1. Who guards the guardians?

COMMENTARY

The United Kingdom's Leveson Inquiry has been the hottest free show in town since it began taking evidence in November 2011 until the first phase of the Inquiry concluded on 24 July 2012. During that time, the general public has been exposed to a tsunami of information from the great and the good in Britain, which raised questions not only about journalism practices and ethics but the separation of powers and the rule of law. The importance to any democracy of an independent judiciary cannot be overestimated. Sir Brian Leveson began the inquiry by posing the question: Who guards the guardians? He stressed that the concept of the freedom of the press was a fundamental part of any democracy and that he had no desire to stifle freedom of speech in Britain. This article reflects on missed opportunities and considers the future for press regulation in Britain. It also makes the point that irrespective of whatever new regime is established, it is time for proprietors, editors and journalists to stand up for responsible, public interest journalism and only then will there be an outside chance that the public's faith in mainstream journalism will be restored.

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IN MAY 2006, Richard Thomas, the United Kingdom's Information Commissioner, published a report entitled *What Price Privacy*? The focus of the report was on a key provision of the *Data Protection Act 1998* that makes it an offence to obtain, disclose or procure the disclosure of confidential personal information knowingly or recklessly without the consent of the organisation holding the data. Thomas (May, 2006) went on to say:

> Yet investigations by my officers and by the police have uncovered evidence of a pervasive and widespread 'industry' devoted to the illegal buying and selling of such information.

Seven months later, a second report was published entitled *What Price Privacy Now?,* charting the progress that had been made in seeking to halt the unlawful trade in confidential personal information. Thomas was calling for the offence under Section 55 of the *Data Protection Act* to attract a custodial penalty of up to two years in prison in addition to either the 'derisory fine or a conditional discharge' (Thomas, May, 2006, p. 3) that were the only penalties for those convicted under the section.

The initial report made it clear that the Press Complaints Commission should take a much stronger line to tackle press involvement in this illegal trade. In 2003, the House of Commons Culture Media and Sports Select Committee had considered issues surrounding privacy and media intrusion into private lives and the Information Commissioner's actions were simply building upon this foundation. The chair of the Press Complaints Commission had been made aware of the information that was coming out of Operation Motorman, the title given to the ICO's investigation. The second report failed to name names:

> As was made clear, certain journalists associated with certain newspapers and magazines were behaving in an unacceptable way, especially in the light of the Select Committee's recent condemnation. After a further meeting and correspondence, the PCC issued a Note reminding the press of its data protection obligations, including the possibility of committing an offence when obtaining personal information. (Thomas, May, 2006, pp. 31-32)

This was an underwhelming response by the PCC, being even more surprising when it was considered that the Information Commissioner was pushing for the Act to be amended to include the provision for custodial sentences to be imposed.

What followed seven months later almost defied belief. The second report stated:

> The Press Complaints Commission has confirmed to the Information Commissioner in writing, on public platforms and in a press release that journalists must act within the law, having regard for the *Data Protection Act* 1998 and the proper use of the public interest exemption on which they can rely. The Press Complaints Commission has agreed to keep repeating this message wherever the opportunity arises. The Commissioner hopes that this will be done as loudly and actively as possible. (Thomas, December, 2006, p. 19)

Table 1: Journalists' illegal personal information transactions

	Number of transactions positively identified	Number of journalists/ clients using services
Daily Mail	952	58
Sunday People	802	50
Daily Mirror	681	45
Mail on Sunday	266	33
News of the World	228	23
Sunday Mirror	143	25
Best Magazine	134	20
Evening Standard	130	1
The Observer	103	4
Daily Sport	62	4
The People	37	19
Daily Express	36	7
Weekend Magazine (Daily Mail)	3	4
Sunday Express	29	8
The Sun	24	4
Closer Magazine	22	5
Sunday Sport	15	1
Night and Day (Mail on Sunday)	9	2
Sunday Business News	8	1
Daily Record	7	2
Saturday (Express)	7	1
Sunday Mirror Magazine	6	1
Real Magazine	4	1
Woman's Own	4	2
The Sunday Times	4	1
Daily Mirror Magazine	3	2
Mail in Ireland	3	1
Daily Star	2	4
The Times	2	1
Marie Claire	2	1
Personal Magazine	1	1
Sunday World	1	1

Source: Thomas, December, 2006 p. 9.

Table 1 demonstrates the extent of the problem. Journalists were accused of being at the heart of the illegal trade in personal information gathering.

A critical examination of the emerging evidence illustrating the seriousness and extent of the activities, leads one to conclude that a more robust response by the print media in general and the PCC in particular at that stage could have averted more serious consequences for the industry as a whole at a later stage. A cursory look at the table shows that News International titles with the exception of the *News of the World* were hardly at the centre of the alleged criminality. Evidence submitted to the Leveson Inquiry by Alexander Owens, the former chief investigations officer at the ICO, throws some light upon the muted response from the Commissioner in late 2006. He told the inquiry that the consequences were deemed too hot to handle and that the report should be quietly placed on the back burner. He said he was informed: 'We can't take the press on, they are too big for us.'

Forward six years and, at the time of writing, it has just been announced that the Metropolitan Police have made two more arrests as part of Operation Elvedon which is investigating allegations of inappropriate payments to police and public officials. Operation Elveden is running in tandem with Operation Weeting which is specifically investigating phone hacking. The arrests on 7 August 2012 of a police officer and a journalist on suspected conspiracy charges brings the total number of arrests under the Elevedon investigation to 43 (Dodd, 2012). One should not be surprised at the number of arrests, given that Operation Motorman noted in 2006 that 305 journalists had been identified as driving the illegal trade in personal information. These matters go to the heart of governance in the print media, or to be more precise, *the lack of* appropriate governance, in failing to ensure that journalists acted within the law and always in the public interest. Without wishing to be judgemental in respect of any changes taking place at News International, it is interesting to note that in early August 2012 the Church of England sold its shares in News Corporation for a total of £1.9 million. The background to this action is that the Church's Ethical Investment Advisory Group (EIAG) had been urging News Corporation to hold senior managers to account for phone hacking. There had apparently been a year of 'continuous dialogue' with the company, however it was felt that it had not '…shown or is likely in the immediate future to show, a commitment to implement necessary corporate governance reform' (Dodd, 2012).

IBTIMES/Paul Hackett

Colin Myler, last editor of the *News of the World*, holds up a copy of the final edition of the newspaper outside the office in Wapping, East London, 9 July 2011.

In 2007, Clive Goodman, the *News of the World* Royal correspondent, and Glen Mulcaire, a private detective employed by the *NOTW* in a consultancy and research capacity, were jailed for breaching section 1 of the *Regulation of Investigatory Powers Act 2000* and conspiracy to intercept communications contrary to the *Criminal Law Act 1977*. Subsequently, the Press Complaints Commission conducted an investigation into the use of subterfuge, phone tapping and compliance with the Editors' Code of Practice. Its report was widely castigated as a 'whitewash'. Andy Coulson resigned as editor of the *News of the World* and on that basis it was concluded that he was no longer answerable to the PCC because its jurisdiction covered only journalists working for publications that subscribed to the self-regulatory system. However, we did gather from the report's conclusions that Goodman was a rogue reporter and that '…no-one else at the *News of the World* knew that Messrs Goodman and Mulcaire were tapping phone messages for stories' (Press Complaints Commission, 2007).

That is a carefully worded statement and, improbable as it now seems, could well have been true. It did not address the question though of whether anyone else at the newspaper was involved in phone hacking or had knowledge of such nefarious activities. The new editor of the newspapers told the commission that it should consider the episode in perspective as it represented ' … an exceptional and unhappy event in the 163-year history of the newspaper involving one journalist'.

A second PCC report two years later was branded as 'worse than pointless' by *Guardian* editor Alan Rusbridger when it concluded there was no fresh evidence of widespread phone hacking at the *News of the World* (Tryhorn, 2009). About the same time, Scotland Yard's assistant commissioner John Yates declared there was no further evidence that would justify continuing with the phone hacking investigation (Palmer & Mendick, 2011).

Yet while these momentous decisions were being taken News International was reported to have paid publicist Max Clifford over £1 million and Gordon Taylor, chairman of the Professional Footballers Association, nearly £750,000 to settle actions by them after having their phones hacked.

If this was an attempt to buy their silence and for the *News of the World* to attempt to draw a line under the whole sordid affair then it backfired quite spectacularly. A raft of celebrities began to suspect that their phones may have been hacked and commenced civil actions for breach of privacy and confidentiality. We now know the outcome of those actions which have been settled out of court with large payments to the claimants.

It will be clear from what I have said that effective action could and should have been taken much earlier and might have avoided the need for a judge-led inquiry with its wide terms of reference to inquire into the culture, practices and ethics of the press.

It had the hallmarks of a huge establishment cover-up by the media, police and politicians. The Guido Fawkes 'anti-political' blog site described the response to Operation Motorman as 'Britain's Biggest Establishment Cover-Up'.

Press regulation

Let me offer the proposition that we have never had an effective system of press *regulation* in the UK. The Press Complaints Commission was set up in the early 1990s to do exactly what it said on the can: to deal with *complaints* about the press. Its predecessor, the Press Council set up in 1953, had been

widely criticised as being ineffective. The Calcutt Report recommended a Press Complaints Commission should be established and gave the new body 18 months to prove '… that non statutory self-regulation can be made to work effectively…' When reviewed in 1993, Calcutt was highly critical of the PCC and recommended that government should set up a statutory complaints procedure. Note the emphasis on complaints rather than ethics and industry practices. Two years later, the government rejected the recommendations in favour of existing self-regulation. In one sense the PCC has a reasonable track record of dealing with complaints. Complainants invariably chose the PCC rather than a legal route because they simply wanted an apology or a commitment to reassure them that the conduct would not recur. The complaints were judged against a Code of Practice, a set of 16 principles reviewed annually that were deemed to form the foundation criteria for responsible journalism. Clause 10 which deals with clandestine devices and subterfuge is particularly apposite.

> The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or e-mails; or by unauthorised removal of documents or photographs.

It should be pointed out that engaging in misrepresentation or subterfuge can only be justified when there is a clear public interest underpinning the need to engage in such behaviour and only then when the material sought cannot be obtained by other, presumably, lawful means. The PCC has either resolved or adjudicated on thousands of individual complaints. However if there were generic issues affecting journalism practice then the PCC was the only body that could make an objective assessment of the problems facing the industry. Is it really conceivable that the PCC, a body that has numerous editors of national newspapers and magazines among its membership, had no idea of the developing storm or that phone hacking and blagging was seemingly endemic within the newsrooms of one or more national newspapers? There was a strong whiff of collusion and self-interest in the lack of effective action in response to the gathering storm.

So while the Leveson Inquiry has been taking evidence and the Metropolitan Police has been pursuing its investigations, civil claims against News International continue unabated. The High Court judge who has been dealing

with the breach of privacy actions was informed in May 2012 that there were 46 outstanding claims against News International and that a claimant group representing all those individual interests had been established. Claimants do not have to allege phone hacking but they can bring evidence of computer hacking or other types of surveillance authorised by the *News of the World*. Intriguingly there appears to be claims emerging against the *Sun* newspaper as well as *NOTW*. Justice Vos has ordered that claims against both newspapers can proceed together. Litigation is due to commence in February 2013. If this litigation follows the pattern of the earlier cases, it is likely that many if not all cases will be settled by then (Staiano, 2012).

The mere existence of a regulatory framework, even a statutory one, does not of itself guarantee that standards will improve. I offer in evidence the creation in the UK of the Office of Communication (OFCOM) to regulate the broadcast media. OFCOM is a statutory creation. Unlike the brief 16-clause PCC Code of Practice the Broadcasting Code runs to some 100 pages. It is a comprehensive blueprint of the fundamental principles of responsible broadcasting. However unlike the 'toothless' Press Complaints Commission OFCOM has the power to impose fines and ultimately withdraw the licence to broadcast. Yet the existence of such a code and the power to impose huge fines has not prevented a number of highly publicised scandals in the past few years. The most publicised was the premium rate telephone scandal that surfaced in 2007. In May 2008, for example, Independent Television, a national broadcaster, was fined £5.68 million when it was admitted that it had made money from competitions for which viewers paid to enter but they had no chance of winning. That might be because the winners had been decided before a programme ended or by inviting viewers to participate in a competition when the broadcast was a repeat.

Ed Richards, the OFCOM chief executive, said at the time:

> This was a thorough set of investigations which uncovered institutional failure within ITV that enabled the broadcaster to make money from misconduct on mass audience programmes.

To the best of my knowledge nobody was ever prosecuted. So my point is that we can write whatever laws we wish. We can create codes of practice and regulatory frameworks to our heart's content but that doesn't guarantee that standards will be maintained or enhanced. What we really need are

people of integrity carrying out their directorial, managerial and individual responsibilities appropriately and each day acknowledging the ethical boundaries within which they have to operate.

So what is Sir Brian Leveson likely to recommend this month after his painstaking work over the last nine months?

Options

Let the existing Press Complaints Commission reform itself:
This is a non-starter, simply because in March 2012 the PCC announced that it was to be disbanded. It is now in a transitional phase maintaining its mediation and conciliation services until a new regime is agreed.

Let the PCC lead the call for a new self-regulatory scheme:
There is a possibility that proposals put forward by Lord Hunt of Wirral who took over the chairmanship of the PCC in the latter part of 2011 may command some support. Lord Hunt's proposals do not embrace statutory regulation but rather a regime that is based upon the publishers signing contracts with a new regulatory body and face having fines imposed if they breach the terms of the agreement. So the idea is that a new regime would be underpinned through enforceable commercial contracts. If fines are to be imposed as part of a contractual regime then one assumes that all publishers would need to know in advance the scale of such fines and precisely on what basis they would become liable.

It is also proposed that named individuals will become responsible for overseeing standards at each publisher. There would be an annual audit through which each publisher would be required to show how each title was ensuring a new Code of Practice was being followed and standards being maintained. In the majority of publications systems are already in place so this should not be overly burdensome. Auditing systems are already in place in many areas of public life. Education, health services and care homes spring to mind. So why not the print media?

Whether Lord Hunt's proposals impress Sir Brian Leveson remains to be seen. There are, however, huge questions that need to be answered. How, for example, can a new regulator ensure that all the big players in the industry contract into a new regime and honour their obligations? Secondly, what is to stop the publishers from pulling out of the new structure? It should be noted that Richard Desmond, the owner of the Express Newspaper Group, withdrew

his titles from the PCC in early 2011. A third question is would such a system help to reassure the public and ensure that the excesses of the recent past are not seen again in the future? One assumes that funding for such a system would have to come from the industry and that in itself might suggest there is the whiff of self-interest at play. Such a system would also seem to be focused on what one might call the everyday complaints that the industry receives and that the PCC dealt with reasonably well. It is the policing of journalistic practices that surely must be at the forefront of any regulatory reform.

If this were to be the blueprint for future regulation then it is probably fair to continue to use the label of *self-regulation* in describing the underpinning philosophy of such a regime.

Independence within the Office of Communication. (OFCOM):

Another option that appeared to attract critical attention at the inquiry hearings was of a print media regulator acting within the 'backstop' of OFCOM, the current broadcast regulator in the UK. The Office of Communication was created by the *Office of Communications Act 2002*. So a key point is whether there is an overriding need to create a second regulatory framework unless the dichotomy between print and broadcast regulation needs to be maintained. The Advertising Standards Authority has an independent existence within the overall framework of OFCOM. It continues to determine its own modus operandi without any intervention from OFCOM. Only if there are serious problems in the way the authority operates would OFCOM be drawn into the equation with the expectation that it would investigate and endeavour to resolve any issue as quickly as possible. So the assumption is that a new print regulator would work independently within the OFCOM framework dealing with any alleged breaches of either the existing Editors Code of Practice or a new set of guidelines resulting from the inquiry's recommendations.

This idea has merit and not only in cost terms. First it would mean independence from government and Parliament. Secondly there would be a 'standing' body ready to take effective action were anything on the scale of what we have seen recently to happen again. This should ensure that we would never again have a weak and ineffective response of the type we saw from the PCC in respect of the concerns raised from 2006 to 2009. Thirdly, OFCOM has the ability to impose fines and as we have seen with earlier broadcasting scandals the impact has been a positive one in changing attitudes and

enhancing good practice within the broadcast industry. It would also mean that the print media would have an advocate for its industry. OFCOM should be seen in a positive light. It may be there to regulate the broadcast industry but it also does a tremendous amount of good work in helping the broadcast industry meet future challenges.

One might regard this as a *co-regulatory* model. This clearly would provide more industry involvement than statutory regulation and would be linked to specifically defined purposes and objectives of regulation. OFCOM's own submission to Leveson was very much supportive of this approach. OFCOM would be the' backstop body' that would ensure effectiveness and when necessary carry out enforcement activity. The print media would have to make a contribution to the running costs of a 'new' OFCOM and no doubt there would need to be additional personnel with print media experience at all levels within the organisation.

Perhaps a co-regulatory model could cope better with tensions that might arise between commercial interests and the public interest. The public interest should be seen as a justification for the pursuit of campaigning, investigative journalism not an excuse for behaviour solely designed to enhance commercial interests. The Max Mosley privacy case in the UK in 2008 was a good example of a contrived public interest that backfired on the *News of the World* resulting in damages payments of £60,000 and legal costs of some £500,000 (British and Irish Legal Information Institute 2008).

The Irish model

In 2008 Ireland established a Press Council and a Press Ombudsman system. The latter in effect takes complaints about alleged breaches of the Irish Code of Practice which runs to 10 principles. In 2012, 325 complaints were dealt with and only 91 proceeded to adjudication. This emphasises the mediation role of the Ombudsman's office. Statutory recognition of the council and Ombudsman resulted from the passing into law of the *Defamation Act 2009*. This means that a judge can take into account whether or not a publication co-operated with the Press Council for the purposes of section 26 of the Act which deals with fair and reasonable publication on a matter of public interest. Professor John Horgan the Irish Press Ombudsman, gave evidence to the Leveson Inquiry on 12 July 2012. He expressed the opinion that statutory *recognition* (not regulation) did nothing to harm press freedom in Ireland.

He considered that the print media viewed this recognition as a 'necessary balancing' of the right to publish and a complainant's right to redress. Newspapers and magazine publishers are not compelled to join the Press Council regime but could face problems in respect of defending defamation actions unless they can show their complaints procedures are at least as effective as those of the Press Council.

The way forward

I would suggest that the *co-regulatory* model is the one most likely to be recommended in the Leveson Report. I can see no overriding reason why a regulatory dichotomy between print and broadcasting media is required going forward. The print media is facing enormous challenges to maintain commercial viability, to respond to convergence issues and to deal with the digital onslaught. A regulatory model that brings a print media regulator within the overarching framework of the Office of Communication has many virtues not least the fact that immediate intervention could occur if there are fundamental problems to be addressed. It is widely predicted that journalism schools in the UK will be forced to teach a compulsory ethics module as part of their overall training programmes. Whether this will result in a more ethical print media is debateable. Ethical issues arise all the time in the training of new journalists and are dealt within context. In my experience, it has been the practices of some of the national newspapers that has undermined the impact of ethics teaching in the journalism schools.

Many will be familiar with the name of Chris Jefferies. He was the landlord of Joanna Yeates, the young woman murdered in Bristol just before Christmas 2010. Within hours of his arrest, the character assassination by the media had begun mainly through inference and innuendo. He was entirely innocent. Try teaching the provisions of the *Contempt of Court Act 1981* that state that once proceedings are *active* then nothing should be published that creates a substantial *risk* of serious prejudice to the administration of justice. Proceedings are active immediately there has been an arrest. I teach my students the legal principles and the reasons for the restrictions. There should not be trial by media. The accused is entitled to benefit from the presumption of innocence. Article 6 of the European Convention on Human Rights guarantees the right to a fair trial. Yet students ask '…if this is the law why did the *Daily Mirror* and the other newspapers engage in the character assassination of Chris

Jefferies?' A hard question to answer with any degree of conviction. To speak of a commercial imperative undermines one's commitment to respect for the rule of law. The prospect of heavy fines did not deter the newspapers with the *Mirror* fined £55,000 and the *Sun* £18,000 for contempt of court.

Simply because a man has been arrested is not a justification for publishing stories which result in him fearing for his life. He has successfully sued newspapers for defamation and has received over £400,000 in damages. It is only by proprietors and editors taking a more ethical approach to the dissemination of news that this sort of situation can be avoided in the future.

The final part of the Leveson Inquiry referred to as Module 4 heard proposals from a wide range of people and organisations as to what would be the most effective regulatory regime for the print media. Respondents were invited to take into account the following three factors:

1. What a regulatory regime should do;
2. How it should be structured to achieve that;
3. The detailed rules that should be put in place to achieve the objectives.

The proposals are to be measured against a set of criteria centred upon:

1. Effectiveness;
2. Fairness and objectivity of standards;
3. Independence and transparency of enforcement and compliance;
4. Powers and remedies
5. Costs.

Looking at the criteria under each of the headings will certainly bring to mind the practices and processes inherent in the OFCOM regime. On that basis, I firmly believe that the inquiry will recommend that a new press regulator should be 'embraced' by the long arms of OFCOM. If as predicted OFCOM does become the 'backstop' regulator for the print media it will deserve the *imprimatur* 'super regulator' as from 1 October 2011 it took over regulation of the UK postal services in addition to its existing responsibilities.

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