The Leveson Inquiry into the Culture, Practices & Ethics of the Press

Witness Statement by Francis FitzGibbon QC

1. I make this statement in reply to a request issued on behalf of Lord Justice Leveson, in a letter dated 30th January 2012 by Sharron Hiles, senior assistant solicitor to the Inquiry into the Culture, Practices & Ethics of the Press.

Who I am

2. I am a QC and a member of Doughty Street Chambers in London. I have been in practice at the Bar since 1986 and was appointed QC in 2010. My practice is in criminal law, and since 2003 I have sat as a fee-paid (part-time) Judge of the First Tier Tribunal (Asylum & Immigration Chamber), hearing appeals in asylum, immigration and deportation cases. I co-authored *A Practitioner's Guide to the Law and Regulation of Financial Crime* (Sweet & Maxwell 2011) and have been an occasional contributor to the *Solicitors' Journal*.

Q. 1: What material my website 'Nothing Like the Sun' publishes, and why

3. The title 'Nothing Like the Sun' is a quote from Shakespeare's Sonnet No. 130 ('My mistress' eyes are nothing like the sun…'). It was intended to indicate that the blog (i) would bear no resemblance in style, content, tone, or political orientation to the tabloid press and (ii) might offer unexpected views on familiar-seeming matters, as the poem does by up-ending conventional forms of flattery. The subtitle of the blog describes it as an '*occasional blog on legal and other matters that interest me*', and it sums up what I write on the blog.

4. I set the blog up in July 2011, having recently begun to use Twitter, where I found a lively group of tweeters who are lawyers, legal academics, legal journalists or writers, students, police officers, or people who just have an interest in legal matters. They frequently share information in the form of case reports, or commentaries. Many of them contribute to blogs or have their own.

5. I have long thought that the mainstream media, with some honourable exceptions, routinely misunderstand or actively misrepresent the legal process. Caricatures of

out-of-touch Judges, greedy and immoral advocates, and gross oversimplifications of cases and decisions are the staple. The web provides much better sources of information about the law than are to be found in the mainstream media.

6. There are many legal blogs, with a variety of characteristics. Some are very learned and go into particular issues in great detail. I would single out barrister Adam Wagner's 'UK Human Rights Blog' (http://www.ukhumanrightsblog.com/), published in collaboration with his Chambers at 1 Crown Office Row, and 'UKSC blog' (http://ukscblog.com/), edited by a group of senior solicitors and barristers, which analyses decisions by the Supreme Court. Their intent is serious and they are informative and professionally organized.

7. Some put up more personal posts about their experiences. Others write about their own particular areas of law. Others aggregate legal news stories from a variety of sources, with little or no comment. The Guardian's website has a useful collection of UK and international legal blogs under 'The Guardian Legal Network' (http://www.guardian.co.uk/law/series/guardian-legal-network).

8. My blog is not associated with my Chambers, and I am the only contributor to it. Its format comes off-the-peg from Wordpress.com, a website that enables anyone to set up a blog at no expense. I began to write with no particular expectation that anyone would take an interest in what I had to say, but largely for my own satisfaction. I do not set out to be scholarly, but rather to give what I hope is a readily comprehensible account of legal issues which have come to public attention (and about which I have some knowledge), sometimes with a critique, and my personal views where appropriate. It is not aimed specifically at lawyers. I have a particular interest in the criminal justice system, human rights, and asylum and immigration issues. There seems to me to be space for informed discussion of these matters in an accessible form, which avoids oversimplification and yet does not get bogged down in excessive detail. 'Discussion' includes oral discussion, and I have also taken part in a regular legal podcast called 'Without Prejudice' which is run by Mr Mike Semple-Piggot (a former law lecturer and full-time legal blogger). Its format is a panel discussion on matters of current interest, not unlike the BBC Radio 4 programme 'In our Time'.

9. Things I have written about include

- Professor Dawkins's view about jury service
- the Abu Qatada litigation
- the ending of the Forensic Science Service and forensic evidence in general
- the law of joint enterprise
- the returning to Afghanistan of children whose asylum claims have failed
- Section 5 of the Public Order Act 1986
- Deterrent sentences
- Article 8 of the European Convention of Human Rights
- The August 2001 riots

10. The site has had over 3750 hits since it started. A number of people have commented on my posts, some critically, most favourably. I have also contributed articles to an online legal magazine, The Justice Gap (http://thejusticegap.com), which aims to promote access to justice and explain legal issues to non-lawyers. I receive no payment for any of this.

Q.2 Where are my servers located? Do I consider that the UK courts have jurisdiction over the way my website is operated in the UK, and how far does this jurisdiction extend?

11. I do not know where the servers are located. I am sure that the UK courts have jurisdiction over me, if not over them if they are abroad. If a court ordered me to stop publishing I would. But as with any on-line information, once it is out it is extremely difficult for a Court to prevent its dissemination in the hands of others who may or may not be within the jurisdiction. Please see answer to Q.5.

Q. 3 How do I source stories, etc

12. My blog does not deal with 'stories' in the sense of news stories, giving facts that have not been previously generally known or published. It is a commentary on facts and stories already in the public domain, and typically comes from official reports of legal cases, or (appropriately anonymised) cases of which I have direct knowledge, or legal issues more generally. I take responsibility for the factual accuracy of what I write. I reference sources such as law reports or official documents with hyperlinks, so that an interested reader can easily look further into the issues under discussion.

Q.4 The extent to which I am aware of the sources of information

13. See answer to Q. 3

Q.5 The extent to which I consider that ethics can and should play a role in the blogosphere

14. This is a huge question and probably calls for the skills of a social psychologist and a philosopher for a really informative answer, but these are my views: there is no reason to consider that the 'blogosphere' is or should be an ethics-free zone. The term 'blogosphere', and the phenomenon it describes, has generated a mystique that it does not merit. It is a part of human life and therefore demands normal standards of behaviour, and has them (at least in the small part of it that I am familiar with). Its distinctive property is the ability for large numbers of people to communicate simultaneously and instantaneously. There is no good reason to abandon the rules that govern normal civilised human behaviour when communicating on-line, including obeying the law. No one could sensibly claim that participation in the 'blogosphere' relieves us of all the moral and ethical obligations which we apply in the rest of our lives.

15. It is of course capable of being anarchic because with no effective enforcement of ethics, individuals can behave badly without sanctions. Some do. But bad behaviour is not endemic. Serious abuse of the internet can be remedied by criminal and civil law. On-line sex offences, inciting public disorder, hacking, and other criminal activities are detected and punished. The recent closure of the overtly libellous 'Solicitors from Hell' website shows that the civil courts can take effective action too. But even where legal sanctions are unavailable, it is difficult for a blogger to behave badly without censure. Because interactions are public, there can be little or no secrecy, so any piece of behaviour which arouses disapproval will be exposed. Without being naïve, I think that the prospect of instant and forceful censure may discourage at least some people from behaving unethically.

16. Until doing some background reading in preparation for this Statement, I was not aware of the 'Blogger's Code of Conduct', originally proposed by Mr Tim O'Reilly (of O'Reilly Media, a large US software developer and publisher). The Code of Conduct suggests that those engaged in blogging or social media should:

1. *Take responsibility not just for your own words, but for the comments you allow on your blog.*
2. *Label your tolerance level for abusive comments.*
3. *Consider eliminating anonymous comments.*
4. *Don't feed the trolls (ie do not respond in public to people who post inflammatory or inappropriate messages)*
5. *Take the conversation offline, and talk directly, or find an intermediary who can do so.*
6. *If you know someone who is behaving badly, tell them so.*
7. *Don't say anything online that you wouldn't say in person.*

17. So far as it goes, this appears to me to be a sensible starting point for the conduct of public discussion on the web, whether in a blog or another form of social media.

18. A further difficulty is how to assess the weight of on-line bad behaviour that falls short of criminal or tortious conduct. The potential reach of anything published on-line is huge, but the actual number of people who see it may be minuscule. As in ordinary life, it is reasonable to expect a degree of robustness against slights and insults.

19. I would not go so far as to say that all those who enter the blogosphere do so at their own peril, but it is far from unique as a potential source of harm; and unlike the conventional media, it allows for instant comment and rebuttal. I cannot conceive of it being used to channel murderous propaganda with any success (as did newspapers in Hitler's Germany, or radio broadcasts in Rwanda in the 1990s), because other voices would intervene immediately.

20. In a pluralist and open society we have to tolerate many things that we dislike or find offensive, if no for other reason than because the alternative – suppressing them – is worse. The blogosphere may have its fair share of cranks and mischief-makers, but their exposure to criticism should reduce the real harm that they can do. They are no more representative of the whole of the blogosphere, than the unethical practices of parts of the printed media are: those practices, despicable though they are, do not mean that newspapers in general are innately corrupt.

21. The area of the blogosphere with which I am familiar shows that it can be used to inform and educate, and generate debate about important issues. I recognise of course that not all blogs and social media content are high-minded, and there are many out

there that would give serious and justified offence, but yet fall outside the jurisdictional or substantive reach of the law. But for the reasons given in answer to Qs 8 & 9 below, I do not see how a system of universal regulation could remove them or give redress.

22. The criminal law already has a specific sanction for 'improper use of a public electronic communications network' under Section 127 of the Communications Act 2003:

> *(1) A person is guilty of an offence if he—*
> *(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or*
> *(b) causes any such message or matter to be so sent.*
>
> *(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—*
> *(a) sends by means of a public electronic communications network, a message that he knows to be false,*
> *(b) causes such a message to be sent; or*
> *(c) persistently makes use of a public electronic communications network.*
>
> *(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.*
>
> *(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).*

23. I understand that the scope of this provision is due to be tested in February 2012 by the High Court in the case of **R v Chambers** (the 'Twitter joke' trial). A key issue is likely to be whether the offence is one of strict liability.

Q. 6 Do I have any policy re complaints?

24. No. The blog carries a 'comment' section for readers to add their views about what I have written (which are moderated before they appear). I am not an expert in the law of defamation but I am familiar enough with the general principles to apply them if ever I were to write something potentially libellous. I welcome corrections to factual errors. Readers are free to debate the points that are made in the posts. I would not expect the sort of thing that I write to risk defaming anyone or intruding on their privacy.

Q.7 Do I consider myself to be regulated?

25. Yes, in three ways: (i) by the law; (ii) by my professional code of conduct; (iii) by the self-regulation that is inherent in the blogosphere, referred to in paras. 13-17 above.

Q.8 Domestic system of regulation

26. The question as put is practical: whether the content of websites 'can' be regulated, not whether it ought to be. The ready availability of free platforms such as Wordpress, as well as bespoke paid-for websites, would frustrate any system of regulation. There is simply too much content. It would require a vast range of resources to monitor it. According to Wordpress.com's statistics (http://en.wordpress.com/stats/), it publishes a total of about 400,000 posts every day, of which 66% are in English. 100,000 new blogs are created every day. A breakdown by country is not given. The content will be hugely diverse. Tumblr, another large social networking and blogging site, claims to host over 43,000,000 blogs worldwide (http://www.tumblr.com/about).

27. Unless there were a system of registration for every blogger, and a sensible definition of just what came within the system's jurisdiction, a national regulatory system could never cover all blogs. And even if that could be achieved, enforcement of sanctions would be near impossible. I could simply close my blog and start another one somewhere else, or operate anonymously and untraceably. The models of effective control of across-the-board internet content, typically by blocking access to selected websites as in China, Burma, Iran, Cuba, and Syria, are not compatible with our right to free expression – and even they cannot entirely suppress it. On the other hand, an ineffective system is pointless. I don't think that regulation of the whole blogosphere by anything less than out-and-out censorship would have a chilling effect on free expression – it would have no effect; and the effort required would be out of all proportion to the good it would do.

28. Different considerations may apply to blogs that are run or adopted by other media outlets. There is no reason why the on-line content generated or aggregated by newspapers should not fall under the same regulation as the papers' print content, as it does at present. That would place an onus on the newspaper to ensure that the

external content which it promoted complied with the requirements of a regulatory code of practice.

29. A blogger who wanted the additional readership that would flow from association with a large media outlet would be deterred from bad online behaviour by the threat of exclusion if the content breached the code of practice.

30. Bloggers such as barristers who are subject to professional codes of practice face disciplinary proceedings if they breach their professional rules. A current example is the disbarring of a barrister who communicated on Twitter under the name of '@geeklawyer'. He insulted an opponent in offensive and puerile terms on Twitter and was found guilty of 'disgraceful behaviour' and (for that and other reasons) to have brought the profession into disrepute (The Daily Telegraph, 30th January 2012).

Q.9 Should victims of bad blogging be able to seek redress

31. I cannot offer a definition for 'victim', or 'bad blogging' that falls short of what is included in Section 127 of the 2003 Act. But because I believe that what appears in blogs is subject to the law, it follows that some one who has been defamed or whose privacy or confidentiality has been breached in a blog, should have the same redress as if they had been wronged in the conventional media. Whether the laws of libel, privacy and confidentiality are correctly balanced against free expression is a separate issue, but in principle the same standards should apply across different media. Likewise, a blogger who commits a criminal offence on-line is and should be answerable to the criminal courts just as much as if the offence is committed elsewhere.

32. I do not think that there is a special class of behaviour, unique to on-line communications, which is not proscribed by law, and which calls for a remedy that is not available to people who feel aggrieved by conduct in the physical world.

Q.10 Does/can blogging act as a check on bad journalism

33. Blogging can remedy bad journalism by directly rebutting inaccurate or misleading reporting. A clear example in the UK was the on-line exposure of the poor journalistic practices of Mr Johann Hari of the *Independent* newspaper by Mr David

Allen Green in his 'Jack of Kent' blog, about which the Inquiry has already received evidence. Another example is the rebuttal by UK Human Rights Blog (see above) of misleading coverage in the Daily Mail about the number of cases which the UK loses at the European Court of Human Rights: http://ukhumanrightsblog.com/2012/01/12/uk-loses-3-out-of-4-european-human-rights-cases-more-like-1-in-50-actually.

34. While a certain amount was at stake in these cases, the true potential of blogging and social networking as a corrective to bad reporting could be seen during the Libyan and Egyptian uprisings, where blogs and tweets by private citizens rebutted the propaganda of the governments through state-controlled media. In 2010, Index on Censorship gave Twitter an award for freedom of expression, specifically for its use in the Iranian elections in 2009, where it enabled opposition supporters to communicate freely while other forms of communication, including news outlets, were censored.

35. The ability to self-publish gives well-informed individuals or groups the opportunity to correct errors and falsehoods in the mainstream media rapidly. Whether this deters bad journalism is perhaps more doubtful, but at least it gives a platform for reasoned argument that anyone can access. Many if not most mainstream journalists have an on-line presence and have more and more interactions with the 'blogosphere'.

36. The openness of the internet permits unlimited participation in a 'story' or report that appears in a blog, or in another on-line platform. This openness redefines what is meant by reporting. While a newspaper may filter (for example) accounts of a particular incident from members of the public through a single reporter or a small team, anyone who was present (or who is witnessing events in real time) can report them. An instance of this can be found in the use of social networking during the August 2011 riots – not the use of Blackberry Messenger to gather rioters and looters – but the use of Twitter and Facebook to organise cleaning up in the immediate aftermath. Large numbers of people were generating and publishing the 'story' as it happened.

37. The quality of the product will inevitably be uneven. But as a matter of principle, there is no reason to think that at its best it should be inferior to the best news-gathering by traditional media. The openness of the internet and the availability of

instant rebuttal make it less likely that lies, distortions and inaccuracies of the kind with which this inquiry has been concerned, will go unchallenged.

38. The vast choice of material that is available online (in blogs or in general) may at first appear overwhelming. But as familiarity increases, it becomes possible and straightforward to choose what type material to read, and to be selective about the sources. As it enables participation, it also encourages the user to edit what he or she reads.

Q.11 Other matters under the Inquiry's Terms of Reference

39. I think it's important not to regard the 'blogosphere' as an alien world which has no respect for law or the norms of civilized behaviour. While it offers everyone a soapbox from which to propagate their views, it cannot guarantee that anyone will listen or take notice. There will of course be people who abuse the opportunities it gives, but there is no reason to think that all such abuses will go unchecked either by law or by other internet users.

40. Internet communication generally, and self-publishing in particular, represent a huge advance for freedom of expression for people who do not have access to mainstream media, or whose interests and views are unattractive to those media, for commercial or other reasons. There will inevitably be much dross, but there is no compulsion to give the dross any attention. But there is much to be found that has real value and adds to public understanding of important and topical issues.

Francis FitzGibbon QC

3rd February 2012