

PRESS RECOGNITION PANEL

Response to Ofcom consultation: Protecting people from illegal harms online

Introduction

1. The Press Recognition Panel (PRP) was established under the Royal Charter on Self-Regulation of the Press ('the Royal Charter') to oversee the independent system of press self-regulation in the UK (known as 'the Recognition System').
2. Under the Recognition System, press self-regulators can apply for recognition to become an 'Approved Regulator' by demonstrating compliance against a set of minimum standards for independence, financial sustainability and effective complaints handling. This includes developing and holding subscribing news publishers to account against a Standards Code which balances the interests of the public and the importance of freedom of speech.
3. Once recognised, the PRP continues to monitor an Approved Regulator and undertakes a Cyclical Review two-years following recognition and then every three years subsequently to ensure ongoing compliance.
4. Because successive Governments have failed to commence legislation underpinning the Recognition System, a very large part of the industry does not belong to an Approved Regulator. Amongst other things, this means that there is no independent external oversight of what (if any) standards are being applied nor the effectiveness of any complaints handling mechanisms with alternative route to redress outside of the courts (which due to cost and complexity is a route unavailable to the majority of the ordinary public).
5. As news publishers (including user-to-user generated content directly posted on a news publisher's service) have both protections in and exemptions from parts of the legislation, this creates a regulatory gap in which online harm may persist, hosted on a news publishers' service, which, on any other service, could have been addressed.

Definition of 'Recognised News Publisher'

6. Under the legislation, online platforms will be in the position of needing to determine, before they take action, whether they are taking action in relation to 'news publisher content' or against a 'Recognised News Publisher' and apply the protections and exemptions accordingly.
7. However, the definition of a 'Recognised News Publisher' (upon which the definition of 'news publisher content' is dependent) is very broad. Particularly the characteristics of 'is subject to a standards code' and 'has policies and

procedures for handling and resolving complaints' are areas of particular concern. As the oversight regulator for online platforms exercising their obligations under the Online Safety Act 2023, Ofcom is the only body in a position to offer meaningful guidance.

8. As per the drafting in the Act, neither of these characteristics provide any commentary as to the adequacy of the standards code or the complaints handling policies and procedures. Under the Recognition System, the adequacy of an Approved Regulator's standards code complaints handling policies and procedures are independently and externally assured against an agreed set of criteria which balance public protection and freedom of speech as specified in the Royal Charter.
9. The specific requirements of the Royal Charter in relation to standards codes and complaints handling are attached at annexes A and B respectively. The requirements set out in Section 56 of the Online Safety Act 2023 ('Section 56') are not sufficient in and of themselves to enable online platforms to make such an assessment as to the adequacy of a news publisher's standards code or complaints handling policies and procedures. Given that these issues engage matters of press self-regulation, it would be problematic for online safety regulation to set a lower (or indeed higher) threshold than is set out in the Royal Charter.
10. For example, it is highly arguable that the Independent Press Standards Organisation (IPSO) would meet the requirements of Section 56. In practice both IPSO and the Editors' Code of Practice ('the Editors' Code'), which IPSO is required to enforce, are significantly controlled by industry interests.
11. Consequently, it is highly questionable as to whether the Editors' Code is in fact 'published by an independent regulator' given that IPSO (despite its name) is not independent and neither does it control the Editors' Code (a point that was highlighted as a major weakness by the review commissioned by IPSO's into its own governance¹). In contrast, Impress publishes its own Standards Code and has demonstrated the requirements for independence as set out in the Royal Charter.
12. As a result, neither the Editors' Code nor IPSO's complaints policies and procedures achieve balance between public protection and freedom of speech but rather weight the system in favour of industry's commercial interests. To illustrate how this manifests in practice, the Editors' Code attempts to redefine 'freedom of speech' as a fundamental, rather than qualified, human right and that there is 'a public interest in freedom of expression itself'.
13. A significant proportion of the clauses within the Editors' Code contain a public interest exemption which means that it is acceptable to breach the standards if it can be justified in the public interest. However, with the circular definition of 'freedom of expression = public interest' written into the Editors' Code, an extremely high threshold has been created before a breach of the code can be demonstrated².

¹ Sir Bill Jeffrey, April 2023, Independent external review of IPSO. Available at: <https://www.ipso.co.uk/media/2315/independent-external-review-of-ipso-april-2023.pdf> [Accessed 12 February 2024]

² Press Recognition Panel, 2023, Annual report on the recognition system, London: PRP, available at: <https://pressrecognitionpanel.org.uk/wp-content/uploads/2024/02/Press-Recognition-Panel-Annual-Report-on-the-Recognition-System-Laid-in-Parliament-on-8th-February-2024.pdf> [accessed 12 February 2024]

14. This has significant repercussions on the effectiveness of IPSO's complaints handling processes. Across a five-year period, IPSO only investigated 3.82% of the complaints it received and upheld 0.56%³. This is an extraordinary level of inactivity for an organisation which is allegedly intended to hold a significant part of the industry to account.
15. By comparison, Impress (currently the only Approved Regulator) upheld 21.67% of the complaints it received in the six-year period 2018–2023. This figure also needs to be contextualised that Impress members are a self-selecting group consisting of, in the main, small and specialist publications who have voluntarily taken the step of demonstrating their commitment to high editorial standards and joined the Approved Regulator. Consequently, as a section of the industry, they may be much less likely to generate complaints than the large tabloid titles amongst IPSO's membership.
16. Under Section 56, an uninformed and superficial assessment of IPSO membership may lead to online platforms concluding wrongly that IPSO membership is satisfactory to meet the requirements of the definition of a 'Recognised News Publisher'. However, the standards and complaints handling policies and procedures operated by these news publishers is in no way equivalent to an Impress member. The degree of assurance that we can take about a news publisher from IPSO membership is very low compared to the degree of assurance we can take from an Impress member which would be much higher.
17. There are also a range of news publishers who do not fall within Impress' or IPSO's membership. Of these, some have their own in-house standards and complaints processes (and some of these adopt and enhance the Editors' Code) while a further category of news publishers do not operate any standards or complaints processes at all. Amongst this group, it is not possible to quantify the number of news publishers who may or may not meet the definition in Section 56 regarding a 'Recognised News Publisher'. The decision-making methodology that online platforms might apply to this unknown number of titles is an open question.

Effect for online platforms

18. Given the requirement for online platforms to keep under review their compliance with Section 18 of the Online Safety Act at regular intervals, as well as after making a significant change, they will need to interpret the criteria as they are presented on the face of the Act in order to demonstrate that they are meeting the duty.
19. Given the wide definition of a 'Recognised News Publishers' and the current regulatory landscape as it applies to news publishers, this leaves online platforms in a very difficult position. Ofcom in turn will need to assess the sufficiency of the measures that online platforms have taken to secure compliance.
20. This is likely even more acute in practice when an online platform needs to determine whether to take action or not. We remain concerned that, if further

³ Press Recognition Panel, 2024, A review of IPSO's complaints process and related issues, available at: <https://pressrecognitionpanel.org.uk/wp-content/uploads/2024/01/A-Review-of-the-UKs-Independent-Press-Standards-Organisations-Complaints-Process-and-Related-Issues-FINAL-2.pdf> [accessed 12 February 2024]

guidance is not developed on this, online platforms will be faced with a difficult choice, for example, in exercising their takedown duties of adopting either an unduly permissive position ('if in doubt, leave it up') or an unduly restrictive position ('if in doubt, take it down').

21. Given the way in which the news can frequently be amplified and played out on social media, this may have further reaching consequences than may initially be anticipated where users are simply re-posting content which may, or may not, be news publisher content across multiple services. The opportunity for inconsistent decision-making is high.
22. Several of the 'non-priority offences' may likely be challenging to deal with in this nebulous area relating to 'False communications' (especially given that a 'Recognised News Publisher' cannot commit this offence) and 'Threatening communications'. Some of the priority offences may also raise ambiguity including 'Threats, Abuse and Harassment, including Hate'.
23. Given the breadth and reach of user-to-user and search services, the opportunity for confusion is high. The need for a consistent methodology to be applied is acute if we are to avoid placing disproportionate hazard for online platforms in determining what is and what is not 'news publisher content' and, at worst, creating havens for illegal activity online.

Recommendation

24. We recommend that Ofcom should include in your statutory codes of practice for online platforms implementing safety duties under the Online Safety Act 2023 that the definition of a 'Recognised News Publisher' means a news publisher which is a member of an Approved Regulator operating within the Recognition System.
25. Without further guidance, online platforms will be left with a quasi-regulatory role for which they lack the expertise, motivation or legitimate authority to perform. If this issue is not addressed, online platforms will be operating in a regulatory void and Ofcom will have abdicated its responsibility to ensure that regulated services take appropriate steps to protect their users.

*Press Recognition Panel
22 February 2024*

Annex A — Royal Charter Criteria relating to Standards Codes

Criterion 7: The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which may comprise both independent members of the Board and serving editors. Serving editors have an important part to play although not one that is decisive. Assessment of further action required.

Criterion 8. The code must take into account the importance of freedom of speech, the interests of the public (including but not limited to the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled), the need for journalists to protect confidential sources of information, and the rights of individuals. Specifically, it must cover standards of:

- a) conduct, especially in relation to the treatment of other people in the process of obtaining material;
- b) appropriate respect for privacy where there is no sufficient public interest justification for breach; and
- c) accuracy, and the need to avoid misrepresentation.

Criterion 8A. A self-regulatory body should provide advice to the public in relation to issues concerning the press and the standards code, along with a service to warn the press, and other relevant parties such as broadcasters and press photographers, when an individual has made it clear that they do not welcome press intrusion.

Criterion 8B. A self-regulatory body should make it clear that subscribers will be held strictly accountable under the standards code for any material that they publish, including photographs, however sourced. This criterion does not include advertising content

Criterion 8C. A self-regulatory body should provide non-binding guidance on the interpretation of the public interest that justifies what would otherwise constitute a breach of the standards code. This must be framed in the context of the different provisions of the code relating to the public interest.

Annex B — Royal Charter Criteria relating to Complaints Policies and Procedures

Criterion 9. The Board should require, of those who subscribe, appropriate internal governance processes (for dealing with complaints and compliance with the standards code), transparency on what governance processes they have in place, and notice of any failures in compliance, together with details of steps taken to deal with failures in compliance.

Criterion 10. The Board should require all those who subscribe to have an adequate and speedy complaint handling mechanism; it should encourage those who wish to complain to do so through that mechanism and should not receive complaints directly unless or until the internal complaints system has been engaged without the complaint being resolved in an appropriate time.

Criterion 11. The Board should have the power to hear and decide on complaints about breach of the standards code by those who subscribe. The Board will need to have the discretion not to look into complaints if they feel that the complaint is without justification, is an attempt to argue a point of opinion rather than a standards code breach, or is simply an attempt to lobby. The Board should have the power (but not necessarily the duty) to hear complaints:

- a) from anyone personally and directly affected by the alleged breach of the standards code, or
- b) where there is an alleged breach of the code and there is public interest in the Board giving consideration to the complaint from a representative group affected by the alleged breach, or
- c) from a third party seeking to ensure accuracy of published information. In the case of third party complaints the views of the party most closely involved should be taken into account.

Criterion 12. Decisions on complaints should be the ultimate responsibility of the Board, advised by complaints handling officials to whom appropriate delegations may be made.

Criterion 12A. The Board should be prepared to allow a complaint to be brought prior to legal proceedings being commenced. Challenges to that approach (and applications to stay or sist) can be decided on the merits.

Criterion 13. Serving editors should not be members of any Committee advising the Board on complaints and should not play any role in determining the outcome of an individual complaint. Any such Committee should have a composition broadly reflecting that of the main Board, with a majority of people who are independent of the press.

Criterion 14. It should continue to be the case that complainants are able to bring complaints free of charge.

Criterion 15. In relation to complaints, where a negotiated outcome between a complainant and a subscriber (pursuant to criterion 10) has failed, the Board should have the power to direct appropriate remedial action for breach of standards and the publication of 20 corrections and apologies. Although remedies are essentially about correcting the record for individuals, the power to direct a correction and an apology must apply equally in relation to:

- a) individual standards breaches; and
- b) groups of people as defined in criterion 11 where there is no single identifiable individual who has been affected; and

c) matters of fact where there is no single identifiable individual who has been affected.

Criterion 16. In the event of no agreement between a complainant and a subscriber (pursuant to criterion 10), the power to direct the nature, extent and placement of corrections and apologies should lie with the Board.

Criterion 17. The Board should not have the power to prevent publication of any material, by anyone, at any time although (in its discretion) it should be able to offer a service of advice to editors of subscribing publications relating to code compliance.

Criterion 18. The Board, being an independent self-regulatory body, should have authority to examine issues on its own initiative and have sufficient powers to carry out investigations both into suspected serious or systemic breaches of the code and failures to comply with directions of the Board. The investigations process must be simple and credible and those who subscribe must be required to cooperate with any such investigation.

Criterion 19. The Board should have the power to impose appropriate and proportionate sanctions (including but not limited to financial sanctions up to 1% of turnover attributable to the publication concerned with a maximum of £1,000,000) on any subscriber found to be responsible for serious or systemic breaches of the standards code or governance requirements of the body. The Board should have sufficient powers to require appropriate information from subscribers in order to ascertain the turnover that is attributable to a publication irrespective of any particular accounting arrangements of the publication or subscriber. The sanctions that should be available should include power to require publication of corrections, if the breaches relate to accuracy, or apologies if the breaches relate to other provisions of the code.

Criterion 19A. The Board should establish a ring-fenced enforcement fund, into which receipts from financial sanctions could be paid, for the purpose of funding investigations.

Criterion 20. The Board should have both the power and a duty to ensure that all breaches of the standards code that it considers are recorded as such and that proper data is kept that records the extent to which complaints have been made and their outcome; this information should be made available to the public in a way that allows understanding of the compliance record of each title.

Criterion 21. The Board should publish an Annual Report identifying:

a) the body's subscribers, identifying any significant changes in subscriber numbers;

b) the number of:

(i) complaints it has handled, making clear how many of them are multiple complaints,

(ii) articles in respect of which it has considered complaints to be without merit, and

(iii) articles in respect of which it has considered complaints to be with merit, and the outcomes reached, in aggregate for all subscribers and individually in relation to each subscriber;

c) a summary of any investigations carried out and the result of them;

d) a report on the adequacy and effectiveness of compliance processes and procedures adopted by subscribers; and

e) information about the extent to which the arbitration service has been used.