LEVESON INQUIRY

Witness Statement of

Jeremy James Waldron (b. 1953, Invercargill, New Zealand). Currently resident at [redacted]

1. Who you are and a brief summary of your career history.

I am Professor Jeremy Waldron, FBA, Chichele Professor of Social and Political Theory at All Souls College, Oxford. For half the year, I am also University Professor in New York University Law School, in New York.

For the past 25 years I have been resident in the United States (in New York and in Berkeley, California). I was resident in the United Kingdom between 1978 and 1987, and I have been resident again (on a half-year basis) since 2010. This necessarily limits my knowledge of current arrangements concerning press ethics in the UK.

I am a New Zealander by birth and nationality, educated in law and philosophy at the Universities of Otago and Oxford. I am a Barrister and Solicitor of the Supreme Court of New Zealand. I have a doctorate in law from Oxford. Before Oxford and NYU, I taught at Columbia University, Princeton University, the University of California at Berkeley, the University of Edinburgh, and Oxford University. I was elected to the American Academy of Arts and Sciences in 1998 and I have been a Fellow of the British Academy since 2011. In that year I also received the Phillips Prize from the American Philosophical Society for lifetime achievement in jurisprudence.

My work in jurisprudence and political theory is well known, as are my books and articles on constitutionalism, democracy, homelessness, judicial review, minority cultural rights, property, the rule of law, hate speech, and torture. My books include *The Dignity of Legislation* (Cambridge, 1999), *Law and Disagreement* (Oxford, 1999), *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford 2010), *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale 2012), *The Harm in Hate Speech* (Harvard 2012), and *The Rule of Law and the Measure of Property* (Cambridge 2012).

I emphasized to your assistant when she invited me to comment on these matters that I have no expertise at all in the area of journalistic ethics. For the purposes of the Leveson Inquiry, she indicated that a broader background in political morality might also be helpful. It is from that perspective that I am writing today. Please bear this lack of specific expertise in mind when evaluating my comments.

Relevant aspects of the public interest

2. How would you describe the public interest in a free press?

The public has an interest in the existence of flourishing newspapers, along with other media (like television) that report news and pursue issues of public concern. Local newspapers are important but national newspapers (and other national media) are particularly important to lead, focus, and facilitate public understanding of public issues and public debate about public issues. In a democracy, citizens need a great deal of help to understand public issues and to see what their rulers are doing and how they can be held accountable. Because democracy is partly a matter of collective action, they need to be able to *share* this knowledge and share a broad-sweeping and continuous debate on public issues. Without that, it is not clear how democracy could work. Without newspapers and other news outlets, citizens would be dependent almost entirely on rumour or on government propaganda for their understanding of public issues.

The interest in flourishing news media also helps explain why a *free* press is important. The press must have access to government, to representatives, and to government officials, but if it is to do its specific work in making democracy possible, it must be something much, much more than a mere outlet for government views. It must be able to sustain independent and critical positions, without fear of retribution or closure when the government is embarrassed or annoyed by its reporting, by its analysis, or by its comments. In other words, the public interest in a free press is partly the public interest in have independent sources of knowledge and comment about public affairs—again, shared sources, working on a very wide front.

Of course members of the public also have a simple interest in free speech, from which press freedom is derivative. Individuals sometimes want not only to speak out on public issues, but to print pamphlets or books of their own, or to avail themselves of the forums that newspapers and other media make available. In principle, newspaper proprietors, editors, commentators, and journalists are citizens exercising their rights of free expression. We mustn't lose sight of this when we talk about the more systematic public interest in a free press.

These considerations also explain why the public has an interest in the existence of a *plurality* of newspapers and media outlets. Such plurality—borne of the freedom and independence of particular news outlets—helps structure debates and provides a number of perspectives and frameworks within which information and comment of public concern can be understood.

3. How would you describe the public interest in freedom of expression? To what extent does that public interest coincide with, or diverge from, the public interest in a free press?

The public interest in free expression is partly each individual's interest in being able to speak his or her mind, publish his or her views. This liberty is of the utmost importance though of course it has limits (obscenity, defamation, hate speech, incitement etc.)

But more than that, the public interest in free speech is also the interest of every member of the public in having access to the speech of others—having ways of hearing what is said, and of being able to reflect upon what others say by way of information-dissemination and public comment and opinion.

Following through on that point, the public interest in free speech is also our democracy's interest in free and open debate about public issues, uncensored and immunized from the anger or embarrassment of those in power who would rather not be held publicly accountable in this way. The ordinary citizens of a modern democracy—millions of them—share a public interest in an environment where information of all sorts is gathered and opinion of all kinds is made available. This is what establishes the framework for a democracy. And since we must always bear in mind that democracy is not a game, this is also what establishes the basis on which people can avoid great social and individual harms, by holding their leaders accountable. It also means that individual citizens and the people as a whole can make informed decisions on the basis of the truth, which those who oppose free speech often have an interest in hiding.

Needless to say, the public interest in free speech also goes beyond these political dimensions. It is also an interest in a flourishing culture—literary, artistic, and scientific. I believe that this interest is important for its own sake—the sheer value of a free and open culture—and as a backdrop against which the more specifically political importance of free speech is understood.

4. In order to maximise the overall public interest, with what other aspects of the public interest would freedom of expression, or freedom of the press, have to be balanced or limited? The Inquiry is particularly interested in the following, but there may be others:

a) the interest of the public as a whole in good political governance, for example in areas such as:

i) national security, public order and economic wellbeing;

Of course the public interest in free speech and freedom of the press sometimes has to be balanced against the public interest in security and order, where untrammelled expression and publication might do particular harm to the public

interest. But talk of balance can be very dangerous here. We need to understand three things about public order and security issues:

1. there is occasionally the prospect of genuine harm done by free publication on these matters;
2. these are matters on which *nevertheless* the public has an intense and proper interest in knowing and understanding and in holding their rulers accountable; and
3. these are matters on which those in power will—if they can—seek to avoid accountability or public understanding of what they are doing by invoking considerations of kind (1) whenever they can, whether those considerations are strictly speaking applicable or not. *We have no experience to the contrary on this point.* Governments *always* exaggerate claims of security and public order and they often do so in order to avoid the exposure of malfeasance or abuses.

Recent experience of UK security services' complicity in torture illustrates all these points:

1. it is sometimes important to secure sources of information
2. the public has an intense and proper interest in knowing whether torture is being used in its name
3. beyond sheer and mendacious denial, the first move of any government faced with the prospect of exposure of complicity in torture has always been to seek to use the mantle of security concerns as a cover if at all possible.

None of this means that point (1) is unimportant. It does mean that talking about a simple balance between free speech and point (1) is inadequate and disingenuous if it does not take points (2) and (3) into account as well.

ii) the rule of law, the proper independence and accountability of law enforcement agencies, and access to justice;

These are all important values, which occasionally might give rise to requirements that need to be balanced against freedom of expression or freedom of the press. For example, current arrangements for jury trial in the UK may require avoidance or suppression of comment on pending litigation where such comment might be prejudicial.

From an outsider's point of view, however, it is very striking how often the statement "These matters are pending before the courts" is used as a standard cover for refusing any form of public comment. Any sensible reflection on these matters should take into account, not only the importance of these considerations, but their liability to be abused by those in power. I am not saying that refusing or suppressing comment on these grounds is always indefensible. But we should work on the assumption that it often or usually is.

It is worth emphasizing, moreover, that much of this is dependent on the current approach to jury trial in the United Kingdom. Other modern democracies manage to use juries without this sort of impact on free expression or freedom of the press: the United States is a good example. Since free expression and freedom of the press are important public values, it is incumbent on us as a society to reconsider our present arrangements for jury trial, and to ask whether other arrangements might be viable which do not have this impact on freedom of expression or freedom of the press.

Under the rule of law, one might also recognize the importance of suppressing the names of complainants in certain matters, and the importance of the media in respecting such suppression.

Among the other values mentioned, however, it is hard to see why these would give rise to competing considerations. "The proper independence and accountability of law enforcement agencies" is supported by freedom of the press, not set back by it; and it is not something to be balanced against freedom of the press. Also it is hard to see why "access to justice" should be thought of as something that has to be balanced against freedom of the press or as something that might legitimately be invoked as a consideration limiting free expression or freedom of the press

iii) the democratic accountability of government for the formation and implementation of policy.

Once again it is hard to see why this has been cited, in these questions, as a possible consideration to be balanced against (or as a possible ground for limiting) free expression and freedom of the press. The public interest in democratic accountability of government for the formation and implementation of policy militates entirely in favor of a free press, for reasons set out in my answer to question 2.

Perhaps what is meant is that the democratic accountability of government is to be channelled through ministerial accountability to Parliament and not pre-empted by accountability through the media. This is a mistake. Parliamentary accountability is very important, but it works best in tandem with more informal modes of accountability in society at large. Every modern democracy has to find ways of bringing formal and informal accountability into relation with one another; in a vibrant democracy, this relatedness provides an important sense of the public's involvement with public debate—a sense that the relevant issues are not isolated in the formal rituals of the House of Commons.

Perhaps what is meant is that the confidentiality of policy formation sometimes needs to be protected in its early stages (for example, to prevent various forms of opportunistic trading etc.) This importance of this can be

recognized. But again, it should be invoked occasionally rather than as a standard response, and we should always be aware of this consideration's potential for abuse.

b) the public interest in individual self-determination and the protection and enforcement of private interests, for example:

i) privacy, including (but not necessarily limited to) the rights to privacy specified in general in Article 8 of the European Convention on Human Rights and in European and national legislation on the protection of personal data;

Privacy in general and the particular rights that are mentioned here are all important and do certainly constitute considerations that need to be balanced against freedom of the press.

The phrase "public interest" has a certain ambiguity which is perhaps unfortunate in the context.

(a) Large numbers of the members of the public are "interested" in the private details of celebrities (for example), in the sense that they are pruriently eager to read about them or look at pictures and video of the celebrities' conduct of their lives.

(b) But the phrase "the public interest" has a second and much more important sense, which refers to matters which have a public dimension, matters that concern the shared conduct of public affairs.

Sense (b) is the sense in which I have used "public interest" in my answers so far. In the case of (a), there is definitely a balance to be struck, and often the privacy interest of (say) celebrities will outweigh the public's prurient interest in their lives. In the case of (b), the balance may be tilted the other way: on important matters of public affairs, one should be cautious and indeed sceptical of any claim that a public figure's private life is entitled to protection. I don't mean that such a claim is always inappropriate. It is a matter of judgment in each case. But—to give an imaginary example –an MP cannot invoke the value of privacy to cut off press interest in private living arrangements for which he might be receiving inappropriate expense remuneration.

ii) confidentiality, the protection of reputation, and intellectual and other property rights;

These are all important values. I will comment only on "the protection of reputation." The United Kingdom needs to give some thought as to whether it should accept the US doctrine (in the 1964 case of *New York Times v Sullivan* 376 U.S. 254) that drastically restricts the rights of public figures to recover

damages for defamation and thus drastically limits the possibility of free public debate being closed down by the threat of legal action.

This is yet another illustration of the point that we cannot simply cite these considerations that are supposedly to be balanced against press freedom as though they were mantras that everyone (in Britain) accepts. Each of these considerations has to be scrutinized in light of the value of press freedom; and such scrutiny requires us to imagine, envisage, or learn from other societies' embrace of alternative ways of doing things, ways that diminish the impact of these considerations on press freedom. The time has long passed when one could simply announce that press freedom needs to be balanced against "protection of reputation" or "national security" or "the rule of law" etc. We should accept that the importance of press freedom requires us to reconsider the way we have been pursuing some of these other values.

iii) individual freedom of expression and rights to receive and impart information where those interests and rights are not identical to the interests and rights of the press.

Rights to receive and impart information, say between one individual and another, are of course worthy of protection, along the lines indicated in my answer to i) above. But again it is partly a matter of whether there is a genuine public interest involved —in sense (b) above (on p. 6). If there is, then it may not be appropriate to protect (say) e-mails between ministers and their advisors from public scrutiny.

In saying this, I am assuming that access to the information in question is through lawful means. As to access through irregular or unlawful means, I think the important point here is to assess how high the threshold of public interest—again, public interest, not public prurience (see my remarks under on p. 6)—has to be in order to justify the means used to obtain the material. Whistle-blowers are sometimes in technical breach of the law when they reveal important information of wrongdoing by their employer. Ideally, legislation should address this, making an exception to the relevant laws of confidentiality and perhaps even official secrecy, rather than requiring public-spirited whistle-blowers to risk their freedom for the public good.

In thinking about this topic, it is important not to assimilate the protection of (say) corporate communication or communications within the civil service to individuals' "rights to receive and impart information." Individuals have a genuine interest in privacy. The government does not. Whatever interest the government has in confidentiality is related to exactly the same considerations of the public good that may be at stake in revelations concerning its conduct or its abuse of power. In other words, any interest that the government or a corporation has in protecting communications of this kind must be argued for in

a way that is explicitly responsive to genuine public interest in information concerning misconduct or wrong-doing.

5. What are your views on the extent to which the overall public interest is currently well served, both in principle and in practice, by the current balance between the public interest in the freedom of the press and free expression on the one hand, and competing aspects of the public interest on the other? In your opinion, what changes if any would be desirable in this respect, in order to maximise the overall public interest? If relevant, please state whether those changes should be voluntary or obligatory.

As I indicated in my answer to Question 1, I have limited experience of current arrangements on these matters in the United Kingdom. I suspect that current justifications in Britain for restricting press freedom based on governmental and corporate interests tend to be exaggerated by simple recitation of mantras such as "confidentiality" and "official secrecy." Britain has a reputation elsewhere in the world as being a "security state" in a very adverse sense—as a state whose citizens have allowed security and surveillance considerations to proliferate out of hand, often without public discussion. This is certainly how many Americans regard Britain.

The changes that would be desirable, then, would involve greater thoughtfulness on the grounds of those who defend restrictions on the press on grounds of public interest.

It would be most unfortunate if the elaboration of greater protection for individual privacy and confidentiality—which probably *is* needed—were used to justify also greater secrecy and deference to state and corporate interest. It would be unfortunate if arguments for non-voluntary respect for individual privacy were cited also as grounds for increasing the non-voluntary aspect of press deference to state and corporate interests. It is hugely important that these issues be separated.

Press ethics

6. What would be the distinguishing features of the conduct and practices of a media industry, or any organisation which was a part of that industry, which would make it an 'ethical' one?

"Ethics" refers to a deeply inculcated body of values, principles, and attitudes that concern aspects of professional behavior that are intimately related to the practices of a given trade or profession, but are at the same time specifically directed to the impact of those practices on the interests of people

other than the person constrained by the ethics—i.e., the impact on the interests of outsiders or on the interest of society at large.

Ethics has to do with the way a trade or profession is practised. We expect that in any trade or profession people will act in a way that makes money: the profit motive is a powerful motivator in all fields of business—and journalism and media management are no exception. That's OK: we expect management in these areas to be imbued with the profit motive. But the enterprise of ethics seeks to match that by also imbuing action in this field with similarly deep and pervasive concerns about others' interests. So ethics is about values that are supposed to go at least as deep as the profit motive into the way one practices one's profession and the attitudes one brings to it.

In the last paragraph, I drew an analogy between ethics and the profit motive: the latter needs to be at least as deep and as pervasive in the practice of the given trade or profession as the other. But there is also this relation between them: ethics are set up in order to limit and place certain constraints on activity that might be motivated by profit-seeking. It is supposed to have a comparable presence in people's attitudes and activity so that it can operate as a check. We set up systems of ethics because we are afraid that the profit motive or other motives of vanity or self-interest may, if unchecked, lead to grave harm to others' interests or to the public interest. Also we try to make ethics something shared and explicit—e.g., in written and promulgated codes of conduct, so that the relevant professionals have something to point to, something to fall back on, if they are asked or required to do something wrong. We formulate codes of conduct, so that the ethically scrupulous person is not seen as an odd-ball, but as somebody keeping faith with values that everyone in the profession is fully acquainted with.

On some accounts, ethics is seen as something independent of law; it is contrasted with law and refers to a set of values, principles and attitudes that are inculcated in the relevant community or in the members of a certain profession, to guide their actions in matters that are not directly constrained by law. But that is not necessarily the case; certainly it's not part of the meaning of the term. So, sometimes "ethics" is not necessarily contrasted with law in this way: many bodies of professional ethics are enforceable by law or by professional disciplinary bodies under legal auspices and with quasi-legal sanctions like withdrawal of professional licenses etc.

It is a further question, I suppose whether journalism as a profession should be required and encouraged to develop a set of explicit professional standards, complementing those applying to editors.

7. In particular, to whom might the press be considered to owe ethical duties, and why? What might be the content of such duties? To what extent might such duties come into conflict, and how should any such conflicts be resolved? The Inquiry is particularly interested in the following as potentially owed ethical duties, but there may be others:

a) readers and consumers of the media;

The primary ethical obligation of the press to its readers is truth and, as far as possible, comprehensive, intelligent, and intelligible coverage of matters of public concern. (Again, I insist on the difference between "public interest" and "what the public may be pruriently interested in," set out on p. 6 above.) Our democratic arrangements (for elections and accountability) presuppose that people can rely on the press for the information about public life that they need in order to make intelligent decisions.

There is also a broader concern—apart from democratic politics—to ensure that people know about the world and what is happening, in places or in regards that their own day-to-day experience won't necessarily acquaint them with. The press has a responsibility to see that the public are not ignorant. (I believe also that this is matched by the responsibility on members of the public to inform themselves and to actually avail themselves of such information and analysis as is possible.)

Finally the press has a responsibility to purvey this information (and concomitant opinion) with some care, so as not to exaggerate or stir up panics or public hysteria. This is a delicate matter of judgment, because of course there are some things that the members of the public need to know about precisely so that they can be angry or indignant about public affairs in the right sort of way.

You may ask: why—on a free speech model—should the press have these responsibilities? Other individual speakers do not. When I express myself publicly on some matter—in a leaflet or pamphlet or book—I am not subject to exactly these ethical imperatives. That is true. But the powerful, pervasive, and systemic presence of the press and the other media in modern society generate distinctive responsibilities that are not fully accounted for on the free speech model. Of course, free speech too is constrained by various duties and limits. But these are much less than those that I am saying the press is constrained by.

Now, the obligations of any particular publisher should be considered as shared obligations—shared with other press outlets. So it might be thought that there is less of an obligation on left-leaning newspaper A to provide balanced coverage of some issue in circumstances where right-leaning newspaper B can be relied on to put the case for the other side and present the material and information that the other side regards as relevant. It is a little like the adversarial ethics of legal advocacy. But that analogy also helps explain why

we don't tolerate a simple Darwinian dog-eats-dog account of press ethics. Each newspaper and media outlet has a responsibility to the system of public information, public debate and public accountability as a whole, just as lawyers have obligations to the court as well as to their clients.

b) persons who are subject matter of stories / other media products;

Of course, the press must take account of the laws of defamation. Over and above that, they have an ethical obligation not to knowingly or negligently misrepresent persons who are the subject matter of stories, or to mischaracterize facts about them, showing them inappropriately in a bad light, even if such misrepresentations or mischaracterizations are not, in the technical sense, defamatory. This is an example of the way in which professional ethics might supplement the strict law, although even these ethical standards may have a legal dimension inasmuch as they affect which persons and news outlets are fit and proper to practice journalism or to control large sections of the news media.

I believe that it is important also to distinguish between the ethics of the press's dealings with private persons and the ethics of their dealing with politicians and public figures. In the United States, this is the basis of an extremely important principle so far as the law of defamation is concerned. In the UK, the doctrine of *New York Times v. Sullivan* (1964) is not followed. But it might still be appropriate to draw the distinction at the level of the professional ethics of journalism and editorship, distinguishing between (i) the carer and solicitude for reputation that is owed to private persons and the care and solicitude for reputation that is owed to those who are properly accountable to the public for what they do. It would be unfortunate if (ii) were regarded in as stringent a light as (i). It would be unfortunate if figures who are properly held publicly accountable were able to shelter behind the same level of protection from press scrutiny, comment, and characterization as people who have not put themselves and their actions into the public domain.

c) the wider public;

What is owed to the wider public is necessarily more diffuse and may be more difficult to encapsulate in the language of duty, even that of ethical as opposed to legal duty. Many of the relevant considerations are set out in my answer to question 2 above.

d) employees, journalists and other producers of the media;

I have no comment to offer on this point, beyond indicating that where journalists / employees of some media outlet have acted properly, albeit aggressively, in the public interest, it is the ethical obligation of their employers and the owners of the media outlets in question to stand with their employees

and to do what they can to protect them and to bear witness to the ethical responsibilities that their employees were discharging.

Equally, we might want to say that it is the responsibility of the employer / owner of a media outlet not to refuse to publish high quality journalism by their employees simply on the ground that it might embarrass politicians whom the employers / owners happen to support.

e) shareholders, investors, advertisers and others with an economic interest in the media.

Of course all those working in the media must take account of the economic interests of shareholders etc. But it is not appropriate to regard this as a principle of media ethics or journalistic ethics capable of competing, in ethical deliberation, with the principles discussed so far.

Of course, executives of any company have legal and ethical duties to their shareholders. But shareholders have no right whatsoever that these duties be carried out in a journalistically unethical way (any more than—by analogy—shareholders in a private hospital have an interest that might require doctors to act unethically).

Economic interests can be thought of as potentially affecting ethical principles in two ways: First, they can be thought of as explicitly competing considerations that have to be balanced against ethical principles. That is what I was dealing with in the previous paragraph: I said such a balancing exercise would be inappropriate. But secondly, economic interests can affect the way in which ethical principles are defined. And here too, I want to suggest a hard line. Beyond general respect for free press and very basic commercial viability, the interests of shareholders etc. should not affect the way in which principles of journalistic ethics are defined, formulated, interpreted, or understood.

8. What role might reasonably be expected to be played by a code of conduct in encouraging, inculcating or enforcing ethical behaviour by the press? What would be the distinguishing principles and features of any code of ethical conduct with universal application to the media industry?

I have addressed this already in my answer to question 6. A code of ethics, even when it is not legally enforceable, can have an important presence in the life and work of the media.

i. Its importance derives first of all from its being inculcated in all journalists, particularly new employees: employers and mentors are to encourage them to think of themselves and their work in this light.
ii. Its importance derives also from its being shared and common explicit knowledge among employees in their peer relations and between

journalists and their employers. Everyone will be aware that these are the appropriate standards and everyone will treat them as a common point of reference. A person who abides by these standards will not be seen as an idiosyncratically scrupulous individual; he or she will be seen as an ordinary adherent to standards that are taken for granted in the profession.

iii. Because the ethical standards are also public, they can establish a body of common expectation as between the media and their readers and the subjects of their stories.

Ethics, and codes of ethics, often work because they define common expectations and a clear well-stated shared point of orientation among all those who have a stake in the practice of the profession in question. Even if they are not legally enforceable, still they help to define which actions are, so to speak, beyond the pale, and which journalists and newspapers are "rogue" journalistic and newspapers. Also the ethical code of conduct—being shared and public in the sense I have just defined—helps shape both journalistic and public debate on these issues and helps focus critical reflection upon media action, which is an indispensable part of the media's relation to the public. This shaping and focusing function is an important one.

I don't want to ignore the dimension of legal enforceability. These judgments may well also have indirect legal implications when regulators are deciding questions regarding excessive concentration of power in the media or who is a fit and proper person to hold a broadcasting license etc. But often the importance of the legal dimension is that it reinforces the functions I have set out above, rather than the work it does in and of itself.

9. Please comment on the current edition of the media industry's Code of Practice http://www.pcc.org.uk/cop/practice.html from the perspective of its status as an ethical code. Your answer should in particular address the following:

a) comprehensiveness – are there significant areas of conduct or practice which are not covered which it would be reasonable to expect to be addressed? Does the Code sufficiently address itself to the range of ethical duties which the press might reasonably be expected to owe?

I believe it would be helpful to add two other items:to the little list, at the end of the Code, of what the public interest includes:

iv) malfeasance or incompetence in public or quasi-public office.

v) attempts by those in public or quasi-public office or in industry to seriously mislead the public.

The present i) and iii) don't go far enough in these regards, to connecting the public interest via the work of the media to specifically democratic considerations.

Also, I believe that Principle 1 (on inaccuracy, misquotation, etc.) could be formulated more strongly, by adding something along these lines:

> It must be recognized that a misquotation or misrepresentation can do harm that is very difficult to repair, even when there is a correction and apology. In the modern internet-dominated world, the original misquotation or misrepresentation will not disappear from the web or be modified just because there has been a public correction. Search engines will still come up with the original story. This does not diminish the need for prompt and public corrections, but it should remind journalists of the importance of the original duty of care to ensure that misrepresentation and misquotation do not happen in the first place.

b) the public interest – to what extent does the Code seek to maximise the public interest? Where might it go further in that respect? Are there respects in which it has a potential to operate contrary to the public interest?

I believe that the Code, quite rightly, does *not* seek to maximize the public interest. That is not its function. Many of its principles aim to protect individuals; and though we may *say* that that too is in the public interest, no insight is gained by doing so. The asterisk marks clauses where there may be a public interest override—but again that is not a matter of *maximizing* the public interest. (And anyway, for the purposes of the asterisk, only certain aspects of the public interest are mentioned –which is as it should be.)

c) normativity – does the Code appropriately identify, and distinguish between, conduct which is to be regarded as:

i) obligatory or forbidden (whether or not as a matter of law)
ii) important, and necessarily the subject of best efforts
iii) generally desirable, or good day to day practice
iv) aspirational only - a standard of excellence, or best in class?

and does it appropriately identify exceptions to those rules?

I believe that the normative language of the Code is reasonably clear as between these various categories.

d) interpretation - is the 'spirit' of the Code clear and appropriate?

By and large, the spirit of the Code is clear. However I would try to clarify one important point along the following lines.

I have mentioned several times already in my responses (see p. 6 above) that there is a difference between

> (a) "public interest" in the sense of what members of the public would be interested in reading about, in a sense of prurience, curiosity, and attention to celebrity; and
>
> (b) public interest in the sense that refers to matters which have a public dimension, matters that concern the shared conduct of public affairs.

I would suggest making this distinction explicit and insisting that for the purposes of the Code, references to "the public interest" are always to be understood in sense (b), perhaps with special reference to the aspects of public interest listed at the end of the Code.

It might be worth adding to the Code something along the following lines in order to make this point clear:

> For the purposes of this Code something is not *in the public interest* merely by virtue of the fact that members of the public are curious about it or would be entertained by reading about it.

e) effect - is it clear what consequences will flow from non-compliance with the Code, whether in general or in particular? Are those consequences appropriate?

No, it is not clear—apart from the references at the beginning to the Press Complaints Commission. Reference should also be made to internal policing of professional standards among members of the profession themselves; and also to areas in which journalists and their employers can expect public support and areas where they can expect public condemnation, if any issues arisen under these guidelines.

10. What approach would you recommend to the consideration of improvement to the nature, status, content and enforceability of the current Code? Are there changes to either content or enforceability of the current Code you would wish to see? Please explain your thinking.

See my answers under 9 (d) and (e) above.

11. What other changes would you consider desirable in order to encourage or constrain the press to improved standards of ethical conduct and practice? Your answer should explain the standards you consider appropriate and why, whether conformity should be encouraged or constrained, and how.

Upholding ethics in any domain is partly a matter of public debate and public justification. It is not just a game internal to the profession or activity concerned or its relation to government.

I believe it is particularly important that the public be involved in the further elaborated in discussion of these guidelines. One way in which they should be involved is through continuing discussion of free speech in relation to these matters. We all believe that free speech is an important value. However, it is often cited as a shield against or a rebuttal of serious and quite proper criticisms of press or media behavior. In public discussion of free speech there are a number of well-known doctrines and catch-phrases which help to structure the way in which people—especially non-experts—talk about these matters. One well-known example is the constant reference (via Oliver Wendell Holmes) to the idea of "shouting fire in a crowded theatre": principles of free speech are not supposed to protect anything which is the equivalent of shouting fire in a crowded theater. I think it would be good if reference to press standards could attain similar iconic quality. Probably this is unrealistic for all the clauses in the Code, but principles like "Free speech and press freedom should not protect the harassment of children or intrusion into people's grief."