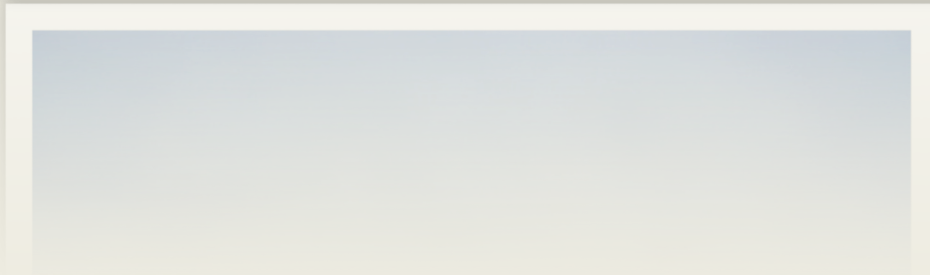


Good News?

Representation to Lord Leveson

**A report by the Advisory Group on Journalism &
Charitable Status**



1. Introduction

- 1.1. The public value of journalism is widely recognised. In February 2012 the House of Lords Communications Committee described the importance of journalism that ‘informs and educates us, enhances our democracy, and is a force for good.’¹ They said that the role of investigative journalism ‘in putting previously unreported information into the public domain and providing the stimulus for public debate is immensely important.’² This endorsement builds on a long tradition in Britain of respect for the educational and civic value of the press that stretches back through the work of George Orwell and John Stuart Mill to Thomas Paine and John Milton.
- 1.2. In the United States, the value of journalism to the public has been recognised by the Inland Revenue Service (IRS), which has granted the equivalent of charitable status to a number of non-profit news organisations with an educational remit. The burgeoning charitable news sector, such as multi-award winning group ProPublica, supported by donations and grants, now makes an important contribution to the plurality of media provision in that country.
- 1.3. In England and Wales, the Charity Commission has not publicly endorsed the approach of the IRS. Though, in correspondence with the Joseph Rowntree Reform Trust, the Commission has accepted that there is potential for the registration of a charitable news organisation.³
- 1.4. The House of Lords Communications Committee has called on the Charity Commission to ‘provide greater clarity and guidelines on which activities related to the media, and in particular investigative journalism, are charitable in the current state of the law.’⁴ The Committee has asked the Commission ‘to take into consideration both the current pressures on investigative journalism as well as its democratic importance when interpreting the relevant legislation.’ As yet, the Commission has not responded to this request.
- 1.5. In this paper, we lay out an argument to Lord Leveson that endorses the request of the House of Lords Communications Committee. We believe that the law as it stands could admit certain forms of public benefit journalism in pursuit of recognised charitable objects, such as (but not limited to) advancing education, citizenship, community cohesion or the promotion of ethical standards of

¹ House of Lords, Select Committee on Communications, 3rd Report of Session 2010–12: *The future of investigative journalism*, published 16 February 2012, paragraph 201 and Summary.

² *Ibid*, paragraph 1.

³ Letter from Alice Holt, Head of Legal Services, Charity Commission, to Andrew Phillips, Bates Wells & Braithwaite, 3 December 2010.

⁴ House of Lords, Select Committee on Communications, *op cit.*, paragraph 201.

conduct. We note the Charity Commission's concerns about the implications of registering news organisations as charities, and suggest to Lord Leveson that the American approach to charitable journalism provides a model that could be followed in this country.

1.6. This report was prepared by the Advisory Group on Journalism and Charitable Status, co-chaired by Bates, Wells & Braithwaite; the Bureau of Investigative Journalism; and Wilkes, a non-profit parliamentary news organisation.

2. *The Value of Journalism*

2.1. Without a free and impartial media that educates the public, it would be extremely difficult for citizens to understand or contribute to the workings of their society or to find personal fulfilment. The free press is thus an important cornerstone of the human right to freedom of expression, as set out in Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998. It provides the public with information on which to make important decisions; it enables the public to play a part in their community or society as active citizens; it may foster community cohesion by drawing a community together in a shared purpose or identity; and it underpins the right to democratic participation, by enabling the public to hold politicians and public bodies accountable.

2.2. The state has a duty to protect the free press. In its most recent guidance on Article 19 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has noted that the state's responsibility extends beyond the negative liberty of non-interference: the state has a positive duty to enable citizens to hold, receive and impart information and ideas: 'The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.'⁵

2.3. The value of journalism is legally recognised in a number of areas of civil and criminal law, where 'public interest' defences are available to publishers, authors and disseminators. The public interest is not defined in law, but these defences recognise the public benefit that may be provided by certain kinds of information and ideas. The 'public interest' is not of course the same as 'whatever interests the public'. There are several distinct meanings of the noun 'interest' in the English language, including 'the feeling of wanting to know or learn about something or someone'. This is interest as curiosity: 'what interests the public'. However, in this paper when we talk about the 'public interest' we are drawing

⁵ United Nations Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, paragraph 13.

upon the third sense of 'interest', as defined in the Oxford English Dictionary, as 'the advantage or benefit of a person or group'. In other words, although the word 'interest' is used, English law has a well-developed appreciation of the 'advantage or benefit' to the public of certain forms of journalism. The law recognises that this benefit is likely to flow to the whole community, or society, rather than a distinct group. In this sense 'public benefit' and 'public interest' are more or less interchangeable.

- 2.4. For instance, the exposure by journalists of problems at a child welfare agency could lead to fewer child deaths. 'The coverage of the newspaper thus generates accountability, which city residents benefit from and appreciate.'⁶ More broadly, there is evidence of a causal link between press freedom and the absence of corruption. Research in a large number of countries has found that there will be less corruption where the press is less constrained, whether through laws and regulation that influence media content; political or economic influence over media content; or repressive actions, such as the arrest, harassment and murder of journalists.⁷
- 2.5. Public benefit journalism thus enhances the ability of the public to inform themselves on issues that concern them, and enables them to play a part in society as active citizens. The absence of public benefit journalism may therefore lead not only to shortcomings in public education and community cohesion, but also be more generally detrimental to the public – i.e. to a 'democratic deficit'.⁸
- 2.6. There is likely to be considerable public benefit in journalism that advances charitable objects such as education, citizenship, community cohesion or the promotion of ethical standards of conduct.**

3. The Value of Charitable Status

- 3.1. Viable third sector organisations, which do not seek to generate profits or create shareholder value, and do not wish to rely upon state subsidy, must be capable of attracting and accepting philanthropic support. This effectively requires charitable status, with its fiscal and reputational benefits. Charitable status is not the only form of non-profit ownership: other options include the non-charitable

⁶ James T. Hamilton, 'What's the Incentive to Save Journalism?', in *Will the Last Reporter Please Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix It*, ed. Robert McChesney and Victor Pickard (New York: New Press, 2011), pp.277-88.

⁷ See Aymo Brunetti and Beatrice Weder, 'A Free Press is Bad News for Corruption', *Journal of Public Economics* 87 (2003), 1801-24.

⁸ See Andrew Currah, *What's Happening to our News? An Investigation into the Likely Impact of the Digital Revolution on the Economics of News Publishing in the UK* (Oxford: Reuters Institute for the Study of Journalism, 2009), pp.119-140.

Company Limited by Guarantee (CLG) and the Community Interest Company (CIC).

- 3.2. Although it lacks the reputational benefit of charitable status, a non-charitable CLG can demonstrate best practice in terms of transparency. This is a useful structure for companies pursuing objectives not recognised as charitable but which aim to attract public support. However, unless its non-profit status is entrenched, the Articles of a CLG can be changed and its non-profit status removed, for instance on winding up. Furthermore, a CLG lacks the reputational advantage of a charity; it is not eligible for tax or rate relief; and it will struggle to attract grants.
- 3.3. A CIC can be a company limited by guarantee or a company limited by share capital. It has special features that ensure its assets are applied for the benefit of the community. CICs are regulated by the CIC regulator. They are regulated more lightly than charities, but more heavily than standard companies. A CIC's community benefit is hardwired through the community benefit test, which asks whether a reasonable person would consider that its activities are being carried out for the benefit of the community. There is an 'asset lock' which means that there can be no transfer or distribution of assets out of the CIC except under certain stringent conditions; and a CIC cannot convert into a private company; it can only convert into a charity. A CIC is not eligible for tax or rate relief, and does not attract Gift Aid.
- 3.4. Unlike CICs or non-charitable CLGs, charities are eligible for relief on corporation tax, capital gains tax and stamp duty. A newspaper owned and operated by a charity would be eligible for 80% mandatory rate relief. Gift Aid on any donation goes to the charity, and higher rate taxpayers receive tax relief on their donations, providing a major incentive to give. Many charitable funders will only give to organisations with charitable status, and even where the terms of a grant do not rule out non-charitable organisations, charitable status still gives a grant applicant a reputational advantage. At least one non-profit news organisation in this country has been turned down for significant funding solely because of its lack of charitable status. Charitable news organisations would also be able to attract bequests and legacies. Recent proposals to reduce the tax relief on major donations provoked a fierce backlash from the charity sector, which is highly sensitive to the fiscal environment.
- 3.5. In line with its fiscal and reputational advantages, charitable status is a unique badge of trust. The Charity Commission rightly sees itself as the guardian of the public's confidence in the integrity of the sector. It is not in the public interest for charitable status to be compromised by charities with political aims or which pursue private benefit at the public's expense. The Charities Act 2006, amended

in 2011, requires the Commission to assess the charitable nature of all charities according to a 'public benefit' test, as follows.

3.6. A charity must be established for exclusively charitable purposes, as set out in section 3 of the Charities Act 2011. These include purposes that may be particularly relevant to news organisations, such as the advancement of education, citizenship or community development.

Education

3.7. The Charity Commission has published extensive and useful guidance on the first of these purposes. It is noteworthy that the Commission accepts that education 'does not have to be value free and completely neutral. Education can be based on broad values that are uncontroversial which would be generally supported by objective and informed people. For example, most people would agree that protecting the countryside, in general, is a good thing, or that public services should be efficient, so there would be no need for education to articulate the opposite view.'⁹ Such uncontroversial values might include, for instance, the notion that public life should be free from corruption, or that holders of public office should act solely in terms of the public interest, in accordance with the Nolan principles.

3.8. The Commission argues that an educational charity should allow the public to make up their own mind on potentially controversial activities by:

- researching and presenting information in a neutral and balanced way that encourages awareness of different points of view, where appropriate;
- considering the arguments in an appropriate way related to the evidence; and
- if it reaches conclusions, those conclusions being based on evidence and analysis.

3.9. These principles closely resemble the approach of the IRS to news charities in the United States (see below) and could be applied to public benefit journalism in England and Wales. The charity China Dialogue Trust (1125378) sets out 'to advance the education of the public (including in particular the public of the people's republic of China) in the conservation, protection and improvement of the physical and natural environment'; it does so largely via a website dealing with such issues.

Good Citizenship

⁹ See http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbeduc.aspx.

3.10. The Charity Commission has not yet published detailed guidance on citizenship and public benefit. We would encourage them to do so, and we recommend that they take into account the Department for Education's guidance on the citizenship curriculum for young people in schools: 'Education for citizenship equips young people with the knowledge, skills and understanding to play an effective role in public life. Citizenship encourages them to take an interest in topical and controversial issues and to engage in discussion and debate. Pupils learn about their rights, responsibilities, duties and freedoms and about laws, justice and democracy. They learn to take part in decision-making and different forms of action. They play an active role in the life of their schools, neighbourhoods, communities and wider society as active and global citizens.'¹⁰ We believe that the Government's emphasis in the citizenship curriculum on the importance of 'active' citizenship should be reflected in the Charity Commission's guidance on charities operating under his head. We welcome the Commission's note in response to an application from the Bureau for Investigative Journalism that 'the advancement of citizenship may be furthered by building the capacities of persons and equipping them with knowledge and skills to participate in democratic processes.' We believe this is precisely what public interest journalism achieves.

Ethical Standards of Conduct

3.11. There is another existing charitable object that might be particularly relevant to journalism charities. Transparency International UK (registered charity number 1112842) promotes 'ethical standards of conduct and compliance with the law by governmental, industrial, commercial, voluntary sector and professional organisations in international and domestic business transactions and overseas development initiatives'. Part of the charity's output is comparable to journalism; it consists of reports on corruption in the private, public and voluntary sectors.

3.12. We believe that, like Transparency International UK or China Dialogue, charities with a purpose relating to education, citizenship or ethical standards, might reasonably decide that the most appropriate way to pursue those objects would be through journalistic activities.

3.13. However, we recognise that a charity must not only have a charitable purpose; it must be operated for the public benefit. Public benefit is not defined

¹⁰ See

<http://www.education.gov.uk/schools/teachingandlearning/curriculum/secondary/b00199157/citizenship/ks3>.

in legislation, but the Commission breaks it down into two principles in its guidance.¹¹ There must be an identifiable benefit or benefits (principle 1):

- It must be clear what the benefits to the public are (principle 1a);
- The benefits must be related to the aims of the charity (principle 1b);
- Benefits must be balanced against any detriment or harm (principle 1c).

And benefit must be to the public or a sufficient section of the public (principle 2):

- The beneficiaries must be appropriate to the aims of the charity (principle 2a);
- Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted by geographical or other restrictions (principle 2b);
- People in poverty must not be excluded from the opportunity to benefit (principle 2c);
- Any private benefits must be incidental (principle 2d).

3.14. We believe that public interest journalism is of considerable public benefit (principle 1). As we have suggested (see above), it is possible to show a causal relationship between certain forms of journalism and outcomes that benefit the public. Moreover, the benefit to the public may include broad, indirect and intangible benefits, which flow from, for example, those in positions of power who break the law being brought to account. Consider the finding of the Court of Appeal in 1971 that ‘the publication and dissemination of reports of judicial decisions was a purpose beneficial to the community in that it made a significant contribution to the sound development, administration and knowledge of the law’.¹² Further research and consultation would develop the evidence base for the relationship between journalistic activities and public benefit. However, as discussed above, semantically and historically, ‘public interest’ and ‘public benefit’ derive from a similar concern with the public good.

3.15. The benefits to the public (principle 1a) of a charitable news organisation might include the provision of information that allows the public to play an active part in the life of their community or society. Other benefits might include the sound administration of the law, as a result of enhanced public accountability; improvements in public health, as a result of scrutiny of public health provision; or improvements in education. As the Commission notes in its guidance on education and public benefit, these are uncontroversial as outcomes of public education.

¹¹ See http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx.

¹² *The Incorporated Council of Law Reporting for England and Wales v Attorney-General and another* (1971), All ER 1029.

- 3.16. These benefits may well be related to charitable objects (principle 1b) such as the advancement of education; the advancement of citizenship or community development; and the promotion of ethical standards.
- 3.17. These benefits are clearly balanced against any detriment or harm (principle 1c) insofar as the legal and regulatory framework for journalism takes this balance into account as a matter of course. Charitable news organisations might easily include an ombudsman function in their arrangements, and might write an editorial code of practice into their Articles of Association, in order to enshrine this commitment to editorial balance and the avoidance of sensationalism. Broadcasters such as the BBC and Channel 4 have enshrined the principle of editorial balance in their constitutions, and some charities might choose to adopt such guidelines.
- 3.18. The benefit of public interest journalism will always be to the public or a sufficient section of the public (principle 2) because the outputs from these journalism organisations will be free of charge and directly available online or in print; and because the impact of such publication will stretch beyond the immediate consumers of the information, to the community or society at large through improved civic standards.
- 3.19. The beneficiaries will be appropriate to the aims of the charity (principle 2a) because they will be either the community or the public at large.
- 3.20. The opportunity to benefit will not be unreasonably restricted by geographical or other restrictions (principle 2b) for the reasons given above.
- 3.21. People in poverty are unlikely to be excluded from the opportunity to benefit (principle 2c) because, as stated above, material will either be freely available online or easily accessible via a public library or other public internet access.
- 3.22. Any private benefits will be incidental (principle 2d). These organisations may be required to be constituted on a fully non-profit basis, and its Articles require best practice and prohibit inappropriate benefits to commercial organisations. We believe that news charities could provide for the appointment of an ombudsman, and should commission an independent annual audit of their activities, within reasonable cost. They will of course be subject to the law of the land in relation to civil claims in defamation, privacy, intellectual property, etc.; and they may subject themselves to the standards imposed by any relevant regulator.
- 3.23. There are already a handful of charities that operate in the media sector. These organisations tend not to produce journalism but to promote education through the development of journalistic skills, or by producing and disseminating

information about the media. The Prison Radio Association (1114760) aims to rehabilitate offenders by allowing them to participate in the production of radio broadcasts. Television for the Environment (326585) produces informative programmes about environmental issues. The British Film Institute (287780) encourages the development of arts and film in the UK. The Media Standards Trust (1113680) advances education in the media and the Media Trust (1042733) advances capacity building in the media, in part through a community television channel.

- 3.24. There are limited examples of newspapers being owned by charities: the *Maidenhead Advertiser* is owned by Baylis Media Limited, which is in turn 100% owned by Louis Baylis (Maidenhead Advertiser) Charitable Trust, a registered charity (210533). The Trust was created in 1962 to ensure the newspaper's 'continuance as part of the civic and social life of the community it serves.' The Trust has £11m of assets. In 2009 the newspaper lost £140,000, and is subsidised from endowment. This complex ownership structure means that the newspaper does not benefit from rate relief and, conversely, its activities are not limited by charity law. Indeed, this lack of available charitable status is potentially to the disadvantage of the community, for there is nothing to underpin its commitment to the promotion of community life.
- 3.25. There are other charities whose activities resemble aspects of journalism, including think tanks which publish regular policy reports; student unions which publish newspapers; and community radio stations.
- 3.26. **The Community Interest Company and the non-charitable Company Limited by Guarantee do not require organisations to undergo the rigorous test applied by the Charity Commission. In return, they are not capable of attracting the same kind of philanthropic or public support through donations. There are limited opportunities here for organisations that aspire to develop a viable form of non-profit journalism.**
- 3.27. **We believe that charitable status should be available in principle to non-profit journalism organisations. Charity law should be capable of recognising the broad public benefit in certain forms of public interest journalism, subject to conditions that would not open the floodgates to the registration of news organisations that are pursuing commercial benefit or political objects.**
- 3.28. **The Charity Commission has already recognised the charitable nature of certain forms of media organisations. Furthermore, it has registered other charities that embody journalistic techniques in their charitable activities. We recommend that Lord Leveson notes our request to encourage the Commission to respond to the request of Parliament (see above) for**

‘greater clarity and guidelines on which activities related to the media, and in particular investigative journalism, are charitable in the current state of the law.’

4. The American Approach

4.1. In correspondence, the Charity Commission has accepted that there is potential for the registration of a charitable news organisation.¹³ However, the Commission has asked to see ‘the structural constraints flowing from an exclusively charitable object and the governing document that will ensure that the purpose promoted is capable of having the impact claimed and that it is a purpose for public benefit.’¹⁴

4.2. We believe that the Charity Commission may be assisted here by reference to the approach of the United States Inland Revenue Service to news organisations with 501(c)(3) tax-exempt status (the US equivalent of registered charity status). This is a burgeoning sector: trail-blazing American news organisations include the award-winning charity ProPublica, a registered 501(c)(3) which runs an independent newsroom staffed with distinguished journalists and editors, focusing on in-depth investigative reporting and distributing stories for free, generally via 25 traditional news organisation partners. ProPublica relies heavily on philanthropic funding.

4.3. Investigative journalism is not a charitable purpose in the US but journalism is recognised as a legitimate activity in pursuit of an education purpose. Case law in this area has established that charitable journalism should be (1) impartial, (2) supported by undistorted facts, not mere expression of opinion, (3) in support of the public interest not commercial appeal, and (4) undertaken by expert journalists.¹⁵

4.4. News organisations are more likely to be approved for tax exemption by the IRS if they avoid commercial business models (e.g. based on newspaper sales, advertising or subscriptions) and rely on philanthropic funding. ProPublica, for example, provides most of its content free of charge.

4.5. There are specific considerations around partnering with a commercial organisation. The charitable news organisation must be careful to maintain a clear distinction between its activities and those of its partner. This principle

¹³ Letter from Alice Holt, Head of Legal Services, Charity Commission, to Andrew Phillips, Bates Wells & Braithwaite, 3 December 2010.

¹⁴ *Ibid.*

¹⁵ See Jeffrey P. Hermes, Guide to the Internal Revenue Service Decision-Making Process under 501(c)(3) for Journalism and Publishing Non-Profit Organizations (Cambridge MA: Berkman Center for Internet & Society at Harvard University, 2012), *passim*.

prevents commercial news companies from setting up a charitable arm as a subsidiary for solely fiscal reasons.

- 4.6. Political lobbying is permitted where it constitutes non-partisan analysis or where it is an insubstantial element of a charity's activities. Again, in this country, political campaigning is permitted as an ancillary activity.
- 4.7. This rigorous US approach is framed by a system that is otherwise comparable to English charity law. This suggests that the challenges to achieving charitable status for news organisations cannot be insuperable.
- 4.8. **We believe that the approach of the United States Inland Revenue Service provides a suitable template for the Charity Commission to recommend the constitutional and practical arrangements of news charities so as to protect the integrity of the charitable sector.**
- 4.9. **In conclusion, we maintain that journalism is capable of demonstrating public benefit, and of meeting charitable objects. Further research and consultation may be necessary to develop the evidence base further in this area, and to create effective principles for internal checks and balances on news charities.**

5. Conclusion

- 5.1. **We submit to Lord Leveson that there is likely to be considerable public benefit in journalism that advances charitable objects such as education, citizenship, community cohesion or the promotion of ethical standards of conduct.**
- 5.2. **The Community Interest Company and the non-charitable Company Limited by Guarantee do not require organisations to undergo the rigorous test applied by the Charity Commission. In return, they are not capable of attracting the same kind of philanthropic or public support through donations. There are limited opportunities here for organisations that wish to develop a viable form of non-profit journalism.**
- 5.3. **We hope Lord Leveson will share our belief that charitable status should be available in principle to non-profit news organisations. Charity law should be capable of recognising the broad public benefit in certain forms of public interest journalism, subject to conditions that would not open the floodgates to the registration of news organisations that are pursuing commercial benefit or political objects.**

5.4. We hope Lord Leveson can be guided by that fact that the approach of the United States Inland Revenue Service provides a suitable template for the Charity Commission to recommend the constitutional and practical arrangements of news charities so as to protect the integrity of the charitable sector.

5.5. In conclusion, we would like to impress upon Lord Leveson the following beliefs:

- Journalism is capable of demonstrating public benefit, and of meeting charitable objects. Further research and consultation may be necessary to develop the evidence base further in this area, and to create effective principles for internal checks and balances on news charities.**
- The Charity Commission has already recognised the charitable nature of certain forms of media organisations. Furthermore, it has registered other charities that embody journalistic techniques in their charitable activities. We urge the Commission to respond to the request of Parliament (see above) for ‘greater clarity and guidelines on which activities related to the media, and in particular investigative journalism, are charitable in the current state of the law.’**