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Ms Rowena Collins-Rice
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7 June 2012

Dear Ms Collins-Rice

I have recently taken over the chair of BIOA from Peter Tyndall. So I am replying on behalf of BIOA to the invitation extended in your letter of 24 April 2012.

I hope the attached submission by on behalf of BIOA is helpful. If it would assist the Inquiry's research team for BIOA to expand on or discuss any points, we would be happy to do so.

The submission concludes with BIOA's views. But I hope that the preceding technical information will be of assistance to the Inquiry in reaching its own views.

Yours sincerely

Tony King

British and Irish Ombudsman Association (BIOA)
Submission to the Leveson Inquiry
7 June 2012

This submission focuses mainly on the role that a Press (or Media) Ombudsman scheme could fulfil in any new arrangements that emerge as a result of the Inquiry's work.

Section A deals with the Inquiry's draft criteria for a regulatory solution.

Section B describes the ombudsman model as it has been adopted in the UK.

Section C explains some issues that would be particular to a Press (or Media) Ombudsman scheme.

Section D expresses BIOA's views.

This submission has been approved by BIOA's elected Executive Committee. It does not necessarily represent the views of every single BIOA member.

A: Draft criteria for a regulatory solution

We have no comments on the draft criteria – save to say that they appear to us to be appropriate, proportionate and comprehensive.

Paragraph 4.1 of the draft criteria says – '*The system must provide credible remedies, both in respect of aggrieved individuals and in respect of issues affecting wider groups in society*.'

The rest of this submission explains about ombudsman schemes, and deals with how a Press (or Media) Ombudsman scheme might provide redress, against the background of a wider regulatory framework.

B: Ombudsman model

Principal features of an ombudsman scheme

The principal features of an ombudsman scheme in the UK are:

- Ombudsman schemes resolve complaints. They are not regulators, though some of their decisions may be seen as precedents and have wider effect.
- The ombudsman model is used to resolve complaints made by someone 'small' (citizen/consumer) against something 'big' (public body or commercial business).
- Ombudsman scheme procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business.
- Access to ombudsman schemes is free for citizens/consumers, and they are not at risk of an order for costs.
- Ombudsman schemes handle enquiries as well as complaints, because dealing with an enquiry may head off a complaint (for example, by resolving a misunderstanding).
- The citizen/consumer first complains to the body/business, accessing the ombudsman scheme if dissatisfied with the body/business's response (or if it does not respond within a reasonable time).
- When dealing with complaints, ombudsman schemes seek to achieve a fair resolution at the earliest possible stage – rather than working towards an assumed future hearing.
- Ombudsman schemes use flexible and informal procedures – resolving cases by mediation, recommendation or decision as appropriate.

- Ombudsman schemes do not just rely on the evidence the parties volunteer. They actively investigate cases (using their specialist expertise) – calling for the information they require.
- So the outcome is not affected by how well either of the parties presents his/her/its case, and representation by lawyers (or others) is not necessary.
- Ombudsman scheme recommendations/decisions are based on what is fair in the circumstances, taking account of what was good practice at the time as well as law and regulations.
- Ombudsman schemes publicly feed back the general lessons from cases they have handled, so stakeholders (including government/regulators) can take steps to improve things for the future.
- Because there is a flexible and informal process, and representation is not necessary, a typical ombudsman case is much quicker and cheaper than an equivalent case in a court or tribunal.

BIOA has published:

- criteria for ombudsman schemes[1]
- principles of good governance for ombudsmen[2]

The BIOA criteria cover:

- independence
- fairness
- effectiveness
- openness and transparency
- accountability

These BIOA criteria are recognised by the Cabinet Office in its published guidance to government departments on ombudsman schemes.[3]

Ombudsmen dealing with public-sector bodies or private-sector businesses[4]

The fundamental principles applicable to ombudsman schemes are the same, whether they deal with complaints against public-sector bodies or private-private sector businesses. But there are some differences between the roles and powers of ombudsmen in the two sectors.

Ombudsmen covering the public-sector deal with complaints against bodies that are directly or indirectly subject to democratic accountability. They usually issue non-binding recommendations rather than binding decisions. And, save in relation to the health sector, they usually focus on maladministration.

Ombudsmen schemes covering the private-sector deal with complaints against commercial businesses that are not subject to democratic accountability. They usually have power to issue decisions that bind the business. And their main role is to be an informal alternative to the civil courts.

As the press (and most of the wider media) comprises private-sector commercial businesses, the most instructive models for a Press (or Media) Ombudsman are those that cover the private sector, though

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1 www.bioa.org.uk/docs/BIOA-Rules-New-May2011-Schedule-1.pdf

2 www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf

3 www.cabinetoffice.gov.uk/sites/default/files/resources/guide-new-ombudsman-schemes.pdf

4 This is a convenient short-hand way of describing the distinction. More accurately, public-sector ombudsmen deal with relations between citizens and public service providers, and private-sector ombudsmen deal with private relations between individuals and organisations which are usually private, but which may include public bodies (e.g. the Pensions Ombudsman may deal with pensions provided to employees of public authorities).

there are two special features in relation to the press/media (which we address in section C):

- In existing private-sector schemes, complaints are mostly from customers (or prospective customers). That is not the case with the press/media.[5]
- Resolving complaints about the press/media) may involve balancing the private interest of the alleged victim against the public interest.[6]

Methods of Establishment

Ombudsman schemes dealing with complaints against private-sector bodies are typically established in one of three ways:

- Statutory: Established by statute, which gives them a compulsory jurisdiction over specified types of (usually regulated) businesses (for example, the Financial Ombudsman Service and the Legal Ombudsman).
- Underpinned by statute: Specified types of businesses are required to be covered by an ombudsman scheme that meets specified minimum criteria (for example, the Property Ombudsman and Ombudsman Services: Energy).
- Voluntary: Established voluntarily (sometimes after government/consumer pressure) by a particular trade association, but with independent governance (for example, the Removals Industry Ombudsman).

Statutory ombudsman schemes

With the 'statutory' model as employed in recent times, typically:

- An independent board of non-executive directors is appointed by a statutory regulator, to oversee the strategy, efficiency and effectiveness of the ombudsman scheme.
- The directors are all required to represent the public interest, and if any are connected with businesses in the sector involved they must be a minority.
- The budget is proposed by the chief ombudsman, adopted by the independent board and approved by the statutory regulator.
- The chief ombudsman and any other ombudsmen are appointed by the non-executive directors, on terms that secure the independence of the ombudsmen.
- The independent board helps safeguard the independence of the ombudsmen, and helps ensure there are adequate resources to handle the work.
- The ombudsmen are independent decision-makers (as a judge would be) and the chief ombudsman acts as chief executive of the organisation.
- The independent board is not involved in deciding cases, nor in the day-to-day management of the ombudsman scheme.

Typically, the statute provides a framework of powers, enabling the regulator and/or the ombudsman scheme (with the approval of the regulator) to make detailed rules about jurisdiction/process/powers, so that these can be kept up-to-date without requiring primary legislation.

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[5] We return to this in section C, in relation to 'complainant eligibility'.

[6] We return to this in section C, in relation to 'basis of ombudsman decision'.

Ombudsman schemes underpinned by statute

With the 'underpinned by statute' model, governance and the provisions for making rules about jurisdiction/process/powers follow the 'voluntary' model described below – adapted so far as necessary to comply with the statutory minimum criteria.

The statutory provisions often include a requirement that the ombudsman scheme must be approved by the statutory regulator in the relevant sector, which ensures that the ombudsman scheme complies with the statutory minimum criteria and keeps its performance under review.

The regulator may approve a single ombudsman scheme. But, in some cases, regulators have approved two or more 'competitive' ombudsman schemes (each meeting the statutory criteria) with businesses choosing which ombudsman scheme to join.

If there are 'competing' ombudsmen in a particular sector, this can create confusion for the public – who may be unsure which business is covered by which ombudsman scheme. And public confidence is less where it is the business that has the choice of which ombudsman scheme to use.

This raises the appearance, and the risk, of businesses attempting to exercise an influence over the ombudsman schemes – by favouring the one that they like best and/or by threatening to undermine one scheme financially by threatening to move to another.

For these reasons, we do not favour the 'competitive' model if it is the business that is able to choose. The 'competitive' model is said to reduce costs, but costs can be adequately controlled by transparency and regulatory scrutiny.

Voluntary ombudsman schemes

With the 'voluntary' model, typically:

- An independent board/council of non-executive directors is appointed, to oversee the strategy and efficiency of the ombudsman scheme.
- The directors may represent the public/consumer/business interests, but only a minority must represent business interests.
- There is also a trade board/council, comprising only business members, which may only have a consultative role or which may decide how the total budget is apportioned amongst members.
- The budget is proposed by the chief ombudsman and adopted by the independent board. It may or may not have to be approved by the trade board/council.

As with the statutory model:

- One or more ombudsmen are appointed by the non-executive directors, on terms that secure the independence of the ombudsmen.
- The independent board helps safeguard the independence of the ombudsman/ombudsmen, and helps ensure there are adequate resources to handle the work.
- The ombudsmen are independent decision-makers (as a judge would be) and the chief ombudsman acts as chief executive of the organisation.
- The independent board is not involved in deciding cases, nor in the day-to-day management of the ombudsman scheme.

Typically, the rules about jurisdiction/process/powers are set in the constitution and rules of the ombudsman scheme, possibly supplemented by an industry code of practice.

Process: complaint-handling by the business

Typically, there is a specified process and time limit (which may vary from one sector to another) for the handling of complaints by businesses – so that:

- as many disputes as possible can be resolved quickly;
- the number of disputes that have to be referred to the ombudsman scheme is minimised; and
- it is clear when the consumer can refer the dispute to the ombudsman scheme.

In all three models (statutory, underpinned by statute and voluntary), typically:

- The complainant must complain first to the business (orally or in writing). The business is required to provide a written response within a specified time.
- That written response must tell the complainant that, if he remains dissatisfied, he/she can refer the complaint to the ombudsman scheme.
- If the complainant is dissatisfied with the written response, or if the business fails to issue one within the specified time, the complainant can go to the ombudsman scheme.

Depending on the way in which the scheme is established, the rules about how businesses must handle complaints may be specified in:

- rules made by the relevant regulator;
- the rules of the ombudsman scheme; or
- an industry code of practice.

The ombudsman scheme may assist the early resolution of cases by businesses through:

- publishing details of its approach to common disputes;
- giving advice to the public and to businesses; and/or
- helping train citizens' advice centres and businesses' complaint departments.

Process: enquiry-handling and complaint-handling by the ombudsman scheme

Enquiries: Ombudsman scheme handle enquiries, from both potential complainants and from businesses, as well as complaints. Early explanations can often resolve misunderstandings and prevent disputes turning into full-blown cases. In some sectors, only about a quarter of enquiries actually turn into full cases.

Jurisdiction: If a complaint is referred to the ombudsman scheme, it is first screened to check that it is within the ombudsman scheme's jurisdiction.

Whether or not a particular case falls within the jurisdiction set for the ombudsman scheme is a matter for the ombudsman, and not for either of the parties or anyone else – subject, of course, to any oversight by the courts.

If the complaint is within jurisdiction, typically, the case first goes to an investigator. The case may then be resolved in a variety of ways. The procedure to be adopted in any particular case is for the ombudsman to decide (consistently with the scheme rules and the principles of natural justice).

Early termination: In some cases it is clear at the outset that a full investigation is not justified, for example where:

- the case has already been decided by a court;
- the case raises legal issues that can only be resolved by a court; or
- the business has already offered as much redress as the ombudsman scheme would award for what the complainant says the business did wrong.

Mediation: Some cases can be resolved quickly and fairly by mediation – where, assisted by an independent view from the ombudsman scheme about the circumstances in dispute, a settlement can be negotiated that both the consumer and the business agree.

Investigation: If the case is not resolved by mediation, the investigator will investigate – taking an active role in deciding what evidence is required and calling for it. So there need to be relevant provisions compelling the parties to provide information and documents. Those provisions can be:

- in statute[7] (which *can* override any legally-enforceable duty of confidentiality to third-parties); or
- rules[8] (which *cannot* override any legally-enforceable duty of confidentiality to third-parties).

These powers are particularly important in relation to the business – because, if it is the complainant who refuses to cooperate, the ombudsman scheme can decline to proceed with the case.

Recommendation: Having completed the investigation, the investigator will then recommend an outcome – that is, whether the complaint should be upheld/rejected and, if upheld, what redress should be provided. In a majority of cases, both parties accept the recommendation.

Decision: In a minority of cases, one or other party rejects the recommendation. After any further representations by the parties, the case is reviewed by an ombudsman, who issues a decision. So the ombudsman provides, in effect, an internal appeal stage.

Usually it is possible for the ombudsman to come to a conclusion about the case on the basis of what the parties have said plus the documents and other records – supplemented, where necessary, by talking to the parties by phone – without requiring a formal hearing.

The ombudsman decision is based on what the ombudsman considers to be fair in the circumstances of the case – taking into account not only what a court would do but also any industry code and what the ombudsman considers to have been good business practice in that sector at the relevant time.

Typically[9], whether membership of the ombudsman scheme is compulsory or voluntary:

- The ombudsman can award compensation up to a specified monetary limit[10] and/or require the business to do something in relation to the complainant (whether or not a court could).
- If the complainant accepts the ombudsman's decision, it is legally binding on the business and the complainant.[11]

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[7] See, for example:
- (in relation to the Financial Ombudsman Service) Financial Services and Markets Act 2000: sections 231 (requiring information) and 232 (referral to court); and
- (in relation to the Legal Ombudsman) Legal Services Act 2007: sections 147 (requiring information), 148 (referral to regulator) and 149 (referral to court).

[8] One example rule: "The ombudsman may require a [business] named in the complaint to provide any information relating to the subject matter of the complaint which is, or alleged to be, in its possession. If the [business] posses such information, it shall as soon as is reasonably practicable disclose it to the ombudsman (unless the [business] certifies to the ombudsman that the disclosure of such information would place the [business] in breach of its duty of confidentiality to a third party whose consent it had used its best endeavours to obtain)."

[9] This is typical in UK ombudsman schemes covering complaints against private-sector businesses. Abroad, it is more usual for ombudsmen covering complaints against private-sector businesses to make non-binding recommendations. As previously explained, because public-sector bodies are directly or indirectly democratically-accountable, UK ombudsmen covering them can only usually make non-binding recommendations.

[10] Depending on the sector, current monetary limits range from £5,000 to £150,000.

[11] Binding as a result of statute (in the case of statutory ombudsman schemes) or by contract (in the case of other ombudsman schemes).

- If the complainant does not accept the ombudsman's decision, the complainant remains free to pursue the matter in court.[12]

The existence of a monetary limit reflects that the ombudsman process is designed to be less formal than a court, as well as that the decision is binding on the business only and is not subject to appeal (see below). It is an acknowledgement that these advantages for the complainant may not be appropriate for higher-value issues.

The ombudsman may be empowered to award compensation not only for financial loss but also for:

- damage to the complainant's reputation caused by the business;
- distress and inconvenience that the business has caused to the complainant;
- costs incurred by the complainant; and/or
- interest until the compensation is paid.

Note that the ombudsman's award is to compensate the complainant. It does not set out to punish the business, and there are no exemplary or punitive damages.

There is usually no external appeal but, where the ombudsman scheme fulfils the relevant criteria of carrying out a public function, an ombudsman's decision may be subject to judicial review.

A few ombudsman schemes have specific provisions under which, if an ombudsman agrees:

- a specific legal issue may be referred to court; and/or
- a 'test case' may be taken to court (if the business agrees to pay the complainant's costs also).

As mentioned above, there are more enquiries than cases, and only a minority of cases go on to an ombudsman. But each stage has differing levels of complexity. In one typical ombudsman scheme, the 'gearing' of case-handling staff among the three stages is about:

- 15% enquiry-handlers
- 75% investigators
- 10% ombudsmen

Funding

In accordance with normal ombudsman practice, the service is free for the complainant, so that cost should not be a barrier to access. This helps the business to 'draw a line' under a complaint, especially if it is taken up by the press/media or a politician.

The business can say something along the lines of – '*We considered the complaint and gave written reasons for not agreeing with it. If the complaint remains dissatisfied he/she can take their case to the independent ombudsman for free.*'

In different sectors, the cost is shared in a number of ways, including:

- a levy payable by all the businesses covered by the ombudsman scheme, often apportioned according to their market share;
- case fees payable by the businesses about which complainants actually refer complaints to the ombudsman scheme; or
- a combination of the two, with part of the funding coming from a levy payable by all relevant businesses and part from case fees.

[12] It is extremely rare for a consumer who 'lost' with the ombudsman to go to court – because the business will cite the ombudsman decision and because of the risk of an adverse costs order.

A levy reflects the fact that all relevant businesses benefit from the increased public confidence created by the existence of the ombudsman. Case fees mean that more of the cost is borne by the businesses that produce more cases.

It is common for any case fee to be payable irrespective of the outcome of the case – to avoid the complication of a further dispute about whether or not the case should be chargeable, because the emphasis should be on resolving the dispute rather than who is 'right' and because charging a fee only if the business 'loses' might be regarded as influencing objectivity.

But – provided there is also some element of funding by levy – businesses are sometimes allowed a small number of 'free' cases per year, to protect smaller businesses from the (largely unjustified) fear of being 'blackmailed' by a consumer with a spurious complainant who knows about the case fee.

From the ombudsman scheme's point of view, how the cost is divided among the businesses is less important than ensuring that funding:

- is sufficient to provide the resources to deal with the workload effectively and efficiently; and
- cannot be used to try and influence the ombudsman's approach.

The public require convincing that it is not a case of 'he who pays the piper calls the tune' – which is one of the reasons why adherence to the BIOA criteria for ombudsmen and the BIOA principles of good governance for ombudsmen is essential.

Accessibility

Members of the public with a problem can only access the ombudsman scheme if:

- they are told that the ombudsman scheme exists;
- they are told how to contact the ombudsman scheme;
- the ombudsman scheme can be contacted through a range of accessible channels; and
- the means of contacting the ombudsman scheme ensure that cost is not a barrier.

The scope and procedures of the ombudsman scheme should be published and easily accessible. They should include a clear statement of:

- the types of complaint that the ombudsman scheme can deal with;
- anything the complainant must do before referring a complaint to the ombudsman scheme;
- the process the ombudsman scheme uses for the complaints that are referred to it;
- any requirements on the parties as part of that process;
- any costs that have to be paid, or which can be awarded at the end of the process;
- how and by whom cases are decided;
- the basis of decision (typically, fairness);
- whether the decision is binding on the business or not;
- the consequences if the business does not comply with a decision.
- whether or not decisions are published;
- whether or not the name of the business is published (increasingly the trend); and
- whether or not the name of the complainant is published (usually not).

It will assist complainants and businesses to resolve disputes between themselves, and reduce the number that are referred to the ombudsman scheme, if the ombudsman scheme publishes the approach taken to typical disputes – through case studies and/or guidance notes.

Accountability

Accountability does not involve any restriction on the independence of the ombudsman. It involves the ombudsman scheme paying due regard to the overall public interest in the forward-planning and day-to-day running of the ombudsman scheme.

Many ombudsman schemes consult publicly in advance about their procedures, business plans and budgets. This gives an opportunity to obtain information that helps to estimate future workload – something that is often the most difficult aspect of managing an ombudsman scheme.

Ombudsman schemes publish a report at least yearly:

- explaining the work they have done;
- providing appropriate statistics about the disputes they have handled;
- explaining the way they have handled them (including the arrangements for quality-control); and
- describing any systemic and emerging issues.

Some larger schemes publish more often – maybe including a monthly newsletter for businesses and consumer advisers.

Relationship with any regulator

It is theoretically possible for there to be an ombudsman scheme without there being a regulator. For example, the former Banking Ombudsman was established in 1985 before there was conduct-of-business regulation in banking (and even before there was a Banking Code).

But it is difficult to see how this could work in a high-profile and contentious area such as the press/media. The ombudsman scheme would almost certainly be accused by the press/media of being a quasi-regulator, and circumstances might force the ombudsman scheme into becoming a quasi-regulator.

The independence of the ombudsman scheme includes independence from the regulator. Even where the regulator appoints the ombudsman scheme board, board members are operationally independent, and the ombudsmen are independent from their boards in making decisions.[13]

Operational independence does not prevent exchange of information between the ombudsman scheme and the regulator – for example on systemic issues and new/emerging issues. Some ombudsman schemes in the regulated sector provide monthly data to the regulator and have detailed liaison arrangements – typically set out in a memorandum of understanding.[14]

Industry codes

Industry codes can be subject to a range of governance and monitoring arrangements. The Banking/Lending Code[15] is a good example, as it has developed through various stages over time as circumstances and public expectations have changed.

In 1989 the government launched a review of banking. The report recommended that the banking industry itself should create a code of good practice. The code is owned and agreed by the industry, which appointed a standards board to monitor compliance with it.

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[13] See, for example, Financial Services and Markets Act 2000, schedule 17, paragraphs 3(3) and 4(2).

[14] For an example, see www.financial-ombudsman.org.uk/about/MOU-april2007.pdf

[15] See www.lendingstandardsboard.org.uk. The code was narrowed from all banking to just lending when the regulator created conduct-of-business rules for deposit-taking and payment services.

The standards board was originally comprised of industry members only, but eventually ended up with a majority of independents (including an independent chair) – which is clearly preferable. Monitoring developed from self-certification to proactive inspection by the standards board.

The code was reviewed periodically, with each edition (broadly) raising the standards set out in its predecessor. Originally, it was drafted solely by the industry – though the industry did seek (though often did not follow) stakeholder views when preparing subsequent editions.

Then, borrowing a mechanism from Australia, the industry started to appoint an independent reviewer to conduct the periodic review. (The reviewer was selected by the industry, but in practice the industry did choose independents.)

The reviewer consulted stakeholders and the proposed amendments to the code. But it remained a decision for the industry whether to accept those amendments or reject them and be publicly answerable. The industry accepted a majority of recommendations, but not all of them.

C: Issues that would be particular to a Press (or Media) Ombudsman

Potential complaint issues

Based on previous evidence to the Inquiry, including that on behalf of the Press Complaints Commission, the complaints that fall for consideration appear to cover (broadly) the following groups:

- redress, after publication, for material that it is alleged should not have been published;
- redress for harassment that has taken place;
- redress for improper acquisition/use of personal information that has taken place;
- intervention, before publication, on material that it is alleged should not be published; and
- intervention in relation to harassment that is taking place or is anticipated

In that context, we discuss below:

- the relationship with the courts;
- the relationship with any regulator;
- the relationship with any rules, guidance or code of practice;
- basis of ombudsman decision;
- businesses/activities covered;
- complainant eligibility; and
- how far the ombudsman model is an apt one for handling issues of this nature.

Relationship with the courts

As previously mentioned, typically:

- Ombudsman schemes resolving complaints against a private-sector business deal with events after the fact, providing redress (where appropriate) for past acts/omissions. They may provide advance advice, but they do not take pre-emptive decisions along the lines of a court injunction.
- The ombudsman scheme can require the business to pay the complainant compensation and/or require the business to do something in relation to the complainant (whether or not a court could do so).
- Any money award by the ombudsman is to compensate the complainant. The ombudsman does not set out to punish the business, and there are no exemplary or punitive damages. Any money award is subject to a specified monetary limit.[16]

[16] Depending on the sector, current monetary limits range from £5,000 to £150,000.

If:

- there were no upper limit on ombudsman awards; or
- the ombudsman could award exemplary/punitive damages; or
- the ombudsman could provide injunctive relief;

there would be increasing pressure for the ombudsman scheme to operate much more like a court – losing the inherent benefits an ombudsman scheme provides.

Any Press (or Media) Ombudsman scheme award limit could be set at a level that would be adequate for most cases involving most members of the public. But some cases involving exceptional circumstances and/or involving well-resourced public figures would probably still need to go to court.

As mentioned in section C, some existing ombudsmen are able to provide redress for damage to a complainant's reputation caused by the business, but the award limit would mean that more substantial defamation cases would still be for the courts.

Typically, where ombudsman schemes deal with complaints about private-sector businesses, complainants are required to take one remedy or the other: they cannot complain through the ombudsman scheme, accept an ombudsman's award and then go on to sue in court.

In relation to the press/media, in the very exceptional circumstances of a case that does not involve a well-resourced public figure but would justify an award above the ombudsman scheme's maximum limit, alternative arrangements might be appropriate.

One possible option (for example) might be that, if a Press (or Media) Ombudsman upholds the complaint and confirms the circumstances are sufficiently exceptional, the complainant is given the choice of taking the maximum the ombudsman can award or alternatively being financially supported to pursue the case in court.

Relationship with any regulator

We use the term 'regulator' to mean any regulatory body (whether statutory or voluntary) with powers about conduct in relation to the relevant sector. Our assumption is that carrying out press/media activities will not require a business to obtain prior authorisation from any regulator.[17]

Whilst an ombudsman might award appropriate redress in the majority of cases, it would be for any regulator (and not the ombudsman scheme) to impose any sanctions on any business whose activities (or systemic failure to handle complaints appropriately) deserved criticism or punishment.

It is difficult to see how any Press (or Media) Ombudsman scheme could operate effectively, without becoming a quasi-regulator, unless it was operating alongside an effective regulator with a compatible status in the eyes of the public.

A voluntary ombudsman scheme (established as a separate body with independent governance) could operate alongside a voluntary regulator, or a statutory ombudsman (established as a separate body with independent governance) alongside a statutory regulator.

But a statutory Press (or Media) Ombudsman alongside a voluntary regulator would have a superior status in the eyes of the public. It would be subject to pressure to act as a quasi-regulator and second-guess the regulator – even though the ombudsman scheme was not designed nor resourced to fulfil this role.

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[17] Save where already required in relation to broadcasting.

Relationship with any rules, guidance or code of practice

Resolving complaints about the press/media may involve balancing the private interest of the alleged victim against the public interest. So any Press (or Media) Ombudsman scheme will be assisted by there being regulatory rules or guidance, or a code of practice, addressed to businesses.

The ombudsman scheme would take those into account in deciding what was fair in the circumstances of an individual case – though the persuasiveness of any rules/guidance/code would be proportionate to the status of the body producing them and the process by which they were prepared and approved.

Businesses/activities covered

We appreciate that the Inquiry is considering how far any of its recommendations should apply to the press or also to the wider media.

It is important that there should be clarity about which businesses/activities are covered by the jurisdiction of any Press (or Media) Ombudsman scheme. This would be advantageous to the public and relevant businesses, as well as advantageous to the ombudsman scheme and the courts.

In the sector that is being covered by the Inquiry, it may be simpler and clearer to define the ombudsman scheme's jurisdiction by reference to specified activities (and not by reference to particular businesses) – which might parallel the activities covered by any regulatory body.

Complainant eligibility

In existing private sector schemes, complaints are mostly from customers (or prospective customers). That is not the case with the press/media – where complaints are most likely from those who are the (actual or potential) subjects of news stories.

It would be necessary to define the classes of people and bodies who would be able to refer a complaint to any Press (or Media) Ombudsman scheme, and whether that was limited to individual alleged victims or included (for example) bodies representing vulnerable groups.

Obviously, the wider complainant eligibility is drawn, the greater the burden on businesses (at the first stage of complaint-handling) and the ombudsman scheme (at the second stage, but paid for by businesses) – and the greater the chance that some cases might be brought for 'campaigning' rather than redress reasons.

If the Inquiry were minded to consider a Press (or Media) Ombudsman scheme open to (for example) bodies representing vulnerable groups, it might be appropriate to consider some requirement for 'permission' – which would be novel (but not impossible) for an ombudsman scheme.

Basis of ombudsman decision

Typically, ombudsman decisions are based on what the ombudsman considers to be fair in all the circumstances – taking into account the law, any regulator's rules and guidance, any relevant code of practice and what the ombudsman considers to have been good practice at the relevant time.

A Press (or Media) Ombudsman scheme would need to balance the private interest of the alleged victim against the public interest. So it would be helpful to qualify the basis of decision to include an explicit reference to the ombudsman having regard to the public interest in maintaining a free press (or freedom of the media).

Redress, after publication, for material that it is alleged should not have been published

Such cases would be comparatively straightforward in principle for a Press (or Media) Ombudsman scheme to handle. If upheld, they would involve:

- an award of compensation (up to any monetary limit); and/or
- a requirement for the business to do something in relation to the complainant (maybe publish a correction of specified form and prominence).

Redress for harassment that has taken place

Similarly, such cases would be comparatively straightforward in principle for a Press (or Media) Ombudsman scheme to handle. If upheld, they would involve:

- an award of compensation (up to any monetary limit); and/or
- a requirement for the business to do something in relation to the complainant (maybe publish an apology of specified form and prominence).

Redress for improper acquisition/use of personal information that has taken place

Similarly, such cases would be comparatively straightforward in principle for a Press (or Media) Ombudsman scheme to handle. If upheld, they would involve:

- an award of compensation (up to any monetary limit); and/or
- a requirement for the business to do something in relation to the complainant (maybe verify destruction of material and publish an apology of specified form and prominence).

Of course, we refer here to the civil aspects, with any criminal/regulatory aspects being dealt with by the relevant authorities.

Intervention, before publication, on material that it is alleged should not be published

Advance intervention would be new territory for an ombudsman scheme. It might well be considered highly novel, and risky, to give an informal Press (or Media) Ombudsman scheme power to prohibit publication – though an ombudsman might offer advice on the basis of the information then available.

Over time, as a body of published decisions was established, the need for advice and indeed the likelihood of a business acting in a way that could result in a later decision against it might reduce – as businesses become familiar with the approach the ombudsman scheme is likely to take and the decisions it is likely to reach. And the ombudsman scheme might publish guidance summarising past decisions.

If a business made full disclosure and followed advice from the Press (or Media) Ombudsman scheme, that could count in its favour if the ombudsman scheme were later required to consider what was a fair outcome to a claim for redress (and might also be taken into account by a court in any proceedings). But it does not seem practicable for any ombudsman to guarantee a safe harbour in advance.

If a business failed to make full disclosure or failed to follow advice from the Press (or Media) Ombudsman scheme, that could count against the business if the ombudsman scheme were later required to consider what was a fair outcome to a claim for redress (and might also be taken into account by a court in any proceedings). And the ombudsman's published decision could include explicit criticism of the business on this point.

But it would not be consistent with the usual ombudsman model for that to result in exemplary or punitive damages. It would be more consistent with the normal ombudsman model for the Press (or Media) Ombudsman scheme to report the matter to the regulator[18], and for the regulator to consider any sanction.

Intervention in relation to harassment that is taking place or is anticipated

Similarly, a Press (or Media) Ombudsman might offer advice on the basis of the information then available. Whether or not a business followed advice, could count if the ombudsman scheme were later required to consider what would be a fair outcome to a claim for redress (and might also be taken into account by a court in any proceedings). The ombudsman's published decision could criticise the business for not following advice, but any sanction would be a matter for the regulator.

D: BIOA's views

Comments on the provisional proposals from the Press Complaints Commission

The Press Complaints Council has proposed a new voluntary regulator with two arms. It says that one of these would be a '*complaints and mediation arm*':

- which would '*maintain the mediation and arbitration services that the existing PCC provides*';
- whose '*principal sanction will remain a critical adjudication*'; and
- which *'will not be able to award compensation*.'

BIOA does not consider that is an appropriate model.

- It would be wrong in principle for the dispute-resolution body not to be independent of the regulator, even if the regulator were a statutory one.
- Aside from any muddle or potential conflict of interest, the roles of regulator and dispute-resolver are different (and require the deployment of different skills).
- A dispute-resolution arm of a new voluntary regulator would be unlikely to generate sufficient public confidence.
- The ombudsman 'brand' is well-recognised by the public, and appears to command widespread public confidence.

Nor does BIOA consider that the remedies available should be so limited:

- Well-resourced individuals would still be able to seek compensation in court, but most members of the public would go uncompensated.
- They should have access, through an ombudsman scheme, to appropriate compensation and other remedies, subject (for the reasons explained earlier) to a maximum monetary limit.

BIOA's tentative suggestions for consideration

This section summarises BIOA's own suggestions, and would be happy to engage in dialogue about them. We feel strongly about the standards applicable to ombudsmen, but we are tentative about some other aspects because:

- we have not had the benefit of the huge time and effort the Inquiry has put into considering the issues and evidence; and

[18] See, for example, www.legislation.gov.uk/ukpga/2007/29/section/143 - reports by the Legal Ombudsman to legal regulators.

- the potential role and design of any ombudsman scheme would depend in part on the view the Inquiry reaches on the role, design and status (voluntary/statutory) of any regulator.

In any event, we hope that the technical commentary in sections B and C will assist the Inquiry in forming its own conclusions on whether there is a role for a Press (or Media) Ombudsman scheme and, if so, the basis on which one should be established.

We suggest that there is a role for a Press (or Media) Ombudsman scheme as part of a proportionate system of checks and balances. It could provide an independent, informal, efficient, effective and economical means of resolving a large proportion of complaints that arise.

We have considered whether there is any existing ombudsman scheme that would be well placed to deal with this work, but we have concluded that a separate Press (or Media) Ombudsman scheme would be appropriate – because of the special issues associated with balancing public rights and the public interest against private rights.

Ombudsman schemes operate successfully in a wide range of different sectors. They are all based on the same fundamental principles, but details of their powers and roles are adapted to meet the particular needs of the relevant sector.

We believe that there is scope to design a Press (or Media) Ombudsman scheme that meets the needs of that sector. But we consider it is vital that it should remain true to fundamental ombudsman principles, if it is to capture and hold public confidence.

As indicated in section B, those fundamental ombudsman principles are set out in BIOA's published criteria for ombudsman schemes[19] – covering independence, fairness, effectiveness, openness and transparency, and accountability – and BIOA's principles of good governance for ombudsmen.[20]

Consistently with those criteria/principles, and taking account of the challenging role that a Press (or Media) Ombudsman would need to fulfil, we recommend:

- The name 'ombudsman' should not be used unless the body complies fully with the BIOA criteria for ombudsmen and the BIOA principles of good governance for ombudsmen.
- There should be a single ombudsman scheme (not 'competitive' ones) – to ensure that perceived independence is not undermined, and to secure consistency of decision-making.
- Any ombudsman scheme should be constituted as an independent body entirely separate from any regulatory body.
- This should not prevent any ombudsman scheme from providing relevant information, and referring misconduct, to any regulatory body.
- Any ombudsman scheme should have an independent board of directors, appointed on terms that secure their independence from those appointing them.
- Board members should not be appointed by a body which has more than minority representation from the industry, and not more than a minority of board members should be from the industry.
- The body appointing the board members could be the regulatory body – but only if the regulatory body itself is similarly independent from the industry.
- The independent board of directors should appoint the ombudsmen, on terms that secure the ombudsmen's independence from those appointing them.
- The scope and powers of any ombudsman scheme should be set independently, in the public interest, and not set by 'negotiation' with the industry.

[19] www.bioa.org.uk/docs/BIOA-Rules-New-May2011-Schedule-1.pdf

[20] www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf

- The funding arrangements should ensure sufficient resources for the workload, and not provide any lever for the industry to try and exert any influence over the ombudsman's approach.
- Any ombudsman scheme should be operationally independent, so that no regulator or industry body has any influence on its approach and decisions.
- The jurisdiction of any ombudsman scheme should be based on specified business activities (rather than particular businesses), and could parallel that of any regulatory body.
- This means that any body or person whose activities are specified would be subject to the ombudsman scheme's jurisdiction.
- Any ombudsman scheme should be able, and should be resourced, to handle enquiries as well as complaints.
- Complaints could be referred by any member of the public (and possibly small businesses, charities etc) who allege that they have suffered harm.
- This could, if appropriate, be extended to include representative bodies etc (noting our earlier comments about 'permission').
- Relevant businesses should be made subject to rules, or a code, on the effective handling of complaints – and this should include a clear 'gateway' to the ombudsman scheme.
- Those eligible to refer a complaint to any Press (or Media) Ombudsman scheme should be able to do so free of charge, and not be at risk of being required to meet any of the business's costs.
- The ombudsman should decide complaints:
    - on the basis of what the ombudsman considers to be fair in all the circumstances;
    - having regard to the public interest in maintaining a free press; and
    - taking into account:
      - the law;
      - any regulator's rules and guidance;
      - any relevant code of practice; and
      - what the ombudsman considers to have been good practice at the relevant time.
- The ombudsman should be able to award redress (up to a specified monetary limit) and/or require the business to take specified steps in relation to the complainant.
- The ombudsman should make decisions that bind the business (rather than non-binding recommendations).
- The ombudsman's decisions should be final, and should not be able to be overturned other than by the courts or an appeal route provided for by law.
- Any route to challenge the ombudsman's decision should discourage frivolous/vexatious or routine use. Judicial review, with its requirement for permission, may well be the most appropriate.