

## **‘Moving in concentric circles’? The history and politics of press inquiries**

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### Abstract

*In this paper we consider the Leveson Inquiry’s use of a narrative device – the policy cycle – to justify the need for a break with the past. We challenge that narrative, which runs through much of the literature, and posit a more nuanced and complex account of the politics and history of press inquiries, drawing upon the political science literature. We then reflect upon the implications of our findings for the future of press regulation.*

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## Introduction

The Leveson Inquiry into the *Culture, Practices and Ethics of the Press* represents a landmark in the history of press regulation, and its findings and recommendations are likely to resonate far into the future.<sup>1</sup> Its terms of reference included an investigation of: the relationship that the press has with politicians and the police, the extent to which the 'current policy and regulatory framework has failed', and whether there had been a 'failure to act on previous warnings about media misconduct'.<sup>2</sup> Its recommendations on press regulation, when and if they are implemented, will have profound and far-reaching consequences for press freedom and the protection of individual privacy.

In this paper, we are not concerned directly with the Leveson Inquiry, the events leading up to it, its content, nor its aftermath. Much has been, and will continue to be, written on all of this.<sup>3</sup> Rather, we are concerned with how a narrative of press regulation has been constructed. As the Leveson report states: 'In order to understand the present position in relation to press regulation, it is necessary to examine what has happened in the past'.<sup>4</sup> This is a position with which it is difficult to disagree, but if history is to be used as a rhetorical tool to attack or defend an institution, ideology or normative claim, then it follows

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<sup>1</sup> Lord Justice Leveson *The Leveson Inquiry: Report into the Culture, practices and ethics of the press*, HC780 (London: TSO) available:

<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

<sup>2</sup> *ibid*, pp 4-5. These terms of reference relate to part one of the inquiry.

<sup>3</sup> For an overview, and critique, of Leveson's key recommendations see: D Hooper and B Jordan 'The Leveson report and the future regulation of the press' (2013) 24(2) *Ent. L.R.* 44; P Chamberlain 'Where now? The Leveson Report and what to do with it' (2013) 18(1) *Comms. L.* 21; P Wragg 'Time to end the tyranny: Leveson and the Failure of the Fourth Estate' (2013) 18 *Comms. L.* 11; P Wragg 'Leveson's vision for press reform: one year on' (2014) 19(1) *Comms. L.* 6; S Barnett 'Leveson Past, Present and Future: The Politics of Press Regulation' (2013) 84(3) *Political Quarterly* 353; E Barendt 'Statutory Underpinning: A Threat to Press Freedom?' (2013) 5(2) *Journal of Media Law* 189; T Gibbons 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202; J Rowbottom 'Politicians, the Press and Lobbying' (2013) 5(2) *Journal of Media Law* 253; P Wragg 'Leveson and Disproportionate Public Interest Reporting' (2013) 5(2) *Journal of Media Law* 241; G Phillipson 'Leveson, the Public Interest and Press Freedom' (2013) 5(2) *Journal of Media Law* 220; P Wragg 'The legitimacy of press regulation' [2015] *PL* 290.

<sup>4</sup> Leveson, above n 1, p 195.

that there is a responsibility for those interested in the issues at stake to carefully appraise whether the evidence supports the narrative being presented.

In constructing the history of press regulation, Leveson focused upon six government-initiated inquiries that took place during the twentieth century, suggesting that when taken together ‘these form the formal public policy response to concerns with the press, press standards and the behaviour of journalists and others acting on behalf of newspapers and their employees, in the post-war period’.<sup>5</sup> His summary of events conforms to what can be called the ‘policy cycle’. First, there is a perceived crisis in public attitudes towards press behaviour and ethics, which results in an inquiry recommending the strengthening of controls over the press. The industry responds by setting up, and then strengthening incrementally the (self-)regulatory scheme, though the changes fall short of the preceding inquiry’s recommendations. Then there may follow a period of compliance, with a brief improvement in press behaviour, but as the issue loses political and media attention, the press reverts to the practices which caused the original concerns. The regulator can do little to resist or punish the activities of recalcitrant newspapers because it lacks both the powers and credibility to intervene effectively, inevitably leading to another inquiry. This policy cycle appears to have occurred every ten to fifteen years, interspersed with the activities of parliamentarians, mainly in the form of Private Member’s Bills (PMBs), serving as a particular spur for the government to act.

Lord Justice Leveson, after reviewing all of the previous inquiries, made the following observation:

The history demonstrates a distinct and enduring resistance to change from within the press. This replication of pattern (sic), of the wheels of history moving in

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<sup>5</sup> *ibid.* The Leveson report contains a chapter summarising the history of press inquiries (Leveson, above n 1, part D, ch 1).

concentric circles, has been demonstrated through the press response to the recommendations made and repeated over the years, the regulators' response to those recommendations and, it must be said, the response of successive Governments to the clear advice they have been receiving.<sup>6</sup>

The regularity and inevitability of press inquiries, and their apparent failure to produce real and permanent changes in the behaviour of the press, is well-rehearsed in the literature on press regulation.<sup>7</sup> Less developed is an understanding of how successive governments have used press inquiries to deflect blame and to neuter calls for press reform. Curran and Seaton claim that the press inquiries themselves should carry some of the criticism in failing to propose solutions to the problems they identified, but the principal reason for a failure to respond to issues of press behaviour was that 'the press intimidated the political class'.<sup>8</sup> Conboy echoes this view, claiming that: 'There have been enough concerns over the content and behaviour of the press in the twentieth century to warrant political threats to legislate, but these have usually been faced down by calls to defend the hallowed "freedom of the press", a rhetoric that few politicians would take on despite its flimsy constitutional basis or historical grounding in fact.'<sup>9</sup> As a result, Conboy continues, the inquiries and commissions failed to produce 'any concrete outcomes'.<sup>10</sup> It is the frailty of the government, and the

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<sup>6</sup> Leveson, above n 1, pp 216-17. The title of this paper derives from this quote.

<sup>7</sup> The key literature supporting the 'policy cycle' narrative, much of which is relied upon by Leveson includes: T O'Malley and C Soley *Regulating the Press* (London: Pluto Press, 2000); R Snoddy *The Good, the Bad, and the Unacceptable: The hard news about the British Press* (London: Faber & Faber, 1992); G Robertson *People Against the Press: Enquiry into the Operations of the Press Council* (Quartet Books, 1983). See also D Freedman *The Politics of Media Policy* (Cambridge: Polity, 2008); J Hardy *Western Media Systems* (London: Routledge, 2008); L Fielden *Regulating for Trust in Journalism: Standards regulation in the age of blended media* (Oxford: Reuters Institute for the Study of Journalism, 2011); P Lunt and S Livingstone *Media Regulation* (London: Sage, 2012); M Feintuck and M Varney *Media Regulation, Public Interest and the Law* (Edinburgh: Edinburgh University Press, 2 ed, 2006) pp 191-195. The Media Standards Trust published a paper during the course of the inquiry which sought to reinforce the policy cycle narrative: M Moore and GN Ramsay *A Free and Accountable Media* (Media Standards Trust, 2012) available: <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/06/MST-A-Free-and-Accountable-Media-21-06-12.pdf>.

<sup>8</sup> Curran and Seaton *Power Without Responsibility* (London: Routledge, 7 ed, 2010) p 338.

<sup>9</sup> M Conboy *Journalism in Britain: a historical introduction*, (London: Sage, 2011) p 58.

<sup>10</sup> *ibid*, p 59.

power of press, that is seen to determine any attempt at press regulation. The 'outcome' is rarely if ever attributed to the deliberate intention or strategy of the government itself.

The 'policy cycle' narrative formed a powerful backdrop to the Leveson inquiry and appeared to underscore calls for a change of approach. Leveson's model of self-regulation, which many of the previous inquiries supported and even perpetuated, was to be supplemented by the novel and controversial mechanism of statutory underpinning.

In this paper we challenge the policy cycle narrative in two ways.<sup>11</sup> In the first part we revisit the major inquiries into the press since 1947. This is not just a matter of clarifying the historical record, it is key to how we understand and explain attempts to regulate the press. We show not only how the object of regulation has changed, but also the impetus behind such changes. Each subtly differs from the others, investigating different concerns and justifying their recommendations using distinct evidence. Assessed together they might form a general 'public policy response', but this does not mean that they should be seen as homogenous – concern with the press has evolved over time and it is important to recognise that in the majority of cases the behaviour and ethics of the press have *not* been the main driver behind the inquiries. In the second part of the paper we draw upon the political science literature on inquiries and agenda setting, together with insights into the political economy of media, in order to provide a more nuanced account of the history of press inquiries.

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<sup>11</sup> The idea of a 'policy cycle', a process that brings together the various stages of policy making, did hold sway within political science for some time, but it has been challenged on theoretical and empirical grounds. The criticisms focus on the fact that it fails to map onto reality. The distinct phases of the model, as it is conceived in policy science, are at odds with the empirical evidence which suggests that phases overlap and interact. As a result, it is now regarded as a heuristic device used to organise thinking about, and analysis of, policy change, but not to describe an actual process (see C Knill and J Tosun *Public Policy: A New Introduction* (Houndmills: Palgrave Macmillan, 2012), M Hill *The Public Policy Process* (Harlow: Pearson, 6 ed, 2013), and H Colebatch (ed) *Beyond the Policy Cycle: The Policy Process in Australia* (Crows Nest: Allen & Unwin, 2006)).

Histories of press regulation, and the accompanying policy cycle narrative, are a consequence, we suggest, of viewing the process too parochially. There is no reason to presume that press regulation policy is *sui generis*. It is just one of many policy issues with which governments are confronted, and the way to understand their response is to draw upon the methods by which other policy responses are understood. In the first instance, this is a question of comprehending the setting of an agenda: why and how an issue (in this case, the behaviour of the press) achieves political salience. Where once the agenda was explained in terms of the rational actor faced with an identifiable problem, or by the cautious bureaucrat overseeing a process of ‘disjointed incrementalism’, the explanation now looks to models of ‘punctuated equilibrium’ in which periods of relative stability are marked by radical shifts in the attention given to issues.<sup>12</sup> In the second part of this paper, we explore whether these later perspectives account for the repeated re-appearance of press regulation on the political agenda.

The setting of the agenda is, of course, only one aspect of the story. The other – albeit related – matter is the choice of policy tool with which to respond. This too has been the concern of political scientists.<sup>13</sup> In particular, there is the question of the use of the public inquiry or commission. Typically discounted as attempts to bury a politically awkward problem ‘in the long grass’, the more detailed genealogy of inquiries reveals their uses (and misuses) to take a variety of forms and to result in a range of outcomes.<sup>14</sup> We draw upon both the literature on agenda-setting and on commissions of inquiry to inform our history of attempts at press regulation.

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<sup>12</sup> A Downs ‘Up and down with ecology’ (1972) 28 *Public Interest* 38; H Hecllo and A Wildavsky *The Private Government of Public Money* (London: Macmillan, 1974); P John, A Bertelli, W Jennings and S Bevan *Policy Agendas in British Politics* (Houndmills: Palgrave Macmillan, 2013).

<sup>13</sup> A Jordan and J Turnpenny (eds) *The Tools of Policy Formation: Actors, Capacities, Venues and Effects* (Cheltenham: Edward Elgar, 2015).

<sup>14</sup> R Sulitzeanu-Kenan ‘Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of inquiry’ (2010) 40(3) *British Journal of Political Science* 613.

In better appreciating the press inquiries of the past, we can more readily grasp its present and its future. With this in mind we conclude by commenting briefly upon how to interpret the actions of government and the industry in reacting to and implementing the Leveson Inquiry's recommendations.

## **Part One – Revisiting the history of press inquiries**

In this part, we return to the original source documents and analyse all of the major inquiries set up by British governments since 1947. We have focused on the motivations for establishing the inquiries, the terms of reference, the key themes which emerge, and the reception by Parliament and governments of their recommendations on press regulation. (Our findings are summarised in a table provided in an Annex to this paper.)

We have conducted comprehensive searches and analyses of the archival materials.

Keyword and timeframe based searches of the *Cabinet Papers Online Archive* were undertaken,<sup>15</sup> together with searches of *Hansard*.<sup>16</sup> Although the Cabinet Papers relating to the two Calcutt inquiries (reporting in 1990 and 1993) are still unavailable, there has been some research providing insights into the Government's reception of the reports.<sup>17</sup> This is

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<sup>15</sup> Using terms such as 'Press', 'Newspaper', 'Commission', 'Royal Commission' and the names of those appointed to lead each individual inquiry an insight was sought into how the each was discussed in the privacy of the cabinet and the 'politics' at play behind the scenes.

<sup>16</sup> The introductory section of each report, which details the origins and scope of the inquiry, allowed us to narrow down the timeframes during which we should concentrate our attention (i.e. the earliest parliamentary questions/debates that were claimed to have triggered the inquiries), whilst the date of publication dictated the period in which we looked for government/parliamentary response (further narrowed down by undertaking keyword searches of the House of Common Parliamentary Papers Archive).

<sup>17</sup> A Bingham 'Drinking in the Last Chance Saloon: The British Press and the crisis of self-regulation, 1989-95' (2007) 13(1) *Media History* 79. Bingham draws upon a series of interviews and a roundtable. For the transcripts see: A Bingham (ed) *Regulating the Press: The Calcutt Report and the Establishment of the Press Complaints Commission* (Centre for Contemporary British History 2007). The historian Richard Shannon has published a book in preparation of which he was granted access to the PCC's archives (*A Press Free and Responsible: Self-Regulation and the Press Complaints Commission 1991-2001* (London: John Murray, 2001).

now supplemented, of course, by the lengthy and detailed testimony before the Leveson inquiry of a number of the key protagonists, which we have drawn upon extensively.<sup>18</sup>

It appears that that the tabling of PMBs dealing with concerns over press behaviour can prompt action on the part of government or industry. We undertook an analysis of the Parliamentary Sessional Indexes from 1944-1997 identifying any PMBs which related to the behaviour or regulation of the Press in order to relate their contents to the inquiry closest to them in temporal terms i.e. to what extent did they genuinely influence the timing and tone of any inquiry?<sup>19</sup>

Using these data, we have been able to construct histories of the major inquiries into the press commissioned since World War II, and use these findings to identify different narratives, or sets of narratives, to those considered by Leveson.

Our evidence suggests there are two distinct periods or phases in the history of press regulation. The first is covered by the three decades from 1947, the second by the late-1980s to the mid-1990s. The earlier period sees inquiries into the press prompted more by issues of ownership and control than by the ethics and practices of journalists. It is only in the later period that journalistic behaviour becomes central. In this first section, therefore, we examine the inquiries that took place between 1947 and 1977.

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<sup>18</sup> The evidence received by the Leveson inquiry can be accessed through its archived website. Written evidence is arranged by the name of the witness and can be accessed here: <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/evidence/>. Oral evidence is arranged by the date of the relevant hearing and can be accessed here: <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/hearings/>.

<sup>19</sup> The following PMBs, by year, sponsoring MP, and key provisions were considered: 1952, Simmons, statutory press regulation; 1961, Mancroft, general right to privacy against press and broadcasters; 1967, Lyons, general right to privacy; 1969, Walden, general right to privacy; 1982, Alluan, right of reply enforced by an ombudsman; 1984, Mitchell, right of reply enforced by statutory panel; 1987, Clywd, right of reply enforced by statutory commission; 1988, Worthington, right of reply enforced by statutory commission; 1989, Browne, general right to privacy; 1992, Soley, right of reply enforced by statutory regulator; 1997, Steen, statutory PCC.



## Inquiries into the press 1947-1977

*The first Royal Commission: The Ross Commission 1947-1949.*<sup>20</sup>

The first inquiry into the press focused on ownership and its effects on freedom of expression and the accurate presentation of news. Discussion of an inquiry first surfaced at Cabinet level in July 1946, with Herbert Morrison (Deputy Prime Minister and Leader of the House) recommending that the Government should make clear, in forthcoming parliamentary debates on the issue, that it 'thought there was a case for considering whether an enquiry ...should be instituted.'<sup>21</sup> This was the subject of some controversy within the Cabinet, particularly over the nature of the inquiry and whether it might lead to the enactment of legislation.<sup>22</sup>

To placate the critics within the Cabinet, it seems that the outcome of the inquiry was mapped out before any evidence had been taken. Morrison explained to his Cabinet colleagues that he did not contemplate that an inquiry would lead to legislative action on the part of the Government, rather it would 'serve a useful purpose in bringing to light undesirable practices which would cease as soon as the light of publicity had been directed on to them'.<sup>23</sup> In a Cabinet memorandum of September 1946, Morrison wrote of the need to avoid 'the impression that we are bringing the newspapers to trial', rather the inquiry would

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<sup>20</sup> Royal Commission on the Press 1947-1949 Cmd 7700. The Political and Economic Planning Group (PEP) was the first to recommend self-regulation of the press in 1938. While the Leveson report suggests this was a government appointed group (Leveson, above n 1, p 197) PEP described itself in its foreword as 'an independent non-party group, consisting of more than a hundred working members' who 'give part of their spare time to the use of their special training in fact-finding and in suggesting principles and possible advances over a wide range of social and economic activities.' Political and Economic Planning Group, *Report on the British Press* (London: PEP, 1946).

<sup>21</sup> The National Archives (TNA) Cabinet Conclusions, 15 July 1946 [C.M. 68 (46)] CAB/128/6.

<sup>22</sup> In response to Morrison's initial suggestion of a Royal Commission, Sir Stafford Cripps (President of the Board of Trade) argued instead for a formal judicial led inquiry, set up under the Tribunals of Enquiry (Evidence) Act 1921. Lord Jowitt (Lord Chancellor) weighed in pointing out that it was unlikely that a judge could be secured to lead such an inquiry. Cripps also posed the question of what action the Government might take as a result of an inquiry: 'Was it contemplated, for example, that the enquiry should lead to legislation, and if so, on what lines?' TNA Cabinet Conclusions, 30 July 1946 [C.M 75 (46)] CAB/128/6.

<sup>23</sup> TNA Cabinet Conclusions, 30 July 1946 [C.M 75 (46)] CAB/128/6.

consist of a 'general review of the place which the press should occupy in a democratic community'.<sup>24</sup>

Despite these assurances, there remained doubts within the Cabinet, including the 'real risk of a white-washing report'.<sup>25</sup> While, overall, support for some type of inquiry remained, a number of Ministers remained concerned that the Press would characterise the Government's decision to set up an inquiry as an attack on the freedom of the press, giving yet more rhetorical ammunition 'for a handful of rich men opposed to our economic policy'.<sup>26</sup>

In the light of Cabinet differences, it was decided that there ought to be a free vote in the House of Commons. Carried with a substantial majority, the backbench sponsored motion read:

That, having regard to the increasing public concern at the growth of monopolistic tendencies in the control of the Press and with the object of furthering the free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news this House considers that a Royal Commission should be appointed to inquire into the finance, control, management and ownership of the Press.<sup>27</sup>

It was clear from this that the perceived threat, in Parliament at least, was to free expression, and its source was the ownership and control of the press.

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<sup>24</sup> TNA 'Inquiry into the Press' Memorandum by the Lord President of the Council 27 September 1946 [C.P. (46) 360] CAB/129/13.

<sup>25</sup> TNA Cabinet Conclusions 3 October 1946 [C.M. 84 (46)] CAB/128/6.

<sup>26</sup> TNA 'Cabinet Minutes' 17 October 1946 [C.M. 87 (46)] CAB/195/4.

<sup>27</sup> Cited by the Ross Commission, above n 20, p 3.

Chaired by an Oxford academic Sir William Ross, the Royal Commission began its work in April 1947. Its terms of reference broadly reflected the motion, although concerns over increased concentration were given less prominence. While freedom of expression and accurate presentation of *news* were specified, no mention was made of ethical standards, nor of invasions of privacy.

Reporting in 1949, the Commission's findings were mixed. On the one hand, it took the view that the press was neither highly concentrated, nor likely to become so in the near future.<sup>28</sup> On the other hand, it did express some considerable anxiety that further consolidation might lead to less diversity of viewpoints.<sup>29</sup> Indeed it reported evidence of distortion and excessive partisanship, and a paucity of intellectual rigour, particularly among the national tabloids.<sup>30</sup> The Commission did note the commercial realities of the newspaper business:

The failure of the Press to keep pace with the requirements of society is attributable largely to the plain fact that an industry that lives by the sale of its products must give the public what the public will buy. A newspaper cannot, therefore, raise its standard far above that of its public and may anticipate profit from lowering its standard in order to gain an advantage over its competitor.<sup>31</sup>

There was therefore no simple answer to the question of raising the standard of press coverage. The Commission did however reject two potential solutions. There was no case to be made for major changes in the ownership and control of the industry; free enterprise was, in the Commission's view, a 'prerequisite' of a free press.<sup>32</sup> Neither did the solution lie

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<sup>28</sup> Ross Commission, above n 20, p 175.

<sup>29</sup> *ibid.*, p 176.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*, p 177.

<sup>32</sup> *ibid.*, pp 155, 177.

in state regulation, a point on which the Commission was emphatic.<sup>33</sup> It recommended instead that *the press* set up a body, to be known as the General Council on the Press (GCP) which would seek to maintain freedom of expression and accuracy in the presentation of news. Expressing some surprise that there was no organisation that presented the interests of the press as a whole,<sup>34</sup> the body it proposed would have various functions. While the maintenance and articulation of standards did number among them,<sup>35</sup> there were other functions of at least equal importance, including promoting the training and employment conditions of journalists, conducting research into issues such as changing trends in public opinion and taste, and the structure of the industry.<sup>36</sup> It would also have an explicit lobbying function for the press.<sup>37</sup>

In reporting back to the Cabinet, Morrison described the report as a ‘first-rate survey of the British Press’.<sup>38</sup> He even went on to say: ‘there is much to be said for the view that it would be in the public interest that there should be periodical inquiries into the Press say at ten yearly intervals’.<sup>39</sup> On establishing the proposed GCP, this ‘would be a matter for the Press itself’, but ‘we should say that we favour the recommendation and hope that the Press will give effect to it: if the Press does not act, we must consider the matter again’.<sup>40</sup>

#### *The second Royal Commission: The Shawcross Commission 1961-1962.*<sup>41</sup>

In fact, it was just over ten years before the next inquiry. The main trigger came from a proposed merger between the Odhams Press (a magazine and book publisher) with either

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<sup>33</sup> *ibid*, pp 165, 177. Indeed, the Commission was quite indignant that there had been press coverage in the national newspapers that it had been considering a Government appointed body (*ibid*, p 130).

<sup>34</sup> *ibid*, p 165.

<sup>35</sup> Relatively little attention was paid to the problem of intrusions on privacy and inaccurate reporting, though there was some limited anecdotal evidence (*ibid*, p 132).

<sup>36</sup> *ibid*, pp 170-171.

<sup>37</sup> *ibid*, p 172.

<sup>38</sup> TNA ‘Report of the Royal Commission on the Press’ Memorandum by Lord President of the Council. 9<sup>th</sup> July 1949. [C.P. (49) 147] CAB/129/35

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid*.

<sup>41</sup> *Royal Commission on the Press 1961-1962* Cmnd 1811 (the Shawcross Commission).

Thompson or Daily Mirror Groups, alongside the closure of seventeen national newspapers in the years since the Ross Commission's report.<sup>42</sup> The political fall-out of the proposed merger was felt at Cabinet level. In January 1961, Rab Butler (Home Secretary) observed that 'there was considerable pressure for the Government to institute some form of enquiry', while also cautioning that 'there were serious objections to a *general* enquiry into the Press'.<sup>43</sup> The Prime Minister, Harold Macmillan, made it clear in Parliament that the Government did not intend to intervene directly in the proposed Odhams takeover, but in the Cabinet the idea was mooted of an inquiry 'into the economics of the newspaper industry' to address the 'real public anxiety about the present state of the industry'.<sup>44</sup> Considerable discussion was given to the potential consequences of an inquiry and the chance that it 'would extend embarrassingly into the whole working of the capitalist system' and that consequently the 'best form of enquiry might therefore be a small Royal Commission with limited terms of reference'.<sup>45</sup>

The terms of reference of the second Royal Commission, chaired by Lord Shawcross,<sup>46</sup> were indeed extremely narrow. As it observed in its report: 'The commission were not to be concerned, as were the 1949 Commission, with the performance of the Press, or with General ethical questions'.<sup>47</sup> The focus was largely on what could be seen as the structural factors leading to an increase in concentration of ownership. While the report acknowledged that the consolidation of ownership could impact upon the plurality of views, and the provision of accurate news reporting, the focus was on identifying ways in which the industry might become more efficient, thereby stemming closures and a further concentration of titles.

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<sup>42</sup> *ibid*, pp 9-10.

<sup>43</sup> TNA 'Cabinet Conclusions' 31<sup>st</sup> January 1961 [C.C. (61)] CAB/128/35 (emphasis supplied).

<sup>44</sup> TNA 'Cabinet Conclusion' 7 February 1961: 4 [C.C. (61)] CAB/128/35

<sup>45</sup> *ibid*.

<sup>46</sup> Lord Shawcross had served as an Attorney General under the previous Labour administration, and went on to become to chair the Press Council from 1974 to 1978.

<sup>47</sup> Shawcross Commission, above n 41, p 10. 'General ethical questions' here is taken to mean 'accurate presentation of news', in line with the terms of reference of the Ross Commission (see Table in the Annex to this paper).

On that issue the report rejected any Government interference in the marketplace to support smaller titles, alluding to some of the potential dangers of allowing government to use such economic levers to undermine the freedom of the press.<sup>48</sup> The recommendations were few and modest, the most important concerned controls on mergers between newspapers which were not in the public interest.<sup>49</sup> These proposals were implemented under the Monopolies and Mergers Act 1965. In fact, had this legislation been in place at the time of the Odhams merger, it might have obviated the need for a Royal Commission altogether.<sup>50</sup>

Despite its apparent lack of relevance to the terms of reference, and the Shawcross Commission's own acknowledgement that it was not concerned with press behaviour, a small number of findings and recommendations were made on press regulation.<sup>51</sup> The report was critical that the GCP did not comprise of a lay chairman, nor any lay element, both recommendations of the Ross Commission.<sup>52</sup> The criticisms did not, however, pertain to the GCP's failure as a complaints body policing standards; in fact, the report was critical of the GCP because it appeared to have 'devoted itself almost entirely to questions relating to professional standards'.<sup>53</sup> The problem with the GCP concerned its lack of research activity; it had not been given, in accordance with the recommendations of the Ross Commission, the specific objectives, powers and resources to conduct research into the changing nature of the industry.<sup>54</sup> Indeed, the Commission noted that had these recommendations been implemented then 'our own inquiry might have been unnecessary and public awareness of

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<sup>48</sup> *ibid*, p 98.

<sup>49</sup> *ibid*, pp 105-110. Other proposals included more transparency for readers concerning the ownership of the newspapers they were purchasing, better training for apprentice journalists, and a restriction on cross-ownership of newspapers and television companies.

<sup>50</sup> A key recommendation of the Ross Commission was the expansion of the jurisdiction of the Monopolies Commission to deal with local newspaper consolidations which might not be of sufficient scale to fall within its purview (Ross Commission, above n 20, pp 162, 178).

<sup>51</sup> Shawcross Commission, above n 41, pp 100-102.

<sup>52</sup> *ibid*, p 101. See Ross Commission, above n 20, p 171.

<sup>53</sup> Shawcross Commission, above n 41, p 101.

<sup>54</sup> *ibid*, p 101, [323].

possible developments might indeed, of itself, have modified the course which in the end those developments actually took'.<sup>55</sup>

There is no doubt that the Shawcross Commission saw the lack of action on the part of the press industry as a serious omission, and while agreeing with the Ross Commission that there were advantages to establishing the body on a voluntary basis, it did not rule out the need for legislation:

If the press is not willing to invest the Council with the necessary authority and to contribute the necessary finance the case for a statutory body with definite powers and the right to levy the industry is a clear one. ...We recommend... that the Government should specify a time limit after which legislation would be introduced for the establishment of such a body, if in the meantime it had not been set up voluntarily.<sup>56</sup>

This time the threat to legislate did resonate with the industry. In 1963, the GCP was replaced by a new body, the Press Council, with an independent chair (Lord Devlin, a retired Law Lord), and a lay membership of one fifth.

#### *The Younger Committee on Privacy 1972.*<sup>57</sup>

It is not until 1970 that the issue of privacy and intrusion becomes of sufficient concern to justify an inquiry, albeit one not limited to the activities of the press. Cabinet discussions in January that year were about what attitude to take to a PMB proposed by Brian Walden which included a general right to privacy, enforceable before the courts.<sup>58</sup> The Government

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<sup>55</sup> *ibid*, p 101, [320].

<sup>56</sup> *ibid*, p 102, [325].

<sup>57</sup> *Report of the Committee on Privacy* Cmnd 5012 (the Younger Committee).

<sup>58</sup> On the changing nature of press behaviour and coverage which contributed to parliamentary concern see R Greenslade *Press Gang: How Newspapers Make Profits From Propaganda* (London: Macmillan, 2004), ch 10.

wanted to be seen to be dealing with concerns over privacy, while at the same time marshalling its supporters behind the scenes in an effort to defeat the Bill. James Callaghan (Home Secretary), for example, acknowledged increasing public concern on the subject, but was convinced, together with other Cabinet colleagues, that it was preferable 'that Parliament should prescribe the basic definition of personal privacy' rather than leaving it to the courts to do so 'in a series of rulings on individual cases'.<sup>59</sup> If he failed, however, to persuade the Bill's supporters to back down, the Prime Minister himself engineered the Bill's defeat through the use of the payroll vote: 'the Home Secretary should be given whatever degree of Ministerial support was required to ensure its defeat'.<sup>60</sup>

As a sop to the backbenchers, the Government set up the Younger Committee on Privacy, which included a chapter on the press among many others on broadcasters, credit rating agencies, banks, employment, students and teachers, and medicine, in addition to a more general discussion of a right to privacy.<sup>61</sup> In contrast to the preceding reports, considerable attention was given to press intrusion and privacy; indeed the Committee noted that more complaints had been received concerning the behaviour of the press than any other aspect of the inquiry.<sup>62</sup> These complaints, though, appeared not to resonate with a wider public. Following a survey of public opinion, the Committee concluded that there is 'no clear evidence that the press is in the forefront of people's minds as a threat to privacy'.<sup>63</sup> On the other hand, in evidence, organisations representing the press interest, together with editors and leading proprietors, did accept that there were instances, albeit sometimes exaggerated, of unreasonable behaviour. The press view, however, was that the 'Press Council is the best means of dealing with these transgressions and it is better to accept that they will occur from

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<sup>59</sup> TNA Cabinet Conclusions 22 January 1971 [CC (70)] CAB/128/45

<sup>60</sup> *ibid.*

<sup>61</sup> The terms of reference did not mention the press explicitly.

<sup>62</sup> Younger Committee, above n 57, p 35. It should be noted, however, that the complaints against the press only totalled 27. None of the complaints related to the use of surreptitious devices, and the only complaints concerning intrusion related to harassment.

<sup>63</sup> *ibid.*, p 37.



time to time – and deal with them when they do – than to incur all the risks of legislative controls'.<sup>64</sup>

The Younger Committee settled against recommending for a general right to privacy, preferring instead to recommend specific, piecemeal measures to bolster the protection of privacy (for example, by outlawing the use of surreptitious surveillance techniques). It was against this background that the Younger Committee turned to the Press Council and its efficacy.<sup>65</sup> For such a body to be effective in 'expressing the press' sense of responsibility', it was essential that it must be *created by the press*, and its members *appointed by the press* to include 'a large proportion of people who are concerned with management and editorial policy, and with the everyday work of journalism'.<sup>66</sup> On the other hand, a sufficient level of lay representation, at least half, was also vital if the body was to command the respect of the public:

We do not suppose that the Press Council is incapable of choosing such people, but their influence in the Council and hence their effectiveness will depend on the extent to which they are generally regarded as independently representing the interests of the public rather than the press.<sup>67</sup>

In order to achieve this the Press Council should establish an independent appointments commission to appoint lay members.<sup>68</sup> The Committee cautioned against any delay in implementing this proposal, alluding to previous experience.<sup>69</sup> While recommending that critical adjudication be given 'similar prominence' to the original item of news,<sup>70</sup> more

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<sup>64</sup> *ibid*, pp 37-38.

<sup>65</sup> *ibid*, pp 54-55.

<sup>66</sup> *ibid*, p 55.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid*.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid*.

extensive powers – such as the imposition of fines, awarding compensation, or suspending publication – were ruled out.<sup>71</sup> In addition, the Committee recommended the Press Council codify its decisions on privacy, which might guide journalistic behaviour and inform the public.<sup>72</sup>

*The third Royal Commission: the McGregor Commission 1974-77.*<sup>73</sup>

There is surprisingly little discussion of the build up to the third Royal Commission in the Cabinet papers of the period. There is, however, much discussion of the economic state of the industry, in particular the imminent closure of the Beaverbrook plant in Glasgow.

Cabinet papers from April 1974 indicate that the then Prime Minister, Harold Wilson, was encouraging Ministers to discuss urgently the possibility of the Government providing financial assistance to keep the plant open.<sup>74</sup> The first reference to an inquiry was in a Cabinet memo by the Employment Secretary. This concerned the Government's Bill on trade union rights, noting editors' specific worries over powers the legislation might give to the NUJ to interfere with editorial policy.<sup>75</sup>

Chaired by Professor Oliver McGregor, a social scientist, the focus of the third Royal Commission was again the structure of the press industry and the economic conditions it faced, the major trigger being the problems of the Beaverbrook newspaper group and the dangers of further newspaper closures.<sup>76</sup> This is clearly reflected in the terms of reference which, while including an investigation into 'the responsibilities, constitution and functioning of the Press Council', were dominated by questions concerning the economics of newspaper production, management and labour relations, and market concentration.<sup>77</sup> Despite being of

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<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> Royal Commission on the Press Cmnd. 6810 (1977).

<sup>74</sup> TNA 'Cabinet Conclusions' 9 April 1974 [CC (74)] CAB/128/54/9

<sup>75</sup> TNA 'Freedom of the Press' Memorandum by the Secretary of State for Employment 3 December 1974 [C(74) 142] CAB/129/180/17.

<sup>76</sup> McGregor Commission, above n 73, p 2.

<sup>77</sup> *ibid.*, p i.

peripheral concern, the McGregor Commission's analysis and critique of the performance of the Press Council were more in-depth than any previous inquiry.<sup>78</sup> Public confidence in the Press Council, the Commission asserted, depended upon it showing a 'determination to be independent of the press', and the press in turn had to show a willingness to abide by the rulings of the Council.<sup>79</sup> This was the 'only alternative to the introduction of a legal right to privacy, and, perhaps, of a statutory Press Council'.<sup>80</sup> While the Council had a number of 'worthy' functions, it was only complaints handling which could be viewed as 'essential'.<sup>81</sup> This represented a significant shift from the Ross and Shawcross Commissions.

Although the McGregor Commission was critical of the institutional set up and performance of the Press Council, praise was also heaped upon it:

...[W]e have concluded that it is preferable to build on the framework, traditions and virtues of the existing Council. Though we make many criticisms in this chapter, we emphasise at the outset that these virtues are great and we record our recognition of the service which the Press Council has given to the community for nearly a quarter of a century.<sup>82</sup>

The Commission also noted that the Press Council was an international exemplar, with other countries modelling their regulatory arrangements closely on it; in turn their 'existence testifies to the high reputation of the British Press Council'.<sup>83</sup> Nevertheless, it lamented the failure of the press to increase lay membership in line with the Younger Committee's

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<sup>78</sup> Although in the context of the final report it was only one of 21 chapters (excluding the introduction and conclusion).

<sup>79</sup> McGregor Commission, above n 73, p 196.

<sup>80</sup> *ibid.*, p 196.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.* Here the Commission is referring to both the Press Council and the predecessor GCP.

<sup>83</sup> *ibid.*, p 198.

recommendations,<sup>84</sup> and while some improvements had been made to the appointments process, it remained unsatisfactory.<sup>85</sup>

Of all the criticisms levelled at the Press Council, the major one related to its lack of a written code.<sup>86</sup> The Commission did not think that the case law of the Council could act as an effective substitute for a clear statement of principles.<sup>87</sup> The code would have both a symbolic and practical purpose, but crucially it would 'enable the public to judge the performance of the press by known and accepted standards'.<sup>88</sup>

The McGregor Commission considered the role of sanctions, including the ability to fine or suspend publication, but rejected them on the basis that they would require statutory backing, a 'potentially dangerous weapon of control over the press'.<sup>89</sup> Instead, it recommended greater prominence be given to adverse adjudications,<sup>90</sup> and also pressed the Council to take a more proactive role, rather than waiting for formal complaints before initiating an investigation.<sup>91</sup>

The Commission's findings on press regulation do not appear to have engaged the Government in any meaningful way. Perhaps this was unsurprising given the political and economic climate of the time, and the marginal relevance of press regulation to the inquiry.

In a Cabinet memo of March 1976, the Secretary of State for Trade refers to 'widespread

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<sup>84</sup> *ibid*, p 200.

<sup>85</sup> In particular that the Press Council itself was responsible for the nomination of potential appointees (*ibid*, p 201).

<sup>86</sup> *ibid*, pp 207-210. Interestingly, a former Chairman of the Council, the retired law lord, Lord Devlin appeared unconvinced by the need for a code of conduct, preferring instead principles to evolve through the development of case law (H P Levy *The Press Council* (1967) xi, cited by McGregor Commission, above n 73, p 207).

<sup>87</sup> During the course of the inquiry the Press Council did make a number of declarations of principle, including one on privacy.

<sup>88</sup> McGregor Commission, above n 73, p 209. It also pointed towards the fact that other self-regulatory bodies, such as the ASA, had adopted codes of conduct, and there was no reason to think that it would not be appropriate for the press.

<sup>89</sup> *ibid*, p 212.

<sup>90</sup> *ibid*, p 213.

<sup>91</sup> *ibid*, pp 204-205, 213.

fears that one or more national newspapers might close while the Commission was pursuing its general remit' and this fear resulted in the Commission publishing an interim report, dealing with emergency financing measures for the industry.<sup>92</sup> The Cabinet response to this report also occurred in a meeting dominated by the resignation of Harold Wilson.<sup>93</sup> In the face of this and the economic instability of the industry the need for improvements in press regulation must have appeared a rather distant concern. By the time the Commission issued its final report, the Beaverbrook plant, which had continued as a workforce cooperative, had finally closed.

### **Summary: press regulation 1947-1977**

This first period in the government's response to the press and press regulation has a number of specific features. It is marked by political caution. This is expressed ideologically in the reluctance to intervene, a reluctance that is justified in terms of a particular, negative liberty conception of press freedom and on a voluntary model of regulation. It is also cautious in policy terms. The inquiries were used to manage and contain the agenda. This period of press regulation is also marked by its focus on the ownership and control of the industry, rather than privacy and the ethics of the newspaper industry. And related to this, any drive for change appears to owe little to public opinion, and more to concerns that are exclusive to the political class and to market growth and change.

Against this backdrop of political caution, the period is characterised by a gradual shift of the agenda towards privacy and journalistic practices, and concern with the institutional design of the self-regulatory regime. Some themes emerging from the later inquiries – especially on the independence of the regulator and the need for a code of conduct – resonate into the future. Nonetheless, as Gerald Dworkin wrote of the Younger Committee, the approach to

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<sup>92</sup> TNA 'National Newspaper Industry' Memorandum by the Secretary of State for Trade 12 March 1976 [C(76) 30] CAB/129/188/5.

<sup>93</sup> TNA 'Cabinet Conclusions' 16 March 1976 [CC(76)] CAB/128/58/10.

regulation was 'very gentle ... and most of its recommendations have been accepted, with relief and satisfaction'.<sup>94</sup> This was to change radically in the second period, as did the cosy consensus around the superiority of self-regulation.

### **'Drinking in the Last Chance Saloon': The Calcutt inquiries and the Government's response 1989-1995**

If the previous period of press regulation was cosy and consensual, this new phase was more confrontational. For the first time, the Government appeared to be giving serious consideration to statutory regulation, together with the enactment of civil and criminal privacy laws. While ultimately this came to nothing, the Government over a long period appeared to extract from the industry a series of concessions to strengthen self-regulation. The interesting question then is how it managed to maintain a *credible* threat of legislating for so long, especially as its political capital withered away.

During the 1980s, the press – particularly the tabloid press – became much more aggressive in its pursuit of 'human interest' stories, especially those about celebrities. The most (in)famous of these concerned the late Princess Diana, the television presenter Russell Harty and the comedy actor Gordon Kaye.<sup>95</sup> But ordinary people also became the focus of tabloid attention, reaching its nadir with *The Sun's* coverage of the Hillsborough disaster in 1989.<sup>96</sup> This behaviour appeared to arouse increasing public concern and media attention. The period saw the launch of *Hard News*, a Channel 4 programme dedicated to the misdeeds of the press, on which the Home Office Minister David Mellor uttered his famous threat to the press that they 'were drinking in the last chance saloon'.<sup>97</sup>

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<sup>94</sup> G. Dworkin 'The Younger Committee Report on Privacy' (1973) 36(4) MLR 399, 404-405

<sup>95</sup> The latter case concerned *Sunday Sport's* journalists who gained access to the actor's hospital room and photographed him after he had brain surgery.

<sup>96</sup> Snoddy, above n **Error! Bookmark not defined.**, pp 99-101.

<sup>97</sup> Greenslade, above n 58, p 539.

*The Calcutt Committee report 1990.*<sup>98</sup>

This, then, was the background to the publication of the *Report of the Committee on Privacy and Related Matters*, the result of an inquiry chaired by David Calcutt QC.<sup>99</sup> As with the Younger Committee, Parliamentary support – during the 1988/89 session – for two PMBs on the protection of privacy and right of reply had forced the Government into acting.<sup>100</sup> For the first time the terms of reference of a Government-instigated inquiry referred solely to the behaviour of the press *and* the possibility of statutory controls directed specifically at it.<sup>101</sup> This is a change in tone, as well as a change in emphasis.

The Calcutt Committee was highly critical of the Press Council.<sup>102</sup> It lacked independence because of its financial dependence upon the publishers and the ‘inherent conflict between its roles as a defender for press freedom and as an impartial adjudicator in disputes’.<sup>103</sup> It was also inefficient, with complainants being deterred from pursuing complaints due to its ‘slow and cumbersome procedures’, often taking several months to conclude.<sup>104</sup> The Committee was also critical of the Council’s lack of a written code of conduct, and its lack of reasoning, detail and precision when it reached a decision.<sup>105</sup> Ultimately the Council lacked effective sanctions; all it could do was ‘encourage, exhort or censure’.<sup>106</sup>

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<sup>98</sup> *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990) (the Calcutt Committee or Calcutt I depending on context).

<sup>99</sup> For a critique of the report see C Munro ‘Press Freedom – How the Beast was Tamed’ (1991) 54(1) MLR 104.

<sup>100</sup> Calcutt Committee, *ibid*, p 1.

<sup>101</sup> Its terms of reference refer to ‘public concern about intrusions into the private lives of individuals by certain sections of the press’ and the need ‘to consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen’ (*ibid*, p 1).

<sup>102</sup> *ibid*, pp 63-64.

<sup>103</sup> *ibid*, p 63. There were even reports that members of the Council had appeared at hearings on behalf of their own newspapers.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid*, p 64.

<sup>106</sup> *ibid*.

The Calcutt Committee then took an audacious step. While stating that the press should be given ‘one final chance to prove that voluntary self-regulation can be made to work’, in order to ‘emphasis the break from the past’, the Press Council should be disbanded and replaced by a new body.<sup>107</sup> This gave the Committee the opportunity to shape the responsibilities and procedures of the new body, which it did so in considerable detail. The new body, to be called the Press Complaints Commission (PCC), should focus solely on providing effective redress for complainants, rather than lobbying in the press interest,<sup>108</sup> and should itself draft, ‘publish, monitor and implement’ a code of practice.<sup>109</sup> To underscore its independence and effectiveness, appointments would be made by an independent commission,<sup>110</sup> and the industry would need to demonstrate a willingness to provide the necessary funding.<sup>111</sup> The powers of the PCC, however, were not to be significantly expanded from those enjoyed by the Press Council; in particular it would have no powers to award compensation nor to prevent publication.<sup>112</sup> The only power it would have was to require the publication of adjudications and apologies in accordance with its directions.<sup>113</sup>

The new model of self-regulation was hardly a fundamental change from the pre-existing arrangements. More significant was the ‘trap’ which the Calcutt Committee laid were the industry to not comply fully. While previous inquiries had alluded to the possibility of legislation if their recommended reforms were not implemented, the Calcutt Committee went further by prescribing in detail an alternative statutory scheme if the industry could not demonstrate that self-regulation could work.<sup>114</sup> The test of success was a ‘stiff one’ which would be failed by the misbehaviour of just a few maverick publications.<sup>115</sup> And statutory

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<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*, p 66.

<sup>109</sup> *ibid.*, p 67.

<sup>110</sup> *ibid.*, pp 69-71.

<sup>111</sup> *ibid.*, pp 71-72.

<sup>112</sup> *ibid.*, p 67.

<sup>113</sup> *ibid.*, p 69.

<sup>114</sup> *ibid.*, ch 16.

<sup>115</sup> *ibid.*, p 73. The reference to maverick publications probably related principally to *The Sport* which had not been a member of the Press Council.



regulation, rather than being a last resort, was instead presented as a reasonable and proportionate solution to the problem at hand.<sup>116</sup> A statutory tribunal would be charged with the interpretation and enforcement of a code of practice, with powers extending to the award of compensation and even prior restraint. In these respects, the Calcutt Committee represented a radical departure from the past.

Beyond press regulation, the Committee also recommended a number of criminal offences aimed at the press in the pursuit of increased protection of privacy.<sup>117</sup> On the other hand, as had the Younger Committee before it, the Calcutt Committee recommended against the adoption of a tort of infringement of privacy, despite the Court of Appeal's overtures to Parliament to do so in *Kaye v Robertson*,<sup>118</sup> a judgment handed down during the Calcutt Committee's deliberations.<sup>119</sup>

In another break with the past, there was considerable support in Government for the implementation of the recommendations. Recognising the risks of inaction, an initial Home Office discussion paper emphasised that any delay in acting would mean a reversion to the status quo of a succession of 'poorly drafted Bills', 'Government inspired efforts to talk them out' and 'Parliamentary indignation at the impunity of the press'.<sup>120</sup> David Waddington (Home Secretary) and his junior David Mellor emphasised the need to make clear that backing the new PCC, rather than a statutory body, should not be seen as an act of weakness.<sup>121</sup>

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<sup>116</sup> Intermediate steps, such as self-regulation on the contractual model, and statutory back-stop powers were rejected.

<sup>117</sup> These related to physical intrusion, long-lens photography, and the use of covert surveillance devices with the intent of obtaining private information for publication, all of which would be subject to a number of public interest defences (Calcutt Committee, above n 99, p 23). See Munro, above n 99, pp 108-109 for a discussion.

<sup>118</sup> [1991] FSR 62.

<sup>119</sup> Calcutt Committee, above n 99, ch 12.

<sup>120</sup> Bingham, above n 17, p 83.

<sup>121</sup> *ibid*, p 84.

The PCC was set up in 1991 and its early days turned out to be something of a 'baptism of fire'.<sup>122</sup> The industry's behaviour seriously undermined it during its 'probationary period', with one story concerning the breakdown of the marriage of the Prince and Princess of Wales attracting particular opprobrium.<sup>123</sup> These events triggered a number of different responses. On the part of the Government, David Mellor (now promoted to the new post of Secretary of State for National Heritage) invited Calcutt in July 1992 to judge the PCC's performance, although this time he was unconstrained by a committee.<sup>124</sup> Developments were also taking place in Parliament, with a further PMB proposing statutory regulation being published by Labour backbencher Clive Soley, and the National Heritage Select Committee (NHSC) announcing its own investigation into press regulation.

#### *Calcutt II Report 1993.*<sup>125</sup>

Published in January 1993, Calcutt's assessment of press regulation was not good news for the industry. Calcutt was singularly unimpressed with the PCC, and the industry's failure to implement the Committee's recommendations in full.<sup>126</sup> He derided the PCC as 'in essence, a body set up by the industry, financed by the industry, dominated by the industry, operating a code of practice devised by the industry and which is over-favourable to the industry'.<sup>127</sup> Tinkering with the PCC was not sufficient. In Calcutt's view, it was not only time for a statutory tribunal but also for the enactment of a tort of privacy, the worst possible outcome for the industry.

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<sup>122</sup> *ibid*, pp 84-85.

<sup>123</sup> This resulted from the serialisation of Andrew Morten's book on Princess Diana in *The Times* in June 1992. It subsequently became clear that the book was written with the tacit consent of the princess.

<sup>124</sup> Neither did he consult the Committee (Bingham, above n 17, p 86).

<sup>125</sup> Department of National Heritage *Review of Press Self-Regulation* (Cm 2135) (London: HMSO, 1993) (Calcutt II)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271963/2135.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271963/2135.pdf).

<sup>126</sup> While a code had been adopted, Calcutt complained that it was created and controlled by the industry, rather than by the PCC. Furthermore, the appointments process was not sufficiently independent, and the PCC's inability to deal with third-party complaints 'gravely weakened' its potential to regulate.

<sup>127</sup> Calcutt II, above n **Error! Bookmark not defined.**, [5.26].

Much had changed in the period between the creation of the PCC and Calcutt II. While the credibility of the PCC had been damaged, the incumbent Government had also been affected by events: it now had a wafer thin majority, on 'Black Wednesday' sterling had been ejected from the ERM, and the UK continued in a period of recession. The resignation of David Mellor, during the course of the Calcutt II inquiry, was part of a concerted investigation into 'sleaze' within politics.<sup>128</sup> Collectively these events can be seen as contributing to the 'draining away' of the political capital that would be needed to take on the press.<sup>129</sup> In responding to Calcutt's recommendations, Mellor's successor, Peter Brooke, took the pragmatic view that 'the political climate made strong action against the press profoundly difficult'.<sup>130</sup> The upcoming debate on Soley's Bill and the imminent report of the NHSC also gave the Government breathing space. Another important factor was the lack of consensus around Calcutt's recommendation for a statutory tribunal. Ardent critics of self-regulation – Soley, Kaufmann<sup>131</sup> and even Robertson<sup>132</sup> -- all rejected Calcutt's prescription of what the latter called 'state sponsored censors'.<sup>133</sup> When it reported in late-March 1993, the NHSC rejected Calcutt's tribunal, recommending a half-way house of continued self-regulation with a backstop statutory ombudsman scheme.<sup>134</sup> Meanwhile the industry reacted with a series of significant reforms aimed at addressing some of the Government's concerns.<sup>135</sup>

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<sup>128</sup> Mellor had apparently announced the Calcutt II inquiry knowing that the press was investigating his private life. While this is testament to his resolve to act, it did fatally undermine his independence forcing his resignation (Shannon, above n 17, p 101).

<sup>129</sup> Bingham, above n 17, p 85.

<sup>130</sup> *ibid*, p 86.

<sup>131</sup> Who chaired the National Heritage Select Committee at the time.

<sup>132</sup> Robertson was the author of a book which had broadly condemned the Press Council (Robertson, above n **Error! Bookmark not defined.**).

<sup>133</sup> Shannon, above n 17, p 119.

<sup>134</sup> National Heritage Select Committee *Privacy and Media Intrusion* (HC 294, 1993) xxi.

<sup>135</sup> These included strengthening the independence of the appointments commission, announcing extra funding, the setting up of the telephone hotline, changes to the code dealing with intrusive photography (with the PCC to ratify changes), and an extension of the PCC's remit to deal with third party complaints (*ibid*, p 122).

While statutory regulation was now off the agenda, the enactment of privacy laws was a live issue within Government.<sup>136</sup> The Lord Chancellor had in July 1993 published a consultation paper which was broadly supportive of a statutory privacy tort,<sup>137</sup> and the case for new intrusion offences – à la *Calcutt I* – also gathered pace, despite problems concerning the need to exempt the security services.<sup>138</sup> By early-1994, it appeared that the Government's White Paper on privacy would include firm legislative proposals on both fronts. However, in March 1994, the Prime Minister intervened personally in the work of the Cabinet sub-Committee ordering them to 'go back to the drawing board'.<sup>139</sup> Why the *volte-face*? Sir John Major's evidence before the Leveson inquiry is revealing. There was a presentational issue, insofar as a civil remedy would be seen as protecting the rich elite rather than the ordinary public.<sup>140</sup> More importantly, however, it was clear to him that the press were very hostile to the privacy tort, and there was the danger of their opposition 'spilling-over' into other policy areas.<sup>141</sup> Another important development came with the announcement in November 1994 that Conservative peer, Lord Wakeham, was to take over as PCC chairman in the New Year. He had chaired the Cabinet sub-Committee responsible for the emasculation of the draft White Paper, an important factor in the industry appointing him.<sup>142</sup> More importantly, as Major admits, his appointment made it much less likely that the Cabinet and Conservative MPs would support privacy legislation.<sup>143</sup> There was a change of personnel within Government, with Brooke being replaced by Stephen Dorrell, a strong advocate of self-regulation.<sup>144</sup>

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<sup>136</sup> In a speech to the Newspaper Society in May 1993, the then Prime Minister, John Major, appeared to rule out statutory regulation (Shannon, above n 17, p 129).

<sup>137</sup> LCD and Scottish Office, *Infringement of Privacy, Consultation Paper*, July 1993.

<sup>138</sup> Bingham, above n 17, p 88.

<sup>139</sup> Oral evidence to the Leveson Inquiry of Lord Brooke (Morning Session, 24 May 2012) p 19.

<sup>140</sup> Oral evidence to the Leveson Inquiry of Sir John Major (Morning Session, 24 May 2012) p 68.

<sup>141</sup> *ibid*, pp 69-72.

<sup>142</sup> Second witness statement of Lord Wakeham (15 May 2012) [31].

<sup>143</sup> Witness statement of Sir John Major (14 May 2012), p 37.

<sup>144</sup> Shannon, above n 17, p 192.

*The 'exit from the last chance saloon': the Government 'White Paper' 1995.*<sup>145</sup>

Dorrell was the effective author of the White Paper, published finally in July 1995.<sup>146</sup> The Government still had to adopt a firm position on the privacy tort and the intrusion offences but, according to Dorrell, it had 'argued itself into a standstill'.<sup>147</sup> There was also a tactical reason for not enacting the tort – doing so would leave it only with the (by now wholly unconvincing) threat of statutory regulation to extract further concessions from the industry.<sup>148</sup>

The White Paper explicitly ruled out statutory regulation mindful that many members of the public 'would think the imposition of statutory controls on newspapers invidious because it might open the way for regulating content, thereby laying the Government open to charges of press censorship'.<sup>149</sup> It called for general improvements to the PCC, including the setting-up of a compensation scheme and a significant strengthening of the Code.<sup>150</sup> Most notably, the Government retrenched its position on the privacy tort and intrusion offences, ruling out both on the basis of drafting problems and a lack of public consensus.

## Summary

In summary, the second period in the history of press regulation was, as we have shown, significantly different from its predecessor. Not only did the focus shift decisively from market and industry issues to those of ethics and journalistic behaviour, but also the inherent

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<sup>145</sup> *The Government's Response to the House of Commons National Heritage Select Committee, Privacy and Media Intrusion* (Cm 2918, July 1995) (the White Paper). Though commonly referred to as a White Paper, as its title indicates, it was technically a response to the NHSC report of March 1993.

<sup>146</sup> Virginia Bottomley had succeeded Dorrell as Secretary of State for National Heritage on 5 July 1995, less than two weeks before the publication of the White Paper on 17 July 1995. The White Paper was approved by the Cabinet sub-Committee in June 1995 (Oral evidence to the Leveson Inquiry of Stephen Dorrell (Morning Session, 23 May 2012) 35).

<sup>147</sup> Oral evidence of Dorrell, *ibid*, p 22. The Lord Chancellor continued to favour the tort, though there were presentational difficulties with the fear it would be represented by the press as a 'self-protection racket'. The Attorney General and the Home Secretary were continuing to oppose the criminal offences, despite the public commitment to legislate (*ibid*, pp 12-16).

<sup>148</sup> Oral evidence of Dorrell, *ibid*, pp 17-18.

<sup>149</sup> White Paper, above n 146, pp 4.

<sup>150</sup> *ibid*, pp 7-8.

resistance to Government intervention momentarily weakened. This is not to say that issues over media concentration went away, but they were refocused on cross-media ownership, especially in the light of the increasing deregulation of broadcasting.<sup>151</sup>

This was and is the closest that any government has come to *statutory* regulation of the press. The Government had drawn a line in the sand – the notion of the ‘last chance saloon’ – which appeared to put its own credibility in question were it to back down. Back down it did, though, as political events conspired to change its ability and, therefore, its view of what it could achieve.

At the same time, the two periods share features too; most notably, they chart an erosion of the reluctance to intervene, a weakening of support for self-regulation and a willingness to use statutory measures to control press excesses (albeit not all in the name of ‘press regulation’). These elements of the history of press regulation show the ‘policy cycle’ account as over-simplistic – the reality is more messy and confusing, but contained within it are some important lessons for those who wish to make sense of press regulation. In the next section, we try to bring some order to the confusion.

## **Part Two: More than ‘concentric circles’? Analysing the history and politics of press regulation**

Our telling of the story of press regulation has focused on the commissions, inquiries and committees that have reported on the issue. This was not just a neat narrative device. This was how successive governments responded to the issue of press regulation. It is,

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<sup>151</sup> In particular, the Broadcasting Act 1996, Schedule 2 contained detailed cross-media ownership rules. See M Feintuck ‘The UK Broadcasting Act 1996: A Holding Operation?’ (1997) 3(2) *European Public Law* 201; Curran and Seaton, above n 8, pp 333-334; Feintuck and Varney, above n 7, pp 135-145; S Barnett What's wrong with media monopolies? A lesson from history and a new approach to media ownership policy (MEDIA@LSE Electronic Working Papers No 18) available <http://www.lse.ac.uk/media@lse/research/mediaWorkingPapers/pdf/EWP18.pdf>.

therefore, important to begin by asking why this particular policy tool has been used in this case.

It is commonly assumed that inquiries are used by politicians as a way of avoiding difficult issues or decisions, while appearing to act decisively.<sup>152</sup> Sporting metaphors are often called upon to describe this strategy: the issue is kicked 'into touch' or 'into the long grass'. In his autobiography, Jack Straw describes how as Home Secretary he contemplated dealing with a contentious Bill designed to introduce freedom of information: 'I had half a thought that the best thing might be to bin the whole bill, kick it into the long grass with a Royal Commission'.<sup>153</sup> Certainly, our evidence reveals occasions when similar thoughts occurred to politicians dealing with the issue of press regulation, but to see all inquiries in this light, and to assign press regulation to the same fate, is to do a disservice to the complex history that we have reported.

There is relatively little research on the politics of the public inquiry, but what there is reveals that many factors come into play in determining why they are used and what effect they have. Among these factors are 'political considerations', but there is also the matter of the 'severity' of the issue.<sup>154</sup> Raanan Sulitzeanu-Kenan argues that the decision to appoint an inquiry may be motivated by a desire to avoid or deflect blame or to be seen to respond to 'the public agenda' (issue salience), and that either may be affected by the proximity of an election. By tracking each of these factors in a range of different UK inquiries (albeit none involving press regulation), he draws the surprising conclusion that the severity of the issue itself *is rarely* the prime motivation. Rather, inquiries are established to deflect blame,

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<sup>152</sup> Charles Clarke, the ex-Home Secretary, has coined the phrase 'The Too Difficult Box' to characterise issues with which politicians are reluctant to deal, and for which an inquiry (or equivalent) is the default response. See C Clarke (ed) *The Too Difficult Box* (London: Biteback, 2014).

<sup>153</sup> J Straw *Last Man Standing: Memoirs of a Political Survivor* (London: Pan, 2013) p 281

<sup>154</sup> Sulitzeanu-Kenan, above n 14.

especially when an election is imminent, and particularly when the issue has 'saliency', by which is meant that it is receiving media attention.<sup>155</sup>

This accords to an extent with our findings on inquiries concerning the press. Both Labour and Conservative governments have used an inquiry in order to deal with an issue which is attracting public, parliamentary and media attention, although the triggers were not the same. The Ross, Shawcross and McGregor Commissions were used in part to manage the political agenda and control the scope of the controversy. The immediate motivations for these inquiries was either the closure of plants, newspapers or a proposed merger.

(Unsurprising then the specific recommendations of all three on the regulation of the press were largely ignored as being either irrelevant or simply a potential source of embarrassment.) In the cases of the Younger and Calcutt Committees, these inquiries were a means of staving off pressure for enacting privacy laws, in particular, legislating for a privacy tort. The Younger Committee was set-up specifically to placate backbenchers who were the supporters of a PMB which would have, if passed into law, created an actionable right to privacy, something the Government of the day did not want to pursue. The Calcutt Committee, the only inquiry launched specifically to address press behaviour, was clearly a response to media and backbench pressure, but was also a means of dealing with internal disagreements within the Government regarding the desirability of taking action to restrict press behaviour.

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<sup>155</sup> If the inquiry is to be seen as a holding device, then it might be supposed that the selection of the chair and members of the inquiry team is key to the politician's strategy. But membership and its impact on the outcome has received very little attention. Sulitzeanu-Kenan's extensive examination of inquiries (above, n 14) makes almost no mention of the issue. Our own analysis of the membership (see Annex Column 3) does not suggest any obvious correlation between the outcomes and the size or composition of the inquiry. Nor does there appear to be one with the professional or political affiliation of the chair. For the most detailed discussion in the literature see M Bulmer 'The Royal Commission and Departmental Committee in the British Policy-making Process' in B G Peters and A Barker (eds) *Advising West European Governments: Inquiries, Expertise and Public Policy* (Edinburgh: Edinburgh University Press, 1993) 37. For the politician's view see G Howe 'The Management of Public Inquiries' 2002 70(3) *Political Quarterly* 304.



The motivations and responses of the Thatcher and then Major administrations to the two Calcutt reports go beyond merely managing the public agenda and ministerial differences. While it is easy to characterise the years from the Calcutt Committee's report in 1990 to the publication of the White Paper in 1995 as a period of procrastination and dithering, the situation is far more complex. Although the eventual response of the Government was to ignore the recommendations of both Calcutt I and II, and merely continue to encourage the press to improve its self-regulatory arrangements, the administration had managed to extract improvements to the self-regulatory regime. The industry realised that undermining the credibility of the PCC could ultimately result in legislative action. It is probably correct to say that by 1995 the 'last chance saloon', and the unconsummated threat that it represented, did more harm than good by exposing the Government's inability to act. In Dorrell's words, the Government had eventually to present its conclusion that 'we were going to do nothing in the least bad way'.<sup>156</sup> However, here we see the politicians using the device of an inquiry tactically, bringing pressure to bear on the industry to reform and improve self-regulation by holding the recommended legislative measures in abeyance for as long as is possible and credible. Perhaps this is a pertinent lesson for the current Government.

'Issue salience' is not synonymous with public concern. As the Calcutt Committee admitted, there was nothing to suggest that press behaviour had worsened over time.<sup>157</sup>

Nevertheless, the 'salience' of the press behaviour, at least as a matter of media attention, clearly influenced the decision to set up Calcutt (and later, of course, Leveson). The abuses of privacy and gross misreporting provided ammunition for rival media outlets. And although press inquiries were not always obviously linked to the severity of the issue or the need to deflect blame, it is evident that they were useful to politicians who felt fearful about intervention that might be represented as compromising 'the freedom of the press'.

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<sup>156</sup> Oral evidence of Dorrell, above n 146, p 35.

<sup>157</sup> Calcutt Committee, above n 99, [4.8].

Concern for the freedom of the press, and a belief in the harmful effects of state intervention, may well derive from a deeply held political philosophy.<sup>158</sup> While this may have suppressed the desire to intervene, it would be hard to make sense of the history of press inquiries without acknowledging the changing relationship between politicians and the press. The Leveson inquiry paid considerable attention to this question, and the extent to which a relationship which is too close may distort public policy choices, especially in relation to media policy.<sup>159</sup> But if anything evidence over time suggests a more antagonistic and confrontational relationship between the press and politicians. Steven Barnett, in charting the period from 1945 onwards, characterises this deterioration in terms of the passage from 'deference' to 'disdain'.<sup>160</sup> If Barnett is right, then this state of affairs helps to account for the shift in attention from the ownership and economic sustainability of the press to journalistic standards.

Lying behind this growing antagonism is the newspapers' struggle to maintain their market share, faced by the rival claims of television and other forms of news delivery. These shifts put pressure on advertising revenue; they also make it harder for newspapers to retain their readers. To counter both, there is a strong incentive to sensationalise news and to focus more on human interest stories and 'soft' news generally.<sup>161</sup> Both of these might lead to behaviour that may either impact directly on politicians or on those who have their ear. In other words, the political prominence given to journalistic behaviour may itself be a product of shifts in the political economy of journalism, and of the latter's consequence for relations with politicians and with the need to find 'news' that attracts the attention of a declining

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<sup>158</sup> For a discussion see Phillipson, above n 3, and Wragg 'The legitimacy of press regulation', above n 3.

<sup>159</sup> See, in particular, The Leveson Inquiry, above n 1, Volume III, Part I, chapter 8. For a discussion see Rowbottom, above n 3.

<sup>160</sup> S Barnett 'Will the crisis in journalism provoke a crisis in democracy?' (2002) 73(4) *Political Quarterly* 400.

<sup>161</sup> See C E Baker *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: CUP, 2007); J Curran and J Seaton, above n 8.

readership. Such an account again calls into question the 'policy cycle' narrative. This is not about repeated patterns, but a trend.

We see from our historical account of press inquiries, that governments are fearful of a stand-off with the press. The Attlee Government, worried of the consequences of an inquiry recommending legislative measures and the inevitable press retaliation, was clearly relieved that the Ross Commission recommended that it do nothing. John Major's decision to shelve plans to legislate was clearly motivated by an anxiety that a press backlash would extend across the whole of the Government's activities.<sup>162</sup> Even a Government with a landslide majority, at the beginning of its term, may wish to ignore the issue of press reform rather than seize the moment. As Tony Blair revealed in his Leveson evidence, his administration wanted to manage the relationship with the press, rather than confront it.<sup>163</sup>

It is important to note, however, that the increasing visibility or experience of an issue is not in itself a guarantee that it will feature on the political agenda. The Leveson 'policy cycle' suggests that for press regulation there is a natural order to these things; that the issue emerges every ten to fifteen years in response to public concern as the system of self-regulation inevitably breaks down.<sup>164</sup> However, a better account is to be found in recent work on the formation of agendas in British politics by Peter John and his colleagues.<sup>165</sup>

Moving beyond notions of (disjointed) incrementalism (relatively routine processes of adjustment) and, ideas of an 'issue attention cycle' in which policy agendas are set by

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<sup>162</sup> Oral evidence of Major, above n 140, pp 69-72.

<sup>163</sup> Oral evidence to the Leveson Inquiry of Tony Blair (Morning Session, 28 May 2012) pp 4-5. While in opposition, Tony Blair had sought a rapprochement with the Murdoch press with his Hayman Island speech to News Corp executives in July 1995. The speech was on the topic of the cross-media ownership, but had a wider effect of neutralising the issue of press regulation for any incoming Labour administration (Shannon, above n 17, p 201). It should not be forgotten, however, that major changes to privacy laws were implemented by the Labour government. Principal among these was the incorporation of the ECHR by Human Rights Act 1998 which gave the courts the legislative imprimatur for the development of the tort of misuse of private information.

<sup>164</sup> We see from our analysis of the inquiries that press behaviour has not been the main 'trigger', with the exception of Calcutt I and II.

<sup>165</sup> John et al., above n 12.

'crises' encountered by the system, John et al. adopt the concept of 'punctuated equilibrium', in which periods of stability are followed by those of rapid, and radical, change. In its latest version, this model – still drawing on evolutionary metaphors – has emerged as 'focused adaptation' in which governments, faced with a range of policy issues/problems, respond by selecting the issues and responses that will best serve their electoral calculations. While John et al.'s research does not consider the media and media regulation, it does suggest that we should understand the decision to initiate inquiries into the press, and the policy (or lack thereof) that follows, as part of an electoral calculation, itself mediated by media framing of the issue. The 'policy cycle' relied on by Leveson becomes instead part of the restless trawling of problems and issues undergone by British governments, and the iteration between the partial solutions that emerge from each new crisis and its attendant inquiry. Rather than a cycle, we are seeing periods of relative stability, which does not indicate that the issue of press regulation has 'gone away', followed by dramatic, visible 'action' as its salience changes.

One surprising result of our historical analysis of press inquiries is the potential PMBs have to prompt Government action; these bills, especially those that attract the opposition of the government of the day, face formidable parliamentary hurdles.<sup>166</sup> It is difficult to state categorically the effect that any of these Bills had on events, with two exceptions.<sup>167</sup> The Simmons Bill in 1952 appeared to act as a catalyst for the press industry's implementation of the Ross Commission's proposals on the setting-up of the General Council on the Press.<sup>168</sup> Walden's Bill in 1969 was clearly pivotal in the setting up of the Younger Committee looking into privacy generally.<sup>169</sup> There was also evidence that the Government's initial proactive response to the Calcutt Committee's recommendations was influenced by the potential

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<sup>166</sup> See A Brazier and R Fox 'Enhancing the Backbench MP's Role As a Legislator: The Case for Urgent Reform of Private Members Bills' (2010) 63(1) *Parliamentary Affairs* 201. On proposals for reform see House of Commons Procedure Committee *Private Members' bills* (HC 188, 2103).

<sup>167</sup> See n 19 above for a list of all the PMBs.

<sup>168</sup> Indeed, the Bill was withdrawn in the light of the industry's decision to set-up the GCP.

<sup>169</sup> This is well documented in the Cabinet discussions above.

embarrassment of having to talk-out a series of backbench bills.<sup>170</sup> It would be too simplistic, therefore, to dismiss the potential of PMBs to influence the government by virtue of the very low probability of their reaching the statute book. They may form the vocal point for public and media debate, and ultimately lead to a change in government policy.<sup>171</sup>

This history of press inquiries does not conform to the neat picture of the ‘concentric circles’ of a policy cycle. Instead, it is constituted by the combination of political ideology and political pragmatism, as these wrestle with principles of free press and state intervention; by the shifting political economy of the press, and the consequences this has for news agendas and journalistic practice; by the impact this media behaviour has on the political class, mediated by that class’s dependence on powerful media conglomerations; by the inadequacies of the regime of self-regulation; and by the contingencies of scandals and electoral cycles. This complex network of intersecting processes was reflected in, and refracted by, the inquiries into press regulation.

### **Part Three: Lessons for the future**

We turn now to consider briefly what this history of press inquiries means for the future of press regulation. As we said at the outset, we have deliberately avoided a discussion of the events leading up to the setting-up of the Leveson inquiry and the machinations of politicians and the industry in its aftermath. Nonetheless some lessons from the past can usefully inform how we should view present and future events.

Leveson’s recommendations on press regulation were and have only been partially implemented by the Coalition Government and the industry. Again, it appears that the press has demonstrated a degree of intransigence when it comes to conforming to the

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<sup>170</sup> Bingham, above n 17, p 81.

<sup>171</sup> For examples see Brazier and Fox, above n 166, pp 205-207.

recommendations of ‘yet another’ inquiry. Crucially, the vast majority of the industry has refused to engage with the Leveson-inspired recognition architecture put in place under the Royal Charter.<sup>172</sup>

We have also had an intervening general election, seeing the return of a Conservative administration and the appointment of a Secretary of State who is apparently unpersuaded of the need to implement in full the laws which did make it to the statute book under the last Parliament.<sup>173</sup>

On the face of it, Leveson’s caution appears to have gone unheard:

This is the seventh time in less than 70 years that the issues which have occupied my life since I was appointed in July 2011, have been addressed. No-one can think it makes any sense to contemplate an eighth.<sup>174</sup>

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<sup>172</sup> A position confirmed by the IPSO chairman, Sir Alan Moses: HL Select Committee on Communications, *Press Regulation – Where are we now?* Evidence Volume, Q26 <http://www.parliament.uk/documents/lords-committees/communications/Pressregulation/PREvidence.pdf>. For a good explanation of the Royal Charter and the incentives to join a regulator recognised by the Press Recognition Panel (PRP), see: Hugh Tomlinson *The New UK Model of Press Regulation* (LSE Media Policy Brief, March 2014): <http://www.lse.ac.uk/media@lse/documents/MPP/LSE-MPP-Policy-Brief-12-The-New-UK-Model-of-Press-Regulation.pdf>. The failure of any industry regulator to apply and receive recognition has the consequence that the cost-shifting rules under section 40 of the Courts and Crime Act 2013 cannot come into effect. The vexed question of a rival regulator, IMPRESS, applying for recognition may well have important consequences here. The PRP has opened a second consultation on whether IMPRESS should be recognised, see PRP ‘Second PRP call for information about IMPRESS’s application’ 4 May 2016 available: <http://pressrecognitionpanel.org.uk/2206-2/>. IMPRESS has a very limited membership, with no mainstream national titles.

<sup>173</sup> This relates to commencement of the cost-shifting rules under section 40 of the Courts and Crime Act 2013. The Secretary of State, John Whittingdale has indicated that he is ‘not minded’ to commence these provisions, see HC Deb 21 April 2016, vol 608, col 1045.

<sup>174</sup> Lord Justice Leveson *An inquiry into the culture, practices and ethics of the press: executive summary and recommendations*, HC779 (London: TSO, 2012) p.31 available: <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0779/0779.asp>. More famously, during the oral evidence of Jeremy Paxman, Leveson expressed his determination ‘not to do is to produce a document which simply sits on the second shelf of a professor of journalism’s study for him to discuss with his students as yet another attempt that went nowhere’ in response to which Paxman quipped ‘As high as the second shelf, eh?’ (Afternoon Session, 23 May 2012) p 144.

But this only tells part of the story.

Clearly the Independent Press Standards Organisation (IPSO), the body which the press have put in place, falls short of Leveson's recommendations in a number of key respects, although it does improve upon what has gone before.<sup>175</sup> It is underpinned by contract – which means for the first time that the press regulator's powers are enforceable, in a way that is common, and relatively successful, among other non-statutory regulators.<sup>176</sup>

Membership of the Editorial Code Committee – responsible for amending the Code – has been changed to include three lay members in addition to the chairman of IPSO, and the Code itself has recently been amended to reflect some of the adverse adjudications of IPSO in its first year.<sup>177</sup> The chairman, Sir Alan Moses, a retired Court of Appeal judge, has expressed his intention to implement reforms; for example, changes have been made to IPSO's procedures (which he had previously stated publicly to be 'opaque', allowing the publishers to 'obfuscate and resist' investigations),<sup>178</sup> he has secured a four year funding deal for the industry,<sup>179</sup> and more importantly perhaps, he has put his weight behind a

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<sup>175</sup> For a detailed analysis see Media Standards Trust, *IPSO: An assessment*, 15 November 2013 <http://mediastandardstrust.org/mst-news/ipso-an-assessment-by-the-media-standards-trust/>. Principally, it still acts in the shadow of an industry dominated body, controlling its purse strings (the Regulatory Funding Company is very close to Pressbof in terms of membership and the powers it has over IPSO). Appointments are not sufficiently independent in terms of what Leveson recommended, and there is at present no arbitral arm.

<sup>176</sup> For a discussion see Moore and Ramsay, above n 7, pp 36-38. Although this model of regulation was rejected by Leveson, it was recognised as an improvement on existing arrangements (above n 1, pp 1648-1650).

<sup>177</sup> Regulatory Funding Company / Editors' Code of Practice Committee *Press Information: Editors' Code of Practice revised* 3 December 2015 [http://www.editorscode.org.uk/downloads/press\\_releases/Code-Review-Press-Release.pdf](http://www.editorscode.org.uk/downloads/press_releases/Code-Review-Press-Release.pdf). See R Greenslade 'Editors' code revised to prevent gender bias and wayward headlines', *The Guardian*, 3 December 2015 <http://www.theguardian.com/media/greenslade/2015/dec/03/editors-code-revised-to-prevent-gender-bias-and-wayward-headlines>.

<sup>178</sup> HL Select Committee on Communications, above n **Error! Bookmark not defined.**, Q30. Amendments have been made to its complaints and sanctions procedures, with IPSO taking control over the content of its procedural rules. These include the introduction of own-initiative investigations, and the simplification of the rules on a 'standards investigation' which may ultimately result in substantial fines up to a maximum of one million pounds. See IPSO Press Release 'IPSO announces new rules and regulations, gaining increased powers and enhanced independence', 10 February 2016 <https://www.ipso.co.uk/IPSO/news/press-releases-statements.html>.

<sup>179</sup> J Jackson and J Martinson 'Ipso agrees four-year funding deal to "underline independence"', *The Guardian*, 10 February 2016 <http://www.theguardian.com/media/2016/feb/10/ipso-agrees-four-year-funding-deal-to-underline-independence>.

consultation on an arbitral arm and launched a pilot arbitration scheme.<sup>180</sup> IPSO has also announced an ‘independent’ review of its performance and institutional arrangements, which mirrors the recognition procedure under the Royal Charter.<sup>181</sup>

So, as the House of Lords Communications Select Committee asked in its probe into the post-Leveson developments, what should the Government do next?<sup>182</sup> The tactical choice for a government wishing to extract further concessions from the industry is probably to do nothing. Since its inception, we have seen incremental improvement upon IPSO’s arrangements.<sup>183</sup> The Government, in turn, would assist the regulator greatly by applying pressure on the industry to put its own house in order while keeping the threat of intervention in the background. For many this will seem far from ideal, but lessons from the past, as we have shown in this paper, show that the politics of press regulation is very much the ‘art of the possible’.

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<sup>180</sup> IPSO *Arbitration Project Report: A report summarizing the issues relating to press arbitration and outlining proposals for an IPSO Arbitration Scheme* (June 2015) <https://www.ipso.co.uk/aboutus/consultationonarbitrationscheme.html>.

<sup>181</sup> IPSO Press Release, 24 February 2016 <https://www.ipso.co.uk/IPSO/news/press-releases-statements.html>. Terms of references ranging from IPSO’s independence, funding levels and its effectiveness in dealing with complaints and imposing remedies. On the independent review see <http://www.ipsoreview.co.uk/>.

<sup>182</sup> HL Select Committee on Communications, *Press Regulation – Where are we now?* HL Paper 135, 23 March 2015 <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/135/135.pdf>

<sup>183</sup> For a defence of IPSO and its effectiveness see IPSO ‘Reality Regulation: A lecture by Sir Alan Moses’, 12 April 2016 [https://www.ipso.co.uk/assets/110/Reality\\_Regulation.pdf](https://www.ipso.co.uk/assets/110/Reality_Regulation.pdf). For a powerful riposte see Simon Carne ‘Sir Alan Moses and the Culture Secretary’ <https://inform.wordpress.com/2016/04/17/sir-alan-moses-and-the-culture-secretary-simon-carne/>.



Annex: Press Inquiries 1947-1993

Investigation	Trigger(s)	Type, composition, and length of inquiry	Terms of Reference	Recommendations on press regulation	Actions Taken/Rejected
<b>Ross Commission 1949</b>	Concerns about Press Ownership. In part Stimulated by NUJ and Labour Party pressure. Motion carried for a Commission following a Free Vote.	Royal Commission Chaired by academic 15 members 1 x academic 1 x accountant 2 x trade unionists 2 x barristers 1 x politician	'With the object of furthering the free expression of opinions through the Press and the greatest practicable accuracy in the presentation of news, to inquire into the control, management and ownership of the newspaper and periodical Press and the news agencies including the financial structure and the monopolistic tendencies in control, and to make recommendations thereon.'	Establishment of a General Council of the Press.	General Council of the Press formed in 1953. Focused upon preserving the freedom of the press, reviewing developments that might restrict the flow of information in the public interest, encouraging the training of journalists and studying trends towards concentration or monopoly.
<b>Shawcross Commission 1962</b>	Closure of 17 daily and Sunday Newspapers in London and the Provinces since 1949. Increasing concentration of ownership.  The Commission were not to be concerned, as were the 1949	Royal Commission 5 members Chaired by former Government Minister [went on to chair PC 1974-78] 2 x academics 1 x trade unionist 19 months	'To examine the economic and financial factors affecting the production and sale of newspapers, magazines and other periodicals in the United Kingdom, including (a) manufacturing, printing and distribution and other costs; (b) efficiency of production; and (c) advertising and other revenue, including any	<u>Not</u> to attempt to subsidise the Press Industry.  To reconstitute the General Press Council to comply with the recommendations of the 1949 Commission.  The Government should set a timetable for this change to the Press Council, with the threat of legislation if not done.	In 1963 the General Press Council was reorganised to bring in lay members and the name changed to the Press Council – its objectives were also extended to include assessing complaints about press conduct or the conduct of people/organisations towards the press.

	Commission, with the performance of the Press, or with general ethical questions.		revenue derived from interests in television; to consider whether these factors tend to diminish diversity of ownership and control or the number or variety of such publications, having regard to the importance, in the public interest, of the accurate portrayal of news and the free expression of opinion.'	Press Council should act as a tribunal to hear complaints of undue influence by advertisers, advertising agents or superiors.	
<b>Younger Committee 1972</b>	Response to the Second Reading of the 'Right of Privacy Bill' (Brian Walden). Government could not agree with the Bill as proposed but announced the formation of a Committee to investigate the issue.	Report commissioned by Home Office, LCD, and SS for Scotland 17 members Chaired by former Government Minister (Labour) 2 x MPs 3 x QCs Various others 27 months	To consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusion into privacy by private persons and organisations, or by companies, and to make recommendations'	One half of the membership of the Press Council should be drawn from outside the Press. When the Press Council makes a critical adjudication the newspaper at fault should publish it with similar prominence to the original item. The council should codify its adjudications on privacy.	-
<b>McGregor Commission 1977</b>	The closing of the Beaverbrook printing plant in Glasgow and the danger of further restriction on the public's choice if other papers were to close. Also concern about giving the press 'as	Royal Commission 12 members Chaired by academic [went on to be first chair of PCC] 1 x life peer 2 x senior businessmen 2 x journalists 2 x academics	'to inquire into the factors affecting the maintenance of the independence, diversity and editorial standards of newspapers and periodicals and the public's freedom of newspapers and periodicals, nationally, regionally and locally, with particular reference to:	Press Council to adopt stricter standards for invasion of privacy. Greater control of newspaper mergers. Secretary of State's draft charter on press freedom to include; freedom for journalists to act in accordance with conscience, editorial	Press Council specifically rejected the proposal to create a code of practice.

	<p>much freedom as possible on matters of public interest while leaving the individual better protected from harmful intrusions into his privacy'.</p>	<p>1 x consumer activist</p> <p>35 months [though note interim report]</p>	<p>a) The economics of newspaper and periodical publishing and distribution;</p> <p>b) The interaction of the newspaper and periodical interests held by the companies concerned with their other interests and holdings, within and outside the communication industry;</p> <p>c) Management and labour practices and relations in the newspaper and periodical industry;</p> <p>d) Conditions and security of employment in the newspaper and periodical industry;</p> <p>e) The distribution and concentration of ownership of the newspaper and periodical industry, and the adequacy of existing law in relation thereto;</p> <p>f) The responsibilities, constitution and functioning of the Press Council; and to make recommendations.</p>	<p>freedom to refuse contributions.</p> <p>Press Council to be constituted of equal numbers of lay and press representatives.</p> <p>Press Council to extend the doctrine of right to reply.</p> <p>Codification of conduct of editors and journalists.</p>	
<p><b>Calcutt I 1990</b></p>	<p>'The immediate background to our appointment was the extent of parliamentary support during the</p>	<p>Report commissioned by Home Office</p> <p>7 members</p> <p>Chaired by senior barrister</p>	<p>In the light of recent public concern about intrusions into the private lives of individuals by certain sections of the press, to consider what measures</p>	<p>Criminalisation of physical intrusion with intent to obtain personal information for publication.</p> <p>Legal restrictions on certain types of press reporting.</p>	<p>Calcutt was subsequently asked to assess what progress was made by the industry (PCC) in July 1992.</p>

	1988/89 session for two Private Members' Bills on Protection of Privacy and Right of Reply'.	1 senior barrister 2 journalists 1 MP (SDP) 1 academic 1 former lay member of PC  11 months	(whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, taking account of existing remedies, including the law on defamation and breach of confidence; and to make recommendations.	Press Council to be disbanded and replaced by Press Complaints Commission. <b>Press to be given one final chance to prove voluntary self-regulation can work.</b> If this fails then a statutory system for handling complaints should be introduced. If individual publications fail to respect the PCC, then the PCC should be placed on a statutory footing.	
<b>Calcutt II 1993</b>	Request by the UK Government to review press self-regulation after 18 months of operation.	Report commissioned by the Department of National Heritage 1 member – senior barrister  6 months	To assess the effectiveness of non-statutory self-regulation by the press since the establishment of the Press Complaints Commission and to give my views on whether the present arrangements for self-regulation should now be modified or put on a statutory basis.'	The creation of a Statutory Regime to underpin a Press Complaints Tribunal – to include a code of conduct, ability to undertake its own investigations, enforce publication of corrections. Criminalisation of physical intrusion/surveillance.	Government do not respond until July 1995 but decide not to adopt any of Calcutt's recommendations.