

<p>1 Wednesday, 18 July 2012</p> <p>2 (10.00 am)</p> <p>3 MR JAY: Sir, may we start off today by reading in some</p> <p>4 statements? I have provided you with the list.</p> <p>5 LORD JUSTICE LEVESON: Yes.</p> <p>6 MR JAY: They've been circulated to the core participants so</p> <p>7 they can be read in and put on the system.</p> <p>8 LORD JUSTICE LEVESON: So these are a number of statements,</p> <p>9 from New Zealand Law Commission, from a number of press</p> <p>10 councils, from a number of groups such as Professionals</p> <p>11 Against Child Abuse, from the Trades Union Congress, the</p> <p>12 National Council for Training of Journalists, City</p> <p>13 University of Europe, Data Centre Europe, Finnish Press</p> <p>14 Council, Index on Censorship.</p> <p>15 I repeat, as I have previously said: nobody should</p> <p>16 think that because they're not called to give evidence,</p> <p>17 their submissions are not being considered. Everything</p> <p>18 is being considered. The choice of those who give oral</p> <p>19 evidence obviously is affected by the time available but</p> <p>20 I'm very grateful to everybody for contributing to the</p> <p>21 work of the Inquiry. We'll read all these statements</p> <p>22 into the record of the Inquiry.</p> <p>23 MR JAY: Thank you. The first witness today is Mr Mosley,</p> <p>24 please.</p> <p>25 LORD JUSTICE LEVESON: Thank you very much indeed.</p> <p style="text-align: center;">Page 1</p>	<p>1 LORD JUSTICE LEVESON: I'm not even sure it would reach</p> <p>2 1 per cent.</p> <p>3 A. Indeed. I think that's probably right. Because for an</p> <p>4 injunction, something like £10,000 minimum. For trial,</p> <p>5 you have to be prepared to put a million pounds at risk,</p> <p>6 and I think yes, a very small percentage of people who</p> <p>7 can do that.</p> <p>8 LORD JUSTICE LEVESON: It's one of the problems about</p> <p>9 justice generally, but in this area it's particularly</p> <p>10 expensive.</p> <p>11 A. Yes.</p> <p>12 MR JAY: Thank you. Your second, third and fourth major</p> <p>13 problems may well be self-explanatory. The second one</p> <p>14 depends, I suppose, on the view the Inquiry forms of the</p> <p>15 evidence it's received as to the culture, practices and</p> <p>16 ethics of the press. Then you make criticisms about the</p> <p>17 PCC, which, again, are in issue before the Inquiry.</p> <p>18 There's evidence about that. Then you refer to the</p> <p>19 Internet.</p> <p>20 Your basic proposal involves the creation of a new</p> <p>21 body, the Press Tribunal, which you're going to tell us</p> <p>22 about in a moment, but also renaming the PCC, or rather</p> <p>23 creating perhaps a new regulatory body, which you would</p> <p>24 want to call the Press Commission. So it's not, as it</p> <p>25 were, son of PCC, but a fresh body; is that right?</p> <p style="text-align: center;">Page 3</p>
<p>1 MR MAX MOSLEY (recalled)</p> <p>2 Questions by MR JAY</p> <p>3 LORD JUSTICE LEVESON: Mr Mosley, you've previously been</p> <p>4 sworn in in the Inquiry, some considerable time ago.</p> <p>5 Rather a lot of water has passed under the bridge. You</p> <p>6 took up my invitation to consider the criteria for</p> <p>7 a regulatory solution. I'm very grateful to you for</p> <p>8 doing so.</p> <p>9 A. Thanks for the opportunity.</p> <p>10 MR JAY: Thank you, Mr Mosley. We're looking now at your</p> <p>11 proposal for a new system of press regulation, which you</p> <p>12 submitted on 8 June of this year.</p> <p>13 A. Yes.</p> <p>14 Q. Are you content to attest to the truth of this</p> <p>15 statement?</p> <p>16 A. I do.</p> <p>17 Q. You identify, first of all, four major problems. In</p> <p>18 other words, could you explain to us about those?</p> <p>19 A. Well, the first one I think is absolutely fundamental.</p> <p>20 It's that at present if you wish to bring proceedings</p> <p>21 for defamation or breach of privacy, it's extremely</p> <p>22 expensive, so expensive that probably 1 per cent or</p> <p>23 thereabouts of the population can afford it, and I think</p> <p>24 that's completely wrong. It means that the majority of</p> <p>25 people are deprived of any remedy in those areas.</p> <p style="text-align: center;">Page 2</p>	<p>1 A. That's right. I think the -- I think it very important</p> <p>2 that the press play a major role in making the rules,</p> <p>3 and indeed the current Editors' Code Committee -- it's</p> <p>4 not perfect but it's perfectly usable. It's just that</p> <p>5 it needs enforcing. I believe that there's a strong</p> <p>6 argument for, on the one side, having the body that</p> <p>7 makes the rules, and then, entirely separately, a body</p> <p>8 that enforces them, which body would never come into</p> <p>9 contact with most of the press because they'd observe</p> <p>10 the rules. It's only if they broke the rules they'd</p> <p>11 come into contact with the enforcement body.</p> <p>12 I think keeping those separate then overcomes any</p> <p>13 suggestion of state control of the press, because the</p> <p>14 only thing you'd need a statute for would be the body to</p> <p>15 enforce the rules. The body that makes the rules</p> <p>16 could -- it needs, I think, more outside representation</p> <p>17 than it has at the moment, particularly as it would, in</p> <p>18 fact, be the successor to the Editors' Code Committee,</p> <p>19 which is, of course, entirely editors. I think we need</p> <p>20 the public to be involved in making the rules, but then</p> <p>21 that can be a non-statutory body, provided there's</p> <p>22 a statutory body to stop breaches of the rules.</p> <p>23 LORD JUSTICE LEVESON: Do you have a view upon the extent to</p> <p>24 which serving editors should remain responsible for</p> <p>25 creating the rules?</p> <p style="text-align: center;">Page 4</p>

<p>1 A. I don't think they should create the rules but 2 I completely see that they should play a part in the 3 discussions that lead to the rules. I don't think they 4 should be excluded completely. 5 If I may, I have a great deal of sympathy, in a way, 6 for the press when they say, "We don't want outside 7 interference", because I spent 18 years running a body 8 that was responsible for all of international 9 motorsport, not just Formula 1, and what one dreaded was 10 well-meaning people from the outside coming and 11 interfering in something that they didn't fully 12 understand. 13 If I could give you one quick example: when Ayrton 14 Senna was killed in 1994, the entire resources of the 15 Italian judicial system focused on the question of why 16 did the car crash. Now, on the roads, that's exactly 17 what you want to know. You want to avoid accidents, so 18 why the car crashed is relevant. But in racing, they're 19 always going to be crash. They're operating at the 20 limit of human ability. So the interesting question was 21 not why did he crash, but why did he get killed and what 22 can we do to make sure that when they crash -- because 23 it's inevitable -- they won't get killed? And there was 24 us focusing on the question that mattered, and ten years 25 of proceedings through the Italian judicial system</p> <p style="text-align: center;">Page 5</p>	<p>1 want that. 2 I think they only come into conflict, the public and 3 the press, when the press wants to do something that 4 impinges on the rights of the members of the public. 5 LORD JUSTICE LEVESON: But they do impinge then, and there 6 isn't that degree of disconnect in your motor racing 7 example. 8 A. This is true, sir, but I think that's why one needs then 9 a sort of long stop, a safety net, whatever one likes to 10 call it, of a regulatory -- a statutory body that can 11 actually stop the press going too far. 12 MR JAY: Mr Mosley, in terms of the tribunal that you wish 13 to see set up, you recognise that it will need 14 a statutory underpinning for all sorts of reasons, not 15 least Article 6 of the Convention, because people are 16 going to be forced to use it; is that correct? 17 A. Yes. 18 Q. Can I try to understand one or two characteristics of 19 it, page 00476. This is a tribunal which will also deal 20 with issues of accuracy, where there may or may not be 21 a cause of action at law; is that right? 22 A. Yes. I think there are a lot of complaints, 23 particularly from groups of people, that they or their 24 activities are misrepresented by the press, and there 25 should be some mechanism for questioning the press when</p> <p style="text-align: center;">Page 7</p>
<p>1 focusing on the question that didn't matter. 2 That is an illustration of something which I think 3 everyone understands, that if you've been in an area for 4 30-odd years and you have expertise, you really do know 5 what matters and what doesn't matter, but the quid pro 6 quo of being allowed to get on with it is you must 7 succeed in what you're doing. In other words, you have 8 to stop killing people. In our case, you mustn't kill 9 the spectators, you mustn't kill the drivers, or you 10 must do every reasonable precaution to avoid it. 11 I think it's the same with the press. I think they 12 should be allowed to get on with making the rules, but 13 with outside help. 14 LORD JUSTICE LEVESON: The parallel may not be perfect, 15 Mr Mosley, because it may be that in your motor racing 16 example, both systems wanted to achieve the same 17 ultimate goal -- namely safer motor racing, or with less 18 risk -- whereas it may be that the public and the press 19 have slightly different objectives in connection with 20 the publication of material. 21 A. Sir, up to a point, but the thing is that I think the 22 objective of the press is to inform the public about 23 things which they need to know, which are of 24 significance, plus entertain the public, and those are 25 perfectly legitimate aspirations, and equally the public</p> <p style="text-align: center;">Page 6</p>	<p>1 they do that, if they do it. 2 Q. So the remedy if there weren't a cause of action would 3 be correcting the inaccuracy but would not be to award 4 damages, but there may be the possibility of a fine 5 because you refer to fines -- 6 A. Indeed. In that particular case, I would envisage that 7 the journalist and the representative of the group would 8 come in front of an adjudicator and it would almost 9 certainly get settled there and then, because a decent 10 journalist will recognise if he's got it wrong. 11 Q. Do you visualise, as part of your PC system, the Press 12 Commission, that there would be an anterior requirement 13 for complaints first to be dealt with within the 14 newspaper organisation before going to the tribunal? 15 A. That's ideal, and of course, sometimes in an emergency, 16 if the story's about to be published and you want to 17 stop it, that might not be possible, but generally the 18 first port of call would be the newspaper. 19 Q. In other aspects of your system, there would be a prior 20 notification requirement but it wouldn't be an absolute 21 requirement, in my understanding of the third bullet 22 point on this page. One would have to demonstrate 23 a strong public interest reason for not notifying; is 24 that right? 25 A. That's right. I think there's been the difficulty which</p> <p style="text-align: center;">Page 8</p>

<p>1 was alluded to when I first gave evidence, about there 2 is a public interest in not notifying but there tends to 3 be a confusion between the public interest in the 4 subject matter and the public interest in the question 5 of notification itself, and I'm concentrating there 6 entirely on notification itself. But there are -- there 7 could be circumstances where it would not be in the 8 public interest to give notice, but they're very rare, 9 and when that arose, or when a newspaper thought it 10 arose, under what I'm suggesting, the newspaper would 11 approach the tribunal ex parte and say, "We're thinking 12 of publishing this story. We think it's not in the 13 public interest to give notice; do you agree?" And 14 I think that would be a safeguard for the newspaper on 15 the one side but also for the member of the public who 16 is the subject of the story on the other side, and would 17 avoid the situation where the entire decision is taken 18 by the editor, and of course somebody's life can be 19 ruined instantly. 20 Q. Wouldn't it be better, though, for the advice to be 21 obtained by and received from the PC rather than 22 the tribunal, since there might be a perception of 23 conflict of interest if the tribunal were then 24 subsequently to adjudicate on the reasonableness of the 25 advice it gave?</p> <p style="text-align: center;">Page 9</p>	<p>1 of privacy arising out of the story that was published. 2 LORD JUSTICE LEVESON: Do I gather that you're saying that 3 this would be definitive; in other words, the publisher 4 couldn't go ahead then and publish, even if he was 5 damned? 6 A. I would say no, he has the right to publish, but very 7 much at his own risk, because if then the plaintiff 8 comes along and says, "But you were told by the tribunal 9 not to publish and you did", I think that would be 10 a case where the tribunal would impose, if the case be 11 proven, a substantial fine. 12 MR JAY: Thank you. You're proposing a network of 13 adjudicators who would be provided in the same way as 14 perhaps immigration adjudicators or employment judges in 15 the statutory jurisdiction which apply in those cases. 16 Can I ask you, please, how the Internet would be brought 17 within the scope of this tribunal? 18 A. I think that's a very, very important part, because 19 there are a lot of cases now where things happen at 20 local level on the Internet, for which there's, for all 21 practical purposes, no remedy. 22 For example, if a group of school children are 23 bullying another schoolchild on Facebook, or if on 24 Facebook or Twitter they are abusing one of the 25 teachers, nobody can do anything. Unless the parents of</p> <p style="text-align: center;">Page 11</p>
<p>1 A. I think if the tribunal gave the advice that it was in 2 the public interest to withhold, then the newspaper 3 would be in the clear, because it can't do more than 4 that. I think if it approached the PC about that, the 5 Press Commission, then there could be a conflict of 6 interest because they, after all, are the people making 7 the rules and you cross that border between rule-making 8 and rule enforcement. 9 LORD JUSTICE LEVESON: They couldn't be entirely in the 10 clear, because the person affected must be able to 11 challenge the invasion of privacy in some way, and 12 I think Mr Jay's point is that if you've gone to the 13 tribunal and got an order, then it's quite difficult to 14 see how the person affected could challenge an order 15 which had already been made. 16 A. I think they wouldn't necessarily be challenging the 17 order; they would be challenging the breach of privacy. 18 So I would have throughout the breach of privacy is what 19 they're going to complain about. 20 LORD JUSTICE LEVESON: I see. 21 A. And then they could say, "Well, the tribunal made 22 a mistake. It should never have said this could be 23 published without notice. I think an adjudicator or 24 even a judge would have given me an injunction." But 25 that would not in any way prejudice a claim for breach</p> <p style="text-align: center;">Page 10</p>	<p>1 the child happen to be extremely rich or the teacher 2 happens to have a large private fortune, there's nothing 3 they can do. It's very local and it just needs dealing 4 with. With a system of adjudicators, which can operate 5 right down to local level, that could be dealt with. 6 That's an immediate problem that could be dealt with 7 immediately. More broadly on the Internet, when 8 somebody's in America and they're blogging offensively 9 about somebody in England, that is something that must 10 wait for the evolution of, I would say, international 11 conventions, which are bound to come, but that doesn't 12 stop us putting in place a mechanism to deal with what 13 is actually the main problem at the moment from a pure 14 fairness and justice point of view, which is these local 15 abuses, where there have, I believe, been suicides. 16 Q. Thank you. In terms of the procedures, you're 17 contemplating an informal system, that lawyers will 18 rarely be there. It will be free of charge to both 19 parties, but the adjudicator would have power to -- you 20 call it wasted costs. That presumably is designed to 21 cover frivolous or vexatious cases; is that right? 22 A. Yes. 23 Q. In terms of the powers of the tribunal, most of what you 24 say is self-explanatory, but there may be two 25 significant issues. The first is: how would cases be</p> <p style="text-align: center;">Page 12</p>

1 sent to the High Court, or rather on what basis? Would
 2 it be the tribunal taking the view that it's simply too
 3 big a case, too important a case, to be dealt with at
 4 tribunal level?
 5 **A. Exactly. I think that if it was simply too big to be
 6 dealt with in this way, and too difficult, then it might
 7 have to go to the High Court, but I believe those cases
 8 would be rare. I think that -- I probably shouldn't say
 9 this in this forum, but I think there is a tendency,
 10 particularly in defamation, to overcomplicate things, to
 11 make things very sophisticated, very intellectual, very
 12 complicated, where actually the essential issues are
 13 relatively simple. I believe if you have the two
 14 people, the journalist and the subject, sitting there,
 15 in the overwhelming majority of cases it will get sorted
 16 out.**
 17 LORD JUSTICE LEVESON: Did you see or have you read the
 18 evidence of Sir Charles Gray?
 19 **A. Yes.**
 20 LORD JUSTICE LEVESON: Because that's the impact of the
 21 Early Resolution scheme to which he referred.
 22 **A. I think there's a great deal to be said -- I think if
 23 you get people together early on and they meet as human
 24 beings with somebody there mediating -- the adjudicator
 25 in this case -- there is a great tendency to reach**
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1 **agreement.**
 2 **I can think of a little case I had with one
 3 newspaper where the journalist wrote something -- he
 4 shouldn't have written it. It took weeks. It cost the
 5 newspaper a five-figure sum, and it is a journalist
 6 I know, a sports journalist. It could have been sorted
 7 out in ten minutes. I could have explained to him why
 8 it was wrong, he would have seen the point immediately
 9 and that would have been that. I think there are a lot
 10 of cases like that, but once it gets, dare I say it,
 11 into the hands of the lawyers, it tends to get very
 12 complicated.**
 13 MR JAY: Thank you. The other possibly significant point is
 14 that there's power in the tribunal to prevent
 15 publication of a story.
 16 **A. Yes.**
 17 Q. In other words, to issue an injunction. A very few
 18 other people have argued for that sort of power, on the
 19 basis that injunctive relief, almost as a matter of
 20 principle, really, should only be ordered by the High
 21 Court. Why do you feel that a tribunal of this sort
 22 should have that range of power?
 23 **A. Because if it doesn't, we would be back to a situation
 24 where the only people with a proper remedy for breach of
 25 privacy will be the rich, because only the rich could**
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1 **afford to go to the High Court, and I think we
 2 absolutely have to have a procedure where if somebody
 3 who has no money knows that a story's coming out that is
 4 a clear breach of privacy, that they should be able to
 5 go somewhere and get someone to tell the newspaper not
 6 to print it. The obvious place is our tribunal, and if
 7 you weigh the sort of principle that these injunctions
 8 should only be issued by the High Court, which I can
 9 understand, against the fact that if you insist on that
 10 principle, nobody's going to be able to afford to do it,
 11 or hardly anybody, it seems to me justice requires that
 12 the tribunal have that power.**
 13 Q. There may be an issue as to whether it's a contempt
 14 of -- well, it would be a contempt of the tribunal to
 15 disobey an order of the tribunal, but whether statute
 16 could confer express powers on the tribunal to treat it
 17 akin to a contempt of court. Maybe we'd have to think
 18 through that.
 19 **A. I would have thought that with something like
 20 the tribunal, all it could do is impose a fine, but as
 21 we're talking about fines which are potentially quite
 22 big -- because I think the fines should be expressed in
 23 a percentage of group turnover rather than actual
 24 figures -- then I think the disincentive to breach the
 25 order would be significant.**
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1 Q. Yes, so the power to award a substantial fine if you
 2 disobeyed the order of the tribunal, that would cater
 3 for -- or might cater for my concern, since only
 4 a brazen newspaper would wish to run the risk of such
 5 a significant fine.
 6 **A. (Nods head)**
 7 Q. Would there be power in your tribunal, if it detected
 8 prima facie evidence of generic or systemic breach of
 9 the rules, to refer the matter to the PC for
 10 consideration?
 11 **A. I don't think so, because I think once the PC's made the
 12 rules, then the tribunal would enforce them, and one of
 13 the rules obviously would be that where you had
 14 harassment or systemic breaches, the tribunal would take
 15 action, and if you take -- let's take an extreme case.
 16 The pursuit of the McCanns in the Daily Express. That
 17 would be -- at a certain point, the tribunal, had it
 18 existed then, would have said to the Express: "This is
 19 not acceptable", and imposed a significant fine. If it
 20 had continued, the fine would have been very significant
 21 indeed, and undoubtedly Mr Desmond would have given
 22 orders to stop.**
 23 Q. So the function of the PC then is only as a rule-making
 24 body. It's not there generally to set standards, to
 25 enforce standards outside the sort of activity which
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<p>1 the tribunal would be undertaking? Have I correctly 2 understood your position?</p> <p>3 A. The position -- my suggestion is that it would make the 4 rules and it would set the standards, but the 5 enforcement of the standards and the rules would be 6 a matter for the tribunal. So clearly there would be 7 some -- there's always an element of judgment in these 8 things: have the rules been broken? Have the standards 9 been observed? But those judgments, in my submission, 10 would be taken by the tribunal.</p> <p>11 Q. Yes, I see.</p> <p>12 A. I think, if I may say, the essence of it is the 13 separation of powers, and I think if you're going to 14 have a proper system of functions, you have to separate 15 the legislature from the judiciary.</p> <p>16 Q. Might it not be appropriate to have a lesser form of 17 sanction? I think the only sanction is fine, but in 18 less serious breaches of the rules, why not have a power 19 to admonish or publish an adverse adjudication, which, 20 although if that were the sole sanction would not be 21 sufficient -- I think we can agree about that -- might 22 be appropriate for first-time offenders, if I can put it 23 in that way, and the less serious cases. What do you 24 think about that?</p> <p>25 A. I think that's entirely reasonable, and obviously there</p> <p style="text-align: center;">Page 17</p>	<p>1 very modestly, for a secretariat, any substantial sum, 2 so I didn't give that really any thought at all, but 3 yes, the tribunal would be funded by -- partly by 4 a levy, partly by the fines, but of course, because 5 the -- almost all the adjudicators would be part-time, 6 if the number of offences decreased, the costs would 7 decrease. If they increased, the fines would cover some 8 of it. So I think it would be partly self-financing. 9 The actual Press Commission I think would require very, 10 very modest financing --</p> <p>11 LORD JUSTICE LEVESON: But it still has to perform the 12 complaints-handling function, doesn't it?</p> <p>13 A. I wouldn't have thought so, sir, no.</p> <p>14 LORD JUSTICE LEVESON: Who would do that?</p> <p>15 A. Well, the complaints handling would all be done by 16 the tribunal. So, for example, if there's a mass of 17 photographers outside the house, you would call up 18 the tribunal and say, "Can you please get this stopped?" 19 It would take care of all that that was outside.</p> <p>20 LORD JUSTICE LEVESON: I see.</p> <p>21 A. Sorry, outside rule-making, I should say.</p> <p>22 MR JAY: It sounds as if the tribunal might be quite an 23 expensive body to maintain year in and year out, because 24 you would need -- I wouldn't say an army of 25 adjudicators, but you'd need a fair number of those.</p> <p style="text-align: center;">Page 19</p>
<p>1 would be a power under this system to order a correction 2 and order something to be printed that needed to be 3 printed, and there could be no fine, a nominal fine or, 4 in appropriate cases, a large fine. It's just 5 important, in my opinion, that the power exists, because 6 unless the tribunal has these powers, it won't be able 7 to enforce the rules.</p> <p>8 Q. What interaction, if any, will there be between the PC 9 and the tribunal? Are you envisaging a strict 10 separation of powers between the two?</p> <p>11 A. Strictly speaking, yes, but inevitably there would be, 12 if only informally, discussions, because the tribunal 13 might well say to the Press Commission at some point: 14 "The way you framed that rule would be difficult to 15 enforce, this is difficult, that's a problem," rather 16 like on a national level there is a certain sort of 17 intercourse between the judiciary and the legislature 18 and the government here, and I think that would be 19 entirely reasonable. But generally speaking, the two 20 would be separate.</p> <p>21 Q. In terms of financing the tribunal, you're proposing 22 a small levy on publications with circulations above 23 a certain level. Is this just financing the tribunal? 24 What about the PC? How is that going to be financed?</p> <p>25 A. I don't think the PC would really require, other than</p> <p style="text-align: center;">Page 18</p>	<p>1 Indeed, the range of functions we're referring to here 2 is significant, and the volume of business, in the early 3 stages certainly, may be quite high. Have you costed 4 it, Mr Mosley?</p> <p>5 A. Well, crudely, very crudely. I have said that I believe 6 the maximum levy would be one penny per copy sold or 7 distributed. That, on the basis of the published 8 figures, would produce about £47 million a year, and 9 I think that's greatly in excess of what this would 10 cost.</p> <p>11 If you go for a tenth of a penny per copy, that's 12 4.7 million, between 4 and 5 million. That ought to 13 cover it, because if there is a lot of activity, then 14 there are going to be some fines, and if you have 15 serious cases with big newspapers, you might get serious 16 fines, and it's difficult to predict what the level of 17 activity would be because what one hopes is that you 18 would have all these part-time adjudicators, which would 19 cost a certain amount to train and to instruct, but they 20 would actually have a day job. They would only be doing 21 this occasionally, and if there was not too much 22 activity, then the cost would come right down.</p> <p>23 Q. Two issues, really, about the adjudicators. If you look 24 at analogous tribunals, whether it be employment 25 tribunals or immigration tribunals, they're appointed as</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 if they were -- indeed, they are -- judges. So the 2 state appoints them, the state pays for them, the state 3 pays their pensions and everything else, and insofar as 4 there are disciplinary issues, which of course happen 5 very rarely, the state administers that.</p> <p>6 Your regime sounds more like a private regime where 7 the newspapers are solely responsible for funding, but 8 are we looking at adjudicators who will only be working 9 for the newspapers or are we looking at adjudicators who 10 might, for part of their time, be doing immigration 11 cases but occasionally be doing press cases? How do you 12 see it working?</p> <p>13 A. I saw that slightly differently. I thought that the 14 adjudicators would normally be, for example, 15 a solicitor, and he would have his normal practice, and 16 he would be a little bit like senior members of the bar 17 who are part-time judges, or -- there are deputy High 18 Court judges and there are Crown Court judges.</p> <p>19 Q. Recorders.</p> <p>20 A. They do it on a part-time basis. So they would be paid 21 when they were active but only when they were active.</p> <p>22 Q. Yes, but paid by the state. A recorder or deputy High 23 Court judge is paid by the state.</p> <p>24 A. Paid by the tribunal. The tribunal's funds would come 25 from the levy. So they're indirectly paid by the</p> <p style="text-align: center;">Page 21</p>	<p>1 newsletter, just to keep them on top of the thing.</p> <p>2 Q. There may be problems there. I mean, one sort of 3 problem -- if your adjudicators are appointed from those 4 who are media lawyers, someone might say, "Well, he or 5 she acts for claimants, will come to the job with 6 a certain perspective; he or she who acts for 7 defendants..."</p> <p>8 So there's that sort of problem, but if you go the 9 other way and say, "We're going to choose solicitors or 10 barrister of a certain level of seniority who are not 11 media lawyers", then they'll come to this perhaps from 12 a position of a level of ignorance, frankly. You can 13 give them some training, but they won't be well familiar 14 with the quite complicated issues they'll be asked to 15 adjudicate on. Do you see that difficulty?</p> <p>16 A. I completely see that difficulty. The thing is that the 17 system -- and one has to say that right at the 18 beginning -- would not be perfect. Even what we have at 19 the moment that's beyond the reach of all but a tiny 20 minority of the population is not perfect.</p> <p>21 So the first thing to say is it has to be free of 22 charge. You then have to reduce the level of 23 expenditure to the point where the state, society, 24 whatever one likes to call it, can afford it. It's then 25 a question of finding the most efficient way of</p> <p style="text-align: center;">Page 23</p>
<p>1 newspapers, but of course the levy and the fact that it 2 went into an independent body which then paid these 3 people would make it quite independent of the 4 newspapers.</p> <p>5 Q. So the state could still, as it were, appoint and 6 directly pay for these adjudicators, but the state will 7 then receive the levy from the newspapers, which will, 8 in effect, cover the costs? Is that the system?</p> <p>9 A. That would work perfectly well.</p> <p>10 Q. The other issue is the expertise of the adjudicators. 11 Are we looking for people with no media expertise? Are 12 we looking for people who will sit on panels, in which 13 you would include someone with media expertise? How do 14 you see that panning out?</p> <p>15 A. I was thinking of -- there are different approaches to 16 this, but I was thinking of senior solicitors who had 17 been on a special course about the sort of issues 18 they're going to have to deal with, and would have that 19 level of expertise, but they wouldn't be like 20 a full-time -- some of our leading solicitors who do 21 nothing else. They would have a good knowledge -- well, 22 they would have a knowledge of the law anyway, and they 23 would have a good knowledge of the sort of issues that 24 would come up, and then they would be kept up to date 25 with regular retraining and of course probably a monthly</p> <p style="text-align: center;">Page 22</p>	<p>1 deploying the very limited resources which are 2 available, but it seems to me one must not allow oneself 3 to be diverted from the starting point, which is that it 4 must be free, and it must be free both to the claimant 5 and to the press.</p> <p>6 You would certainly get -- some solicitors and 7 barrister who were not experts would probably make 8 mistakes, but that is inevitable if you reduce the 9 costs, and I would argue that there are even mistakes 10 when you have the enormous expensive procedures. But 11 the mistakes would be very few and far between.</p> <p>12 Fundamentally, a lot of these issues are not that 13 complicated. It would be quite rare that it was 14 complicated. I mean, the really difficult cases, you 15 could send it to the High Court, to an expert judge.</p> <p>16 Q. I'm not sure you don't underestimate the difficulties 17 here, particularly if there aren't going to be lawyers 18 representing the parties. You'll have adjudicators who 19 may be excellent lawyers generally, who may know very 20 little or nothing about media law, trained up to 21 a certain point, which will not be, frankly, a very high 22 point at the start, and then they're thrust in to 23 potentially difficult cases without a lawyer acting for 24 the parties to help them out. That could lead to 25 a fairly rough level of justice, some might argue.</p> <p style="text-align: center;">Page 24</p>

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<p>1 A. It would sometimes -- sometimes inevitably lead to 2 a rough level of justice, but of course, you would have 3 the safety net of the High Court and things like that. 4 But in the end, the fundamental question is: should it 5 be free or not? If it has to be free, then I'm not 6 saying for one moment that the system I put forward is 7 the ultimate or the best. All I'm saying is it 8 absolutely has to be free, if you're going to have 9 justice and the rule of law applying to the entire 10 population, and then do the best you can. 11 I set out my suggestion for six requirements. The 12 first is that it's free, the second is that it should 13 not involve the courts or lawyers, and then also that 14 there should be the powers similar to the court, that it 15 should be quick, efficient and so on. I think those 16 requirements are absolutely right, and I would say 17 that -- what I was tempted to do was to say: well, in my 18 submission, we need to satisfy these six conditions. 19 Then I thought: if I do that, somebody will say, "Well, 20 that's fine. Your condition is it has to be free, it 21 has to replace the courts and so on; how are you going 22 to do that?" 23 So I thought: I'll try and set out, to the best of 24 my ability, a scheme -- a regulatory scheme which works 25 but without claiming that it's the ultimate. I'm sure</p> <p style="text-align: center;">Page 25</p>	<p>1 DR DAMIAN TAMBINI (affirmed) 2 Questions by MR JAY 3 MR JAY: Your full name, please, Dr Tambini? 4 A. Damian Tambini. 5 Q. Thank you. You've kindly provided us with three 6 documents. The first is a document dated 3 July 2012, 7 which deals generally with freedom of the press issues. 8 There's secondly a document which you have coauthored 9 reforming the PCC, which -- I'm just checking the date. 10 I think it's -- I'm not sure when it was written, but -- 11 no, June 2012. We can see that. And thirdly, there's 12 a document about plurality, which again is June of 2012. 13 Are you content to put these three pieces of evidence 14 forward as your formal evidence to this Inquiry? 15 A. Yes. 16 LORD JUSTICE LEVESON: Dr Tambini, as I've said to other 17 people, it's clear that an enormous amount of 18 intellectual effort has gone into these pieces of work. 19 I'm very grateful for the assistance that you and your 20 colleagues have provided the Inquiry. 21 A. A pleasure. 22 MR JAY: First of all, about yourself, you work at the 23 Department of Media and Communications within the LSE, 24 but please give us a snapshot of your career and the 25 expertise you bring to these issues.</p> <p style="text-align: center;">Page 27</p>
<p>1 it can be improved. All I do claim is that whatever we 2 do should be available to the entire population. 3 LORD JUSTICE LEVESON: What's important about what you've 4 done, Mr Mosley, is not the detail; it's the fundamental 5 principles which you believe ought to underpin whatever 6 it is we're doing. 7 A. Exactly that, sir, and it would be very presumptuous of 8 me to say I can sit down and produce the blueprint. The 9 only reason I've done that is so that I couldn't be 10 accused of putting forward something that couldn't be 11 done. 12 LORD JUSTICE LEVESON: No, it's not at all presumptuous. 13 You're doing exactly what I invited you and a large 14 number of other people to do, to help me try to find 15 a way through that works for everybody. 16 A. Yes. 17 MR JAY: Thank you, Mr Mosley. Those were all the questions 18 I had. 19 A. Thank you very much. 20 LORD JUSTICE LEVESON: Mr Mosley, thank you very much 21 indeed. 22 A. Thank you. 23 MR JAY: May we move on directly to the next witness, who is 24 Dr Tambini, please. 25</p> <p style="text-align: center;">Page 26</p>	<p>1 A. Relevant to this Inquiry, I was director of the media 2 policy project at the Institute for Public Policy 3 Research, and later I directed the programme in 4 comparative media law and policy at Oxford University 5 and since 2006 I've been at the London School of 6 Economics. I have served as a government adviser to the 7 communications White Paper 2000, and as a member of the 8 Communications Consumer Panel, which is a non-executive 9 board within Ofcom, a statutory body. 10 Q. I know you want to spend more time discussing your 11 papers on the PCC and media plurality, but may we just 12 look briefly at the first paper of 3 July 2012 dealing 13 with freedom of the press issues. The evidence there 14 overlaps to some considerable extent with the evidence 15 we heard on Monday from our ethicists, but are there any 16 points that you would particularly wish to bring out, 17 either because you believe strongly in them or you feel 18 that they haven't come out properly through the evidence 19 we heard on Monday? 20 A. Well, my intention with submitting this short note was 21 to respond to the questions that were posed because 22 I thought they were very important questions. I think 23 we've seen with the Inquiry as it's gone on the notion 24 of the free press being used as a principle and 25 a reference point in a way which is usually helpful but</p> <p style="text-align: center;">Page 28</p>

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<p>1 I would say not always extremely helpful, and we need to 2 be careful in using the term. 3 It may be helpful if I -- if you'll permit me, I'll 4 tell a short story for an example of when it's used in 5 an unhelpful way. As a policy adviser in the early 6 2000s, I, whilst at IPPR, commissioned quite a lot of 7 research on privacy and the press. In collaboration 8 with the pre-Ofcom regulators, I commissioned, for 9 example, a large survey on the attitudes of the public 10 to the public interest in the context of different forms 11 of media intrusion, and I also published a book on the 12 topic. 13 Now, the reason this is relevant to the notion of 14 the free press was because I was thinking about what, as 15 a very low level policy wonk, you might do. There were 16 clearly some issues there coming out of the research in 17 terms of public concerns. At the time there was 18 a Select Committee inquiry looking at similar issues, 19 there was a controversy about whether a privacy law 20 might be necessary and the impact of the Human Rights 21 Act, and thinking about how to take things forward, 22 having developed this research, I, as normal in these 23 kind of circumstances, began to speak to people close to 24 the government -- advisers, et cetera -- and one of the 25 things which I found very memorable about this</p> <p style="text-align: center;">Page 29</p>	<p>1 in which printing presses were the means of mass 2 communication. They were concerned with establishing 3 the principle that congress should make no law that 4 would abridge freedom of speech or of the press. 5 In 1950, when the European Convention on Human 6 Rights was being drafted, the press aren't mentioned. 7 We are concerned with freedom of expression. 8 My concern is with the conflation, if you like, that 9 occurs with the modernisation of this term "the free 10 press", because whilst in the past it was a good proxy 11 for the means of communication, through the 20th century 12 the picture is a lot more complicated. It comes to mean 13 the distinction between broadcasters, which can be 14 regulated because of the justifications of spectrum 15 scarcity, and the press, which should be somehow free 16 from those obligations that apply to broadcasters. 17 If we come forward to the current situation, the 18 notion of a particular freedom which applies to a means 19 of delivery rather than to a function like journalism or 20 to speech in general, becomes, in my view, slightly more 21 problematic, and it's at this point really that you have 22 to raise more questions about whether the term is being 23 used in a very useful way. 24 So in particular, if you take the term "the press" 25 in "the free press", sometimes it's taken to mean</p> <p style="text-align: center;">Page 31</p>
<p>1 conversation was the phrase which met me from one of 2 these relatively senior policy advisers: "We won't go 3 there; that's freedom of the press." 4 This alerted me to the fact that whilst, motherhood 5 and apple pie, this is not a -- nobody would ever argue 6 against the freedom of the press, you must really be 7 a little bit concerned about when this term is being 8 used in a way which is, if you like, a slogan to protect 9 press interests rather than what I would hope is being 10 meant in terms of a principled objection to forms of 11 censorship. 12 I can go into, if you would like, some description 13 of some particular problems which I've outlined in the 14 note with the term and how it is sometimes used. 15 Q. We're not under any particular pressure of time, 16 Dr Tambini -- 17 LORD JUSTICE LEVESON: I think that's helpful. 18 A. Thank you. 19 LORD JUSTICE LEVESON: Because what you have just said 20 resonates with a number of concerns which we've tried to 21 put to a number of witnesses, so carry on. 22 A. One of the -- I think it's quite helpful to see this in 23 historical terms. Those -- the framers of the US 24 constitution, and in particular the First Amendment to 25 the US constitution, in 1789 were concerned with a world</p> <p style="text-align: center;">Page 30</p>	<p>1 printing presses -- the means of reproducing content, 2 messages -- sometimes it's taken to mean journalism, and 3 sometimes it's taken to mean the media in general. If 4 you like, this conflation, I would argue, helps those 5 who want to use this as a general principle. 6 So the Inquiry has been examining various forms of 7 intervention which could be described as infringing 8 press freedom, and I would like to be concerned with the 9 underlying question of rights to freedom of 10 expression -- are they being impacted? -- rather than 11 with the slightly abstract concern of the principle of 12 the free press being offended. So we need to be mindful 13 of that sense in which the notion of the free press 14 conflates those ideas. 15 LORD JUSTICE LEVESON: Well, of course, part of the 16 complexity of modern life is that there is a conflation 17 within means of delivery. The scarcity of bandwidth 18 which justifies restrictions on broadcasting is no 19 longer tenable because of digital mechanisms for 20 deploying material, and the difference between reaching 21 a large audience through printed documentation has been 22 utterly undermined by the development of the Internet, 23 blogs, Facebook, Twitter, all that. Therefore what is, 24 in your view, the underlying principle that should be 25 respected when one talks about the freedom of the</p> <p style="text-align: center;">Page 32</p>

<p>1 press -- if that means, and should that mean, the 2 freedom of journalists to be able to investigate issues 3 within the public interest going beyond those rules 4 which might otherwise encompass others and otherwise to 5 such extent in which they intend to inform and educate.</p> <p>6 A. I sympathise quite deeply with the desire for simple 7 principles, so I don't wish to disappoint.</p> <p>8 LORD JUSTICE LEVESON: But you're just about to.</p> <p>9 A. My view -- and it's my personal view -- is that the 10 search for very simple guiding principles about press 11 freedom in relation to the privileges of journalists, 12 for example, is not easily resolved because we are going 13 through a very rapid process of change, very fundamental 14 change in obviously the means of communication, and the 15 longer debate about whether there are rights which apply 16 to journalists as a profession, my view -- and I think 17 it's something of a minority view -- is that, to 18 a certain extent, there are. There are certain 19 immunities and privileges which apply to journalists 20 which don't apply to others.</p> <p>21 But, as I say, sorry to not be more helpful, being 22 able to nail it down to a succinct principle, but --</p> <p>23 LORD JUSTICE LEVESON: I'm not talking about a single 24 principle, necessarily. I'm simply seeking to define 25 some lines, if I can, and if you say, "Well, actually</p> <p style="text-align: center;">Page 33</p>	<p>1 expressly mentioned in Article 10, it is mentioned in 2 Article 6 in the context of excluding the press from an 3 Article 6-compliant trial. That can only be done in 4 exceptional circumstances. But it may be that the 5 modern jurisprudence on the convention will bring the 6 press in to Article 10 in any event. Perhaps we 7 needn't --</p> <p>8 A. But not because they are the press or newspapers. Not 9 because there's a fundamental distinction based on the 10 medium of delivery.</p> <p>11 Q. But because in some sort of way they are exercising 12 a qualified right to freedom of expression. But you 13 would wish to emphasise the qualified nature of the 14 right; even if the press come into the convention 15 through Article 10, it doesn't give them any absolute 16 position?</p> <p>17 A. I would agree, and I would add -- because we've been 18 discussing freedom of expression, which is, for many, 19 a very delicate issue -- that I'm entirely committed to 20 freedom of journalism and freedom of the media, and I'm 21 simply entering a note, which is really to stress that 22 use of the term "press freedom" in a way which is 23 a defensive sectoral interest, really, rather than 24 a genuinely principled stand is an enemy of freedom of 25 expression and freedom of journalism.</p> <p style="text-align: center;">Page 35</p>
<p>1 that's simply not possible", that itself is significant, 2 because one then has to find a way of drawing boundaries 3 which respect individual rights of expression and 4 recognise the value that the press -- by which I mean 5 generically, not the printed press -- but that 6 journalism brings to our society but falls short of 7 permitting what some may say are behaviours that do not 8 comport with the public interest and do not fit in with 9 the public interest considerations.</p> <p>10 A. Because the other fundamental point is that press 11 freedom, like freedom of expression, is not absolute. 12 It's qualified and it's relative and you have to balance 13 with the rights of others and other rights. But the way 14 I conceive of it is of, if you like, a social compact of 15 rights and obligations. Journalists do have various 16 forms of privilege and rights, both in law and more 17 broadly, but they are conditional. They are there -- 18 and historically you can see the development of those 19 rights and privileges -- they are there because they 20 serve a certain function in society. The implication, 21 of course, individually or collectively, is that those 22 rights, including the right to self-regulate, can be 23 removed if they do not meet ethical standards or if they 24 fail to serve that function.</p> <p>25 MR JAY: I'm reminded that although the press is not</p> <p style="text-align: center;">Page 34</p>	<p>1 LORD JUSTICE LEVESON: Yes, it can't be used as a club to 2 prevent anybody from entering through the door to 3 question how you or they behave. Is that your point?</p> <p>4 A. (Nods head) Which brings us back to the story I started 5 with.</p> <p>6 MR JAY: Thank you, Dr Tambini.</p> <p>7 May we look now on your co-authored paper on 8 self-regulation, or rather regulation more generally. 9 This approaches the topic from a number of angles, but 10 one of those angles brings in to play European and 11 international comparisons. No doubt there you've been 12 assisted by one of your co-authors who may have majored 13 on that topic.</p> <p>14 A. Yes.</p> <p>15 Q. The first chapter, "Press Councils in comparison", 16 01461. On the internal numbering of the paper, it's 17 page 6. You point out there that the United Kingdom is 18 in somewhat of a minority in the context of 19 self-regulatory bodies, since in most other comparable 20 systems, there are joint enterprises between journalists 21 and media owners or publishers, yet in the United 22 Kingdom, in common with Estonia and Denmark, the 23 publishers are, at it were, sole entities within the 24 self-regulatory system. Is that a fair summary?</p> <p>25 A. That's right. I think it matters, when you think about</p> <p style="text-align: center;">Page 36</p>

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<p>1 self-regulation in practice, who is involved in setting 2 up and designing the overall structure. I'm glad you 3 mentioned the co-authors, Manuel Puppis and Sally 4 Broughton. Manuel's research, on which this is based -- 5 it would be in German if we hadn't done this. He simply 6 looks at press councils and analyses them according to 7 a very simple framework, and finds that the UK system is 8 really an outlier because of this basic structural 9 feature.</p> <p>10 Successful press councils tend to involve 11 representatives not only of owners/publishers but 12 representatives of journalist associations and 13 journalist unions. That's the normal model. Whereas in 14 the UK, we see that the founding of the self-regulatory 15 body was wholly led by publishers.</p> <p>16 Q. To what extent, in your international or pan-European 17 comparisons, has there been, as it were, independent or 18 lay representation in self-regulatory bodies?</p> <p>19 A. Our tables are simplifications. All press 20 self-regulatory bodies do involve some form of lay 21 membership. The normal model in fact involves 22 publishers, journalists or journalist associations and 23 lay membership. They don't tend to be involved very 24 early in the process, and you could make the argument 25 that they tend to be bolted on rather late to add a bit</p> <p style="text-align: center;">Page 37</p>	<p>1 something that we recommend should be considered.</p> <p>2 What the table does is simply analyse -- just 3 present for you the range of different structures. It 4 doesn't go into a huge amount of detail on what's behind 5 these tables, and they are, of necessity, 6 simplifications.</p> <p>7 Q. You say that such two tier systems have proven to be 8 successful. What's the evidence base for that?</p> <p>9 A. Well, the evidence comes from two research projects 10 which are based on interviews and comparison of codes, 11 one which was conducted by Professor Manuel Puppis and 12 published, as I mentioned, in German, I think 2010, and 13 one which is a study which I'm happy to provide to the 14 Inquiry published by myself, which is a three-year 15 European Commission-funded study of self-regulation 16 published in 2008.</p> <p>17 So the evidence comes from interviews from 18 stakeholders and also analysis of codes and numbers of 19 complaints and public awareness. The data sources are 20 secondary, so they're slightly different in the cases of 21 the different press councils, and the data you have 22 there is from Manuel Puppis' research.</p> <p>23 Q. Thank you. The next table looks at the scope of ethics 24 bodies for journalism. In most other jurisdictions, the 25 ethical body is composite, in the sense that it covers</p> <p style="text-align: center;">Page 39</p>
<p>1 of legitimacy. You saw in the case of the Press 2 Complaints Commission gradually, over time, the number 3 of lay members being increased and it's only relatively 4 recently we have a lay majority on the council of the 5 Press Complaints Commission.</p> <p>6 Q. Thank you. Your second table on page 7, our page 01462, 7 looks at structural elements of self-regulatory bodies 8 and here we're looking at the question of tiers. Can 9 I ask you, please, to explain that for us?</p> <p>10 A. We are analysing how the internal boards within the 11 Press Complaints Commission -- press councils are 12 structured, and in particular, looking at the relative 13 role of these boards and the presence or absence of 14 these boards as separate entities within the 15 commissions. So, for example, in just to pick an 16 example, Austria has a body of trustees, a council, an 17 ombudsman and a complaints commission, whereas Denmark 18 only has a main council and a separate complaints 19 commission.</p> <p>20 This is relevant because there is quite a broad 21 range of different tiers and levels within press 22 councils, particularly in the light of a discussion 23 which I know has been going on about whether it may be 24 appropriate or useful to involve an ombudsman, for 25 example, as a first call for complaints, and that's</p> <p style="text-align: center;">Page 38</p>	<p>1 the printed press, broadcasting and online. It's only 2 in a few countries such as ours that it only covers the 3 printed press, but there may be all sorts of historical 4 reasons for that, which are maybe quite complicated to 5 analyse.</p> <p>6 May we move on to the next point, level of state 7 involvement in self-regulatory bodies. I think you mean 8 here two differently related aspects. The first is the 9 degree, if any, of statutory underpinning and secondly, 10 whether there's a state levy or whether it's 11 self-funding; is that correct?</p> <p>12 A. Yes.</p> <p>13 Q. Pardon me, carry on.</p> <p>14 A. If I can expand, state involvement is another one of 15 those areas where there are huge sensitivities, some of 16 them principled, some of them based on self-interest. 17 Some of the elements of proposals for reform -- in fact, 18 I think probably most of them -- contain some form of 19 incentive, either access to new forms of defences, which 20 could be accessed by those titles that self-regulate and 21 contribute to the self-regulatory body, for example in 22 the case of the Hugh Tomlinson proposals -- and 23 obviously these would require some sort of statutory 24 basis. Another reform that could be necessary to reform 25 the system, and which would bring it closer to</p> <p style="text-align: center;">Page 40</p>

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<p>1 a co-regulatory framework, is that the body itself 2 should be established and recognised in statute. 3 But the point we make here -- and a third element 4 could be funding by the state. For example, if 5 a journalist association was involved, many countries 6 have that part of the funding shared by the state, if 7 the journalist association doesn't have the resource to 8 pay it. 9 My view is that -- and the view of my co-authors is 10 that all of these things can be made to work, and can be 11 made to work in a way that doesn't of necessity conflict 12 with freedom of expression, but the necessary safeguards 13 have to be put into place. This is a solvable problem. 14 Q. Thank you. Can you just explain for us, please, your 15 pyramid of press self-regulation? It's on page 01464. 16 Until complaints, I suppose, reach a certain point, they 17 can be dealt with internally either by self-regulation 18 or by statutorily underpinned regulation, but there may 19 be a point when the ordinary law comes into play, either 20 contemporaneously or separately? Is that the concept? 21 A. That is. There's are more fundamental related point. 22 Part of this is about efficiencies. You do want 23 a system which doesn't involve too many cases going 24 through formal adjudication, and you want a system which 25 is accessible to complainants, also those that can't</p> <p style="text-align: center;">Page 41</p>	<p>1 a sentence in bold where you say: 2 "There is a role for the state in self-regulation of 3 the press." 4 Some might say that that's a contradiction in terms. 5 A. Well spotted. 6 LORD JUSTICE LEVESON: I'm pleased about that. 7 A. Any future publication will correct that. This is of 8 course co-regulation, by definition. 9 LORD JUSTICE LEVESON: Oh, it's a mistake. All right. 10 I thought there was some profound ... all right. 11 Q. The first point you make -- we're looking here at the 12 number of council members -- is that you come to the 13 conclusion that considerations of efficiency and cost 14 effectiveness suggest the body dealing with complaints 15 should be kept rather small. Can you explain why you're 16 drawn to that conclusion? 17 A. We're drawn to that conclusion -- to a certain extent, 18 it's a trivial, technical and slightly obvious point. 19 In Germany and Luxembourg, more than 20 people serve on 20 the council. That would strike -- that strikes us as 21 excessive. It's also the case in Switzerland and the 22 Netherlands, but there are, in those countries, 23 particular reasons to do with federation and language 24 groups and representation of different social groups 25 which explain that. In the UK, we would see no reason</p> <p style="text-align: center;">Page 43</p>
<p>1 fund huge costs, but you, at the same time, want 2 a system which does establish some pressure for culture 3 change, some pressure for a behaviour change. The 4 consensus is that the Press Complaints Commission was 5 a complaints-handling body but it didn't really 6 establish those pressures for culture change. 7 So whilst, lower down the pyramid, larger numbers of 8 complaints will indeed be handled by press councils, 9 ombudsmen, different forms of accountability 10 mechanisms -- much larger numbers of complaints -- it's 11 also essential that somehow in this system, mediation 12 and settling of those complaints isn't something which 13 is just simply under the radar, as I think did happen in 14 the Press Complaints Commission, but it is brought 15 somehow into a system where complaints are understood 16 and addressed and monitored in ways which stand some 17 chance of then impacting press behaviour and development 18 of journalism ethics and practices. 19 So whilst, lower down the pyramid, you do want 20 alternative accountability mechanisms, you at the same 21 time need to design a system which creates incentives to 22 change. 23 Q. Thank you. The next subheading is the make up of press 24 councils. 25 LORD JUSTICE LEVESON: Just before you go on, there's</p> <p style="text-align: center;">Page 42</p>	<p>1 to have such a large council on the co-regulatory 2 journalism council. 3 Q. But you do want to see an appropriate mix of public 4 members, journalist members and editor members, so once 5 we have three constituencies, it could be said we're 6 looking at somewhere between 15 and 20, are we, as 7 a sort of optimal number balancing the various component 8 parts? Is that a reasonable conclusion? 9 A. That is a reasonable conclusion, but I wouldn't say -- 10 certainly not higher than that, possibly slightly lower 11 than that. 12 Q. In terms of appointment, which is page 12, 01467, the 13 position which obtains now is that control over 14 appointment of members tends to rest with the founders. 15 Presumably, though, a more desirable system would be 16 a higher degree of independence in relation to the 17 appointment process; is that reasonable? 18 A. Absolutely. And everything I've said really comes with 19 the same general thrust, which is that the overall 20 ownership and control of the Press Council should be 21 more independent and more visibly independent from the 22 owners and the publishers. 23 I can say a little bit more in general terms about 24 why that is and why we have to be mindful of it. 25 Obviously, there are a range of approaches to</p> <p style="text-align: center;">Page 44</p>

<p>1 appointment of Press Council members. There are 2 a number of countries in which the state or the 3 government does appoint some council members. I am not 4 particularly drawn to that approach. In fact, I think 5 I would go as far as to say I am personally against it. 6 Q. Thank you. In terms of powers of the press councils, 7 procedures or dealing with code violations, you make two 8 points, really, on page 13, 01468. First, that it's 9 important that press councils have the power to initiate 10 cases. Could you explain that one for us? 11 A. Just to take the example of the Press Complaints 12 Commission, the power to initiate complaints has really 13 only extremely rarely been used. I believe it does 14 exist, but the ability, for example, in relation to 15 privacy violations or in relation, for example, to the 16 McCanns, to act also when there are no complaints -- the 17 Press Council seems to have been very reluctant to do 18 that. But the -- as I said, the power is there. 19 I think the power should stay there, and it would enable 20 the -- particularly if the co-regulatory body was 21 involved, an ombudsman, potentially on the Irish model, 22 that body should have the power and use the power to 23 start investigations of its own accord. 24 There may be, for example, in relation to collective 25 victims of misrepresentation in the press, who currently</p> <p style="text-align: center;">Page 45</p>	<p>1 it has existed, at least hitherto, has been to control 2 down rather than to widen out the potential basis upon 3 which they will look at what the press has been up to. 4 Is that fair? 5 A. I think that's fair. I think it is, if you like, 6 structural. So the safeguards and fire walls and 7 internal structure of the body really needs to be looked 8 at very carefully. 9 If I might just take a couple of steps back and 10 refer to something that Ed Richards said in his evidence 11 a couple of days ago. He made a quite brilliant point, 12 I thought, about really understanding the fundamental 13 incentives which apply in self-regulation. So we 14 shouldn't assume all self-regulatory bodies are similar, 15 and he made the point that, for example, advertising 16 self-regulation -- there's a very clear self-interest, 17 if you like, an enlightened self-interest, on the part 18 of the advertising industry to regulate itself, because 19 it's necessary in general terms to maintain, for 20 example, trust in advertising. So accuracy and various 21 other code articles can be applied. So advertising 22 self-regulation tends to work quite effectively. 23 That's not the case, for example, in online gambling 24 self-regulation, where it's my view that the industry 25 does not have an interest in restricting its market by</p> <p style="text-align: center;">Page 47</p>
<p>1 have a lot of difficulty with complaints -- there may be 2 significant areas where the ombudsman would be able to 3 improve awareness, improve journalistic practices and 4 act as a kind of a feedback mechanism, and part of that 5 would be that they would be able to initiate some 6 complaints. 7 It's not something I would see done very frequently, 8 but the regulator in general needs to have more powers 9 and more freedom of movement. 10 LORD JUSTICE LEVESON: Isn't that part of a rather wider 11 piece, because the PCC at the moment may, as you say, 12 initiate a complaint of its own, but one of the 13 complaints that's been made to the Inquiry has been that 14 it frequently refuses to take up complaints unless 15 there's an absolutely direct link between the story and 16 the person who is advancing the complaint. So it won't 17 take up a third-party complaint. Generic complaints by 18 groups are, if not positively rejected, then discouraged 19 on the basis that that might be thought to be 20 interfering with the ability to be partisan, 21 irrespective of accuracy. 22 A. Mm-hm. 23 LORD JUSTICE LEVESON: Therefore it's been suggested -- and 24 I'd be grateful for your view -- that actually the whole 25 thrust, the ethos of the Press Complaints Commission, as</p> <p style="text-align: center;">Page 46</p>	<p>1 dealing, for example, with public policy issues of 2 problem gambling. 3 So comparing self-regulatory bodies is not really 4 comparing like with like. You have to understand 5 whether the incentives line up and whether that magic of 6 enlightened self-interest on the part of the industry to 7 regulate itself actually comes into play. 8 I would take, in relation to the press, the logic 9 just a step further and suggest that we should begin to 10 think -- in relation, for example, to phone hacking or 11 privacy violations more generally, begin to think about 12 how the incentives line up for the industry, 13 particularly in newspapers. 14 Privacy violations provide a huge amount of 15 resource. They provide front pages, which sell 16 newspapers. No economist, as far as I know, has 17 actually valued that, but if you have a self-regulatory 18 body which is not -- in some senses, it might have the 19 value of keeping statutory regulation at bay, but it may 20 not have, at its core, the objectives of actually 21 dealing with those kinds of public interest issues. 22 LORD JUSTICE LEVESON: That might be the sole entire common 23 interest of everybody. Keeping statutes away. 24 A. Mm. 25 MR JAY: Is that a convenient moment to have a break?</p> <p style="text-align: center;">Page 48</p>

<p>1 LORD JUSTICE LEVESON: Certainly. We'll have a few minutes. 2 (11.22 am) 3 (A short break) 4 (11.30 am) 5 MR JAY: In terms of sanctions -- it's not altogether clear 6 on my copy because of the way it's been printed -- 7 I think only one press council has the ability to fine; 8 is that right, Dr Tambini? 9 A. Yes, the Swedish. 10 Q. But you recommend, bottom of the page, a combination of 11 the obligation to publish -- that's the name and shame 12 point -- 13 A. Mm-hm. 14 Q. -- and a Press Council that can initiate cases is the 15 strongest model. 16 In terms of your conclusions on the next page, 17 01469, you're contemplating a new council which should 18 be jointly formed by owners and journalists and on which 19 presumably there should be some public representation. 20 I think we've covered that point. 21 Whether it should regulate all news media, including 22 broadcasting -- well, that's quite a big point, if I may 23 say so, given the current status of Ofcom and the 24 position of the BBC. If we pass over that one. But 25 look more carefully at item 3:</p> <p style="text-align: center;">Page 49</p>	<p>1 discussed quite a lot, I should say that particularly 2 when you have financial incentives -- there may be 3 a continuum. If the financial penalties for being 4 outside are too great, it may be very close to an 5 obligation to either join or simply carry too much 6 liability risk. So you'd need to be mindful of that. 7 Q. Yes. Can I be clear, item 5 -- 8 LORD JUSTICE LEVESON: When you say I need to be mindful of 9 it, do you mean to say I should not go that far, or 10 I should try to go that far? 11 A. I'm thinking of some experience in other countries 12 where, for example, defamation, sometimes privacy 13 claims, can be used to shut newspapers, if the liability 14 costs are so high that in effect what you're proposing 15 is a compulsory system. So it may be a question of 16 calibrating those incentives, insofar as that's 17 possible, to make clear that if you want there to be the 18 option of staying outside it and running the risk, if 19 that's what the intention is, then the incentives aren't 20 such that there's simply not a choice. 21 LORD JUSTICE LEVESON: But there will always be a choice, 22 and one has to be very careful that ultimately one isn't 23 seeking to differentiate the operation of the law. 24 A. Mm-hm. 25 LORD JUSTICE LEVESON: But if one takes litigation costs</p> <p style="text-align: center;">Page 51</p>
<p>1 "There's a role for the state in self-regulation." 2 I think, again, defining our terms, we're talking 3 about co-regulation possibly, aren't we? 4 A. If I may just clarify in relation to regulating all news 5 media, I would argue that for broadcasting there's 6 a potential, possibly at a later date, to bring fairness 7 and privacy complaints to this body, and for Internet 8 services, I would argue an initial period in which this 9 would be a voluntary system would probably be the way to 10 go forward and also maybe a size threshold could apply 11 in the event that there was any obligation to take 12 place. 13 But, sorry, the role of the state? 14 Q. Once there is a state role in the system, inasmuch as it 15 has some statutory underpinning, we're either in the 16 realm of co-regulation or the realm of state regulation. 17 It isn't, I think, self-regulation. Would you agree 18 with that? 19 A. We have discussed that point and I agree. 20 Q. What you contemplate is a series of incentives which 21 will impel people to participate, so it's not 22 a compulsory statutorily underpinned system but 23 a voluntary one with some sharp incentives; is that how 24 you see it? 25 A. Yes. There is -- because the incentives have been</p> <p style="text-align: center;">Page 50</p>	<p>1 merely as an example, why isn't it perfectly legitimate 2 to say, "You can join this system and then have access 3 to a cost-limited mechanism for the resolution of 4 disputes which would be available to those who wish to 5 complain about what you were doing. If you don't join 6 the system, then you run the risk that the state will 7 say to you: if you lose, well, you have to pay all the 8 costs that actually somebody else had to incur because 9 you didn't go into the system, and if you win, why 10 should you get your costs, when if you'd been in the 11 system, the person who is complaining about you could 12 have ventilated their dispute without incurring great 13 expense themselves?" What's wrong with that? 14 A. Nothing. You have clarified that in my mind. Thank 15 you. 16 LORD JUSTICE LEVESON: Well, it's only an idea. I've not 17 decided anything yet. 18 MR JAY: Item 5, the body deciding upon complaints. This is 19 in your two tier year system, on my understanding. 20 Within that system, there will be a dedicated complaints 21 body; is that right? And you're making recommendations 22 as to how it should be comprised? 23 A. Yes. Just to enter a caveat, I was reminded during the 24 break by my co-author that the earlier point about 25 numbers of people serving on councils should be</p> <p style="text-align: center;">Page 52</p>

13 (Pages 49 to 52)

<p>1 clarified, because much smaller numbers serve on the 2 actual complaints-handling body in many cases. So it 3 might be a lower number. But yes, you're correct in 4 that clarification of point 5.</p> <p>5 Q. Thank you. Then the proactive more outspoken point -- 6 we have probably covered that already. It's taking 7 cases on your own initiative and third-party complaints. 8 May we move on now to your other paper, which is on 9 plurality and media power. I think we can move straight 10 to, on the internal numbering, page 6, which is our 11 page 01480. It's under tab 82. The basic philosophy 12 here: "Why intervene to protect media pluralism?" Can 13 you tell us about that?</p> <p>14 A. I think it would be useful if I linked this to the 15 discussion of -- the remit of this Inquiry and what this 16 Inquiry's asked to do, if you'll permit me.</p> <p>17 Q. Mm-hm.</p> <p>18 LORD JUSTICE LEVESON: This time you're dealing with two 19 different collaborators?</p> <p>20 A. Yes.</p> <p>21 LORD JUSTICE LEVESON: All right.</p> <p>22 A. There are many -- watching the Inquiry unfold, I've had 23 the distinct impression that media pluralism is treated 24 as an add-on, and at the centre of the Inquiry is 25 a reform of self-regulation, whereas I and a number of</p> <p style="text-align: center;">Page 53</p>	<p>1 evidence has led to, in the past 20 years -- is it too 2 strong to say a disaster, really, in terms of democratic 3 legitimacy in this country?</p> <p>4 So that is not a new problem. Going back through 5 successive royal commissions of the press, this issue of 6 media concentration has been discussed, it's been 7 discussed in countries all over Europe and there are 8 policy frameworks in place to deal with it, and in the 9 paper we discuss some of those.</p> <p>10 But if I can just note a couple of things -- draw to 11 the attention of the Inquiry a couple of other things. 12 A judgment of the Grand Chamber of the European Court of 13 Human Rights just last month gave a judgment which 14 affirmed the positive obligation of states to protect 15 media pluralism. That's the Trenta Italia 16 Secta v Italy(sic), and this builds on their previous 17 decision from 2009.</p> <p>18 So there is a positive obligation on states to 19 protect media plurality. I think what distinguishes 20 this, just to wrap up --</p> <p>21 LORD JUSTICE LEVESON: Hang on, what was that case about and 22 what was the judgment in it?</p> <p>23 A. The case was about a broadcaster that was awarded 24 a licence by the regulator in, I think, 2000 in Italy, 25 but then was not actually awarded the frequencies to</p> <p style="text-align: center;">Page 55</p>
<p>1 colleagues see it the other way around, not only reading 2 the terms of reference of the Inquiry but looking at 3 statements made by the Prime Minister.</p> <p>4 For example, last summer, the importance of market 5 structure in explaining the situation in which we find 6 ourselves cannot, in my view, be overestimated. I'll 7 just quote David Cameron from last July: 8 "Because party leaders were so keen to win the 9 support of newspapers, we turned a blind eye to the need 10 to sort this issue, to get on top of the bad practices, 11 to change the way our newspapers are regulated." 12 Now, you can look at this statement in a variety of 13 ways but I would suggest focusing on the first part: 14 "Because party leaders were so keen to win the 15 support of newspapers ..." 16 It relates to my earlier point in relation to public 17 policy in terms of no-go areas of public policy. 18 Just to encapsulate the importance of making strong 19 recommendations to deal with the pluralism issue, 20 I would just simply observe: if I was advising an 21 incoming government, whether that was the New Labour 22 government or the Cameron government, I would advise 23 them not to alienate significant media interests. The 24 reason for that is market structure, concentration of 25 media ownership, which I think we've heard a lot of</p> <p style="text-align: center;">Page 54</p>	<p>1 broadcast. This was viewed within Article 10 of the 2 European Convention on Human Rights as an infringement 3 not only of freedom of expression but of this positive 4 obligation to promote a plurality of points of view and 5 broadcasters within an audiovisual system.</p> <p>6 LORD JUSTICE LEVESON: Mm?</p> <p>7 A. So if I can just draw this point together. Plurality 8 obligations, which include structural limits on media 9 ownership and also internal pluralism, as you've been 10 discussing, are fundamental. I think that's what sets 11 this Inquiry out against previous, for example, 12 commissions on the press. Previous royal commissions on 13 the press were dealing with a hypothetical problem that 14 might emerge. However, this Inquiry is dealing with -- 15 and it's acknowledged in the quote that I described from 16 the Prime Minister -- a problem that has clearly 17 happened. There has been a long-term systematic failure 18 to protect the public interest in relation to particular 19 media interests. That is a distinction and that is why 20 I would argue the Inquiry should be focusing more than 21 passing attention on media pluralism issues. I'm sure 22 it will.</p> <p>23 MR JAY: Yes. Within the limitations, if any, imposed by 24 the terms of reference. Of course, it's for the Inquiry 25 to understand what those are and the Inquiry is quite</p> <p style="text-align: center;">Page 56</p>

<p>1 capable of doing that. Can I ask you, please, to 2 develop the specific technical points which you set out 3 in your statement? The first is the measurement issue, 4 which is section 2, page 8, 01482. 5 You probably heard the debate yesterday as to 6 whether we should be focusing on news and current 7 affairs, perhaps to the exclusion of all else, the Ofcom 8 view -- I don't think is quite that, but it's the 9 primary consideration -- or whether we should be, as 10 a matter of principle, going wider to all forms of media 11 content. You, I understand, subscribe to the second 12 school rather than the first; is that correct? 13 A. Yes, as a suggestion, but we acknowledge Ofcom's point 14 that it is a trade-off, really, between what's practical 15 just in terms of measurement and what is desirable in 16 terms of a full assessment. We think it is possible to 17 have a full assessment, although I should -- I don't 18 think it's mentioned in paper -- say that what you might 19 tolerate is slightly higher limits when it comes to more 20 general media genres. 20 per cent rather than 21 15 per cent, for example. 22 Q. Can you explain for us, please, if you look at the bold 23 sentence -- or it's rather a clause, the middle of 24 page 9, 01483 -- it says: 25 "At minimum, separate considerations should be given Page 57</p>	<p>1 complete, all bells and whistles system for measuring 2 and limiting media plurality. We offer some advice and 3 comments on proposals of others. 4 Q. Mm. 5 A. But within a system of limits on media ownership, we're 6 simply proposing that -- we make a number of points 7 about what the best methodologies are, comparing the 8 methods of -- which are used in regulators in other 9 countries, and we find that it's possible, for example, 10 to make a -- we make the claim that audience metrics, 11 which are based on time that audiences spend with 12 different media and different media companies, is 13 probably the best metric. 14 The point I'm making here is that we should use 15 those metrics to measure those things separately and 16 they may be considered by a regulator separately in 17 order to form a judgment about whether limits have been 18 breached. 19 Q. Okay. Now, relevant firms -- you'd wish to include 20 online providers of media content. All of them or some 21 of them? 22 A. The method that we're suggesting draws on the Ofcom 23 share of references approach. So to a certain extent, 24 we would -- which is basically a survey, which asks 25 media users what of a list of services they could -- Page 59</p>
<p>1 to affirm its position in the market for news and 2 current affairs as well as across all genres." 3 What do you mean by that, Dr Tambini? 4 A. I think it's relevant to refer also to the recent Ofcom 5 report, which sets out some methods, and I would argue 6 without specifying really whether we're speaking about 7 triggers for a review or absolute caps or some form of 8 monitoring and reporting as part of a continuous review 9 process. So we need to specify what these measures are 10 for. In this context, we're speaking about caps, and 11 within that, the periodic review which would assess 12 whether those limits on media ownership are being 13 approached and so forth. 14 But within those reviews, I think it would be 15 possible to measure both of those things and provide 16 advice and data on both of those things -- 17 Q. Sorry, "those things" are first the firm's position in 18 the market for news and current affairs, secondly -- I'm 19 not quite sure what "secondly" is. 20 A. Secondly is the position in the market across all 21 genres. 22 Q. Can you explain that for us? First of all, what 23 precisely do you mean by that, and how is this going to 24 work? 25 A. What we do in this paper is not offer you a fully Page 58</p>	<p>1 they recall having used recently. Now, that obviously 2 begs the question: what is on that list? And you could 3 have a list which is based on a size threshold, on 4 existing measures of audience, audience rankings. There 5 are a number of data sources available of the most 6 visited websites, for example. 7 So just in practical terms, I would say those most 8 visited online sources and aggregators, search engines, 9 which we know are the most used and most visited should 10 be included on that list and that would prompt people to 11 provide the data in the survey. 12 Q. Wholesale or retail. That's page 10. You favour 13 looking at wholesale levels because it's more 14 comprehensive. I think that one is probably 15 self-explanatory, but relevant indicators is something 16 I invite you, please, to explain to us. The table, 17 unfortunately, hasn't come out very clearly in my copy. 18 Do you see table 1 on page 01485? Just briefly explain 19 to us what the common indicators are, first of all. 20 A. Okay. What this table does is set out a description of 21 different methodologies which are used in Italy, 22 Belgium, France, the UK -- and there are two measures 23 for the UK. And what the table is trying to explain is 24 my fundamental observation about -- particularly the UK 25 framework is that it's subject to an unacceptable level Page 60</p>

<p>1 of delays and challenge. One of the reasons for this -- 2 not the only reason -- is the measures which are used. 3 There has been a long debate about what are the most 4 appropriate ways of measuring media plurality, and I can 5 say a bit more about that, but the -- for example, in 6 Italy, revenue shares are used. This was the proposal 7 you discussed yesterday in relation to Enders Analysis' 8 proposal of a cap on revenue shares. That's the system 9 which is used in Italy, which indicates a proportion of 10 revenues within a specific media market. 11 In Germany -- and Germany's an interesting case, 12 which might warrant looking at a bit more closely -- 13 they have a different policy objective in mind. I think 14 one of the more fundamental reasons that this policy 15 area has been subject to so much challenge and 16 difficulty is because of the lack of clear policy 17 objectives, and in Germany the policy objective is not 18 simply plurality of media sources; it is what they call 19 "Meinungsmacht", power over opinion formation. And they 20 measure, in relation to -- in particular, to television, 21 exposure -- standard audience indicators for audience 22 shares when they're taking into account -- when they're 23 trying to work out if a television merger -- a merger 24 involving a television owner breaches their limits. 25 It's interesting just to build on this a little bit</p> <p style="text-align: center;">Page 61</p>	<p>1 So the fundamental problem, as well as the issue of 2 measures -- and as I've said, the measure we favour is 3 similar to the Ofcom share of references. We think 4 audience measures are better, but the more fundamental 5 issue is clear policy objectives and distinguishing 6 between the objective of diversity of media content and 7 the number of voices, which is, I think, a particular 8 problem. I think this might be something that the 9 Inquiry can help clarify. 10 Q. But can I clarify where you're coming from? If you look 11 at the relevant sections in the Enterprise Act, 58(2)A 12 and 58(2)C, which you've helpfully set out at page 14, 13 01488, are you saying that we should amend the statute 14 so as to remove the references to the need for accurate 15 presentation of news and free expression of opinion so 16 we're just left with 58(2)B and 58(2)C? 17 A. Well, in a merger context, we're not saying that, and 18 I think we're reasonably clear that we're actually 19 saying that these objectives should remain. I think 20 it's an issue for guidance, for clearly identifying 21 measures, criteria and metrics which enable each of 22 those different objectives to be more accurately 23 measured and taken into account, and I'm not sure I have 24 an answer. I may be doing nothing more than pointing 25 out in a problem in this particular case where you have</p> <p style="text-align: center;">Page 63</p>
<p>1 to observe that -- for me, the fundamental issue is this 2 issue of clarity of policy objectives. In the UK, we 3 have a plurality system which -- and we've analysed this 4 in a longer paper -- has the objective of promoting 5 diversity, a different range of view points -- and I'm 6 thinking of the Enterprise Act, section 58 description 7 of what must be taken into account in the event of 8 a merger. But it also has the objective, for example, 9 of guaranteeing freedom of expression, accuracy, and 10 a sufficient plurality of persons, which could be 11 a proxy for opinion-forming power. 12 This contrasts in turn with the US approach, which 13 is much more just concerned with diversity. I think in 14 the UK, we have particular problems because we are 15 asking too much of the merger tests and we're not asking 16 them very clear things, and those things that we're 17 asking the merger tests and the merger framework to 18 achieve are sometimes in conflict with one another. 19 This is going beyond the point about measures. 20 You can imagine a market, for example, where 21 a decline in the number of providers would not result in 22 a reduction of diversity -- and this has been 23 empirically proven -- whereas usually a decline in the 24 number of providers almost always provides a reduction 25 in opinion-forming power.</p> <p style="text-align: center;">Page 62</p>	<p>1 conflicting objectives between diversity and opinion 2 formation -- 3 Q. I'm not sure whether they're conflicting, Dr Tambini. 4 Where is the tension between what we see in section 5 58(2)A and section 58(2)B, for example? They're 6 entirely harmonious objectives, aren't they? 7 A. There may be cases where -- if you think of US newspaper 8 markets, which tend to be local or regional 9 monopolies -- it's an internal plurality point, really. 10 Because they are monopolies, they have to represent 11 a wider number of views. Secondly, there's an economic 12 theory called Hotelling's effect, not because it has 13 anything to do with hotels but because the economist who 14 advanced this idea was called Hotelling, which suggests 15 that in certain sizes of market -- it may be five or six 16 players -- you have a tendency to cluster around the 17 centre of the market. This is usually illustrated with 18 the idea of two ice cream salesmen on a beach. They end 19 up back-to-back selling vanilla, whereas if you have 20 one, they might have a wider range of flavours and they 21 might walk around the beach. 22 But there are good economic reasons why the five 23 major news networks in the US were all covering the 24 OJ Simpson trial continuously, which is not diversity, 25 and you do not always solve that by having more. You</p> <p style="text-align: center;">Page 64</p>

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<p>1 can have an increase in diversity having less.</p> <p>2 The same is not true in relation to the sufficient</p> <p>3 plurality of persons, which I would argue is a proxy for</p> <p>4 this opinion-forming power. I can provide a reference</p> <p>5 to our longer paper, where we develop that point, and</p> <p>6 there are some references there.</p> <p>7 Q. I still don't quite follow it. The persons point is</p> <p>8 only relevant to cross-media mergers, section 58(2)C.</p> <p>9 Parliament has decided when we're looking at newspaper</p> <p>10 mergers we're not interested in number of persons; we're</p> <p>11 interested in sufficient plurality of views, which</p> <p>12 I think precisely addresses the concern you're making.</p> <p>13 That's why Parliament has expressed itself in that way.</p> <p>14 But in any event, my question was: what is the</p> <p>15 conflict between the sufficient plurality of views</p> <p>16 criterion and the accurate presentation of news and free</p> <p>17 expression of opinion criteria? There isn't any, is</p> <p>18 there?</p> <p>19 A. Well, there may be -- it comes to a point, also, of</p> <p>20 market exit, and I think that's part of the intention of</p> <p>21 these clauses, is when a regulator faces a choice</p> <p>22 between allowing a news outlet to close and allowing</p> <p>23 them to merge. In the former case, you may have</p> <p>24 problems in terms of --</p> <p>25 Q. Sorry, closing newspapers isn't within this regime at</p> <p style="text-align: center;">Page 65</p>	<p>1 to suggest that the terms of reference really should be</p> <p>2 centred on plurality rather than regulation, and that it</p> <p>3 may be that the terms of reference had been</p> <p>4 misunderstood.</p> <p>5 I don't want to take too legalistic a view about the</p> <p>6 terms of reference -- I'm conscious that that's</p> <p>7 a criticism that's been made of earlier inquiries -- but</p> <p>8 on the other hand I have to be rather careful not to</p> <p>9 exceed what I am required to do. The Inquiry is into</p> <p>10 the culture, practices and ethics of the press. That's</p> <p>11 part 1, paragraph one. It identifies four particular</p> <p>12 problems: contacts and relationships between newspapers</p> <p>13 and politicians, contacts and relationships between</p> <p>14 press and the police, the extent to which the current</p> <p>15 policy and regulatory framework has failed, including in</p> <p>16 relation to data protection, and the extent to which it</p> <p>17 has failed to act on previous warnings.</p> <p>18 So that's the context and within culture, practice</p> <p>19 and ethics, of course, is the relationship between the</p> <p>20 at public. You can talk about regulatory framework and</p> <p>21 the word "including", which I certainly recognise does</p> <p>22 not exclude issues of plurality, but let's go on and</p> <p>23 look at what I'm required to make recommendations about:</p> <p>24 "For a new and more effective policy and regulatory</p> <p>25 regime, which supports, amongst other things, the</p> <p style="text-align: center;">Page 67</p>
<p>1 all, is it? Only to have a merger.</p> <p>2 A. Well, the public interest considerations, if you are to</p> <p>3 permit the merger, involve a consideration of whether --</p> <p>4 and I think we have seen this in relation to, for</p> <p>5 example, the Sunday Times -- when a newspaper claims</p> <p>6 that it is in financial difficulty and may close,</p> <p>7 therefore should be permitted to merge even though it</p> <p>8 breaches the limits. If it's permitted to close, that</p> <p>9 may have detrimental effects for free expression of</p> <p>10 opinion.</p> <p>11 Q. The merger was allowed to take place because otherwise</p> <p>12 it would have closed, and that was why it didn't have to</p> <p>13 go to the Competition Commission. You'll remember the</p> <p>14 provisions of the Fair Trading Act 1973, section 58,</p> <p>15 I think.</p> <p>16 LORD JUSTICE LEVESON: The big argument in relation to the</p> <p>17 Sunday Times was whether it actually fell within that</p> <p>18 category at all. That was the argument.</p> <p>19 A. Mm-hm.</p> <p>20 Q. Yes. Okay.</p> <p>21 Can we look at your policy recommendations, please,</p> <p>22 Dr Tambini?</p> <p>23 LORD JUSTICE LEVESON: Before we do -- and I'm very keen to</p> <p>24 do so -- I'd just like to focus a little bit on what you</p> <p>25 said at the very beginning of this analysis, which was</p> <p style="text-align: center;">Page 66</p>	<p>1 plurality of the media."</p> <p>2 So that's all to do with a regime. So that's</p> <p>3 a structure which best supports media plurality. Do you</p> <p>4 say that that allows me to descend into the detailed at</p> <p>5 a particular level -- that's a percentage, whatever</p> <p>6 metric you want to take up -- as to what newspaper</p> <p>7 organisations should be entitled to own in this country?</p> <p>8 Or am I there to advise upon the structure that should</p> <p>9 be in place so that an appropriate body can make</p> <p>10 a decision, because I have to pick, in (b), for "how</p> <p>11 future concerns about ... regulation and cross-media</p> <p>12 ownership should be dealt about with by all the relevant</p> <p>13 authorities", including in part, government, et cetera.</p> <p>14 A. Mm-hm. Obviously it's for you, and I welcome the chance</p> <p>15 to --</p> <p>16 LORD JUSTICE LEVESON: We'll agree about that, but I'm</p> <p>17 asking for your views.</p> <p>18 A. My fundamental question is: why is it in there? Why is</p> <p>19 there the reference to the plurality of the media in</p> <p>20 these terms of reference? I don't think it would be</p> <p>21 convincing to argue that it is in there in case the</p> <p>22 self-regulatory structure that you suggest somehow</p> <p>23 impacts on plurality of the media. I would argue that</p> <p>24 it is in there because of the reasons I mentioned: not</p> <p>25 the ethical failures that we've heard so much about this</p> <p style="text-align: center;">Page 68</p>

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<p>1 year in themselves, in terms of phone hacking, 2 et cetera, but because of the more fundamental problem, 3 which was the cover-up, what is viewed as a failure by 4 various institutions and politicians to deal with this. 5 It is that which is explained by the problem of 6 a concentrated press. 7 So, just to repeat the point, this Inquiry has been 8 asked to deal with these issues in the light of what has 9 clearly been a failure and the admission of a failure 10 and the admission of a need to kowtow to press interests 11 on the part of politicians. For me, that's my 12 interpretation of these terms of reference. 13 LORD JUSTICE LEVESON: I have to be rather careful because 14 I happened to be present while these terms of reference 15 were written, so I know how they developed, and I'm very 16 keen merely to construe them as they now exist, but 17 I would like to go back to my question. I recognise the 18 point you make. It's there because of the concern that 19 too much attention was paid to very powerful press 20 interests. That's the concern and that's what we're 21 looking at, and one would have to consider a system 22 which allowed the state to find a way of moderating that 23 influence so that it didn't run counter to the public 24 interest. I understand that. But my question was 25 whether you say that goes further and requires me to</p> <p style="text-align: center;">Page 69</p>	<p>1 very different from me seeking to produce a number, 2 because what concerned me -- and it's that point that 3 I was taking in the very large quotation that you 4 include on the second page of this paper on 13 June 5 2012. That may concern me in having to get to grips 6 with measurement mechanisms and all sorts of competition 7 expertise, which, in the confines of the timeframe and 8 the skill set that is engaged in the Inquiry, may not be 9 the best use of its time -- I put it no higher than 10 that -- which is why I asked the question that I asked 11 you. 12 A. I come back to my answer, which -- again, which is that 13 it may be the best use of Ofcom's time, but Ofcom -- the 14 problem of what Ofcom is being asked to do is a real 15 one. It's coming from the government but the Inquiry 16 has a separate view on what the problem to be fixed is, 17 and the Inquiry has been asked to come up with some 18 solutions, which is why -- I think there are two 19 separate processes here. One is that the government is 20 asking for advice from Ofcom, but if the Inquiry has 21 a different view on what Ofcom should be suggesting and 22 maybe wants to request advice from Ofcom more broadly on 23 what the policy framework might look like, I think 24 that's a feasible one. 25 LORD JUSTICE LEVESON: I think I have asked Ofcom rather</p> <p style="text-align: center;">Page 71</p>
<p>1 say: "I don't think any press interests should be 2 allowed to own more than 10, 15, 20, 25 per cent", 3 however you want to define it. Because that, it seems 4 to me, is the thrust of what you're saying here. 5 A. Where we are in the policy cycle is that it's presumably 6 for you to recommend and for Parliament to -- 7 LORD JUSTICE LEVESON: Oh, I agree about that, yes. 8 A. So my view would that be recommending indicative 9 percentages is where the Inquiry should be. There is 10 a further difficulty, as I'm sure you're aware, which is 11 the nature of the current interplay between the 12 government, Ofcom and the provision of advice. The 13 advice which was provided to this Inquiry by Ofcom is 14 not advice which designs a new system according to any 15 particular criterion. That is because Ofcom regards 16 itself as a non-policy-making body with very little 17 discretion; it is simply answering the narrow questions 18 which Ofcom set for it. 19 So one of the things which it may be possible to do 20 in terms of that provision of advice is ask Ofcom more 21 specifically, and with a clearer set of policy 22 principles in mind, for some more specific advice. 23 LORD JUSTICE LEVESON: Now, that might be true, and I might 24 recommend that that should be done and that might indeed 25 produce a number, if that's the way forward. But that's</p> <p style="text-align: center;">Page 70</p>	<p>1 more broadly. I think I asked a question of them 2 yesterday -- 3 A. But Ofcom needs to be given clearer direction in terms 4 of what the principles on the objectives are. 5 LORD JUSTICE LEVESON: And it may be that I ought to 6 identify principles and objectives, but given that all 7 this is recommendation, as you identify the policy cycle 8 accurately to be, I'm just not sure whether you're not 9 suggesting that I should be jumping two stages ahead of 10 myself and making some assumptions about what Ofcom 11 would say is technically feasible and technically 12 well-balanced in an area where everybody agrees there is 13 no clear metric, there's no magic bullet that solves any 14 of these issues. It requires a number of competing 15 interests to be taken into account which I might not be 16 the best suited to take into account. 17 So question whether I have to leave a rather greater 18 flexibility to push the decision-making along without 19 being definitive or dogmatic. I'm not trying to 20 withdraw from a debate that I ought to be having or 21 making a decision which I ought to make, provided I am 22 the best person to make that decision, because one thing 23 I assure you of: any decision I make outwith my 24 expertise is going to be subject to rigorous challenge 25 by anybody affected by it. Actually, decisions that</p> <p style="text-align: center;">Page 72</p>

<p>1 might be said to be within my expertise are likely to be 2 the subject of rigorous challenge by anybody who 3 disagrees with them.</p> <p>4 I'm happy to take on what I have to take on, but I'm 5 keen to hear your view on my reasons for caution, 6 because I don't want the LSE to be producing a paper 7 headed "A lost opportunity!" Maybe it will.</p> <p>8 A. I think the LSE is the least of your worries.</p> <p>9 LORD JUSTICE LEVESON: I might agree with that, too.</p> <p>10 A. I do completely sympathise and understand where the 11 Inquiry finds itself on this issue, but there is an 12 incommensurability at the centre of this, which is: yes, 13 there are questions of where the technical expertise 14 lies and whether it lies within the scope of this 15 Inquiry and the time it has. I completely appreciate 16 that. But I would also suggest that there is a question 17 here about whether we can sustain the claim that policy 18 making in this area has been demonstrated to be subject 19 to endemic conflict of interest, if politicians have 20 been compromised in relation to individual merger 21 decisions and potentially also compromised in relation 22 to development of policy frameworks in this area.</p> <p>23 So it's a simple point, really, which is whether it 24 is logically consistent to find that politicians are 25 compromised, subject to these conflicts of interest, and</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JAY: In terms of structures, though, Dr Tambini, you are 2 recommending that these decisions are taken away from 3 ministers and conferred instead to an independent 4 regulatory body. That's something which is squarely 5 within the terms of reference, and the reason for that, 6 I think, is fairly apparent from what you've just told 7 us.</p> <p>8 A. The model there is Germany, the KEK, which is a specific 9 body which just deals with media concentration and 10 merger decisions in the media sector and has been seen 11 to be relatively successful. It is an expert 12 commission. Members of the Commission have security of 13 tenure, they have a limited secretariat, and I think 14 that model is worthy of examining.</p> <p>15 I know there's a range of opinion on whether 16 ministers should remain involved in individual decisions 17 on mergers. My view and the view of my co-authors is 18 that they should not; they should be removed.</p> <p>19 LORD JUSTICE LEVESON: Their contrary argument is that this 20 is a question in respect of which they have to be held 21 accountable.</p> <p>22 A. It also relates to -- it's difficult to take different 23 parts of this structure and analyse them individually. 24 It depends. If you have a system of -- with clear, 25 fixed limits and there's less discretion for this</p> <p style="text-align: center;">Page 75</p>
<p>1 at the same time not specify clearly to them some 2 standards and objectives and simply to kick the ball 3 back to them with a very wide discretion.</p> <p>4 I think that if -- I think there's certainly been 5 evidence to suggest that there is this problem with 6 politicians developing policy in this area and anything 7 the Inquiry can do to help them and to narrow the 8 options would be welcome.</p> <p>9 There is a potential other solution, which would be 10 that an organisation, a commission, a civil society 11 involving a commission specifically on media ownership 12 rules to develop more policy in a transparent way over 13 a reasonable period of time and to feed into the 14 Communications Act process could be something that the 15 Inquiry could recommend. You might take the view that 16 that is risky and looks even more like long grass. I'd 17 have to leave that to you. It could be something which 18 is recommended.</p> <p>19 I completely understand the point that plucking 20 figures from the air is not something that the Inquiry 21 feels able to do.</p> <p>22 LORD JUSTICE LEVESON: Yes. Well, the point was slightly 23 wider. It's whether actually plucking figures from the 24 air was something that the terms of reference required 25 me to do. Anyway, we've debated it.</p> <p style="text-align: center;">Page 74</p>	<p>1 Commission, the accountability problem arguably goes 2 away, whereas if you have -- for example, the 3 co-ordinating committee for media reform is suggesting 4 a very interesting model, which is a system of triggers 5 and thresholds. So when you go above the 15 per cent 6 trigger, in effect there is a menu of undertakings, and 7 if you agree to those undertakings, that, in a sense, is 8 a licence for bigness, that public interest obligations 9 are applied to you.</p> <p>10 In that kind of system, you may want some kind of 11 accountability, but even in that kind of system 12 I wouldn't want -- I think we've seen quite dramatically 13 the discretion exercised by ministers in merger 14 decisions and where that gets us. I think that they 15 should be removed from these decisions entirely.</p> <p>16 LORD JUSTICE LEVESON: All right.</p> <p>17 MR JAY: Thank you, Dr Tambini. Those are all the questions 18 I have for you.</p> <p>19 LORD JUSTICE LEVESON: I repeat my thanks, Dr Tambini. 20 There's obviously, as I say, been an enormous amount of 21 work done in these areas and it only underlines the 22 complexity of the issues.</p> <p>23 A. Thank you.</p> <p>24 MR JAY: The next witness, please, is Professor Barnett. 25</p> <p style="text-align: center;">Page 76</p>

<p>1 PROFESSOR STEVEN BARNETT (recalled)</p> <p>2 LORD JUSTICE LEVESON: Professor Barnett, you also have</p> <p>3 given evidence before. Thank you very much indeed.</p> <p>4 Questions by MR JAY</p> <p>5 MR JAY: Thank you. You're a professor at the University of</p> <p>6 Westminster in -- I'm just trying to remind myself.</p> <p>7 Professor of communications. I think you gave evidence</p> <p>8 on 7 December; is that right?</p> <p>9 A. I did.</p> <p>10 Q. Your paper, which starts at page 01560 -- it's tab 93 --</p> <p>11 covers two important but related issues. The first is</p> <p>12 press regulation and secondly combating media</p> <p>13 concentration.</p> <p>14 We heard from Dr Tambini the importance of the</p> <p>15 second issue and how it perhaps bears on the first.</p> <p>16 Standing back from these questions, how much emphasis do</p> <p>17 you place on the second, and to what extent do you feel</p> <p>18 it's responsible for the problem that we've found</p> <p>19 ourselves in with the culture, practices and ethics of</p> <p>20 the press?</p> <p>21 LORD JUSTICE LEVESON: And also, by all means, take</p> <p>22 advantage of the opportunity to comment on the exchange</p> <p>23 that you've just heard to such extent as you feel it</p> <p>24 necessary to do.</p> <p>25 A. Thank you. I would like to take that opportunity.</p> <p style="text-align: center;">Page 77</p>	<p>1 opposition that was desperate to get back into power was</p> <p>2 falling over itself to try and find a way of</p> <p>3 accommodating what they perceived to be the most</p> <p>4 important route to power. And an awful lot of what has</p> <p>5 happened over the last year, I think, falls into that</p> <p>6 category of unaccountable corporate power.</p> <p>7 So that's a long answer to your question of which</p> <p>8 comes first. I'm not suggesting that had we had the</p> <p>9 existing structures of press self-regulation that would</p> <p>10 have been sufficient because dealing with the ownership</p> <p>11 issue would have solved everything, but I do think that</p> <p>12 they are coming at the issue from two different</p> <p>13 approaches and the ownership approach is as important,</p> <p>14 if not more important, than the bottom up. That's the</p> <p>15 top down approach. The press regulation -- the</p> <p>16 mechanics of press regulation, if you like, is the</p> <p>17 bottom up approach, but I would absolutely want to</p> <p>18 emphasise the importance of understanding where</p> <p>19 ownership fits into where we've got to today.</p> <p>20 Which brings me to the exchange that you had with</p> <p>21 Damian. I do not believe it is necessary at all to get</p> <p>22 into the nitty-gritty of numbers, caps, percentages, how</p> <p>23 many newspapers there ought to be, how many media</p> <p>24 organisations there ought to be. I absolutely think --</p> <p>25 and I think this fits with the Inquiry's remit as it's</p> <p style="text-align: center;">Page 79</p>
<p>1 In answer to the question on the sort of chicken and</p> <p>2 egg question, as I tried to make clear in my evidence to</p> <p>3 Module 3, which I've tried to compress for the second</p> <p>4 part of Module 4, I think the concentration of ownership</p> <p>5 issue has been fundamental over the last 30 years in</p> <p>6 producing the kinds of problems and issues that have</p> <p>7 emerged over the last year. I deliberately go back 30</p> <p>8 years and I gave the timelines I say in my Module 3</p> <p>9 evidence.</p> <p>10 There's one sentence from the last paragraph of that</p> <p>11 Module 3 evidence which I'd just like to repeat, because</p> <p>12 I think it answers your question, which is:</p> <p>13 "The danger to democracy of an overly concentrated</p> <p>14 media is not simply in closing down the number of</p> <p>15 potential voices but in the undemocratic exercise of</p> <p>16 corporate power, which, if unchecked, can distort the</p> <p>17 democratic process by wielding too much influence over</p> <p>18 elected governments."</p> <p>19 So for me the first issue is the wielding of</p> <p>20 undemocratic power, corporate power, by organisations to</p> <p>21 whom governments have been in thrall, and one</p> <p>22 organisation in particular, which is News Corporation.</p> <p>23 I also outlined in my Module 3 evidence my own</p> <p>24 involvement, during the 1980s and early 1990s, in the</p> <p>25 Labour Party, where I saw at first hand how an</p> <p style="text-align: center;">Page 78</p>	<p>1 laid down. Notions of plurality, notions of cross</p> <p>2 ownership are absolutely within the remit and I think</p> <p>3 it's perfectly okay, I would have thought, to be able to</p> <p>4 lay down high level principles, high level policy</p> <p>5 principles, and say: "This is what we want in</p> <p>6 a democracy. In a healthy, vibrant, dynamic democracy,</p> <p>7 this is the way Parliament ought to be taking this.</p> <p>8 These are the principles [I've laid out four or five</p> <p>9 which hopefully we can go into in a little bit more</p> <p>10 detail in terms of plurality] but it is up to you,</p> <p>11 Parliament, and you, the regulator, to decide precisely</p> <p>12 how you get to that position."</p> <p>13 So I don't believe personally that the Inquiry needs</p> <p>14 to go beyond the kind of high level statements that</p> <p>15 we've seen in, for example, the 2001 paper on media</p> <p>16 ownership under the Labour government or the 1995 Green</p> <p>17 Paper on media ownership from the then Conservative</p> <p>18 government. They're very good statements of high level</p> <p>19 principle, and for me, that will suffice.</p> <p>20 LORD JUSTICE LEVESON: The problem that Dr Tambini might</p> <p>21 suggest is that that's called the long grass.</p> <p>22 A. Well, if Parliament is so frightened of media ownership</p> <p>23 that it wants to kick it into the long grass, it will do</p> <p>24 that anyway. I don't believe that it's going to be</p> <p>25 persuaded by more detail rather than less detail. If</p> <p style="text-align: center;">Page 80</p>

<p>1 anything, quite the opposite.</p> <p>2 I do believe that this is potentially, for all sorts</p> <p>3 of reasons, a transformative moment in British public</p> <p>4 life.</p> <p>5 LORD JUSTICE LEVESON: I wish people would stop saying that,</p> <p>6 Professor.</p> <p>7 A. But -- and it's a big "but" -- I mean, there are good</p> <p>8 political reasons for saying that, because it's</p> <p>9 a Coalition government, because, if you like, the big</p> <p>10 beasts are clearly, at the moment, lying low, but also</p> <p>11 because -- well, in the sense, there is less of a sense</p> <p>12 of press power at the moment than there has been for</p> <p>13 many, many years. Politicians feel that. Politicians</p> <p>14 feel that. And I think there is a greater sense now</p> <p>15 that it is possible for Parliament to legislate in the</p> <p>16 public interest without fear of a press backlash. I'm</p> <p>17 saying it's better than it was, not that it is absolute.</p> <p>18 LORD JUSTICE LEVESON: Yes. You have to deal with the</p> <p>19 argument that it was always thus. You went back 30</p> <p>20 years. You could have gone back 60 years. You could go</p> <p>21 back to the great media barons of the early part of the</p> <p>22 20th century.</p> <p>23 A. That is absolutely right, and in fact, in many ways they</p> <p>24 were more influential in terms of overall government</p> <p>25 policies, on foreign affairs and domestic issues.</p> <p style="text-align: center;">Page 81</p>	<p>1 notion of corporate power, it's not just about the</p> <p>2 number of -- the diversity of voices and the number of</p> <p>3 voices; it's also about the way in which powerful</p> <p>4 corporations will exploit their media outlets in cross</p> <p>5 promotion, and will use their power potentially to</p> <p>6 pressurise regulators to do the kinds of things they</p> <p>7 want to do.</p> <p>8 The example that's often given -- I've heard</p> <p>9 estimates that last year alone BSkyB sent £1 million in</p> <p>10 legal fees in trying to rebut some of the regulatory</p> <p>11 enquiries that Ofcom were bringing against them, and</p> <p>12 that is one example of how corporate power --</p> <p>13 unaccountable corporate power can be used to generate</p> <p>14 even greater magnitude, even greater power.</p> <p>15 LORD JUSTICE LEVESON: This isn't just a press problem.</p> <p>16 A. It's absolutely not. No, no, no, no. In fact, I would</p> <p>17 say on the contrary. I think if we're talking about</p> <p>18 plurality -- I'm not even making this a News Corp issue.</p> <p>19 The issue of BSkyB within the broadcasting market is</p> <p>20 huge. £6.6 billion was its revenue last year. That is</p> <p>21 almost more than the whole of the BBC, ITV, Channel 4</p> <p>22 and Channel 5 put together, and within the next couple</p> <p>23 of years, projections are that it will be more. That is</p> <p>24 an awful lot. This is without the fact that it's</p> <p>25 39 per cent owned by News Corp, with their control of</p> <p style="text-align: center;">Page 83</p>
<p>1 I think that's right. Ironically, they were probably</p> <p>2 less influential in terms of media policy. But that's</p> <p>3 a historical question, which is debatable.</p> <p>4 LORD JUSTICE LEVESON: I have enough probably wouldn't</p> <p>5 solving that.</p> <p>6 A. Yes.</p> <p>7 MR JAY: May we, Professor Barnett, identify the high level</p> <p>8 principles? We're going to take your evidence out of</p> <p>9 order, if you don't mind, taking the leap that you</p> <p>10 provided us, started with plurality matters. Do we see</p> <p>11 those in paragraph 126 your statement, our page 01563,</p> <p>12 where you focus on six key changes to the current</p> <p>13 regime?</p> <p>14 A. Well, the high level principle -- that's probably too</p> <p>15 grand a title for it. Paragraph 11?</p> <p>16 Q. Mm-hm.</p> <p>17 A. All I say essentially is: why does there need to be an</p> <p>18 intervention in terms of plurality? And the argument</p> <p>19 is: it goes beyond -- and I think this is quite</p> <p>20 important -- the notion of a multiplicity of voices.</p> <p>21 It's not just about dissent or competing voices. There</p> <p>22 are wider cultural issues involved in definitions of</p> <p>23 plurality.</p> <p>24 I've outlined those in paragraph 11, and I think</p> <p>25 it's important to remember -- again, going back to the</p> <p style="text-align: center;">Page 82</p>	<p>1 the national newspaper circulation. That is the kind of</p> <p>2 magnitude that I do not believe would be permitted in</p> <p>3 the United States and probably not in most other</p> <p>4 European countries.</p> <p>5 So you're absolutely right; it is not a press issue.</p> <p>6 It is a plurality issue, and one of the problems that</p> <p>7 Ofcom had -- in fact, the government had -- in deciding</p> <p>8 this public interest test, in the attempted takeover of</p> <p>9 News Corp and Sky, was in trying to find a way of</p> <p>10 saying: "We can't stop this on competition grounds</p> <p>11 because Brussels has already okayed it. We can only</p> <p>12 look at it on plurality grounds." And therefore Sky</p> <p>13 News became the bone of contention, and actually, for</p> <p>14 all sorts of reasons, Sky News, within that</p> <p>15 organisation, is quite small and is probably the best</p> <p>16 thing to have emerged out of BSkyB anyway.</p> <p>17 Sorry, that's a slight divergence, but I just wanted</p> <p>18 to emphasise the importance of saying plurality</p> <p>19 certainly goes beyond newspapers.</p> <p>20 Shall I come back to your paragraph 12?</p> <p>21 Q. No. Can we stay on paragraph 11. I just want to</p> <p>22 understand the separate parts of it. The reference to</p> <p>23 embracing the wider cultural environments; can we be</p> <p>24 clear what you mean by that?</p> <p>25 A. I think it's very important to think about -- where do</p> <p style="text-align: center;">Page 84</p>

<p>1 ideas -- we're not just talking about political issues 2 or political argument. It's the notion of ideas. How 3 do ideas circulate? Where do they come from? Very 4 often, particularly given the power of television, which 5 is still very strong in this country, they come from 6 powerful drama, they come from powerful situation 7 comedies, they come from political satire. Those in 8 turn will often reflect the corporate entity where they 9 came from.</p> <p>10 Again, in my Module 3 evidence, I talked about the 11 seminar a few years ago where someone who had done a lot 12 of work for Disney talked about the Disney values. The 13 way in which you pitch to Disney is very much contingent 14 on what you know Disney is expecting, which is around 15 family values and something that's sort of nice and 16 cuddly, whereas -- and again, in my Module 3 evidence 17 I talked about when Rupert Murdoch started the Fox 18 network -- not Fox News, but the Fox network in 19 America -- he introduced a couple of programmes that 20 were significantly more graphic and more violent than 21 American television watchers had been used to before, 22 and one of his biographers, William Shawcross, said in 23 many ways he was doing for American television what the 24 Sun had done for British newspaper readers in the UK. 25 That, again, is an example -- one was a current affairs</p> <p style="text-align: center;">Page 85</p>	<p>1 in order to ensure that the Coms Act got through 2 Parliament. That's the history of it. And yet here we 3 are, ten years later, going through it word by word 4 saying, "Which bit shall we keep? Which bit shall 5 we ..."</p> <p>6 The answer is -- and here, again, we come to my view 7 of where the Inquiry might best go on plurality, is to 8 say: this is not fit for purpose any more. We don't 9 want a last-minute amendment to one Act based on another 10 Act to do the job of plurality. We want Parliament to 11 think about what it wants, what it means by plurality, 12 and start with the new Coms Act, which -- there'll be 13 a White Paper next year, by saying, "This is what we 14 want. Let's sweep away what we have so far and 15 legislate accordingly."</p> <p>16 So personally, I would not want to make any 17 amendments to the Enterprise Act. I would want to get 18 rid of it and start again.</p> <p>19 Q. Yes, but the new statute then which replaces the 20 Communications Act and the Enterprise Act --</p> <p>21 A. What should it say?</p> <p>22 Q. -- what should it say? We would need a conception of 23 plurality then which wasn't limited to plurality of 24 views in newspapers but went much wider.</p> <p>25 A. Yes.</p> <p style="text-align: center;">Page 87</p>
<p>1 programme, one was a reality type programme -- of 2 programmes which emanated from a particular corporate 3 ethic or philosophy.</p> <p>4 So I do think it's important that we bear in mind 5 the -- whether it's the editorial content of newspapers 6 where news stories come from, whether it's the 7 commissioning strategies in drama or comedy, that 8 ultimately many of these things will come from a kind of 9 a corporate ethic.</p> <p>10 Q. Are you proposing then an amendment to the statute which 11 will not just look at plurality of views, which is the 12 test in the context of newspaper mergers -- is there 13 sufficient plurality of views? -- but we would also be 14 considering much sort of softer concepts which relate to 15 the wider cultural environment that you are discussing 16 here? Is that the way you envisage it?</p> <p>17 A. Well, what I envisage is sweeping away the 18 Enterprise Act, that provision, sweeping away that 19 provision of the Communications Act, because, as I've 20 explained here, they were last-minute fixes.</p> <p>21 I think it's interesting that we get into quite -- 22 for obvious reasons, quite legalistic discussion about 23 the wording of these statutes which were, with all due 24 respect to the Parliamentarians at the time, actually 25 drafted very, very quickly, in a matter of a few days,</p> <p style="text-align: center;">Page 86</p>	<p>1 Q. That would be the starting point?</p> <p>2 A. That would be the starting point. In fact, there is 3 a very good paragraph in the DCMS consultation on media 4 ownership rules in 2001, which, for me, encapsulates 5 where we come from, where it says different media 6 companies produce different styles of programming, 7 et cetera. "A plurality of approaches adds to the 8 breadth and richness of our cultural experience."</p> <p>9 I think I would want to look at something which 10 talks about a plurality of approaches, a plurality of 11 voices but also encapsulates the idea of minimising 12 corporate power in too few hands. So it wouldn't just 13 necessarily be limited to news or voices of dissent. It 14 would encapsulate those concepts of cultural experience 15 and power.</p> <p>16 As I say, as a high level principle -- please don't 17 ask me to give you a draft of a statute, because --</p> <p>18 Q. No, no.</p> <p>19 A. But I think it's possible to do, and if you -- if you go 20 back to where Ofcom gets its authority from, there is 21 a high level principle in the Coms Act which defines 22 what Ofcom is, which is to promote the interests of 23 consumers and citizens. It's very wide-ranging, very 24 broad. Some of us had to fight very hard to get the 25 word "citizens" in there in the first place. But now</p> <p style="text-align: center;">Page 88</p>

22 (Pages 85 to 88)

<p>1 Ofcom draws on that for its authority in a huge amount 2 of what it does, certainly in broadcasting and telecoms, 3 and I think it's possible to start with something 4 equally wide-ranging on ownership and plurality. 5 Q. Thank you. May we move forward now to paragraph 12, 6 where you identify your proposed six key changes to the 7 current regime. Can I ask you, first of all, to explain 8 the first one: 9 "Discretion for initiating an inquiry should be 10 shared by both the Secretary of State and by Ofcom." 11 A. Yes. This was a recommendation -- I advised the 12 House of Lords Select Committee on media ownership in 13 2008 and this was one of the recommendations that came 14 out of that report, which is: quite simply at the 15 moment, it is at the -- solely at the discretion of the 16 Secretary of State whether there is a public interest 17 case at all. So had -- and in fact, on the most recent 18 case, had Dr Cable felt that there wasn't a case to 19 answer, as I believe his initial response was, he would 20 simply have said that merger can go through, and Ofcom 21 would have had no say, nor would the Competition 22 Commission. 23 So rather than remove it entirely from the Secretary 24 of State, I think it's important to allow some political 25 discretion. It could be jointly held so that if the</p> <p style="text-align: center;">Page 89</p>	<p>1 lobbying, conversations that are done between members of 2 congress and lobbyists or people acting on their behalf 3 has to be in the public domain. Everything has to be 4 recorded. Every conversation, every phone call, every 5 meeting is logged. And there are very strict sanctions 6 if these are not followed. 7 I think members of the public, let alone the rest of 8 us who have been involved in this for some time, were 9 quite stunned when that stream of text messages emerged 10 through -- giving us an insight into what was going on 11 during that sort of merger process. 12 I think you're absolutely right. I think if there 13 was some provision made -- and it would have to be very 14 strictly enforced and scrutinised, and I think there 15 would have to be a shift in the culture, which is 16 clearly what has happened in America, to ensure that it 17 is properly observed. If it was properly observed, 18 I think that would go a long way to solving some of 19 these issues. 20 LORD JUSTICE LEVESON: Yes, it couldn't be sidestepped by 21 saying a mobile phone conversation is okay. 22 A. Precisely, absolutely, and participants would have to 23 know that there would be severe sanctions if any of this 24 turned out to have been done in secret. 25 MR JAY: The second principle: <p style="text-align: center;">Page 91</p></p>
<p>1 regulator feels there is a case, it too can unilaterally 2 initiate a public interest inquiry. 3 LORD JUSTICE LEVESON: Unilaterally initiate it or -- 4 somewhere between the two would be to say that if Ofcom 5 were concerned, it could publicly invite the Secretary 6 of State to do so, and then if the Secretary of State 7 didn't want to, there would have to be explained 8 reasons. I'm not promoting it; I'm merely asking you 9 the range. 10 A. Yes, that would be an option, and I think Parliament 11 would probably prefer that option. I still would worry 12 about the way in which that discretion might be used, 13 given, as we've heard so many times, the reluctance of 14 politicians to take on media companies. 15 LORD JUSTICE LEVESON: I understand that, but one of the 16 principles which it seems to me emerges from Module 3 is 17 that a number of the concerns that have been 18 articulated -- very forcibly -- can be addressed, at 19 least in large part if not entirely, by rather more 20 openness and transparency, as indeed has started. 21 A. I think that is absolutely right, and it was very 22 interesting when I went with the Lords delegation to 23 Washington and we talked to -- I think they're called 24 the Centre for Public Integrity -- about the way in 25 which it works in America and any kind of transactions,</p> <p style="text-align: center;">Page 90</p>	<p>1 "Greater flexibility is required in the 2 circumstances which might trigger such an investigation, 3 including organic growth to a point which is deemed to 4 threaten diversity of voice." 5 I think you're not favouring here the recommendation 6 which Ofcom proposes, namely that there should be 7 periodical reviews after four or five years. Instead, 8 discretionary reviews by Ofcom if certain thresholds are 9 met. Have I correctly understood you? 10 A. Yes. I'm not -- yes, I think that's right. I was 11 slightly worried by the Ofcom -- every four or five 12 years is a long gap in between periodic reviews, and 13 I think there would need to be more of a watching brief. 14 I wouldn't mind a combination of the two. A review 15 every, say, three years, combined with a watching brief 16 that -- where there were clear potential triggers, like 17 exceeding what I would call a soft cap in revenues. 18 I think I say further on that I'm -- no, I don't say it 19 here; I say it somewhere else. I'm actually quite keen 20 on the Claire Enders idea of revenue caps, but not hard 21 caps so that as soon as you cross a threshold, that's 22 it, you're caught. It then triggers, as with the CCMR, 23 the media reform recommendations -- it triggers 24 potential obligations and responsibilities. 25 I think it's possible to have a combination of the</p> <p style="text-align: center;">Page 92</p>

23 (Pages 89 to 92)

<p>1 two: periodic reviews and triggers which are, if you 2 like, soft triggers. So there are warnings, there are 3 alerts. 4 Q. You deal with this in paragraph 14. You do mention -- 5 A. I do. 6 Q. -- the Enders proposal of caps, but you're not regarding 7 those as strict limits; you're suggesting if the cap is 8 overtopped, then there must be a review and the review 9 will then take into account the statutory criteria, 10 which we'll see in our new Communications Act. 11 A. Absolutely right, yes. 12 Q. Which isn't quite -- the Enders proposal, I think, is if 13 you overtop the cap, you're then divested to bring you 14 to a point just below the cap. From my understanding -- 15 A. I think that's right, although I think Claire slightly 16 softened her position in evidence. But that's the idea 17 as written and I would go -- I wouldn't go quite as far 18 as -- I think it needs to be a flexible system because 19 of the reasons around sustainability and the economic 20 problems that we've heard so much about, which are real. 21 Q. Can I ask I, please, about the sixth of the principles, 22 because the others I think are clear enough: 23 "The final decisions on divestments, conditions and 24 mitigations when contemplating greater media 25 consolidation should not be left to government</p> <p style="text-align: center;">Page 93</p>	<p>1 a point where that authority needs to be delegated to an 2 appropriate regulator, which would obviously be Ofcom. 3 There then needs to be some kind of accountability 4 mechanism, and that's why I'm suggesting something like 5 a mandatory meeting of the CMS Select Committee, 6 a bit -- as happens now with the Channel 4 and the BBC 7 annual reports. They both have to be presented to the 8 Culture, Media and Sport Select Committee, and I think 9 something like that, to ensure that there is a measure 10 of accountability, would be appropriate. 11 Q. Yes. Your sixth point, on the next page, a more 12 explicit recognition of why pluralism is integral to 13 democracy. Are you expecting there that the statute 14 would reflect these policy objectives? 15 A. Absolutely. And again, this comes back to the rewriting 16 of the statute, and I've indicated here how both the 17 Office of Fair Trading and again, the House of Lords 18 Select Committee both separately recommended that some 19 kind of reference to the importance of news-gathering 20 could and should be written onto the face of an Act. 21 Again, I think we've heard over the last few months that 22 for all the proliferation of online and blogs and new 23 media, the pressure on original journalism on actually 24 going out, finding facts -- accountability journalism, 25 investigative journalism -- is -- the pressure is more</p> <p style="text-align: center;">Page 95</p>
<p>1 ministers. Authority should be delegated to Ofcom with 2 appropriate accountability measures." 3 So -- 4 A. Sorry, which paragraph are we on? 5 Q. Sorry, it's the fifth bullet point. I'm terribly sorry. 6 A. Okay. 7 Q. The bottom of this page. 8 A. Yes. 9 Q. So you accord less weight to the notion that these 10 decisions, owing to their importance, should be left in 11 the last analysis to those with democratic 12 accountability? 13 A. I do, with some reluctance. In fact, the Lords Select 14 Committee in 2008 decided for that very reason -- 15 reasons of democratic accountability -- to leave the 16 final decision in the hands of the relevant minister. 17 I think we've seen what problems occur when you do that, 18 and I think at one point Jeremy Hunt himself said he 19 would be quite happy for this to be taken away from him 20 and be taken by someone else. 21 So I think there is a -- given the amount of 22 pressure that ministers/governments feel to try and 23 accommodate the wishes of media organisations, and the 24 importance of keeping media organisations on side in 25 terms of electability, it seems to me we've now reached</p> <p style="text-align: center;">Page 94</p>	<p>1 than it's ever been before, and while I previously -- 2 you know, I emphasised the wider culture environment, 3 I think it would be also be important to have 4 a recognition of the importance of original 5 news-gathering. 6 Q. The statute merely says the importance of journalism in 7 the public interest. 8 A. I think that's -- 9 Q. That would capture the -- 10 A. Absolutely, absolutely. And, of course, there could be 11 further guidance issued by the relevant departments 12 after that, but you're absolutely right. 13 Q. Can we be clear on your underlying philosophy: the nexus 14 between concentration of economic power and lack of 15 accountability and a deleterious impact on the 16 democratic process -- in other words, influence on 17 politicians -- that is all clearly understood, but are 18 you saying as well that there is a similar sort of nexus 19 between concentration of economic power and unethical 20 practices, or do unethical practices flow from some 21 other systemic or underlying problem? 22 A. No, I think that there is a direct connection. There is 23 this notion of -- and I think we've seen some evidence 24 of it over the last few months -- almost a sense of 25 untouchability by virtue of having that economic power.</p> <p style="text-align: center;">Page 96</p>

24 (Pages 93 to 96)

<p>1 As I said, it's an economic power that translates itself 2 in terms of relationship with the regulator, with 3 employees -- we've heard evidence of that, I think -- 4 and with governments. But I think there is a direct 5 relationship to the culture and practices and ethics, in 6 the sense that if you think you can get away with 7 things, you're more likely to try them.</p> <p>8 Q. Thank you. That's clear. Paragraph 13. I think you're 9 suggesting here a series of behavioural remedies which 10 may be preferred in the right circumstances to 11 divestment or fire sales, as you describe them.</p> <p>12 A. Yes, that's exactly --</p> <p>13 Q. Is that a fair summary?</p> <p>14 A. That's exactly right, yes. I think the notion of 15 divestment is -- it would be perverse, in an environment 16 where we want to encourage more news outlets, to say 17 that essentially someone -- an organisation that has 18 successfully -- is so successful that it's growing 19 should actually lose one of its news outlets would seem 20 to me to be perverse, but we need to understand the 21 rationale behind it and then mitigate the problems that 22 emerge.</p> <p>23 That's not to say that there shouldn't, in extremis, 24 be divestment as a sort of nuclear option. If we reach 25 a situation where one media owner has, let's say,</p> <p style="text-align: center;">Page 97</p>	<p>1 whoever -- take the view that plurality is being 2 affected, it could instigate an investigation which 3 could be resolved by the acceptance of undertakings in 4 lieu. In other words, we're not specifically requiring 5 or mandating by law that you do A, B, C, D, but if you 6 want to stop us doing something which you certainly 7 don't want us to do, then you have to show us how you're 8 prepared to make use of your influence and power in the 9 public good.</p> <p>10 A. Yes. I think that's right at the outset. There would 11 then be the ongoing issue of continuing enforcement.</p> <p>12 LORD JUSTICE LEVESON: Oh yes.</p> <p>13 A. So you can use the stick, saying, "We're not going to 14 let you carry on doing this or owning these media 15 outlets unless you commit to doing X, Y and Z." There is 16 then a commitment to do X, Y and Z, which, a year later, 17 is breached or the investment stops or they leave the 18 self-regulatory body or whatever.</p> <p>19 This was precisely the problem with the UIs with 20 News Corp and Sky, because an awful lot of us who were 21 asked to comment in the consultation simply did not 22 trust News Corp to stick by the commitments that they 23 were making in guaranteeing Sky's independence.</p> <p>24 LORD JUSTICE LEVESON: But the answer to that is some form 25 of audit, annually or whatever.</p> <p style="text-align: center;">Page 99</p>
<p>1 approaching 50 per cent of the national newspaper 2 market, that would clearly be a realistic option. But 3 before we get to that point, I think there are clear 4 obligations that can be imposed in mitigation.</p> <p>5 Q. I've been asked to raise this with you: how do you think 6 these behavioural remedies can be effectively 7 implemented and enforced?</p> <p>8 A. Well, I think this comes back, I suppose, to the whole 9 kind of Module 1 issue about the mechanics of press 10 regulation and how you implement them. I think I said 11 in the first bit of my evidence that I was on the 12 steering committee of the Media Standards Trust for its 13 report and I think that proposal for a backstop 14 independent auditor and self-regulatory bodies seems to 15 me to provide the ideal framework for being able to work 16 through some of these obligations. You say: you have to 17 belong to one of these bodies, it will be enforced 18 through some kind of backstop statute or auditor or 19 regulator, and that regulator will ensure that the 20 following obligations are observed.</p> <p>21 LORD JUSTICE LEVESON: You don't need to go quite that far 22 for this, because if you are seeking participation or 23 a willingness to undertake the activities which you set 24 out in paragraph 13, one of the ways you could simply do 25 it is by saying: well, if the authority -- Ofcom or</p> <p style="text-align: center;">Page 98</p>	<p>1 A. Yes. Yes, undertaken by the regulator and with a clear 2 threat of sanctions which is implementable if there is 3 a breach.</p> <p>4 LORD JUSTICE LEVESON: And that's nothing to do with 5 restricting free speech at all.</p> <p>6 A. It's the process. That's absolutely right. It comes 7 back to -- as I often do, it comes back to Baroness 8 O'Neill's distinction between corporate speech and 9 individual free speech, between process and content. So 10 you don't touch the content, but you do legislate on the 11 process.</p> <p>12 MR JAY: Shall we break for lunch?</p> <p>13 LORD JUSTICE LEVESON: Yes, we will break, but before 14 I break, it's obvious that you've given considerable 15 thought to what a new statutory provision would look 16 like, and doubtless through the various committees that 17 you've advised, thought was given to what it might say. 18 If you have any views as to that and to the language 19 that might be used that you want to share with the 20 Inquiry, I'd be very interested to see it. I'm not 21 saying any commitment, but you've articulated, in 22 language which is clear but not confined, the precision 23 that would be necessary for legislation. I'm not 24 suggesting that you now embark upon three months' work, 25 but if you do have any ideas on that, I would be</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 interested to see it. 2 A. I will work on that. 3 LORD JUSTICE LEVESON: Thank you. Right, 2 o'clock. 4 (1.01 pm) 5 (The luncheon adjournment) 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 101</p>	
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