

SECOND SUBMISSION TO THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT, CONCERNING THE CODE OF PRACTICE ON LOCAL AUTHORITY PUBLICITY

Introduction

These are the representations of Hackney Council (“the Council”) in response to the Secretary of State’s notice of a proposed direction under section 4A of the Local Government Act 1986, dated 25 September 2014.

Response

You have stated that the 25 September 2014 notice supersedes that previously given on 16 April 2014. However, the essential nature of the Secretary of State’s proposal, and of the stated reasons for it, remains unchanged. The Council therefore continues to rely upon everything that was said in its original representations dated 29 April 2014, save for the second point that was made there under the heading “The form of any direction” – which is superseded since the Secretary of State no longer proposes to direct the Council to comply with the whole of paragraph 28 of the Code. Subject to that point, you should treat everything in the April 2014 representations as if it was repeated here. On that basis, we can confine the present representations to updating and enlarging upon the previous representations where it is necessary to do so, and to re-stating certain key points.

We note that, in response to the Council’s letter of 29 September 2014, the Secretary of State (in Mr Rowsell’s letter of 3 October 2014) has again declined to engage in any detail or in any specific way with the factual matters advanced in the Council’s original representations. As the letter of 29 September made clear, the Council has therefore no sensible alternative but to proceed on the basis that the Secretary of State accepts all of the factual assertions contained in the original representations. We emphasise again that, if the Council had been informed of any dispute as to those matters, it would have wished to direct representations to that dispute, and should have been given the opportunity to do so.

The fundamental basis for the proposed direction is that it is to be given because the Secretary of State believes that the publication of local authority newspapers more than quarterly is “damaging to the continuation of local independent media”, and means that the environment is not “as conducive as possible to the flourishing of an independent and politically free local media”. No other reason for giving the direction is suggested.

However, the Council’s original representations indicated (and the Secretary of State has not disputed) that:

- (i) There is no evidence to show that the circulation and revenues of commercial titles have declined faster in areas where councils have produced their own newspapers;
- (ii) The Secretary of State has neither commissioned nor otherwise identified any relevant evidence to sustain any claim that council publications have contributed significantly to a decline in sales or advertising revenues of local newspapers;
- (iii) There is similarly no evidence that, where councils cease to produce their own newspapers, this improves the fortunes of local independent titles;
- (iv) In this part of London, local newspaper circulation fell faster in a borough with no regular council newspaper than it did in the Council's area, with a fortnightly newspaper. Further, local newspaper circulation fell more steeply before Hackney Today began publication than it did afterwards;
- (v) Hackney Today as currently published provides important financial support for the local newspaper industry through the contract for it to be printed;
- (vi) There is a strong and diverse local media sector in Hackney, through which the Council is put under greater scrutiny than ever before. Further, there is a new independent local newspaper whose circulation is growing, and which has stated publicly that Hackney Today does not compete with it and does not undermine its income;
- (vii) There is no basis in evidence for any suggestion that Hackney Today as currently published is competing unfairly with, or damaging, other local media.

In the face of these undisputed propositions, the Secretary of State has merely asserted that it is "self evident" that the existence of local authority newsheets makes for an environment less conducive to the flourishing of an independent press, with less need or incentive to buy commercial media, and a diversion of advertising revenue.

However, this is not a self evident proposition at all. On the contrary, it is one which flies in the face of the undisputed factual position as set out above. The Secretary of State is simply failing to engage with the evidence. The obvious, and indeed the only rational conclusion to be drawn from that evidence is that, in Hackney at least, the local authority newspaper does not have a material impact upon the local

commercial press, partly because there are other market forces at work which are of vastly greater importance, and partly because, as explained in our original representations, it has a different, non-competing content. Likewise, Hackney Today does not contain classified advertising, and the advertising that it contains is drawn essentially from a different market to that which is relevant to the local commercial press – namely, public and voluntary sector partners prepared to pay higher than commercial rates in order to reach every home in the borough. The Secretary of State has in any event offered no answer to how it can be rational for him to treat the sale of advertising space in council newspapers as something to be curtailed, whilst encouraging the sale of advertising space on council websites, in competition with newspapers’ digital advertising.

So there is simply no evidence, certainly in the case of Hackney Today, of the adverse effect on the local commercial press on which the Secretary of State’s proposal depends, nor any rational basis for assuming the existence of such an effect.

Further, even if it could (contrary to the above) be assumed that there was some such impact, there is certainly no basis upon which the Secretary of State could legitimately conclude that it was any more than minimal in nature. The Secretary of State could not rationally or properly conclude that an effect which was merely minimal justified the (undisputed) adverse consequences of restricting Hackney Today to quarterly publication – additional public expenditure of at least £100,000 per year, and greater difficulty in getting important public and voluntary sector information to those who need it, including those subject to digital exclusion, and a disproportionately high number of persons in protected groups for the purposes of the Equality Act. By the same token, the Secretary of State could not rationally conclude that any negative effect on the independent press was greater than the positive impact of the revenue derived from printing Hackney Today.

Still less could it be said to be proportionate to limit Hackney Today to quarterly publication when there is no basis for saying that to do so would make any non-negligible contribution to the aim of fostering an independent press. The Council’s original representations explained why proportionality is required in this context.

Apart from its futile attempts to get round the absence of evidence by claiming that matters are “self evident”, the other suggestion repeatedly made in Mr Rowsell’s letter of 3 October is that it must somehow be justifiable to give a direction because the “great majority” of authorities already publish no more than quarterly. There are a number of reasons why this is a bad point.

First, it does not follow from the fact that many authorities have decided, not least in the face of the Secretary of State’s repeated threats of action and crude references to “Town Hall Pravdas” that they should comply with the Code that they consider that this represents the most effective way in which to proceed. As the consultation

responses previously produced by the Secretary of State demonstrate, local authorities of all political persuasions are overwhelmingly opposed to the Secretary of State's approach to this matter.

Secondly, we do not believe that the Secretary of State has identified all the local authorities which presently publish more than quarterly. We are certainly not in a position to do so ourselves, on a comprehensive basis, but we believe that there are, for example, authorities which are seeking to circumvent the Code by publishing newsletters under more than one different title.

Thirdly, and most importantly, it is not the case that the circumstances of all local authorities are the same. That was recognised by Parliament when it passed the legislation and approved the Code in the form that it did, i.e. a form which did not automatically make it mandatory for all local authorities to comply with everything in the Code. The Secretary of State's approach is therefore contrary to the scheme of the legislation, as we have previously explained. The Council's original representations were directed very specifically towards its own position. They dealt with the state of the local media in Hackney, to which I have already referred. They pointed out the much smaller circulation of alternative local newspapers. They addressed the particular nature of the community which the Council serves, with substantially different levels of internet exclusion to the national picture. We have a very diverse population, and the second highest population density of any authority in the country. We also pointed out that, in Hackney, well above national average numbers of residents feel well-informed about Council services – this is the case even though high levels of deprivation, such as those seen in the Hackney population, are (on the data collected by Ipsos MORI) generally associated with residents feeling dissatisfied with and poorly informed about council services. To the extent that this level of success is being achieved through more frequent publication of Hackney Today, the fact that other authorities are typically less effective than the Council in keeping their residents informed is not, on any view, a good reason to compel the Council to be less effective as well.

I would also point out that the Council's original representations explained that the nature of Hackney's area means that it has to publish a high number of statutory notices, which is a further point of differentiation from many other authorities. A high-density urban area experiences a higher number of planning applications, road closures, developments, licensing applications, and so on. Again, the Secretary of State has not suggested that he disagrees with this proposition as a matter of fact. He has indeed conspicuously failed to address the question of how it can be right, when the government continues to require the publication of these statutory notices in newspapers, on the basis that this is required in order to inform the public about decisions that will affect their lives, to compel the Council to publish its notices in a way that will cost more, and will reach massively fewer households. That is entirely irrational and indefensible, as is the Secretary of State's continued refusal even to explain his position in this respect. The statement in the last paragraph of Mr

RowSELL's letter of 3 October, which denies any connection between this matter and the proposed direction, is simply irrational, and demonstrates that the Secretary of State is refusing to take account of a relevant consideration. What appears clear is that, whatever may have been indicated in the past, the government has yet to develop any plans for any reform of the current law on statutory notices. We are aware that, in a speech to the Local Government Association conference in the summer of this year, the Secretary of State raised the possibility of some joint working between the newspaper industry and local government to address these issues. We understand that, following that speech, the LGA wrote to the Newspaper Society in early August proposing a meeting. We are also given to understand that the Newspaper Society's response was that it would need to speak to the Secretary of State before deciding whether to meet with the LGA, since when nothing more has been heard. This strongly suggests that the industry feels little motivation to change a system under which its publications are effectively subsidised from the public purse. It also raises a question as to what non-public communications there have been between the Secretary of State and the newspaper industry about these matters, and the appropriateness of those communications (on top of the concerns about bias and predetermination which the Council has already raised). We note that, again, the Secretary of State has not disputed the factual assertions made in the Council's original representations under the heading "State aid". It therefore remains our position that the proposed direction would be unlawful on this ground as well.

The Secretary of State's notice stated that: "The Council are invited to expressly consider their public sector equality duty." Our letter of 29 September 2014 requested clarification of what was meant by that statement. Once again, Mr RowSELL's letter of 3 October has discourteously and unhelpfully ignored that request, and we therefore remain at a loss as to what the Secretary of State meant. The public sector equality duty requires an authority to have due regard to specified matters (including the need to advance equality of opportunity) "in the exercise of its functions". The Council has done just that, and it has concluded, for the reasons set out in some detail in its original representations, that to move to quarterly publication of Hackney Today would have an adverse impact upon a number of groups with protected characteristics. At this stage, the relevant function, namely that of deciding whether to exercise the power to give a direction, is being exercised by the Secretary of State, and not by the Council. The Secretary of State's notice does not dissent as a matter of fact from anything that was said in the Council's original representations. On the contrary, it explicitly recognises that some relevant groups will less readily be able to obtain relevant information, "and hence all other things being equal could be adversely impacted". In addition to the matters mentioned in our original representations, it is also worth drawing attention in this context to article 21(a) of the UN Convention on the Rights of Persons with Disabilities, and also to the ONS's published statistics on internet access (that being the effective alternative in this case), and how that varies between relevant groups within the population.

The Secretary of State then gives three reasons for proposing to proceed with a direction despite this adverse impact. None of them will stand scrutiny:

- (i) First, it is said that it is open to the Council to communicate effectively in other ways. In the particular circumstances that prevail in Hackney, however, alternative means of communication will be less effective. The Secretary of State does not appear to dispute this. At any rate, he has not responded to the request in our letter of 29 September to identify the means by which he thinks the relevant adverse consequences could be avoided, so that representations can be made about them. The Secretary of State is therefore proceeding on a false basis and/or is disabling himself from obtaining relevant information about the impact on protected groups. That does not comply with the public sector equality duty.
- (ii) Secondly, it is said (again) that other councils publish on a quarterly basis. But that ignores the particular characteristics of the Hackney population to which we have already referred. Nor in any event is it any justification for a measure that will disadvantage protected groups to say that similar disadvantages exist elsewhere.
- (iii) Thirdly, the Secretary of State says that any disadvantage would be outweighed by the overriding policy of supporting local media. But we have already demonstrated that there is no evidence that making Hackney Today publish less frequently will have any tangible impact in that respect. We simply cannot accept that our responsibility to provide timely and regular information to local people, and in particular to those in protected groups who may not have access to online information, may be housebound by age or disability, and may have a high need for Council services, can be overridden by a policy position which is founded on nothing but conjecture. Nor do we accept that for the Secretary of State to proceed in this way would be consistent with the public sector equality duty.

We also understand Mr Rowsell's letter of 3 October to mean that there has to date been no equality impact assessment by the Secretary of State. Whilst it is true that there is no statutory obligation to carry out such an assessment in all cases, we consider that in the present case the absence of such an assessment is symptomatic of (and part of the reason for) a failure on the part of the Secretary of State to consider the issues properly, to inform himself properly, and to confront the question of what is and is not supported by the evidence – all of which are essential to proper performance of the statutory duty.

Finally, so far as the form now proposed for the direction is concerned, we note that it would require compliance "as soon as practicable and in any event by no later than 1 January 2015". The Council's original representations explained why, in particular

for reasons connected with the employment of staff, any direction ought not to take effect until 6 months after it was given. The Secretary of State has not commented on the points that were made in that respect, so the Council has had no opportunity to address the reason why the Secretary of State disagrees with them (if indeed he does). The Council does not of course know when a direction might be given, but it would obviously now be less than 3 months before 3 January 2015, and probably substantially less than that. For that reason also, any direction given in the proposed form would be unreasonable.

For completeness, we are advised that, contrary to what is said in Mr Rowsell's letter of 3 October, there is no power under section 4A(3) of the 1986 Act for the Secretary of State to direct that the Council should consider any direction given in any particular manner or at or within any particular time. Having said that, if the Secretary of State does, despite the representations made above, proceed to give what in our present view would be an unjustified and unlawful direction, this authority will undoubtedly wish to consider at an early date, and after taking appropriate advice, how it should respond to that unfortunate situation.