A Rusbridger
3rd
10th July 2012

LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

THIRD WITNESS STATEMENT OF ALAN RUSBRIDGER

I, Alan Rusbridger, of Guardian News and Media Limited, Kings Place, 90 York Way London, N1 9GU, WILL SAY as follows:

1. I make this statement in response to a Notice dated 29 June 2012 served on me under section 21(2) of the Inquiries Act 2005 and the Inquiry Rules 2006, by Lord Justice Leveson, as Chairman of the Inquiry. These require me to provide evidence to the Inquiry Panel in the form of a written statement as requested in the Notice.

2. As stated in my first witness statement, I am the Editor-in-Chief of Guardian News and Media Limited ("GNM"). I have been Editor of the Guardian since 1995 and Editor-in-Chief of GNM since 2007. Unless stated otherwise, the facts stated in this witness statement are within my own knowledge and belief.

3. I do not waive privilege. Accordingly anything I say in this witness statement is not intended to waive privilege and should not be read as doing so.

4. *The Questions in the section 21 Notice are set out below and are posed against this background:*

   Lord Black has submitted to the Inquiry a proposal for "a New and Effective System of Self-Regulation"3. In his submission Lord Black states:

   "Responses to the industry consultation from within an extremely diverse set of businesses have inevitably been varied. Parts of the industry – particularly the regional and periodical press – have been understandably anxious about such substantial change, especially when the current system works well for them (as the Inquiry has heard) and above all for their readers. They have rightly been worried about the potential increase in costs and bureaucracy of a new system. But at the other end of the spectrum, some national publishers have argued for even tougher controls. At the end of the day, therefore, this proposal seeks so far as is possible to balance these views. But there

is no doubt to me that the vast majority of the industry sees them as credible, likely to prove effective and that they will take part. Northern and Shell has indicated that it is willing to participate, subject to detailed contract terms."

(2) To what extent were you personally involved in drawing up this proposal for a new system of self-regulation based on contractual obligations, as now set out by Lord Black?

5. I have not been personally involved in drawing up this proposal but have been consulted on a number of occasions by Lord Hunt and Lord Black in relation to their thinking as they shaped their new proposals for regulation. Lord Hunt came to see me early in the process in November 2011, and subsequently we spoke by phone in December 2011, to discuss the high level approach before his evidence to you on 31 January 2012. Lord Black came to see me on 18 May 2012 to discuss concerns we had raised in the industry consultation conducted by Pressbof in the same month. In addition, I attended a gathering of senior editors and executives on 15th December 2011 at which they announced their initial direction of travel. I also attended a breakfast hosted by Lord Hunt just before that meeting with a selection of other editors to reflect in general terms on progress. Finally, I spoke with Lord Hunt last Friday 6th July at his request about the general landscape.

6. There has been further engagement with others in our organisation of which I have been aware. Andrew Miller, the GMG CEO, has, as a member of the NPA, been formally consulted on the proposal and has sent two letters in reply to David Newell at the NPA and Lord Black at Pressbof in March and May of this year, including areas of agreement and disagreement and proposed amendments to the suite of documents sent. I was consulted on and agreed fully with these communications. Gill Phillips, our Head of Editorial Legal, attended two meetings of the in-house lawyer group convened by Pressbof to discuss the contract model.

   How far would you personally, in your capacity as editor, expect to be involved in the final decision as to whether your publication signed up to the contractual obligations envisaged by this system? Please explain in full how that decision would be taken.

7. I would expect Guardian News and Media Limited, as publishers of the Guardian, the Observer and guardian.co.uk, would be the signatory body in this system and as such, the final decision to participate would be taken jointly by Andrew Miller the Chief Executive of Guardian Media Group and myself as Editor-in-Chief of GNM. We would take account of the advice and input of senior executives here including the Group Legal Director, the Head of Editorial Legal, the Managing Editor,

the Readers Editor and the policy & strategy team. We would inform both the GMG Board and the Scott Trust of our decision.

In so far as you are able to do so, please indicate whether your publication is at present fully ready and committed to enter into these contractual obligations. If it is not at present fully ready and committed, please explain why, and detail any changes that would need to be made to the proposal, any further development to proposal required, or any preparatory steps that would need to be taken at your publication, in order to put it in the position of being fully ready and committed to enter into these obligations. If there are no circumstances in which it would be prepared to enter into obligations of this nature, please explain why not.

8. We believe Pressbof have done excellent work to develop a new regime of regulation including the use of contract and meaningful sanctions which we applaud. During the process we have proposed several significant amendments including ending the role of Pressbof, achieving a greater degree of independence, strengthening the suite of carrots and sticks to ensure full participation and adopting the polluter pays principle so that for example, regional newspapers do not have to subsidise investigations into national papers that breach the Code. Some of our proposals have been incorporated and some have not. Nonetheless, should this system be the one adopted after the Inquiry we would participate and sign a contract of this type, subject to negotiations once a finalised and detailed version is provided. I would point out that the Guardian remained part of the PCC system despite losing considerable faith in the organisation in its handling of phone hacking, which caused me to resign from the Code Committee of the PCC. We are committed to industry-wide participation and given the considerable improvement in the new proposal, would participate once more.

9. That said, this does not mean that we fully support this proposal as the best possible answer for press regulation. As we set out in question 6, we believe that improvements are needed including ending the role of an industry funding body and strengthening the carrots and sticks for participation in a voluntary system. Above all we believe that a more ambitious system is required as part of a new settlement between the press and society that reflects the needs of both in today's world. Significantly, that would include a system of alternative dispute resolution that better serves complainants and publishers; strengthened protection for public interest journalism so that the new framework encourages the best in journalism rather than merely protecting against the worst; and improvements to the media plurality framework which is not a separate issue, but lies at the very heart of the culture, practice and ethics of the press.

What specific differences would membership of a system of the kind set out by Lord Black, underpinned by contractual obligations, make to the culture, practices and ethics of your publication?

10. As set out in evidence from myself and Chris Elliott to the inquiry, the Guardian seeks to self-regulate to ensure that our culture, practices and ethics meet the highest standards. We have our own code - including the Editors Code as its basis but strengthened further – as well as the independent Readers Editor system which is a fundamental part of our governance and daily operations and which has worked well for a number of years, with the overwhelming majority of cases being handled to the complainants satisfaction. As such we do not foresee membership of this system altering our approach to any great extent. That said, we would work with the new regulator to ensure that our approach is entirely aligned with their standards and processes.

(6) Is there any other comment you wish to make on the proposal put forward by Lord Black, or on the proposals put forward by others, that are now published on the Inquiry website at http://www.levesoninquiry.org.uk/about/module-4-submissions-on-the-future-regime-for-the-press/

11. As indicated above, GNM has been part of the industry-wide consultation on the proposals advanced by Pressbof on the form of a new regulator. I believe that the system propped by Lord Black and Lord Hunt could still be improved upon. I set out my thoughts on what more can be done below.

12. In our view, any attempt to address the question of press conduct and ethics exclusively by reference to the role of regulation, may produce an inchoate and ultimately counterproductive answer: the only real means of achieving a truly effective and enduring solution to the problem presented to this Inquiry is for the real issues surrounding both press misconduct and media freedoms to be considered in the round. This reflects my view, previously stated to the Inquiry, that the press is under-regulated but over-legislated. We therefore argue for a considerably more holistic approach than that currently articulated by Pressbof, based on a more coherent and ambitious system of regulation, working alongside wider legal reforms - in effect a 'new settlement' between the press and the British public.

<u>The Importance of Enhancing Press Freedoms</u>

13. If the aim of the current process is ultimately to facilitate a new environment in which a healthy and vibrant media acts in the interests of the public then that will more likely be achieved not simply by implementing measures designed to punish inappropriate behaviour. It additionally requires reforms which seek to encourage the press to aspire to the societal ideals of which they are supposed to be the

guardian. A purely prohibitive response, particularly in light of the present economic and competitive pressures facing the modern press, may serve only to emasculate newspapers from pursuing valuable journalism.

14. We believe that there are three central issues confronting the media which presently serve to fetter the practice of responsible journalism in the UK and which, if rectified, would further encourage the best in public interest journalism, while discouraging irresponsible practices:

a. *The present state of the law of defamation*

15. Reform of the libel laws is obviously a matter which is currently before Parliament. However, as presently formulated, the Defamation Bill takes no account of the consequences which are liable to follow from this Inquiry and, in particular, the opportunities offered by a new regulatory regime for press and media standards. A regulator which is able to offer a proportionate system of alternative dispute resolution that allows defamation and privacy complaints to be addressed and adjudicated upon in an expeditious manner (accompanied by a quick and effective system of remedies) would appear to be in the interests of everyone involved in this Inquiry. In recent months we have seen how the current libel regime and lack of cheaper and alternative dispute resolution has such negative consequences for all sides. The risk of costs to the Claimant and the potential chilling effect of costs on a Defendant shows that this is a system which does not serve either side well.

b. Plurality

16. GNM has argued previously that it is vital that when the Inquiry comes to address how any new system of press regulation is to be operate that it also considers the impact of ownership and plurality as it specifically relates to the culture, practices and ethics of the press. It is GNM's strong belief that a lack of plurality fundamentally diminishes all three. The potentially toxic impact of a dominant media entity lies at the heart of problems identified in all three previous Modules. There is a real risk that a report which seeks only to improve the quality and effectiveness of future regulation in a vacuum may serve to treat the short-term symptoms of media misconduct, but will fail to address the underlying disease which precipitated its most egregious incidents.

17. A system of regulation which still allows the concentration of power in the hands of fewer multi-billionaire proprietors – whether corporations or individuals – will impoverish our society. It will also greatly increase the risk that there will be a need for another inquiry into press ethics. The issue of plurality also goes beyond any current questions around News Corporation's publishing interests. Recent developments in the Australian newspaper market and the growing consolidation in national [redacted] indicate that this is a broad and real concern. We

voting'. This would appear to be consistent with best practice in public appointments.

33. The one exception to this rule that we would suggest would be in respect of an Editors' Code Committee, a body on which we consider it is important to maintain an editors' majority as well as additional lay appointees. Such a Committee ensures the commitment of editors to standards and places editorial judgement at the heart of content regulation. However, the work of this Committee must be complemented by and take account of an ongoing process of research and consultation with the public on the terms and operation of the Code. Unlike Pressbof's proposal, we believe appointments to the Editors Code Committee should likewise be made via an independent and transparent process, not by industry bodies.

34. Except where the need to protect privacy or natural justice arises, the regulator should strive to be as transparent and as open as possible in its workings at all times, including by way of publishing minutes of meetings as well as judgements and ultimately an annual report.

Funding

35. We believe that it is critical that the new regulatory body should be funded primarily on the basis of subscriptions plus a 'polluter pays' principle. This could be enforced in several ways, including through annual adjustments to or rebates from the annual fee depending on respective rates of "offending", levies in respect of exceptional investigation costs, and fines for significant breaches of the Code.

36. Such a mechanism would ensure that local newspapers and smaller publishers in particular do not face greater financial pressures than they already do. More fundamentally, it would provide a strong incentive for publishers to assess and moderate their conduct so as to comply with relevant regulatory standards.

Sanctions and Remedies of the new Regulator

37. GNM believes that the current PCC sanctions should remain in place and be supplemented by a more robust regime which, for example, would allow the regulator to rule on the prominence to be given to any correction and apology. The regulator would also have the power to rule on the adequacy of the wording of any proposed apology or correction. A first function of the new regulator would be to design such a regime of sanctions in detail. We welcome that Pressbof's proposal also makes provision for proactive investigation of third party complaints in breach of the Code.

38. As proposed by Pressbof, which we agree with, the regulator would also have the power to impose fines on the publisher where a grave or systematic breach of the code is established. The regulator would need

to outline a full tariff of penalties in relation to different levels of breach. The ultimate sanction open to the regulator would be to suspend or terminate a newspaper's contract (with the loss of the benefits enjoyed by membership of the regulatory body).

Annual audits and the power to launch investigations

39. We also support empowering the regulator so as to allow it to launch investigations into newspaper conduct where there were grounds to suspect that a particular newspaper or newspapers were repeatedly or gravely transgressing any aspect of the Code or where such a step is necessary to safeguard public confidence in the regulatory regime. The regulator's powers in this regard should be expressly proactive (rather than conditional on a tenable complaint). It may be necessary for the regulator to have the power to levy penalties in the event that a party fails to cooperate with an investigation.

40. More generally, GNM supports the compulsory annual audit process originally proposed by Lord Hunt as constituting an effective way of maintaining and enhancing press standards. The audit would provide the mechanism not only for assessing adherence to standards generally, but also compliance with recommendations from the regulator on improving standards following previous adjudications or investigations.

A third arm: Alternative Dispute Resolution ("ADR")

41. GNM is comfortable with the dual functionality of the regulator proposed by Pressbof and its intended formation of complaints and investigations panels. This would provide extensive mediation on all matters relating to alleged breaches of the regulatory code. However, with the objectives identified previously in mind, GNM strongly believes that there should be a third arm to a new regulator that could deal with claims which are actionable at law (for example defamation, privacy, breach of confidence or harassment). This would be best located within the regulator to provide a clear gateway for complainants seeking redress. The regulator could then deliver the service directly or utilise the services of an already accredited and reputable external provider.

42. GNM is a strong supporter of the Readers' Editor concept, which has been highly successful in resolving complaints and cementing the bond between reader and publisher on both the Guardian and The Observer. It brings a degree of informality, independence and record keeping in relation to internal complaint handling. While it probably cannot be imposed, it is suggested that it is something the system should encourage, particularly in regard to larger publishers. The regulator's mediation and adjudication system would be the next port of call and should work in a complementary manner with that process.

43. The advantages of a third arm offering ADR, as a prelude to any court action being initiated, would include speed, low costs and (compared to the legal system) relative privacy. Properly administered, it would hopefully encourage a constructive and proactive relationship between the complainant and the press, in contrast to the long, drawn-out and inflexible stance frequently precipitated by litigation. However, the system must encourage resolution with newspaper in question and thereby serve to bolster, rather than undermine, a credible readers' editor system. There would need to be some form of filtering or gateway administered by the regulator as to what cases should be dealt with through the straightforward mediation route and what should be funnelled through the ADR route. There would need to be a provision – either in statue or via the appropriate Civil Procedure Rules – to the effect that no legal action could be brought against a member publication until the ADR route had been gone through, or unless the regulator specified otherwise.

44. GNM envisages that the adjudicator would have the power to make findings on suitable issues arising from such complaints, including:

- The meaning borne by an article;
- Whether the article was fair and accurate;
- Whether the article was an opinion or an allegation of fact;
- Whether the subject of an article had enjoyed a reasonable chance to respond to any defamatory or controversial implications about them and whether his or her response was sufficiently reported;
- Whether the information published about the subject engaged his or her reasonable expectation of privacy under Article 8 and, if so, whether there was a tenable public interest justification for doing so in the circumstances.

45. As occurs for instance in the construction industry, any legal claim would be stayed until the regulator had given its adjudication on the dispute (or any relevant matter). We understand that such a proposal would not fall foul of Art 6 of the European Convention on Human Rights in terms of a fair trial process. In particular, the system we are advocating would allow a dissatisfied complainant to proceed through the courts after the conclusion of the ADR process. However, the courts would be able to have regard to the course and outcome of the ADR when determining whether the claimant had acted reasonably in so doing. An unreasonable decision to renew a claim would be likely to leave the claimant exposed to paying the costs of those proceedings, irrespective of their outcome. One possibility is that the mediator could prepare a report (as to whether the parties have acted reasonably – treating the mediation process as in effect without prejudice save as to

costs) which report would be admissible on costs at the end of any legal action and to which the Judge must then have regard. We understand that the courts have repeatedly emphasised the deference which is to be shown to a properly directed expert regulator[2].'

46. It may be necessary to for the ADR process to be able, where appropriate, to award damages and costs for this to be an effective route. Consideration will need to be given to suitable levels and caps.

The Role of Statute

47. We have concerns about the necessity of using statute to establish any new system of independent regulation, beyond that required to bring into force any measures designed to encourage participation (i.e. the limited statutory 'underpinning' necessary to establish a process which requires legal claims to be stayed pending regulatory resolution in specified circumstances or to implement a two-tiered system for costs and damages in legal proceedings). The most appropriate means of implementing the latter would appear to be as an amendment to the current Defamation Bill (or, alternatively, as part of a new Communications Bill which seeks to achieve a more coherent legislative framework across all modern media). However framed, a statutory 'backstop' demanding membership and adherence to defined standards is likely to be vulnerable to legal challenge and is more broadly undesirable.

The Code and the Public Interest

48. We believe that the present PCC Code is a very useful and valuable template for any new regulatory regime. Its definition of the public interest could be improved, however, by adding a positive criterion based around the concept of improving the quality of public debate, as has already been adopted by the DPP in his interim guidelines. This potential addition has been supported by several academics who have given evidence to the Inquiry.[3] Perhaps the most accessible formulation of this criterion is found in the BBC's Guidelines:

---

[2] See in R (ProLife Alliance) v BBC [2004] 1 AC 185, at §§79-80 where Lord Hoffmann said (in the context of the application of broadcast standards by the BBC (acting in its self-regulatory capacity)): "Once one accepts that the broadcasters were entitled to apply generally accepted standards, I do not see how it is possible for a court to say that they were wrong. Public opinion in these matters is often diverse, sometimes unexpected and in constant flux. Generally accepted standards on these questions are not a matter of intuition on the part of elderly male judges. The researches into public opinion by the BSC and the broadcasters would be superfluous if this were the case." See too Lord Bingham in R (SB) v Governors of Denbigh High School 1 AC 100 (§31); Baroness Hale in Belfast City Council v Miss Behaving Ltd Ltd [2007] 1 WLR 1420 (§37); and Lord Neuberger in the same case at §91

[3] See, for instance, the witness statement of Steve Barnett, p.7 (MOD100048884)

"disclosing information that assists people to better comprehend or make decisions on matters of public importance.'

49. It must also better articulate and define the issue of proportionality which underpins the practical application of the public interest test by journalists on the ground. We have previously referred to the framework articulated in the so-called 'Omand principles' provide a valid template for considering a journalist's assessment of the public interest[4]. We remain of the opinion that these principles should be incorporated into a revised Code.

50. Any revised definition or approach to the public interest test should be considered against the results of a public consultation on the issue (of a similar type to that regularly conducted by Ofcom in respect of applicable programme standards).

[4] Here are the five questions we have included in the GNM Editorial code, adapted from the Omand principles, which we should ask ourselves about a situation in which we are considering intruding on privacy: 1. There must be sufficient cause – the intrusion needs to be justified by the scale of potential harm that might result from it. 2. There must be integrity of motive - the intrusion must be justified in terms of the public good that would follow from publication 3. The methods used must be in proportion to the seriousness of story and its public interest, using the minimum possible intrusion. 4. There must be proper authority – any intrusion must be authorised at a sufficiently senior level and with appropriate oversight. 5. There must be a reasonable prospect of success; fishing expeditions are not justified.

I believe that the contents of this witness statement are true.

....

Alan Rusbridger Date

A Rusbridger

9th July 2012

LEVESON INQUIRY INTO
THE CULTURE, PRACTICES
AND ETHICS OF THE
PRESS

THIRD WITNESS STATEMENT
OF
ALAN RUSBRIDGER

Editorial Legal Services
Guardian News & Media
Kings Place
90 York Way
London
N1 9GU