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Ireland's Press Ombudsman, John Horgan, on accountability, regulation and redress:

Where do press councils stand?

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Commented [ER1]: Affiliation? Press Council of Ireland ?

[\[The Irish Press Ombudsman is appointed by the Press Council of Ireland\]](#)

Abstract

In recent years, the creation of a number of press councils in Europe and elsewhere, as well as the concurrent appointment of internal ombudsmen or readers' representatives in many significant newspapers, particularly in the United States, is a clear response to a growing public perception that there is a need for an appropriate level of accountability for the print media. It is fair to assume that this is related, in part, to a public perception that there is a need for remedies for abuses of media power – as there is a need for [remedies for](#) abuses of institutional power in any society.

Keywords

press regulation

press councils

media accountability

institutional power

media power

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press ombudsmen

Introduction

The level and significance of public disquiet about the abuse of power by the media is unclear. Falling circulation and revenues in the legacy print media may reflect this; but it is difficult to assume that this is the only or even the main reason. Media fragmentation, the rise of the Internet as a news source, and the state of the Irish and UK economies are also powerful contributory factors.

Leveson, media and society

The most visible manifestation of this public disquiet at the moment is the examination of the relationship between the print media and society at large embodied in the Leveson Inquiry in Britain. However, it is worthwhile pointing out that many of the problems being discussed at Leveson are actually problems relating to breaches of criminal law, which I would argue is not a proper matter for a regulatory agency other than the police. If we assume that any new regulatory machinery will attempt to fill the space between the criminal law on one hand, and unnecessary and expensive recourse to civil proceedings, or statutory regulation, on the other, it is still necessary to try and identify the problems more clearly, and with sufficient specificity. It is not enough to say that 'the media have too much power and it should be curbed', regardless of the amount of agreement that there might be for this proposition.

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Where Leveson is concerned, one of the principal issues is related to privacy. This is certainly a regulatory issue as well as a complaint-related issue, given the recurrent calls in both Britain and Ireland for privacy legislation, and the growing number of cases about privacy and the media in the European Court of Justice. Other issues – such as the correction of errors, and the provision of a right of reply, are more complaint-related, and might well be more suitable for voluntary independent systems of redress rather than for the 24-carat option of legislative change. Even where privacy is concerned, a good case can be made, certainly in common law jurisdictions, for the benefits of a twin-track approach that ~~reflects~~encompasses both civil court decisions and press council or ombudsman decisions.

Journalism lacks definition

The simplest argument for doing something is a belief that journalism, as it is practised today in many countries, needs, for both professional and commercial reasons, a clear definition of best professional practice, and appropriate enforcement measures to ensure that best professional practice is followed. This belief would be shared by some but by no means all journalists; probably by most members of political and other elites, particularly to the extent that they find themselves under a media spotlight; and intermittently by the general public, which otherwise is – I suspect – not greatly exercised by the topic, and whose media consumption is influenced only marginally (and not always positively) by ethical considerations.

If the need to ‘do something’ is accepted (which, in the United States, it generally is not), and generates broad agreement on a voluntary but independent system of accountability, it must

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be recognized that any such system will be necessarily light touch, as a voluntary system differs fundamentally from a statute-based system.

The weakness of any voluntary system, even if it is demonstrably independent in terms of its policies, practices and procedures, is that it exists at the whim of its funders, which are also the entities it regulates, and operates subject to their prior agreement about its structure and powers, including enforcement measures (if any). This can be easily portrayed – however unfairly – as a weakness, and will continue to be, regardless of reforms, unless and until some other funding mechanism is identified, or until the mechanism funded in this way is seen to possess and exercise powers that adequately reflect what the public thinks might be appropriate, and do not conflict with the right to free expression. Insofar as this perception of weakness undermines public confidence, it generates doubts about the long-term viability of such structures, even if they continue to be supported by a media industry for the achievement of limited objectives (primarily complaint-handling)

Ireland and press regulation

It was not until some fifteen years ago that the issue of press regulation surfaced in a substantive form in Ireland. This was in the deliberations, and the Report, of the Commission on the Newspaper Industry, set up in 1995 under the former Chief Justice, Tom Finlay, in the wake of the collapse of the Irish Press Group.

That body recommended the creation of the office of Press Ombudsman, deciding not to recommend the establishment of a press council as such because of the relatively small size of

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our population and of the newspaper market serving it. This was one of the many recommendations of this Commission that was allowed to gather dust, until it was taken down off the shelf a decade later and refurbished as part of on-going discussions between the press industry and the government about matters of common interest. These matters included not only the establishment of a regulatory mechanism for the press, but also reform of the legislation on defamation.

The model of the Press Council and Press Ombudsman, which was established in Ireland in 2007 after considerable research and discussion between all the interested parties, leaned to some degree on the experience of the Swedish Press Ombudsman and on that of the Press Complaints Commission (as well as on other European models). It was also in part – as in the case of many other press councils – a defensive reaction by the industry to the threat of government regulation.

In common with many other press councils, it is primarily a complaint-handling mechanism. Its regulatory role is light, and its powers of enforcement largely dependent on the voluntary agreement of its members. Recent events, however – particularly in Britain – have put a question-mark against the effectiveness of this model, and have prompted a general review which will be the subject of discussion at the annual meeting of the Alliance of Independent Press Councils of Europe in Antwerp (AIPCE) in October.

Press councils vs complaints and regulation

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Press councils are operating in the no-man's land between complaint-handling and statutory regulation, and this means exploring substantial issues of realpolitik. Technically, governments have the power to regulate the press any way they like. In liberal democracies, they generally ~~do~~ [refrain from doing so](#), [not least because](#) because there is a countervailing power – the power of the press, including the power of the press to influence public opinion for or against them – [and because to do so might run the risk of infringing international conventions on the right to freedom of speech](#). As one Irish government minister once said, he did not like to pick arguments with people who bought ink by the barrel. (He ended up [doing time in prison](#) for corruption, but that is another story.) The power of the press is immense, as Honora O'Neill reminds us tellingly from time to time. But it is also not absolute, as even the most fervent apostles of press freedom have to accept. The area in between is where we are all working.

The specific trigger for the creation of the new Irish structures in 2007 was not a phone-hacking scenario, but because the politicians lost patience and began to canvass the idea of statutory regulation. This threat suddenly looked real enough for the press to contemplate retreating from its long-held opposition to regulation of any kind. The subsequent negotiations took four years, in private. What was particularly significant [about these negotiations](#) was the specific [role and](#) recognition of the public interest, something that is often lost sight of in the clouds of dust raised when the twin giants of government and media do battle.

Incentives, [or the](#) stick behind the carrot

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In Ireland, the confrontation eventually developed into a win-win situation, not least because of the efforts of representatives of the public interest, alongside those of the industry (including journalists) on the planning body, the Press Industry Standing Committee, which deliberated for four years. It had much in common with similar compromises elsewhere, but it had one new and arguably important element: it was not just a truce, but it was a truce with incentives to keep the peace.

These incentives were in the gift of government power, as most incentives usually are. They involved not only substantial changes in the law of defamation, but potentially significant legal protection for all publications that became and remained members of the Council. The value of these incentives, it is fair to say, has not yet been legally tested, but it is only a matter of time before it will be. They were confirmed by the statutory recognition, by Parliament, of the Press Council and Press Ombudsman's responsibilities, powers and structure. But there is a stick behind the carrot: should the Council fail to live up to its promise, or should the industry act in any way to undermine the effectiveness of these new structures, these incentives can be withdrawn by the same parliament that created them. This is also a vital [foundation-safeguard](#) for the independence and functions of the Press Council and Press Ombudsman vis-à-vis the industry.

Although this is a solution that may, like all solutions, be culture-specific, two of its elements may be relevant. One is that all the large circulation British newspapers circulating in Ireland – including the *Irish Daily Star*, which is 50 per cent owned by Express Newspapers – became, and remain, full members, and no publication has ever withdrawn or threatened to withdraw. I leave you to draw your own conclusions from that. The other is that the Irish

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solution has – at the insistence of the government in these negotiations, it might be noted – established important rights for journalists, whose own interests in these matters not infrequently differ from those of their proprietors and even from those of their own editors. [The National Union of Journalists in Britain refused to join the Press Complaints Commission because they felt that it was too dominated by editors. That union's very positive experience of the Irish model may in time lead to similar developments in the UK.](#) My own belief is that as long as the power of journalists, of editors, and proprietors, is not realistically factored into this difficult equation, it will never be solved.

I do not argue that the situation in Ireland is perfect. We are only four and a half years in existence, and that is not yet long enough to provide a definitive answer to the criticism – usually, it must be said, emanating from people whose complaints have not been upheld – that we are, despite our independent structure and governance, no more than the tame creature of those who pay our wages. But one possible answer, to those who currently cry out for more and better sanctions, including statutory sanctions or voluntary sanctions enforceable by statute (which is more or less the same thing) is this: distinguish between accountability, redress and regulation; and, if you prioritize and incentivize the first two, you may find that the regulatory problem is well on the way to solving itself, or has at least become usefully re-defined.

Penalties or redress!

My experience as Ombudsman is that effective redress – not penalties – is the key to solving many problems. Regulation is sometimes the hammer reached for by people who think that every

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problem is a nail. But instituting a system that can deliver appropriate and enforceable redress for breaches of an agreed professional code is not as easy as it sounds, because it involves cultural change, and culture is notoriously unresponsive to structural or legislative change. We need to encourage editors to understand that apologies and other forms of redress, when appropriate, are a sign of strength and accountability rather than of weakness or failure. We need to educate the public to understand that a free press, warts and all, is a public good, and to accept that the truth sometimes hurts. And we need to accept that none of this will happen unless we can devise structures that will, subtly but effectively, empower journalists as well as the public interest in ways that counter-balance the powers of the big battalions, and unless we can devise and copper-fasten meaningful incentives.

Lord Leveson himself said, in an *obiter* to which, I think, insufficient attention has been paid, that the prime responsibility for devising a new architecture of responsibility for the media rests with editors themselves. If they do not accept it, or cannot agree about it, they can hardly complain if others do it for them. If the Irish experience proves anything – and the jury is still out on this to an extent – it is that a formula that links incentives to compliance is perhaps a better bet than one that relies on penalties and enforcement (we still have the criminal and criminal law for that, after all).

The problem of enforcement, however, cannot be wished away. The risk remains that if the industry which has – for professional as well as commercial motives, and at no small cost – agreed to create an independent accountability structure is unable to agree to appropriate enforcement measures for the redress of justified complaints, governments will again be tempted

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to step in and insist on statutory enforcement mechanisms that would raise the spectre of state regulation.

Regulatory 'deficiencies'

Commented [ER2]: 'deficiencies' miss-spelt on purpose?

The recent Independent Media Inquiry Report in Australia summarized the deficiencies it identified in the current self-regulatory arrangements administered by the Australian Press Council as:

- Lack of awareness of the Council and its role;
- Inability to properly investigate a complaint for lack of binding powers;
- Lack of resources and funding;
- Insufficient powers of enforcement;
- Appearance of lack of independence from publisher members;
- Insufficient streamlining of complaints procedures; and
- The ability of members to withdraw membership or reduce funding.

These are benchmarks which all press councils and press ombudsmen would do well to address, in conjunction with the media themselves. Other questions that might be relevant include:

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- At what point does enforceable redress for an upheld complaint become regulation rather than complaint-handling?
- What are the functions that necessarily distinguish a regulator from an ombudsman? What are the arguments that justify a regulator rather than or as well as an ombudsman?
- Where do web-based publications fit into the overall scenario of media complaint-handling, redress and regulation?

If the print media are really and seriously interested in, and committed to, best professional practice it is therefore in their own interest to address any perceived regulatory lacunae rapidly and effectively. Otherwise there will be no real reason to dignify journalism as a profession: it will simply subside, eventually, to the level of a trade, like making shoes or washing machines, which the market will punish or reward as it sees fit. Nobody who is seriously committed to journalism, or who believes in the essential contribution that good journalism makes to the proper functioning of democratic societies, can view such a prospect with equanimity.

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