote freedom of expression, was very concerned about the way legislation was rushed through Parliament and, therefore, decided to examine just one part of the legislation – the term 'relevant publisher' – to see if this provided sufficient clarity and certainty for publishers to be able to determine whether they were affected by the legislation.

### **The impact: contradictory, arbitrary, and overreaching**

What we found was that the term was far from clear, and produced contradictory and arbitrary results. On our analysis, for example, the website produced by Sky News may well find that it is excluded from the definition of 'relevant publisher', whereas a publisher whose website includes similar content such as The Times will not, even though it is part of the same stable as Sky. This is because the Sky News website relates to its television channel, which is regulated by Ofcom. This might seem logical, until you realise that Ofcom's remit does not extend to television channels' websites. So the Sky News website will not have to be regulated, whereas The Times's website will be.

We also found that the new class of 'relevant publisher' would include many more publishers than the government intended. During the little debate that did occur in Parliament concerning the definition of relevant publisher, the government made clear that it intended charities, small community newspapers and special interest titles to be excluded from the definition of relevant publisher. Our analysis found, however, that many charitable organisations– such as Amnesty International and Global Witness – have complex corporate structures which allow them to publish as corporate bodies, thereby bringing them into the fold of relevant publishers. Furthermore, despite the government's intention for community newspapers to be excluded from regulation, there is in fact no exemption for small, not-for-profit printed newspapers which, for example, may sell advertising space. In addition, the exemption for special interest titles requires them to report news only on an incidental basis to the main content of the title – which narrows the scope of the relevant exemption considerably.

The publishing world has been divided in two: one set of publishers is 'relevant' for the purposes of the Act; one set is not. In a year's time, 'relevant publishers' may face exemplary damages if they lose a court case for libel, privacy or similar actions, if they are not a member of a recognised regulator. Once a regulator is in place, they will also face punitive costs if sued and have failed to join a recognised regulator. These measures are an impediment to free expression, imposing greater costs and burdens on relevant publishers.

The uncertainty concerning the definition of 'relevant publisher' extends the chill on free speech across the media, because many will be unclear whether the definition applies to them, due to the lack of clarity.

Legislation that will have a significant impact on freedom of expression has been passed without proper consultation, scrutiny and debate. English PEN's research shows that part of this legislation is poorly drafted and will lead to confusion and anomalies. The legislation must be reviewed, with the measures being properly consulted upon and subject to thorough scrutiny by Parliament. When free speech is at stake, surely our society should demand nothing less.

English PEN's full report 'Who joins the regulator? A report on the impact of the Crime and Courts Act on Publishers' can be found here: <http://www.englishpen.org/campaigns/who-joins-the-regulator/>

*This post gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.*

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