The Leveson Inquiry

culture, practices and ethics of the press

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

REPORT

The Right Honourable Lord Justice Leveson

November 2012

4 volumes not to be sold separately
Volume IV

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ASPECTS OF REGULATION: THE LAW AND THE PRESS COMPLAINTS COMMISSION

CHAPTER 1
INTRODUCTION

1.1 This Part of the Report returns to the conduct of the press and provides the context in which the conduct of the press in any particular case can be challenged. A broad outline of the criminal and civil law in so far as it might impact on journalists is set out in Appendix 4 but the substantive law only goes so far.

1.2 For the criminal law, it is important also to consider the practical difficulties which reduce the prospect of a criminal investigation being started, let alone continue to fruition and result in prosecution. Chapter 2 identifies the argument that has been advanced by some that the matters giving rise to this Inquiry are a consequence of a failure of criminal law enforcement rather than anything else, and outlines what I consider to represent the reality of modern policing and the investigation of crime. It deals with the circumstances in which criminal investigations are instigated and the issues that are likely to be faced in the gathering of evidence.

1.3 The Chapter then goes on to analyse the role that acting in the public interest should play within the criminal law. This is first in relation to the decision to prosecute: after the issue was raised by the Inquiry, the Director of Public Prosecutions consulted on the topic and then issued a formal guideline. It also considers the way in which the public interest might impact on later aspects of the criminal process as a consequence of judicial management, the jury and (if a conviction is recorded) sentence.

1.4 Possible changes for the future are then considered. These include the preparation of guidelines should the maximum sentence for offences under s55 of the Data Protection Act 1998 be increased along with the submissions made by the Deputy Commissioner of the Metropolitan Police in relation to the Police and Evidence Act 1984.

1.5 Chapter 3 concerns the civil law. Here the focus is not on the substantive law but, rather, on the impact of different costs regimes on the civil justice system and, in particular, the consequences of proposed changes in the law surrounding funding that are likely substantially to affect litigation against the press.

1.6 On the basis that the costs regime is about to change to the disadvantage of those wishing to pursue civil litigation with the benefit of a Conditional Fee Agreement (which has led to an increase in the award of general damages in personal injury litigation), damages for defamation, breach of privacy and other media torts also fall for review, as does the issue of aggravated and exemplary damages. The other procedural law issue discussed concerns the mechanism for introducing incentives in relation to the costs of litigation if a regulator provides a system of arbitration.

1.7 Chapter 4 is different and does not look to the future. The Terms of Reference require the Inquiry to consider the extent to which the current regulatory framework has failed. That requires a detailed consideration of the operation of the Press Complaints Commission.

CHAPTER 2
THE CRIMINAL LAW

1. Introduction

1.1 The criminal law can touch upon the work of journalists in many ways and inevitably prescribes the ways in which it is acceptable for stories to be obtained. A detailed summary of aspects of the criminal law most likely to be engaged in the pursuit of journalism is set out in Appendix 4 but it is not intended to be comprehensive: by way of example, aspects of the behaviour of Neville Thurlbeck as he pursued a follow up to his scoop relating to Max Mosley were described by Mr Justice Eady as containing "*a clear threat to the women involved that unless they cooperated …* (*albeit in exchange for some money*)", making the point that it was "*elementary that blackmail can be committed by the threat to do something which would not, in itself, be unlawful*".[1] There is no doubt room for other potential offences to be engaged in the unprincipled pursuit of a story.

1.2 On the basis that what was believed to have taken place at the News of the World (NoTW) (ignoring what might have happened elsewhere) consisted of the commission of crime, it has been suggested that this Inquiry is unnecessary, if not misconceived. It is argued that the problem, if such there was, did not lie with the press but with the police for their failure to investigate crime; furthermore, because of the existence of the criminal law, these issues simply do not require further attention in general or regulation in particular. Without attempting to list all of those who have developed the same argument, it is worth mentioning three different ways in which the point has been articulated.

1.3 First, in one of the seminars prior to the commencement of the hearings during the course of an address concerned with defending free expression, Kelvin MacKenzie, the former editor of The Sun, said:[2]

> *"Yes there was criminal cancer at the News of The World. Yes there were editorial and senior management errors as the extent of the cancer began to be revealed. But why do we need an inquiry of this kind?*
>
> *There are plenty of laws to cover what went on. After all 16 people have already been arrested and my bet is that the number may well go to 30 once police officers are rounded up.*
>
> *Almost certainly they will face conspiracy laws, corruption laws, false accounting laws. There are plenty of laws that have been broken. Lord Leveson knows them all by heart.*
>
> *Supposing these arrests didn't come from the newspaper business. Supposing they were baggage handlers at Heathrow nicking from luggage, or staff at Primark carrying out a VAT swindle, or more likely, a bunch or lawyers involved in a mortgage fraud would such an inquiry have ever been set up.*
>
> *Of course not."*

J

[1] paras 82 and 87, *Mosley v News Group Newspapers Ltd* [2008] EWHC QB 1777
[2] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Kelvin-MacKenzie.pdf

1.4 Ian Hislop, the Editor of Private Eye, put the matter in this way:[3]

> *"I do think that statutory regulation is not required, and most of the heinous crimes that came up and have made such a splash in front of this Inquiry have already been illegal. Contempt of court is illegal. Phone tapping is illegal. Taking money from – policemen taking money is illegal. All of these things don't need a code. We already have laws for them. The fact that these laws were not rigorously enforced is, again, due to the behaviour of the police, the interaction of the police and News International, and – I mean, let's be honest about this – the fact that our politicians have been very, very involved, in ways that I think are not sensible, with senior News International people ..."*

1.5 Finally, the Rt Hon Michael Gove MP said exactly the same thing:[4]

> *"I have a prior belief that we should use the existing laws of the land and individuals and institutions should be judged fairly, on the basis of the existing laws of the land – ... and that the case for regulation needs to be made very strongly before we further curtail liberty. ...*
>
> *I think the best way of making sure that people obey the law is making sure that the police are appropriately resourced to investigate crime, that the courts hear the case for the prosecution and the defence and then, if someone is found guilty, that they face the consequences. I fear for liberty if those principles are eroded."*

1.6 The argument goes in this way. If a journalist intercepted a message on somebody else's mobile telephone, without their permission, that journalist has committed a criminal offence and should be investigated and, if appropriate, prosecuted in exactly the same way as would occur if anybody else did the same thing. Journalists should be subject to the same law as everyone else but should not be subject to any additional regulatory restriction when all that each one is doing is exercising his or her right to free speech. A subsidiary argument (also advanced by a number of witnesses) goes further. Far from imposing additional regulation on the journalist, the importance of free speech and the obligation of the press to hold power to account should be recognised in the criminal law, so that, if a journalist is acting in the public interest in pursuing a story, he or she has a defence to any crime necessarily committed while doing so. The defence to a breach of s55 of the Data Protection Act 1998 (DPA), along with the unimplemented amendments contained within the ss77-78 of the Criminal Justice and Immigration Act 2008, is discussed later, but the argument is that no journalist should be in peril of conviction of crime while pursuing a story in the public interest (or, presumably, while pursuing a story that he or she perceives to be in the public interest).

1.7 These arguments fail to recognise the way in which the criminal law operates and the practical limitations facing the police and prosecuting authorities, however enthusiastic their wish to detect all those committing criminal offences might be. The way in which Operation Motorman was pursued by the Information Commissioner and Operation Caryatid (later reconsidered on a number of occasions) by the Metropolitan Police Service (MPS) has been the subject of detailed analysis.[5] At this stage, the intention is not to consider the specific investigations (although some aspects will be identified where relevant) but rather to examine the over-arching constraints which face the police and the courts in the investigation, detection and prosecution of crime in general and crime involving journalists in particular.

[3] p9, line 8, Ian Hislop, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-18-January-2012.pdf

[4] pp55-56, lines 7-14, Michael Gove, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf

[5] Part E, Chapter 4

2. The investigation of crime: complaints to the police

2.1 Crimes come to be notified to the police and investigated in a number of different ways. First and most likely is that a complaint of crime or possible crime is made to the police. The victim of, say, a burglary or a robbery will contact the police and report the matter. Equally plausible is that the police will be notified in the event that the victim of, say, a shooting attends hospital. Alternatively, the police might themselves either be called to the scene of a crime (whether by a victim or witness) or they might be present and witness events for themselves (such as might occur during an occasion of public disorder). This report might be immediate and contemporaneous with events; it might follow after days (a burglary only detected when the householder returns home after holiday); after weeks or months (fraud); or even after many years (historic sexual abuse). Howsoever it occurs, the police will then take statements from witnesses and pursue such investigations as they can. An inquiry might involve scenes of crime officers, forensic scientists or other experts; it might involve the collection of documentary or other real evidence; it might involve the pursuit of information from those who might know who is responsible. Leads will be followed up and, in the most complex cases, a computer system such as HOLMES[6] used to collate evidence and ensure that all appropriate avenues are explored.

2.2 Second, for some criminal offences (and, in particular, for some of the most serious and those which do not generate victims likely to complain to the police), rather than wait for a possible victim, the police will target either an offence or a suspected offender. By way of example, large scale supply of Class A drugs may well be detected because of some intelligence leading to surveillance and the development of evidence in that way. Police resources may well be devoted to target serious criminal activity without waiting for the crime to be committed. In this type of case, however, again, evidence will be followed up, collated and researched in the same way.

2.3 Whatever might have drawn the attention of the police either to the crime or the alleged criminal, many of the same investigative techniques will be deployed in order to bring those guilty of crime before the courts. Thus, during the course of an investigation for an indictable offence, a search warrant or search warrants can be obtained and the relevant evidence seized.[7] Additionally, assuming reasonable grounds can be established that an indictable offence has been committed, a suspect may be arrested and, pursuant to s18 PACE, the police can search any premises occupied or controlled by that person both in relation to that offence and any other indictable offence connected with or similar to that offence.

2.4 Once lawfully on premises being searched, the police can seize anything which the officer has reasonable grounds for believing has been obtained in consequence of the commission of an offence (to prevent it being lost damaged, altered or destroyed), along with anything which the officer has reasonable grounds for believing constitutes evidence in relation to an offence being investigated or any other offence.[8] When it comes to journalistic material, there are very important restrictions to these powers which shall require detailed consideration but, for the present, it is sufficient to identify the possibility that these searches (and any interviews similarly conducted pursuant to powers in PACE) may reveal further evidence.

[6] Home Office Large Major Enquiry System
[7] s8 et seq of the Police and Criminal Evidence Act 1984 (PACE)
[8] s19 PACE

2.5 This very potted and non-exhaustive summary[9] is important simply because it underlines the vital importance of what constitutes the trigger for a police investigation. In the first case, it was the complaint of the victim or other knowledge that a crime had been committed. In the second, it was the intelligence or suspicion that crime was in train. Something had to start the investigative ball rolling. Even for the least serious criminal offences, there has to be something. Speeding is now detected with the use of specific speed cameras; the use of a mobile telephone when driving, or failure to wear a seat belt, however, are only detected if someone (usually a police officer but, perhaps for some offences, a traffic warden) sees the offence being committed and does something about it.

2.6 Turning to the offences which may be committed by journalists in pursuit of a story, the absence of a victim who is aware of the fact of the offence means that there will be no complaint. Neither can reliance be placed on the possibility that a complaint might be generated which will reveal what has been going on sufficiently to expose all such criminal wrongdoing. Both in Operation Motorman and Operation Caryatid, what was significant was not the original complaint (in the first case relating to the passing on of information from the DVLA and, in the second, relating to personal details concerning a member of the Royal Household of sufficient significance itself to cause a substantial police investigation to be undertaken). Rather, it was the entirely fortuitous discovery of a mountain of information in the form of the records kept by Steve Whittamore and Glenn Mulcaire respectively.

2.7 Without those records, nobody would have been any the wiser about the extent to which Mr Whittamore was providing personal data in clear breach of s55 of the DPA and the subsequent exposures would never have seen the light of day. Without the many pages of Mr Mulcaire's records, the fact that names, addresses, phone numbers, PIN details and other links had been gathered and recorded, the inference from all of which being that it could be alleged that there was wholesale and industrial interception of mobile telephone messages, would all have remained unrevealed. Even if the Guardian or the New York Times had managed to obtain sufficient information to enable the police to rely, without more, on the factual basis of the stories as published, the extent of what was going on would have remained hidden. The history of these particular investigations have been analysed at length but it would be truly remarkable if, because in each case of one specific complaint, the police had managed to identify the only private detectives indulging in this type of intrusion.

2.8 The same is so, but even more so, in relation to the bribery of public officials. Putting the question of public interest to one side for a moment, there will be no complaint to the police about such conduct because it will be undetectable unless the public official is foolish enough to make some admission or leave some incriminating evidence around for someone else to see. The journalist will not reveal his or her source for a story (on which see below) and, irrespective of the likely public interest in the story (or, just as likely, the absence of any discernible public interest), it will be almost impossible to get to the bottom of it. Leak inquiries almost inevitably fail to achieve their purpose.

2.9 Considerable emphasis was placed on the fact that the Information Commissioner has always made it clear that, since the reports *What Price Privacy* and *What Price Privacy Now*, he has not received complaints in relation to journalism; in relation to bribery, the present work of the MPS under the umbrella of Operation Elveden is also identified as demonstrating that this type of behaviour is also subject of rigorous police investigation. Neither of these facts, however, supports the wider propositions which are advanced.

[9] Appendix 4

2.10 What is not acknowledged is the fact that absent evidence to point to the commission of an offence (which requires rather more than mere assertion before any report, let alone investigation, can be considered justifiable), nobody who has been the subject of intrusion will necessarily be aware of the circumstances in which information about them came to enter the public domain. At its highest will be a concern that someone has provided information to a journalist which has then been published but any attempt to identify from whom or how that material was obtained will fail on the basis that no journalist will reveal a source.

2.11 Neither will anybody be aware that a particular story has been obtained because money changed hands with a public official. Again, reference has been made to the fact that Operation Elveden has led to a large number of arrests of journalists and, in addition, public officials, the inference being that this is simply a consequence of the police doing the work that they always could have done had they properly investigated the documentation that they had in their possession. That is not, however, the way in which Deputy Assistant Commissioner Akers put the matter. She said:[10]

> *"The Management and Standards Committee (MSC) is an independent body outside of NI and was formally established by News Corp on 21 July [2011]. ... In this role they respond to requests for information from the police which we consider are relevant to our inquiries. Our aim is to identify criminality. It is not to uncover legitimate sources and therefore the MSC responds in a manner that seeks to protect legitimate journalist sources at all times. They are also overseeing the searches being conducted of the 300 million emails produced by NI.*
>
> *... The MSC's role and remit is important to Operation Elveden as current legislation would make it difficult, if not impossible, for police to access material of the type it is seeking without that assistance. Where there is an evidential base to request information, the MSC have provided it in an unredacted format in order to enable police to identify the public official concerned. However, in relation to wider requests regarding the system by which alleged cash/cheque payments were made, the MSC provide information to police in a redacted form, i.e. with the names of the potential source redacted, until police are able to produce evidence that can justify identifying the source."*

2.12 The same point was made during the course of her evidence in these terms:[11]

> *"Q. Now a general point which I think should be made is that have you been receiving assistance by the MSC, which, of course, is the independent review team within News International?*
>
> *A. The Management Standards Committee in News International. Yes, we have been receiving – we've got a co-operative working relationship with them, and they are the people who have passed us information upon which we've made arrests, as well as supplying information to us when we've made requests."* [12]

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[10] pp1-2, para 3 and pp3-4, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-DAC-Sue-Akers1.pdf

[11] pp12-13, lines 24-8, Sue Akers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-6-February-2012.pdf

[12] As I have made clear in Part E Chapter 5, there is an issue about the way in which the relationship between the Management and Standards Committee and the MPS has recently developed. I repeat that I am satisfied that it is not appropriate to elaborate further although the assistance upon which the police have had to depend only serves to make the point that this Chapter identifies

2.13 It is not, perhaps, surprising that there has been considerable criticism of News International (NI) for providing such help to the police and, to put the matter colloquially, for "shopping" or "grassing" on their own employees. The contrary view is that the company has been very concerned to demonstrate that whatever has happened at the NoTW (or other titles under their control) has not only been without the authority of the most senior management of the company but also is entirely contrary to the principles on which the company operates. As a result, the company has done all that it can to assist the police where prima facie evidence of criminal behaviour has been identified. The words 'prima facie' are very important because NI has not conceded that criminal offences have been committed but only that police investigation is justifiable.

2.14 Thus, the mere fact that there are lengthy investigations of phone hacking (Operation Weeting) and the bribery of public officials and others (Operation Elveden) is not evidence that it was and always has been open to the police to conduct the type of investigation now underway. Without the active cooperation of NI, it is clear that the extensive investigations would not have been possible: evidence of the earlier (different) approach is clear from what happened when the police sought to investigate in 2005 during Operation Caryatid which is outlined above.[13]

2.15 It must be emphasised that these points are not made to imply that there has been any breach by a journalist of the data protection legislation in the period since 2006 or, indeed, that the payment of public officials for stories provided in breach of their duty is necessarily more extensive than has been revealed or is suspected as a result of recent disclosures. Equally, however, the absence of complaint is little better than neutral and does not mean that steps should not be taken by newspaper organisations to put into place a regime that provides positive reassurance that the law is not being breached (save only in relation to data protection offences where the public interest justifies it). I am perfectly prepared to accept the evidence, for example, from Associated Newspapers Ltd, that as a result of a specific instruction from the editor-in-chief, no private detective has been engaged by the company since the publication of *What Price Privacy Now,* but this assertion to the Inquiry cannot take the place of a regular and verifiable audit.

2.16 Putting complaint by a victim to the police to one side, the second approach to the detection of crime is similarly of little value in cases such as might arise in relation to the press. The fact is that it is almost inconceivable that the gathering of intelligence in a covert manner would be considered as either necessary or, in any event, appropriate. Not only is it unlikely that the criminality which could be revealed would be of sufficient gravity to justify such steps but, in addition, it is not clear how such information gathering could be undertaken.

3. The investigation of crime: gathering evidence

3.1 Assuming that a complaint has been made to the police, the problems facing any investigator have only just begun not least because of the respect which the law accords to journalists, the fundamental rights of freedom of expression and a free press and the entirely legitimate responsibility of the press to hold power to account. Such is the significance of these important principles that very real safeguards are built into the law to provide protection.

3.2 A detailed analysis of the powers and duties in respect of the search and seizure when that impacts on the work of journalists is set out in Appendix 4. It is sufficient to emphasise that material acquired or created for the purpose of journalism, held on a confidential basis by a

[13] Part E, Chapter 4

person who acquired or created it for that purpose, constitutes excluded material pursuant to ss11(1) and 13 of PACE and other journalistic material constitutes special procedure material (see s14 of the Act). Search for such material is covered by the more restrictive provisions set out in Schedule 1 of the Act, which require the judge called upon to consider an application for production or a warrant to have regard the public interest; this is wide enough to include the importance of the impartiality and independence of the press, the potential stifling of public debate or other relevant factors.[14]

3.3 These protections are not, of course, designed to protect journalists from the consequences of their own deliberate criminality unconnected with the public interest, but the law certainly explains why DAC Akers expressed herself in the way in which she did in her evidence. One of the results of the legislation is that, in protecting what it is entirely appropriate to protect, there is a risk that behaviour which deserves no protection will not be uncovered. It makes it that much more difficult to obtain evidence to support (or, indeed, to undermine) a complaint, making much more remote the prospect of prosecution even where the true facts, if they were known, would demonstrate that such a prosecution was entirely merited.

3.4 These difficulties both in relation to complaint and investigation only serve again to put the burden on journalists to respect the reasons for their freedoms and not to abuse that protection by invoking it to cover up that which cannot be justified. They also utterly undermine the case that all allegations of criminality can be left to the police to be investigated in exactly the same way that other allegations of crime are investigated. Thus, if there are these protections in law which, I accept, are entirely and fully justifiable, there must be some other way in which the press itself and the journalists who work within it can be held to account in relation to their own conduct.

4. A failure of policing

4.1 Against this background it is necessary to consider the wider point that this Inquiry should examine the failure of the police to investigate phone hacking, rather than the activities of the press. The argument is that the Mulcaire notes were available to the police for them fully to investigate yet, for years, they did nothing. The detailed discussion of Operation Caryatid appears above[15] but this question must be considered not just in the context of that case but as a systemic issue concerned with the balance between what conduct should fall only to those responsible for law enforcement and what conduct should be of concern of any business (and its employees) as to the way in which it goes about what it does. This has to be considered both at an individual but also a corporate level.

4.2 A number of witnesses were asked whether, at an individual level, the suggestion that all that had transpired was a failure of policing might seem like blaming the police for their failure to stop motorists speeding, rather than the motorist for speeding in the first place. It is certainly unarguable that there are no small number of offences that are committed when it is believed by their perpetrators that they will not be detected and, in the most part, they are not detected. Perhaps not surprisingly, cars slow down when approaching speed cameras and speed up after the risk of being caught is passed. Few can drive or walk on the streets without seeing drivers use mobile telephones notwithstanding the prohibition on doing so. These are, however, individual offences committed by individuals: there is no mechanism to encourage or exhort those individuals to obey the law, other than the risk that an offence will be detected and the offender pursued.

[14] *R v. Bristol Crown Court, ex parte Bristol Press and Picture Agency Ltd* [1986] 85 Cr App R 190 per Glidewell LJ at 196 and *R v. Central Criminal Court ex parte Bright and others* [2001] 1 WLR 662 per Judge LJ (as he then was) at p679
[15] Part E Chapter 4

4.3 That is not to say that procedures cannot be put into place that allow the extent to which individuals are complying with the law to be monitored. Pursuing the motoring analogy (without in any sense suggesting that there is an equivalence between motoring offences and the type of offending with which the Inquiry has been concerned or, indeed, between the privilege of being able to drive and the right to free expression), such measures are required in connection with the use of certain types of heavy goods vehicles. In one sense, the driver of a heavy goods vehicle is individually responsible for observing the speed limits, rest regulations and other obligations placed upon him for reasons of general road safety. Breaching those regulations constitutes an offence but it would obviously seldom realistically be possible for the authorities to follow a driver to ensure compliance. By requiring every such vehicle to be fitted with a tachograph, however, compliance can be monitored and a check made to discover whether the driver is, in fact, complying with his legal obligations.[16]

4.4 It is possible to pursue this analogy a little further by considering the corporate level. Although employers may have difficulty monitoring the way in which their employees drive company cars not required to have a tachograph, the requirement on employers to ensure that heavy goods vehicles are fitted with a tachograph and that the appropriate records for each vehicle are maintained allows a system of audit for the employer to check on drivers and for the authorities to check on employers. A rogue driver, regularly breaching the regulations, should be discovered; if he is not and, even more so, if there are many such rogue drivers within one organisation, conclusions as to the cultural approach to road safety within that organisation can legitimately be drawn. Moving away from road traffic, it is commonplace for organisations with regulatory obligations to put into place compliance mechanisms intended to promote (if not ensure) proper practice.[17] Equally, compliance is encouraged by an organisation if its culture, or the law, requires self-reporting to the regulator in the event that a breach is discovered.[18] This approach does no more than reflect that the police (or a regulator) cannot be everywhere all the time and will not be well placed to detect impropriety which is likely to remain hidden, particularly when there is no complainant and, thus, no complaint.

4.5 For the press, of course, there is no such regulatory regime and there is no suggestion that there should be. But the problem remains: what can be done to ensure that the law (and, perhaps, an ethical code) is treated with respect by all and that a culture is maintained to the effect that short cuts to obtaining a good story must not involve conduct which responsible journalists would consider reprehensible? If any journalist truly believes that almost anything goes in pursuit of a story, and that the basis for that story will be protected by the newspaper concerned as a journalistic source which will never be revealed, and, furthermore, this approach works, it is not surprising if a culture to that effect develops and the police will simply never be involved. This culture can, however, be avoided if the editor and newspaper

[16] EC Regulation 561/2006 on drivers' hours and tachographs (together with regulations 3820/85, 3821/85, 3314/90, 3688/92, 2479/95, read with the regulations relating to driver's hours and recording equipment , in particular SI 2006/1117, SI 2007/1819 and Part VI of the Transport Act 1968 as amended

[17] For example, the majority of organisations operating as financial services markets, exchanges and firms which are regulated by the Financial Services Authority, and firms defined as the regulated sector under the Proceeds of Crime Act 2002 commonly have compliance departments

[18] For example, note the self-reporting and notification requirements imposed and encouraged by the Solicitors Regulatory Authority in relation to the conduct of solicitors. See also the legal obligation imposed on banks and other financial services firms to report suspicious activity in the context of money laundering and terrorist financing to the Serious Organised Crime Agency if they know or suspect, or have reasonable grounds to know or suspect, that another individual or person is engaged in money laundering; and the information came to them in the course of their business in the regulated sector. It is an offence for an individual working in the regulated sector not to report to their 'Nominated Officer' or SOCA if the conditions for reporting have been met. The Proceeds of Crime Act 2002 also makes it an offence for a nominated officer not to disclose to SOCA if the conditions for reporting have been met (see sections 330 and 331)

insist on a record (capable of being audited by someone should problems arise) which ensures that decisions are made about the ways in which certain types of stories are obtained by reference to identifiable principles and at an appropriate level within the news room. The issue of robust internal governance and the value which might be obtained from such an approach is further discussed in connection with the approach of the civil law analysed below.[19]

4.6 Whether or not there was a failure in policing does not impact on the culture, practices and ethics of the press, save only to the extent that anyone might have thought that the absence of complaint might have encouraged an atmosphere in which less attention was paid to the legality of what was being done than should have been. To put the same point another way, the question that must be addressed is whether there was a feeling of impunity within newsrooms generally or one or more specific newsrooms in particular.

5. Police resources

5.1 There is a further problem in seeking to cast responsibility for the overall present state of affairs on the police on the basis that there has simply been a failure of law enforcement. The approach, so far, has proceeded on the basis that police manpower resources are limitless and that if there is a complaint which is sufficiently based in provable fact to justify investigation, that investigation will be undertaken. The safeguards in the Police and Criminal Evidence Act (PACE) 1984 designed to protect journalistic material will be respected and the matter pursued, whether or not that will permit sufficient evidence to be disclosed to convert a complaint into a case which can be put before a prosecutor with sufficient prospect of success to justify commencement of a prosecution. In fact, superimposed on the limitations based upon the unlikelihood of there being a complaint, and the potential legal and other problems that an investigation will have to address, is the fact that police investigative resources are by no means limitless and work has to be prioritised in relation to every aspect of policing. It is therefore inevitable that a decision will have to be taken at an early stage whether the public interest sufficiently requires resources for this type of investigation, perhaps at the expense of investigating other criminal activity or undertaking other types of police work.

5.2 In that regard, it is not sufficient to point to the activities of the MPS since January 2011, when for understandable reasons concerned with their reputation and, in addition, the Crown Prosecution Service, very considerable resources have been devoted to all the evidence initially available from the search of the home of Mulcaire and now supplemented by material from the Management and Standards Committee at News International. The circumstances of these investigations and the prior history is analysed at length[20] but these are exceptional. The truth is that in relation to individual specific complaints, the complexity of any investigation, the likely attitude of the relevant newspaper to the provision of evidence and the difficulty of securing sufficient evidence potentially to satisfy the very high burden cast upon prosecutors will almost inevitably mean that a conclusion will be reached that resources are better devoted to other, and arguably more serious, complaints of crime.

[19] Part J Chapter 3
[20] Part E

5.3 More than a few witnesses made it clear that the police were simply not interested in pursuing complaints when made. By way of example, Sheryl Gascoigne[21] and Sienna Miller[22] explained to the Inquiry that complaints about being pursued by the press were not investigated or taken further. In one sense, Mr Gove was absolutely right; the police should be appropriately resourced to investigate crime; unfortunately, until resourced to investigate every complaint while, at the same time, carrying on the very many other duties cast upon the police, priorities will be inevitable. The fact that certain crimes (if crimes they ultimately turn out to be) will be considered a low priority, perhaps because of the inherent risks and complexity in undertaking an investigation into them, (or the very limited prospects that an investigation will be successful) does not, or should not, impact on the propriety or justifiability of them being committed.

6. Public interest: a defence to crime

6.1 The analysis of the criminal law reveals that the only offence in respect of which there is a specific defence in law is that contained within s55 of the DPA (namely whether, objectively, the obtaining, disclosing or procuring of personal data was justified as being in the public interest which concept is undefined). As part of the legislative proposal contained within s77-78 of the Criminal Justice and Immigration Act 2008, not yet in force, an increase in the maximum penalty for breach of s55 of the DPA sits alongside a new defence which covers the position where a person acts for special purposes (including journalism) with a view to the publication of journalistic material in the reasonable belief (subjectively held by the journalist) that the obtaining, disclosing or procuring of the data with a view to publication was in the public interest.

6.2 It has been suggested that, far from extending the way in which the criminal law operates to protect victims of journalistic practices that all who have appeared before the Inquiry have condemned, the reach of the criminal law should be reduced by importing a defence to all crime that was committed by a journalist acting in the public interest.[23] The example most often given is the story published initially by the Daily Telegraph, which exposed the way in which the expenses system for Members of Parliament had been abused and, in particular, the fact that the Daily Telegraph paid a large sum of money to someone for a disc of all MPs' expenses which, it is said, must have been provided, at the very least, in breach of confidence. The evidence of the then editor, Will Lewis, was that advice was sought at every stage and very great care was taken to ensure that what the Daily Telegraph did was not in breach of the criminal law[24] but I recognise that, were that situation to recur today, questions about breach

[21] pp71-71, lines 8-3, Sheryl Gascoigne, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-23-November-20111.pdf

[22] pp11-12, lines 15-17, Sienna Miller, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-24-November-2011.pdf

[23] The majority of the press core participants have argued in favour of a public interest defence for journalists, see for example News International closing submissions at para 64, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-News-International.pdf, Associated Newspapers closing submissions at para 31 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf, Guardian News closing submissions at para 17 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Guardian-News-and-Media-Ltd.pdf. See also part 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf; Part 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf which support a general public interest defence for journalists

[24] pp56-57, lines 21-6, Will Lewis, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-10-January-2012.pdf; para 31.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-William-Lewis.pdf

of the Bribery Act 2010 could be more difficult to resolve. A more recent example related to the bribery of a court official to remove driving offences from the court record which was exposed in The Sun.[25]

6.3 The argument is that no journalist should be put in peril of being guilty of crime when he or she is pursuing a story, the publication of which will be in the public interest. The vital significance of the role of the press in holding power to account (and by publishing stories that uncover misconduct about which the public is entitled to know) can only be encouraged by complete protection from the risk of criminal prosecution; there is otherwise insufficient protection for such a journalist who should not have to weigh up the personal risk of criminal prosecution when deciding whether or not to proceed. The importance of the principle is further underlined by the fact that journalists have been prepared to take that risk (particularly in relation to the unwillingness to disclose sources) and that their position has been reflected and recognised (albeit couched with an appropriate exception) by Article 10 of the ECHR in terms that:

> *"No court may require a person to disclose nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice, or national security or for the prevention of disorder or crime."*

6.4 This suggestion is far from being a simple extension of the present or proposed defence to a contravention of s55 of the DPA. Given the different ways (representing different points in the chronology) in which such an offence can be committed, to be effective, the test would have to be satisfied at each stage. Thus, using the present law, it might be possible to procure or obtain personal data on the basis that there is an objectively justifiable basis for concluding that to do so is in the public interest. Disclosing that personal data raises potentially different issues. Take as an example the possibility that a journalist has information that there is a link between a public official (whose private life is of no public interest) and an exposed corrupt agent and that the latter is improperly influencing the former in the performance of his duties. The journalist deceptively obtains details of the telephone records of the public official, discovers that there is no such link but that it is obvious that the public official is having an extra-marital affair. There may be a public interest defence in procuring or obtaining the data in the first place but there is hardly any public interest in then disclosing what has, in fact, been discovered (as opposed to what it was thought, in fact wrongly, might have been discovered).

6.5 Other criminal offences, however, are not based around the protection of data but rather bite at the moment of commission. Assume the same example as above but that the only way to obtain the evidence of a connection was by bribing (or blackmailing) an employee to provide the information, and that doing so produced not the evidence of a corrupt relationship but evidence of the extra-marital affair. With that evidence obtained, subject to potential arguments of privacy in the civil law (which an editor may well be prepared to argue), there would be nothing to prevent the journalist from publishing the story of the affair.

6.6 On the face of it, many journalists might argue that this is entirely justifiable. A story (albeit not the story sought) has been lawfully obtained and there is no reason based upon its manner of acquisition why it should not be put into the public domain. What it depends on, however, is the information of a link between the official and the corrupt agent. Assuming that the story emerged, how could the proposed defence to an allegation of bribery or blackmail

[25] Details contained in the judgment of the Court of Appeal [2012] EWCA Crim 1243

ever be tested? The journalist will say (whether honestly or not) that the information came from a reliable source, responsible in the past for much entirely accurate material, whom he is not prepared to name under any circumstances. The effect of a defence in law will be to emasculate almost all prospect of bringing a journalist to task for the way in which a story has been researched, whatever means, at first blush illegal, might have been used.

6.7 Neither is a criminal defence necessary. It might be thought that it is only right that both editors and journalists should think long and hard before embarking on what is criminal conduct in an effort to pursue a story and that it should not be sufficient to rely on an undisclosed source or sources as an all embracing defence. There are, however, other mechanisms to ensure that the law is not brought to bear on journalists (or, indeed, on any one else) in an oppressive or unfair way.

7. Public interest: the decision to prosecute

7.1 There are a number of mechanisms in place to prevent or inhibit the prosecution of crime which might be described (in non-technical language) as abusive. These revolve around the decision of the prosecutor to prosecute; the control that any criminal court exercises over abuse of its process; the 'rights' of the jury; and the ultimate discretion of a sentencing judge. It is worth discussing each of these in turn.

7.2 Whatever might have been the position previously, in recent times the decision of the prosecutor to prosecute has always involved the exercise of discretion. On 29 January 1951, the then Attorney General, Sir Hartley Shawcross QC, made a statement to the House of Commons which has been frequently since repeated and adopted by subsequent Attorneys General. He said:[26]

> *"It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution."*

7.3 Until this Inquiry, the manifestation of this discretion was only contained within the Code for Crown Prosecutors, which not only prescribes an evidential test (whether there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge) but also a public interest test which is articulated in this way:[27]

> *"A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal (see section 7). The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.*
>
> *Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although*

[26] HC Hansard, Debates, 29 January 1951, vol 483, col 681
[27] paras 12-13, http://cps.gov.uk/publications/code_for_crown_prosecutors/index.html

there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those factors to be put to the court for consideration when sentence is passed."

7.4 Not least because of the expressed concern relating to journalists, the Inquiry raised the issue with the Director of Public Prosecutions, Keir Starmer QC (DPP) and, seeking an analysis of the position, also invited him to consider whether it was appropriate to enunciate a policy in relation to the public interest in the prosecution of journalists.[28] His statement recognised the considerable public concern about the allegedly criminal activities of some journalists and saw no difficulty in developing a bespoke policy to give guidance to staff as to the approach to such difficult cases. Thereafter, on 18 April 2012, he published interim guidelines (on which he commenced a consultation exercise) on assessing the public interest in cases affecting the media. He distinguished between the public interest served by freedom of expression and the right to receive and impart information and the separate question of whether a prosecution is in the public interest (being the second stage of the Code test).

7.5 That process of consultation concluded and, on 13 September 2012, the DPP issued formal Guidelines.[29] Having reviewed the general principles relating to prosecution, the Guidelines refer to principles of special application in cases affecting the media by reference to Article 10 of the ECHR and decisions such as *Sunday Times v UK (No 2)*[30] in addition to the further guidance to be derived from *R v Shayler*[31] and *AG's Reference No 3 of 2003.*[32] The Guidelines then identify that the appropriate approach is encapsulated by the question whether the public interest served by the conduct in question outweighs the overall criminality.

7.6 There is then an outline of the way in which prosecutors should deal with the question by following a three stage process: that is to say (1) assessing the public interest served by the conduct in question; (2) assessing the overall criminality; and (3) weighing these two considerations. In relation to the public interest served by freedom of expression and the right to receive and impart information (not previously defined in law), examples of conduct capable of serving the public interest are provided which are not intended to be exhaustive but which include the following:

"(a) Conduct which is capable of disclosing that a criminal offence has been committed, is being committed, or is likely to be committed.

(b) Conduct which is capable of disclosing that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which s/he is subject.

(c) Conduct which is capable of disclosing that a miscarriage of justice has occurred, is occurring or is likely to occur.

(d) Conduct which is capable of raising or contributing to an important matter of public debate (of which there is no exhaustive definition but examples include public debate about serious impropriety, significant unethical conduct and significant incompetence which affects the public).

(e) Conduct which is capable of disclosing that anything falling within any one of the above is being, or is likely to be, deliberately concealed."

[28] p23, lines 2-17, Keir Starmer QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-8-February-2012.pdf

[29] http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/

[30] [1992] 14 EHRR 123

[31] [2002] UKHL 11

[32] [2004] EWCA Crim 868

7.7 As to the assessment of overall criminality, the Guidelines require prosecutors to focus on the conduct in question, the extent of the wrong-doing and the harm caused. They gave as non-exhaustive examples:

> *"(a) The impact on the victim(s) of the conduct in question, including the consequences for the victim(s).*
>
> *(b) Whether the victim was under 18 or in a vulnerable position.*
>
> *(c) The overall loss and damage caused by the conduct in question*
>
> *(d) Whether the conduct was part of a repeated or routine pattern of behaviour of likely to continue.*
>
> *(e) Whether there was any element of corruption in the conduct in question.*
>
> *(f) Whether the conduct in question included the use of threats, harassment or intimidation.*
>
> *(g) The impact on any course of justice, for example whether a criminal investigation or proceedings may have been put in jeopardy.*
>
> *(h) The motivation of the suspect insofar as it can be ascertained (examples might range from malice or financial gain at one extreme to a belief that the conduct would be in the public interest at the other taking into account the information available to the suspect at the time).*
>
> *(i) Whether the public interest in question could equally well have been served by some lawful means having regard to all the circumstances in the particular case."*

7.8 The Guidelines go on to make the point that the impact on the victim(s) of the conduct in question is of considerable importance[33] and the fact that invasions of privacy can be keenly felt and can cause considerable distress to victims (although "regard must be given to the level of the seriousness of the invasion, whether on the facts there was a reasonable expectation of privacy and whether the conduct in question was proportionate to the public interest claimed to be served"). As for the decision, the Guidelines go on to make two further, very important, points. These are:

> *"37. Prosecutors are reminded that assessing whether a prosecution is required in the public interest is not an arithmetical exercise involving the addition of the number of factors on each side and then making a decision according to which side has the greater number. Rather, each case must be considered on its own facts and its own merits. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Even where there may be a number of public interest factors which tend against prosecution in a particular case, the prosecutor should consider whether the case should go ahead but with those factors being drawn to the court's attention so that they can be duly considered by the court.*
>
> *38. Prosecutors should take special care in cases which involve the disclosure of journalists' sources. In approaching such cases, prosecutors are reminded that the European Court of Human Rights has indicated that:* [34]
>
> > *"Protection of journalistic sources is one of the basic conditions of press freedom … Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public*

[33] Reference is made to Article 8 of the ECHR

[34] Goodwin v UK (1996) 22 EHRR 123 paragraph 39; see also Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2003 and Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101

watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect of an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

7.9 When the DPP was giving evidence, it was made clear that it was not for me or for the Inquiry to enunciate a prosecutions policy and, further, that it was a matter for him to determine whether or not he wished to.[35] However, it is clearly important that he has chosen to accept the invitation proffered to him and now gone so far, after consultation, as to issue formal and thus definitive Guidelines.

7.10 It is right to pay tribute to this contribution to the criminal justice system, which provides clarity to the circumstances in which a prosecution might be considered appropriate (and would obviously have excluded any prosecution should one have been considered in relation to the disclosure of MPs' expenses). It is beyond doubt that journalists would prefer guarantees and immunity but, put simply, that would be unjustified and would do nothing to ensure that appropriate standards of behaviour were set, encouraged, supported and enforced, not merely as a matter of criminal law but also editorial practice.

8. Public interest: other safeguards in the criminal process

8.1 Three other protective mechanisms are available for journalists, each of which can be described shortly. First, although the court has no jurisdiction to interfere with the exercise by the prosecution of its discretion to prosecute,[36] it can offer advice to the prosecutor and require instructions to be taken from the prosecuting authority before permitting the prosecution to commence. Furthermore, the court can stay a prosecution as an abuse of the process of the court, either because it represents an abuse of executive power[37] or in circumstances which amounted to an 'affront to the public conscience';[38] 'so great an affront to the integrity of the justice system and therefore the rule of law that the associated prosecution was thereby rendered abusive and ought not to be countenanced by the court' is also sufficient.[39] It is not necessary to seek to define how these principles might be applied to the prosecution of a journalist; given the proposed guidelines on prosecution, it is extremely unlikely they will ever arise, but there should be little doubt that the circumstances will be obvious if they did.

8.2 The second protective mechanism must be mentioned as a matter of constitutional reality. There are examples, littered throughout history, in which juries are properly directed as to the law and, in particular, the ingredients of a specific offence, who then take the view that, irrespective of the law, they are not prepared to convict for what they perceive to be good reasons. The best (and oft-cited) example is the acquittal of Clive Ponting, a senior civil servant, of offences contrary to s2 of the Official Secrets Act 1911, following his disclosure to Tam Dalyell MP of documents relating to the sinking of the General Belgrano during the

[35] p23, line 13, Keir Starmer QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-8-February-2012.pdf
[36] See *R v. FB, R v. AB, R v. JC* [2010] EWCA Crim 1857 and the cases therein cited and *R v. SH* [2010] EWCA Crim 1931
[37] See, for example, *R v. Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42, *R v. Mullen* [2000] QB 520
[38] Per Lord Steyn in *R v. Latif* [1996] 1 WLR 104 at page 112
[39] See *R v. Grant* [2006] QB 60 per Laws LJ at para 54

Falklands War in 1982. No reliance could be placed on the prospect of a jury taking this course in relation to a journalist but no analysis of the position would be accurate without it being mentioned.

8.3 The third protective mechanism is, in one sense, the ultimate safeguard. Although (in the absence of abuse of process) the court cannot prevent a prosecution from being pursued and will conduct the trial entirely in accordance with the law, should a journalist be convicted, a very substantial discretion vests in the judge when it comes to sentence.[40] Even in those cases governed by guidelines issued by the Sentencing Council (which every court 'must follow'), the ultimate discretion is preserved by the words 'unless the court is satisfied that it would be contrary to the interests of justice to do so': see s125(1) of the Coroners and Justice Act 2009.

8.4 Thus, if a prosecution has been pursued which the judge concludes did not correctly balance the extent to which the public interest served by the conduct in question outweighed the overall criminality, it is open to him or her to reflect that fact in the sentence passed. At one end of the spectrum is an order of absolute discharge, prescribed by s12(1) of the Powers of Criminal Courts (Sentencing) Act 2000 in these terms:

> *"Where a court is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order discharging him absolutely."*

8.5 The effect of such an order is that the conviction is "*deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made*" and "*shall be disregarded for the purposes of any enactment which imposes … or requires the imposition of any … disqualification or disability*" on the convicted person: see s14(1) and (3) of the 2000 Act.

8.6 The argument that has been advanced is that, by this stage, the journalist has had to undergo the indignity of prosecution and trial and that the decision of the judge that it is inexpedient to inflict punishment, doubtless because of the view that the judge takes of the prosecution, is of little comfort. This is a form of special pleading. The fact is that the journalist will have chosen deliberately to break the law in pursuit of a story. That should not be an everyday occurrence and it should be common place that no such decision is taken without the authority of the newspaper which employs him or her and then only following a careful consideration of the material that justifies it. If the journalist is freelance, it will be extremely wise for any such decision to be documented and the evidence base for it made clear.

8.7 In those circumstances, the decision of an independent prosecutor should not be feared or considered an unnecessary interference with the freedom of the press: it is a check on the exercise of that freedom which ensures that it is not being abused. There are then potential checks on the prosecutor's decision, ultimately, by the court should a prosecution ensue and reach the stage of sentence. Provided appropriate attention is paid to the importance of a free press and the duty of the press to hold power to account, there is no reason why journalists should not be subject to exactly the same checks and balances that every other member of society has to endure should they seek to exercise some right or privilege.

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[40] The exception is, of course, where the penalty is fixed by law: effectively, this only applies in relation to murder

9. The future

9.1 In the circumstances, save in relation to the modification of the defence and the increase in the maximum penalty for an offence under s55 of the Data Protection Act 1988 (which requires an order from the Secretary of State implementing the provisions of s77-78 of the Criminal Justice and Immigration Act 2008),[41] I do not recommend that any change is necessary to the substantive criminal law.

> **On the basis that the provisions of s77-78 of the Criminal Justice and Immigration Act 2008 are brought into effect, so that increased sentencing powers are available for breaches of s55 of the Data Protection Act 1998, I also recommend that the Secretary of State for Justice use the power vested in him by s124(1)(a)(i) of the Coroners and Justice Act 2009 to invite the Sentencing Council of England and Wales to prepare guidelines in relation to data protection offences (including computer misuse). With the new statutory maximum and the lack of precedent, it is important that courts recognise the gravity of this type of offending and are also provided with guidance regarding the implications should circumstances arise when it becomes necessary to consider the commission of this type of offence by a journalist.**

9.2 The value of involving the Sentencing Council is obvious. Before producing a guideline, the Council is required to consult on a draft and include within that consultation process "such other persons as the Council considers appropriate":[42] only then is a guideline promulgated. It is inconceivable that the Council would not consider it appropriate to consult the Information Commissioner, the media and any other interested parties on the appropriate categories of the offence, the range of sentence for each category and both the aggravating and mitigating circumstances.

9.3 Turning to the procedural criminal law, in submissions concerned with recommendations for a new more effective policy and the future conduct of relations between the police and the press, the Deputy Commissioner, Craig Mackey, has identified three issues of particular significance. Each of these is concerned with the operation of the PACE. The first concerns what he describes as the '*camouflage of apparent co-operation,*' which itself can defeat an application for a production order because of the requirement in the access conditions, set out in para 2(b) of Schedule 1 to PACE, that 'other methods' of obtaining the material have failed or have not been tried because it appeared that they were bound to fail. The second relates to the extreme difficulty of obtaining journalistic material by means of a production order. The third concerns the absence of a statutory exclusion from journalistic material of items held with the intention of furthering a criminal purpose: that situation is to be contrasted with the fact that 'criminal purpose' material is excluded from legal professional privilege by s10(2) of PACE. I shall deal with them in turn.

9.4 As to the first proposition, DC Mackey points to the evidence of non-cooperation that surrounded the attempt to search the NoTW building and what he described as 'the veneer of apparent co-operation' which followed.[43] On that basis, it is argued that the police would not be able to satisfy the access conditions contained in para 2(b) because the company and its solicitors would always be able to point to assertions of willingness to assist, whatever was happening in fact. He submits that para 2(b) should simply be repealed.

[41] This recommendation is dealt with at length in Part H, Chapter 5
[42] s120(6)(d) of the Coroners and Justice Act 2009
[43] Part E, Chapter 5

9.5 This proposition contains within it a far reaching challenge to the checks and balances that are built into PACE and, for my part, I am not convinced that it would be appropriate to infer from this particular investigation a wider problem concerning obtaining material in circumstances such as obtained here: even if that is the case, it is not evidenced.

9.6 The second concern relates to the definition of journalistic material. The phrase is defined by s13(2) PACE as 'in the possession of a person who acquired or created it for the purposes of journalism'. That phrase – the purposes of journalism – is not defined in the Act but has been given a narrow meaning in the context of the Freedom of Information Act 2000.[44] I see no reason why there should be a different construction of the phrase in the context of PACE.

9.7 The third concern relates to the question whether journalistic material continues to fall within the scope of excluded material (so as to fall within the scope of the second set of access conditions in Schedule 1 of PACE) if it has been created or acquired in furtherance of a crime. Mr Mackey poses the question: if there was iniquity such as crime or fraud did the duty of confidence ever arise? If not, then the journalistic material will not be held under an undertaking, restriction or obligation of confidence as required by s11(3) of PACE.

9.8 Mr Mackey's submission is advanced in this way:[45]

> *"The concept of confidentiality is subject to limiting principles, one of which is that the public interest in protecting confidences may be outweighed by some other countervailing public interest which favours disclosure, such as that a person cannot be the confidant of a crime or fraud (see Lord Goff in AG v. Guardian Newspapers (No. 2) [1990] 1 AC 109 at 282-3). However, the case law concerning the 'defence of iniquity' deals with whether a contractual duty of confidence can be enforced (see e.g. Gartside v. Outram (1857) 26 LJ Ch (NS) 113, Initial Services v. Putterill [1968] QB 396, at 410). There is no direct authority on whether confidentiality under the PACE statutory decision still applies, where it is in the context of criminal behaviour.*
>
> *A caveat was expressly introduced into s10(2) of PACE, dealing with legal professional privilege [to the effect that Items held with the intention of furthering a criminal purpose are not items subject to legal privilege]. However, no such caveat was introduced into sll of PACE dealing with journalistic material held in confidence."*

9.9 The point is then made that similar provisions to Schedule 1 PACE are contained in Schedule 5 of the Terrorism Act 2005, which uses the same definitions of 'items subject to legal privilege', 'excluded material' and 'special procedure material' as in PACE. A simpler set of access conditions provides grounds on which an application for a production order could be granted under that Act even in relation to journalistic material (although one of the conditions is that it is in the public interest having regard to the benefit likely to accrue to a terrorist investigation if the material is obtained).[46] The submission goes on (at para 3.6):

[44] *Sugar v British Broadcasting Corporation* [2012] UKSC 4 per Lord Phillips (at para 67) "Information should only be found to be held for the purposes of journalism ... if an immediate object of holding the information is to use it for one of those purposes"; Lord Walker (at para. 84) "The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way"; Lord Brown (at par 106) that "the central question to be asked ... will be ... whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes". See also para 6.4 of the Annex of Legal Framework

[45] pp12-13, paras 3.2-3.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-submussion-from-MPS.pdf

[46] Para 6 of Schedule 5 of the Terrorism Act 2005

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> *"Parliament has therefore expressly allowed applications to be made for excluded material (including journalistic material obtained in confidence) in terrorism cases, and added a 'public interest' condition (similar to paragraph 2(c) of Sch.1 to PACE) under which the court can take into account, amongst other factors, whether the journalist or media corporation was involved in any criminal activity. Yet Parliament did not include any such provisions in PACE. It is arguable, therefore, that Parliament did not intend the courts to override the PACE definition of journalistic material held in confidence simply by saying it is not held in confidence where it is not in the public interest."*

9.10 It is certainly remarkable that Parliament might have provided greater protection for journalistic material than in relation to legal professional privilege as a matter of general law. Even more so that it would provide less protection for the material where the public interest is served in relation to a terrorist investigation than might be the case if that material has been created or acquired in furtherance of crime. Although the circumstances in which the provision might bite will hopefully be very rare, I see force in the submission that s11(3) PACE should be amended by providing that journalistic material is only held in confidence for the PACE provisions if it is held, or has continuously been held since it was first acquired or created, subject to an enforceable or lawful undertaking, restriction or obligation.[47]

9.11 I am very conscious that I have received submissions only from the MPS on this topic and that there is potential room for argument that any amendment to PACE will have far wider ramifications of which I have not been apprised and go beyond the limited goals that DC Mackey seeks to achieve. Before any conclusion can be reached on any of these issues, appropriate consultation will be essential.

In the circumstances, without pre-judging any conclusion, I recommend that the Home Office should consider and, if necessary, consult upon (a) whether paragraph 2(b) of Schedule 1 to the Police and Criminal Evidence Act 1984 should be repealed; (b) whether PACE should be amended to provide a definition of the phrase "for the purposes of journalism" in s13(2); and (c) whether s11(3) of PACE should be amended by providing that journalistic material is only held in confidence for the PACE provisions if it is held or has continuously been held since it was first acquired or created subject to an enforceable or lawful undertaking, restriction or obligation.

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[47] I do not ignore the considerations that flow from Article 10 of the ECHR and s. 10 of the Contempt of Court Act 1981 (as to which there is no material difference in principle: see *Camelot Group plc v Centaur Communications* [1999] QB 124 at 138G per Thorpe LJ). The courts will continue to have to consider these provisions and carry out a balancing exercise in any case involving the press even if the material is neither journalistic material or excluded within the PACE definitions: a summary of the position can be found in *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin) per Dyson LJ (as he then was) at paras 48 et seq

CHAPTER 3
THE CIVIL LAW

1. Introduction

1.1 Appendix 4 describes the current law and identifies the flexibility that has allowed the common law to develop incrementally and in keeping with social developments and the principles enunciated in general terms by the European Convention on Human Rights. How otherwise could the law seek to deal with concepts which have only emerged in recent years, such as the explosion of communication on the internet, blogs which have the same (or greater) reach as traditional newspapers and the social media such as Facebook? The line drawn between personal and public space has to be re-evaluated in the light of the challenges that have been posed and it would be foolish to expect that change will not continue so that the challenges of next year will be different yet again to those faced today.

1.2 A very good example of the way in which the law has had to re-evaluate its approach can be found in the developments relating to injunctive relief. Until the rise of the internet, with servers based out of the jurisdiction of the UK court but providing material to anyone with access to an online computer, and the additional changes consequent on social media, if the court prohibited the publication of any material, whether based on privacy, confidence or in any other circumstances, the law of contempt (for breach of the injunction) operated to ensure compliance. Attempts to ensure sufficient secrecy to provide effective relief led to what became known as super-injunctions, which in turn led to other difficulties.[1]

1.3 This Chapter is not intended to repeat the analysis of the way in which the substantive law has developed but rather to deal with the problems facing those who seek to enforce their rights. It concerns the complexity of the process of civil law and the availability (or otherwise) of funding for that purpose. Again, it is not intended as a definitive analysis of civil law procedure; it is to provide a sufficient landscape of the problems faced by claimants, the dilemmas faced by defendants and the (perfectly legitimate) attempts of each to confront them. The present position of the substantive law will then briefly be considered.

2. Civil proceedings: the present risk of litigation

2.1 For those without the experience, it might be thought an easy matter to start civil proceedings and, in some contexts, it is. In a myriad number of different circumstances, it is possible to do so on the internet. By way of example only, if a consumer wishes to pursue a retailer in relation to defective goods, if a tradesman wants to recover the amount that he is owed for work done and materials supplied, or if a landlord wants to commence proceedings for possession because of non payment of rent (or for other breaches of the tenancy), it is comparatively straightforward to access the court system and use a process called Money Claims On-line (MCOL) or Possession Claims On-line (PCOL) to do so. If the claim is not defended, obtaining a judgment is equally straightforward, although rather more is involved when it comes to enforcement.

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[1] Appendix 4 and the Report of the Committee on Super-Injunctions chaired by Lord Neuberger MR: http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf

2.2 It goes further. The system encourages self help because, in a large number of cases, there is no provision for public funding to assist those who wish to pursue remedies for breach of their contractual or other rights. Legal aid used to provide that assistance but, to a large extent, because of its cost, it is no longer available. Citizen Advice Bureaus will advise members of the public as to what they can do to enforce their rights (or resist attempts by others to pursue them); other organisations in the third sector do likewise. How that should happen, who should do what, and how it is to be funded are part of the wide debate that surrounds access to justice.

2.3 Where a claim is disputed, it is allocated to the type of trial associated with its value and/or its complexity. For small claims, such as consumer disputes or debt up to £5,000, the case will almost invariably be heard in the county court using the small claims procedure that is available. This jurisdiction leads to a hearing that will be conducted by a District Judge on an informal basis; in most cases, either one or both parties will be unrepresented and will look to the judge to conduct the proceedings in such a way as respects the rights of both parties and apply the law (which, in this type of case, is usually but not invariably straightforward). The judge will reach a decision and so provide the parties with the resolution of their dispute.

2.4 In the context of this Inquiry, this straightforward means of obtaining access to justice is of very limited assistance because actions in defamation can only be commenced in the High Court;[2] it is unusual for such claims to be remitted to the county court and even more unlikely that they will ever be considered suitable for the small claims procedure. Quite apart from the specific provision in relation to defamation, however, the real problem is that there are a large number of types of claim that are too complicated for self help. Many (particularly in the area of media law) require legal help and even ingenuity to pursue.[3] Lawyers then become essential. Those of sufficient personal wealth can afford to fund legal advice and representation. Those who are not, cannot. For them a different mechanism to provide access to justice was provided in the form of the conditional fee agreement (CFA). By this arrangement, solicitors can act for a client on the basis that they work on the principle "No Win, No Fee". In other words, solicitors approached by a potential client without funds make an assessment of the prospects of success in the case: if they consider that the prospects are good enough, they could offer this type of agreement, knowing full well that the law will recognise the agreement and, should their client succeed, allow them to obtain an order that the defendant in the litigation obtain an uplift (up to 100%) of the actual costs incurred (which will have to have been agreed by the defendant or assessed by the court). This uplift represents money that they would not earn from a fee-paying client but is intended to compensate for those cases which they take on but lose, when they forgo all the costs that they have incurred.

2.5 There is an additional complication. Litigation in this country normally operates on the principle that the winner recovers his or her costs from the loser. If, for example, a member of the public sues a newspaper and wins, he or she can expect that the newspaper is good for the money and can pay the costs that the court orders to be paid; if the solicitors are working on a CFA, this will include the uplift. On the other hand, should the newspaper win, an order for costs will equally be likely to follow against the member of the public who may not have

[2] s15(2) of the County Courts Act 1984. The High Court can transfer proceedings to the county court pursuant to s40(2) of the Act

[3] A good example of this legal ingenuity provided one of the sparks that has generated this Inquiry. In an attempt to learn whether she had been a victim of phone hacking, in July 2009, Sienna Miller issued proceedings against the MPS seeking disclosure of any material in its possession that provided evidence that she could use to deploy against NI: see http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Sienna-Miller.pdf. Her lawyers placed reliance on the decision in *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133, obtained the order and the evidence. Many others have since followed suit.

access to money and whose home or other assets would be at risk. To address that problem, the concept of after the event insurance (ATE) was introduced.

2.6 Everybody understands the protection that insurance provides. In the usual case, a premium is paid on the basis that if the insured event arises during the period of the insurance, a specified sum will be paid. Life insurance operates on the basis that an identified lump sum will be paid during the currency of the contract if the person who is the subject of the insurance dies. Travel insurance can insure against the risk of cancellation, baggage being lost in transit, medical expenses being incurred or a host of other risks. ATE is different. The event has occurred before the insurance is taken out. This insurance, however, is to cover the risk of failure of the litigation that arises out of the event. The premium is calculated by the underwriters, based on the risk that the litigation will fail and the amount at risk (the costs that would be ordered to be paid to the winning side) for which insurance is sought.

2.7 ATE insurance has another benefit. As the law presently stands (although this is about to change), the premium itself is fully recoverable as part of the costs of the action so that if the beneficiary of the policy succeeds, not only are the solicitors' costs (including the uplift of up to 100%) recovered but the premium for the ATE insurance is also recoverable. Furthermore, the premium can itself be conditional, in which circumstance it will only be payable if the action itself succeeds. On that basis, if the action fails so that the providers of the ATE insurance have to meet costs up to the insured limit, the solicitors will not recover their costs and the ATE insurers will not recover the premium (notwithstanding that they have had to pay out on the insurance). All this comes at a cost. Insurers will calculate the premium at an appropriate level so that recoveries in the successful cases compensate the loss of premium (and the costs paid) in the unsuccessful proceedings. It will be no surprise, therefore, that premiums have been high.

2.8 The consequence has been a massive increase in the costs of litigation for defendants who lose and, thus, the cost of premiums for employers insuring against employees and public liability claims for those requiring road traffic insurance and many others. It has also increased the cost for those who self-insure, in which group newspaper titles are likely to be included. It resulted in lobbying the Government to change the rules, not only generally but specifically in relation to defamation. As a result, the Ministry of Justice issued a consultation paper on "Controlling costs in defamation proceedings";[4] having reviewed the responses it decided to invite the Civil Procedure Rule Committee (CPRC) to consider draft rules to implement a number of measures to control costs in publication proceedings.

2.9 As a result, amendments to the Civil Procedure Rules and associated directions were introduced in all civil proceedings. The first change was to require notice of ATE insurance to be given to the other party with the letter before claim or within seven days of taking out insurance. Second, additional information was required to be given as to whether premiums are staged and, if so, the stage at which increased premiums become payable along with the level of insurance cover. Furthermore, in relation to publication proceedings only, the Rules introduced a period during which, if the defendant admitted liability and made an offer leading to a settlement, the defendant would not be liable for the ATE insurance premium.[5]

2.10 Running parallel with these changes, however, there was significant concern about costs generally so that a far wider scale review was undertaken by Lord Justice Jackson. He

[4] http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm

[5] http://www.parliament.uk/deposits/depositedpapers/2010/DEP2010-1241.pdf

provided a preliminary report in May 2009;[6] such was the significance of defamation and related proceedings (such as privacy) which generally involved the media that the topics were considered separately. Jackson LJ started by making the point that the monetary return by way of damages in actions of this type may not be substantial[7] but that a claimant could attach great value to winning his claim because the judgment itself will provide vindication. This is an important point for two reasons. First, it emphasises the social objective of providing a mechanism for protection of reputation and personal privacy which is not easily protected simply by money. Second, it underlines that it would not be appropriate to require the same degree of proportionality in relation to costs as, for example, in a commercial dispute.

2.11 Another aspect of this type of litigation concerns what both claimants and defendants describe as aggressive litigating. Representatives of the press point to the observations of Lord Hoffmann in *Campbell v MGN Ltd*[8] referring to "*the conduct of the case by the claimant's solicitors in a way which not only runs up substantial costs but requires the defendants to do so as well*", so that with the risk of a success fee "*the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant's own costs were equally high*". Paul Dacre made a similar point, criticising lawyers for running "relatively straight-forward" cases on CFAs for "*as long as possible*"[9] although, as Jackson LJ observes, if "relatively straight-forward" means that the claimant is bound to win, the change in the rules will assist by accruing cost benefit to early admission. Jackson LJ also noted that three claimant firms laid the blame at the door of media defendants effectively (and positively asserted by one) for dragging litigation out. This has some echo in the evidence heard by the Inquiry regarding what has been described as defensive attack.[10] In the context of this issue, however, it does not matter who is responsible.

2.12 Jackson LJ produced a final report in December 2009[11] and again returned to defamation and related claims. He noted the argument that libel law imposed excessive restrictions on free speech, with the further point advanced in an opinion of Lord Pannick QC and Anthony Hudson that the present system of costs recovery imposed a disproportionate regime such that it "*cannot be convincingly be established that it is necessary and proportionate to a legitimate aim*" rendering compliance with Article 10 of the ECHR arguable.[12] The first point was countered by the submission that it is always open to publish on the basis of what can be proved to be true and that there is no public interest in misinformation. While accepting that

[6] Vol 1 is at http://www.judiciary.gov.uk/NR/rdonlyres/D2C93C92-1CA6-48FC-86BD-99DDF4796377/0/jacksonvol1low.pdf and vol 2 at http://www.judiciary.gov.uk/NR/rdonlyres/642936FA-292D-4432-8CF2-B2A44C7FC4FB/0/jacksonvol2low.pdf

[7] Jackson LJ noted the 'notional' ceiling on general damages awarded in defamation in the region of £215,000 to £250,000 (see *Gur v. Avrupa Newspaper Ltd* [2008] EWCA Civ 594; *Tierney v News Group Newspapers Ltd* [2006] EWHC 3275 para 10. In the final report he explained that the reason for this apparent limit is that "it is abhorrent if a claimant with serious personal injuries is treated less generously by the courts than a defamation claimant who (although distressed) remains fit and well"

[8] [2005] UKHL 61 at para 31

[9] In a speech to the Society of Editors in November 2008

[10] Part F, Chapter 7

[11] http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

[12] This argument subsequently prevailed in the European Court of Human Rights following further litigation relating to Naomi Campbell when the Court ruled that the recovery of success fees at the level sought by lawyers in privacy and defamation cases represents a significant violation of freedom of expression. In that case, the figures were startling: Ms Campbell was awarded £3,500 in damages after the House of Lords ruled her right to privacy had been breached by a front-page story revealing her attendance at Narcotics Anonymous. Her legal costs came to more than £1m, including £288,468 base costs, £279,981.35 in success fees and £26,020 disbursements: see *MGN v. United Kingdom* (Application 39401/04)

success fees and ATE premiums should cease to be recoverable, Jackson LJ was concerned to put other measures in place to ensure access to justice for claimants.

2.13 The special measures that he recommended were an increase in the general level of damages for defamation and breach of privacy by 10% (in line with his recommendation in relation to damages for personal injuries) with effect from the date that CFA success fees cease to be recoverable. The second is that the success fee (in the future to be paid by the claimant out of damages rather than the defendant) would be subject to negotiation but "x% of base costs, subject to a cap, the cap being y% of damages". He goes on to observe:[13]

> *"The claimants in these cases (unlike personal injury claimants) do not need to devote any part of their damages to future care. Their main remedy … is vindication by the judgment of the court or the statement in court after settlement. I see no reason why such claimants should not be prepared to pay a substantial proportion of the damages to their lawyers as success fees."*

2.14 The principal recommendation concerned the mechanism for achieving the intended social objective of protecting claimants from adverse costs orders, on the basis that the paradigm libel case concerns an individual of moderate means and a well resourced media organisation. Jackson LJ therefore suggested qualified one way costs shifting for defamation and privacy cases, as similarly proposed for personal injury and judicial review so that the new provision of the Civil Procedure Rules (which would not require primary legislation) should provide:

> *"Costs ordered against the claimant in any claim for defamation or breach of privacy shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:*
>
> *the financial resources of all parties to the proceedings; and*
>
> *their conduct in connection with the dispute to which the proceedings relate."*

2.15 The broad recommendations made by Jackson LJ were accepted by the Government but the concept of qualified one way costs shifting in relation to defamation and breach of privacy has not, as yet, been adopted. Before elaborating on the effect of that, it is necessary to identify the changes that have been made by legislation contained within Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

2.16 As enacted, s44 of the Act (amending s58 and s58A of the Courts and Legal Services Act 1990, which concerns the regulation of CFAs and the recoverability of success fees) will mean that a success fee under a CFA will no longer be recovered from a losing party although, subject to further regulation as to calculation and as to cap, the lawyers conducting proceedings under a CFA will be able to recover the fee from a client. Save in circumstances irrelevant to the type of litigation connected to the press, s46 of the Act abolishes the right to recover the ATE insurance premium.

2.17 These provisions (due to come into force on 1 April 2013) undoubtedly remove the concern expressed by the European Court of Human Rights in *MGN v United Kingdom*. They will also dramatically affect the balance of the relationship between those who wish to complain about press conduct and the press.

[13] Chapter 32, para 3.4

3. Litigation against the press

3.1 In order to understand the true impact of these changes to the law, it is necessary to go back in time to the period when legal aid (that is to say, state support) was available to fund civil litigation. This was subject to the means of the applicant and sufficiently authoritative legal advice that there was a more than 50% prospect of success or, to put the test another way, that advice would be given to a man of moderate means that the prospects of success were sufficiently good to justify the costs risks of undertaking the litigation. For millions of people, legal aid was a lifeline and permitted access to justice for those who could never otherwise have afforded to pursue a remedy for breach of their rights. The further, additional, benefit of legal aid was that it acted as a shield as well as a sword.

3.2 Thus, not only did legal aid fund the legal costs of the assisted person, but (save in certain limited cases) it prevented the court from making an adverse order for costs against that assisted person should he or she lose the case. In other words, for those whose means were such that they were not required to make any contribution to their own legal costs, a successful defendant would be unable to recover its costs. In the main, this impacted on insurance companies but the consequences were well known and built into the risk assessment and, doubtless, the premium.

3.3 In the same way that there was an exception to the way in which proceedings in defamation could be commenced, there was a further exception in relation to legal aid: put simply, whatever the means of the individual, legal aid was simply not available to pursue litigation based on the torts of libel and slander. This was before the days when CFA agreements were lawful, with the result that only the very rich or, at least, those who could afford or were prepared to take the risk of a substantial costs liability of losing an action were able to litigate. Power was very much in the hands of the press who (by way of comparison with most potential litigants) were well able to afford to litigate; they had in-house lawyers who were very familiar with the law and more than capable of advancing the case of the relevant title forcefully and with authority. Except where a litigant was so wealthy that the risk was simply not a factor, that power was real and must have caused very many who felt aggrieved (whether justifiably or not) by defamatory statements to refrain from seeking to pursue any remedy.

3.4 In the same context, it must be borne in mind that even if a claim succeeded, damages for defamation were large (usually then determined by a jury); it depended on what view the particular (inevitably inexperienced) jury took of the defamatory statement. In most cases, slander (or spoken defamation) required proof of actual financial damage although in libel (written or broadcast defamation), no financial damage is required. Thus, although a very substantial sum might be awarded as damages, it was by no means guaranteed.

3.5 CFAs changed the landscape entirely. Then, all who felt aggrieved at the way in which they had been treated by the press could seek legal advice and the operation of the libel laws (with the defendant having to prove the defence of justification or the circumstances of qualified privilege) created a climate in which redress was far more likely to be attainable and the power which had been with the press now moved to those who wished to sue. If a lawyer was sufficiently confident of the claim, proceedings could be threatened and then commenced on a CFA and the risk to the defendant was enormous. However modest any damages might be, the potential costs bill if the claimant succeeded, increased by 100% for the success fee and then further increased by the cost of the ATE insurance premium, was potentially prohibitive. The press felt driven to settle not only because the editor was prepared to accept that a mistake had been made or did not feel confident about the story that had been written but

because, even if he or she did feel confident, the cost of losing was entirely out of proportion to the issue at stake.

3.6 This analysis is reinforced by the fact that defamation damages (now much more the province of judges, with juries being confined to few cases) have become easier to assess and (in order not to outstrip damages for personal injuries) were unlikely to be particularly substantial. Aggravated damages have always been modest and exemplary damages (intended to be punitive) were awarded in defamation only where it is established that the defendant's conduct has been calculated to make a profit which might well exceed the compensation payable.[14] Furthermore, in relation to privacy, the sum of £60,000 awarded to Max Mosley has been by far the largest award. In relation to his claim for exemplary damages, Mr Justice Eady adopted a restricted approach, deciding that it was not clear that misuse of private information was a tort to which the possibility of exemplary damages should necessarily extend: he considered it a matter for Parliament or, at the very least, the Supreme Court.[15] Thus, the largest sum in play in connection with many claims in defamation and privacy claims is undoubtedly the costs.[16]

3.7 The change of the law enacted by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will again alter the balance between those who complain about the press and the press itself. If damages for invasion of privacy are comparatively modest and there is no prospect of recovering either the uplift on costs that has previously been a feature of the CFA or the premium for ATE insurance, the economics of litigation move against those who would otherwise challenge the press in favour of the press. Neither has this point been lost on the Core Participant Victims, who have complained about their treatment at the hands of the press: many have given evidence to the effect that they have only been able to pursue a remedy against the News of the World (NoTW) because of the existence of the CFA regime and that without it, they would have been left without the wherewithal to pursue a claim for damages at all.[17]

3.8 Privacy claims and claims of the type that have been pursued against the NoTW are not necessarily straightforward and, in the absence of appropriate legal assistance, there is no question of an equality of arms between those who claim to have been victimised and the press. The wealthy will be able to pursue a remedy in court; there will be less incentive for lawyers to take up the cases of those who are not because the potential uplift in costs now payable out of the damages is likely to be comparatively modest. Further, on the basis that the premium for ATE insurance will not be recoverable, it will be much more expensive to litigate with protection against an adverse order for costs and, in the absence of such protection, the risk of financial disaster may be real. On the other hand, it is not difficult to understand

[14] *Rookes v Barnard* [1964] AC 1129

[15] The reasons that Eady J gave were the absence of existing authority and concern about whether such a claim in relation to the misuse of private information satisfied the twin tests of necessity and proportionality in Art. 10 of the ECHR: see [2008] EWHC 1777, [2008] EMLR 20 at paras 172-197

[16] The settlements that News International have agreed with a large number of those who have litigated in relation to phone hacking cannot be assumed to represent the sums that the court would have awarded

[17] Numerous examples were provided by the evidence both of victims and solicitors acting in these cases: p10, lines 2-11, Sally Dowler, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-21-November-2011.pdf; p39, line 15, Christopher Jefferies, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-28-November-2011.pdf; pp92-97, lines 21-5, Mark Lewis, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-23-November-20111.pdf; p44, line 20, Gerry McCann, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-23-November-2011.pdf; para 39: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Submission-on-behalf-of-Neil-Morrissey.pdf. In addition, when making submissions to Lord Justice Jackson, almost all claimant firms placed great importance on the role of CFAs in offering non-wealthy claimants access to justice

the very real dangers of a system which loads costs so heavily against defendants, such that it is never economic to contest a claim and always (almost irrespective of the merits) more sensible to compromise at an early stage. The consequent and real risk to freedom of expression (recognised in *MGN Ltd v United Kingdom*) is obvious.

3.9 In recommending qualified one way costs shifting in defamation and privacy cases, Jackson LJ sought to find a balance between what might be described as the very substantial financial windfall of the CFA/ATE system on the one hand and the undeniable impact on access to justice by those without substantial means on the other. The recommendation has not found favour with the Government although it has emerged during the course of discussions about the draft Defamation Bill, now proceeding before Parliament. Thus, the Joint Committee on the Draft Defamation Bill[18] observed (at para 89):

> *"We are concerned that defamation law will become even less accessible to the ordinary citizen because the Government does not plan to apply to defamation all Lord Justice Jackson's proposals that protect access to justice. For example, in respect of personal injury claims, there will be a cap on the amount that can be charged by lawyers as a success fee of 25% of the damages awarded. This cap does not apply to other civil claims, leaving the existing costs associated with 100% success fees in place. The Government's proposal to increase by 10% the level of general damages payable in civil cases is designed to go some way towards helping parties to pay for their own costs and to meet any success fee if they win. There is also the argument that parties are likely to take greater care over incurring costs when they are paying the costs themselves. However, we do not believe that the 10% increase in damages will be enough to make a difference, given that the average level of damages in defamation cases is no more than £40,000, and costs tend to be in measured in hundreds of thousands when a case goes to court. The mechanism recommended by Lord Justice Jackson to protect the less well-off—known as "Qualified One Way Costs Shifting" (QOCS)—will also not be available in defamation cases under the Government's proposals. This mechanism ensures that a claimant does not risk paying the costs of the defendant if the claim fails, unless they can afford to do so or have themselves acted unreasonably during proceedings. We consider that the application of this form of protection to defamation cases, as recommended by Lord Justice Jackson, may go some way to towards addressing the financial inequality that often exists. It is outside our remit to explore the impact of the Government's separate proposals on civil litigation costs reform in detail. Nonetheless we are sufficiently concerned about them to ask the Government to reconsider the implementation of the Jackson Report in respect of defamation actions, with a view to protecting further the interests of those without substantial financial means." [The emphasis is that of the Joint Committee.]*

3.10 The response of the Government summarised the argument and recited that conclusion but was not prepared, at this stage, to revisit the issue. It said:[19]

> *"74. The current CFA regime with recoverable success fees and ATE insurance has led to high costs across all areas of civil litigation, but there have been particular concerns in defamation and privacy cases. These high and disproportionate costs hinder access to justice and can lead to a 'chilling effect' on journalism, and academic and scientific debate. The European Court of Human Rights judgment in January 2011 in MGN v the UK (the Naomi Campbell privacy case) found the existing CFA arrangements on recoverability in that particular case to be contrary to Article 10*

[18] http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm
[19] http://www.justice.gov.uk/downloads/publications/policy/moj/Government-response-draft-defamation-bill.pdf

(freedom of expression) of the Convention. Changes to the existing CFA regime are therefore necessary.

75. The Government is aware of concerns around access to justice and the ability of those with modest means to pursue claims against often powerful media organisations. However, we do not believe that it is necessary to make any special provision in relation to the costs of privacy or defamation proceedings. As the Committee recognises, these claimants will benefit from a 10% increase in the general damages. The Government will continue to monitor the position following the implementation of the CFA reforms and the other reforms to the law and procedure for defamation claims which are being taken forward."

3.11 The Court of Appeal has taken the lead in relation to the increase in damages. On 26 July 2012, in *Simmons v Castle*,[20] the occasion of an application to approve a settlement in a personal injury appeal was used by a court comprising the Lord Chief Justice, the Master of the Rolls and the Vice President of the Court of Appeal (Civil Division) to increase general damages in tort (that is to say, in relation to non pecuniary loss) by 10% from current levels with effect from 1 April 2013. A further judgment adjusted the way in which the increase will be implemented to take account of the legislative change to CFA arrangements.[21]

3.12 The problem with this approach, on its own, is that it fails to take account of one aspect of the converse of the point recognised by Jackson LJ. He said (undoubtedly accurately) that a claimant would attach great value to winning his claim because the judgment would be vindication. In the case of defamation, that vindication is the public demonstration of success in the action, thereby neutralising the slander or libel. In the case of privacy, however, that which was private is no longer so and, irrespective of the condemnation that might flow from a judgment, what was placed in the public domain cannot be erased (even if some references can be removed from the internet). A modest increase in damages (themselves usually modest) will provide little encouragement to a claimant otherwise anxious to seek what might be entirely justifiable redress.

3.13 In the absence of some mechanism for cost free, expeditious access to justice, in my view, the failure to adopt the proposals suggested by Jackson LJ in relation to costs shifting will put access to justice in this type of case in real jeopardy, turning the clock back to the time when, in reality, only the very wealthy could pursue claims such as these. I recognise (as did Jackson LJ) that most personal injury litigation succeeds with the result that qualified one way costs shifting in place of recoverable but expensive ATE insurance is just as likely to cost insurers less and, furthermore, that the same cannot necessarily be said for defamation and privacy cases. An arbitral arm of a new regulator could provide such a mechanism which would benefit the public and equally be cost effective for the press;[22] if such a scheme is not adopted, however, I have no doubt that the requirements of access to justice for all should prevail and that the proposals of Jackson LJ should be accepted: I return to this recommendation at the end of this Chapter.

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[20] [2012] EWCA Civ 1039; http://www.bailii.org/ew/cases/EWCA/Civ/2012/1039.html
[21] [2012] EWCA Civ 1288; http://www.bailii.org/ew/cases/EWCA/Civ/2012/1288.html
[22] Part K, Chapter 7. As part of the response to encouragement by the Joint Committee to promote a voluntary, media-orientated forum for dispute resolution, the Government recognised that there could well be value in there being a range of arbitration options available, noting that methods of redress and the type of body required to secure effective regulation were issues which are central to this Inquiry: see para 68

4. The substantive civil law

4.1 The Inquiry has not provided a vehicle for detailed consideration of the substantive laws of defamation and privacy. As to defamation, Parliament is presently debating the Defamation Bill, which has already been the subject of pre-legislative scrutiny at a level and with an expertise that I would not hope to emulate. In the circumstances, I do not consider it to be valuable either to go over that ground or to postulate what might be the effect of any legislation eventually enacted.

4.2 It might have been possible to review the law of privacy[23] and there have been suggestions that a statutory enunciation of such a tort could be of value. Again, how it might be formulated and its possible extent has not been the subject of detailed evidence. In any event, the way in which the common law has addressed these issues has allowed flexibility of approach and a sensible enunciation of the relevant factors to be taken into account when balancing the competing issues in fact sensitive cases. I pay tribute to the work of the judges who have contributed to the jurisprudence in this area with clarity and care. It does not appear that legislative intervention will do other than generate further litigation as attempts are made to discover the extent to which the new framework matches the developing law.[24] It goes without saying that any code will have to follow the law and that decisions of any regulator will have to follow the code: that is as far as it is necessary to go.

4.3 I take the same view in respect of a statutory definition of the concept of the public interest. Depending on the circumstances, different situations will invoke different aspects of the public interest and the relevant considerations will be fact sensitive and of variable significance. As time passes and different social culture and customs develop, so the test will have to adjust. Whereas a regulator should be able to identify the public interest in the context of the press (as the Editors' Code of Conduct seeks to do), the ability to adapt is important. Again, in line with the view expressed by the Joint Committee on Privacy and Injunctions, I endorse the view that the incremental approach of the courts to this concept is to be preferred and I do not recommend a statutory definition.[25]

5. Damages

5.1 There is rather more to say on the subject of damages because of the need to treat as commensurate awards for non pecuniary loss in defamation and breach of privacy with similar awards (reflecting pain, suffering and loss of amenity) in claims for personal injury. In an attempt to ensure that balance is maintained, in *John v MGN Ltd*[26] Sir Thomas Bingham MR (as he then was) put the matter in this way:[27]

> *"There is force in the argument that to permit reference in libel cases to conventional levels of award in personal injury cases is simply to admit yet another incommensurable into the field of consideration. … The conventional compensatory scales in personal injury cases must be taken to represent fair compensation in such cases unless and until those scales are amended by the courts or by Parliament. It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover*

[23] Appendix 4
[24] This is the same view as that formed by the Joint Committee on Privacy and Injunctions in its Report: see http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf (HL Paper 273; HC 1443), para 37
[25] para 50, *ibid*
[26] [1997] QB 586
[27] at 614E

damages for injury to reputation greater, perhaps by a significant factor, than if the same plaintiff had been rendered a helpless cripple or an insensate vegetable."

5.2 Because of the primacy of the verdict of a jury, the assessment of damages in defamation could vary widely. Following *Sutcliffe v Pressdram Ltd,*[28] trial judges were recommended to draw the attention of juries to the purchasing power of the award they were minded to make and the income it would produce and *John* marked the time from which the Court expressed the view that judges and counsel should be free to draw the attention of the jury to comparisons. Furthermore, in the light of the effect of s8 of the Courts and Legal Services Act 1990[29] the Court of Appeal is now far more willing to substitute its own view for that of the jury.[30] As a result, more actions in defamation are now tried by judge alone (and the presumption in favour of jury trial is to be reversed by clause 8 of the Defamation Bill).

5.3 Considering the circumstances, it is not perhaps surprising that awards for breach of privacy or breach of confidence have generally been comparatively modest. As already pointed out, the sum awarded to Mr Mosley (£60,000) being by far the largest[31] although there have been other substantial awards: in an action both for libel and breach of confidence, for the latter (which concerned the disclosure of confidential harmful information), £30,000 was awarded. This would have been £40,000 but for the double counting for distress which was part of a further £50,000 awarded for libel.[32]

5.4 Other examples are somewhat lower. They include £5,000 awarded for the publication of photographs taken of a ten year old girl without the prior consent or knowledge of her parents or guardians: the child was shunned after friends saw her face on the front of a pamphlet setting out the Borough's Aids strategy.[33] £3,500 (including £1,000 by way of aggravated damages) was awarded to Naomi Campbell following the publication of her photograph leaving Narcotics Anonymous;[34] £3,750 was awarded each to Michael Douglas and Catherine Zeta-Jones in connection with breach of confidence following the publication of covert wedding photographs;[35] £5,000 awarded to Loreen McKennitt, from a former friend for violating the duty of confidence.[36]

[28] [1991] 1 QB 153; see Lord Donaldson of Lymington MR at 178-9; Nourse LJ at 185-6; Russell LJ at 190: thereafter (per Sir Thomas Bingham MR in *John* at page 608) "juries were reminded of the cost of buying a motor car, or a holiday, or a house"

[29] Where the Court of Appeal had power to order a new trial on the ground that damages awarded by a jury were excessive or inadequate, this provision allowed the Court "to substitute for the sum awarded by the jury such sum as appears to the court to be proper"

[30] For example, *Thompson v Commissioner of Police for the Metropolis* [1998] QB 513 which concerned false imprisonment and malicious prosecution but applies equally to damages for defamation which were extensively discussed

[31] [2008] EWHC 1777 QB; Eady J said (at para 214) that "the purpose of damages, therefore, must be to address the specific public policy factors in play when there has been an 'old fashioned breach of confidence' and/or an unauthorised revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy and integrity". He went on (at para 216): "Thus it is reasonable to suppose that damages for such an infringement may include distress, hurt feelings and loss of dignity".

[32] *Cooper & another v Turrell* [2011] EWHC 3269 see per Tughendhat J (at para. 102) who described damages for misuse of private information as being "to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false(at para 102): http://www.bailii.org/ew/cases/EWHC/QB/2011/3269.html

[33] *Adenjii v London Borough of Newham* [Case 01TLQ 823], October 2001. This was an approved settlement (Garland J) in the High Court

[34] *Campbell v MGN* [2004] UKHL 22

[35] *Douglas v Hello!* [2003] EWHC 786 (Ch). The award of Lindsay J was upheld by the Court of Appeal

[36] *McKennitt v Ash* [2005] EWHC 3003 QB

5.5 I say at once that I do not consider it a coincidence that these last awards have been to those who could be described as 'celebrities': given the likely damages, it is only those who can afford it who have been able to bring such actions; CFAs might have assisted (as they have in the phone hacking litigation) but once, that source of funding is no longer available, the limited amount of money at stake and the high costs risks create a formidable obstacle for most, almost however egregious the breach of privacy or confidence might be. In saying this, I do not ignore the fact that many of these 'celebrities' chose to avail themselves of the CFA regime.

5.6 In the context of an award of the size which has been awarded in cases of the type discussed, an increase of 10% will have little effect and will do almost nothing to ameliorate the impact of the loss of a CFA. In any event, although I recognise that damages for breach of privacy and confidence must be fixed with an eye on the equivalence of damages for pain, suffering and loss of amenity in personal injury cases, I am not satisfied that the assessment is presently pitched at the right level. I put the point in that way because neither do I consider that it is appropriate for the Inquiry, examining a wide range of issues, to undertake a fundamental re-appraisal of damages in this area or make recommendations in relation to change. Rather,

> **it seems more sensible to pick up the suggestion that the damages should also be available for breaches of data protection principles (referable to the duration, extent and gravity of the contravention)[37] and to recommend a review of damages generally available in this area, whether the cause of action is breach of data protection or privacy or breach of confidence or other media related torts.**

5.7 Although guidelines for damages in personal injury cases are available,[38] there are none for privacy or breach of confidence; judges only have the examples of awards that have been made at first instance or considered by the Court of Appeal. Rather than being dependent on a single view, a broader approach should be taken. The Civil Justice Council (CJC) was set up and established by s6 of the Civil Procedure Act 1997 and includes members of the judiciary, the professions, the civil service, consumer affairs bodies, lay advice and those able to represent the interests of particular litigants. Its functions include keeping the civil justice system under review, considering how to make it more accessible, fair and efficient, advising the Lord Chancellor and the judiciary on the development of the civil justice system and referring proposals for change to the Lord Chancellor and the Civil Procedure Rule Committee (CPRC).[39]

> **In the circumstances, I recommend that the Civil Justice Council consider the level of damages in privacy, breach of confidence and data protection cases, being prepared to take evidence (from the Information Commissioner, the media and others) and thereafter to make recommendations on the appropriate level of damages for distress in such cases. How the matter is then taken forward will ultimately be for the courts to determine.**[40]

5.8 Aggravated damages are primarily awarded to compensate for injury to pride and dignity, and the consequence of humiliation, and can include a penal element: this type of award is

[37] Part H, Chapter 5

[38] Guidelines for the Assessment of General Damages (11th edition) has recently been published by the Judicial College (previously the Judicial Studies Board)

[39] s 6(3)(a)-(e) of the Civil Procedure Act 1997

[40] As was the case in relation to the 10% increase proposed by Jackson LJ adopted in *Simmons v Castle* [2012] EWCA Civ 1039

the subject of detailed consideration in the Report of the Law Commission on Aggravated, Exemplary and Restitutionary Damages.[41]

This report, as long ago as September 1997, recommended that legislation should provide that this head of damages should only be awarded to compensate for mental distress and should have no punitive element. I do not seek to improve on the analysis contained in that report and recommend that it be adopted: on its own, however, it will not make a significant difference to the overall award.

The question of exemplary damages is different and is itself worthy of consideration.

5.9 I recognise that the law in relation to the award of exemplary damages is by no means straightforward, having been considered in three cases in the House of Lords and one case in the Supreme Court in less than 50 years.[42] An award can be made in only two categories at common law (oppressive, arbitrary or unconstitutional action by the servants of Government and cases in which the defendant's unlawful conduct has been calculated by him to make a profit for himself, which may well exceed the compensation payable to the claimant) and, third, where expressly authorised by statute. In one sense, it is appropriate to argue that the type of invasion of privacy and defamation involved in many of the circumstances which have been examined during the course of the Inquiry have been pursued specifically to make a profit (by maintaining of developing sales of the paper or encouraging readership rendering the publication more attractive for advertisers). On the other hand, I recognise the understandable reluctance of judges to extend this somewhat anomalous punitive jurisdiction without a clear basis in law for doing so.

5.10 Again, this topic was the subject of the Report by the Law Commission which recommended that exemplary damages should be retained (although re-titled as punitive damages).[43] It recommended that such damages should only be awarded where, in committing a wrong, the defendant 'deliberately and outrageously disregarded the [claimant's] rights'. Moreover, it should be capable of being awarded for any tort (including breach of confidence) and would be available if the judge considers that other remedies will be inadequate to punish the defendant for his conduct; for these purposes, the court may regard deterring the defendant and others from similar conduct as an object of punishment.

5.11 In that regard, it seems to me entirely appropriate that, when considering the question of exemplary damages, the court should be entitled to consider membership of a regulatory body as being relevant to the willingness to comply with standards (whether or not there was a failure to comply in relation to the subject matter of the action). In addition, the demonstration of good internal governance in relation to an appropriate audit by the editor as to the origin of stories should also be material. Equally, but on the other hand, a refusal to participate in a regulatory body might itself be evidence of a deliberate decision to stand outside any approved regulatory regime which itself could go towards the demonstration of outrageous disregard, as could the absence or failure of any adequate procedures for internal governance.

J

[41] http://lawcommission.justice.gov.uk/docs/lc247_aggravated_exemplary_and_restitutionary_damages.pdf

[42] *Rookes v. Barnard* [1964] AC 1129, *Cassell v Broome* [1972] AC 1027, *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 and, in the Supreme Court, in *R (Lumba) v Secretary of State for the Home Department* [2011] 2 WLR 671

[43] http://lawcommission.justice.gov.uk/docs/lc247_aggravated_exemplary_and_restitutionary_damages.pdf Part 4 (page 53 et seq) analyses the law as at 1997 and although there may well have been some developments since then (although the caution of Eady J in *Mosley* is to be noted), a more detailed up to date analysis is not necessary for the purposes of my recommendations

5.12 Although it is tempting to analyse the comparative jurisprudence, the matter is fully discussed by the Law Commission and I see no value in repeating the argument. In that regard, I recognise that the Law Commission Report equally deals with other difficult issues[44] which it is unnecessary for me to address. Having said that, to my mind, the basic principle is straightforward. The commercial benefit from publishing material obtained in breach of rights to privacy or confidence is likely greatly to exceed the basic award of damages (even if increased by the award of aggravated damages) and constitutes no real deterrent. In common with the Joint Committee on Privacy and Injunctions, I have no doubt that the court should be able to award exemplary damages in privacy cases[45] and, I would add, breach of confidence and similar media torts.

In the circumstances, in line with the conclusion in the Report of the Law Commission on Aggravated, Exemplary and Restitutionary Damages, I recommend that exemplary damages (whether so described or renamed as punitive damages) should be available in actions for breach of privacy, breach of confidence and similar media torts as well as for libel and slander. Voluntary participation in a regulatory regime contained in or recognised by statute and good internal governance in relation to the sourcing of stories should be relevant to the decisions reached in relation to such damages.

6. Costs

6.1 The impact over the years of different funding arrangements and costs regimes to litigation in this area is described above. Although the Government has made clear its concerns around access to justice and the ability of those with modest means to pursue claims against often powerful media organisations, the recommendations made by Jackson LJ for one way qualified costs shifting have not, to date, found favour. As the Joint Committee observed, access to justice must be maintained for all citizens seeking to protect their right to privacy.[46]

6.2 In the light of the very real difficulties facing those seeking access to justice, I have no doubt that a regulator needs to provide a speedy, effective and costs-free regime which provides a mechanism for those who complain that their rights have been infringed to be able seek redress. This is equally in the interests of the press who, although an increased number of complaints might be made, will equally be able to hold up the system as a model of dispute resolution which is much cheaper (and less time consuming) than litigation through the courts. It would need to be staffed by experienced media lawyers but there are retired High Court judges and others very experienced in this area of law who are more than capable of taking on what could be an inquisitorial jurisdiction efficiently to resolve all but those which both parties agree (or the judge determines) need court process. One such proposal is discussed as part of the regulatory regime later in the Report.[47]

6.3 The purpose of this part of the Report is not to analyse the way in which such an arbitral system might operate but to consider how the law could recognise its existence and encourage its use. The mechanism for doing so is in relation to costs. Thus, Part 44.3 of the Civil Procedure Rules 1998 (as amended) specifically provides the court with a discretion as to whether costs should be payable by one party to another, the amount of those costs and when they are to

[44] Such as those that surround the need to make a single award shared between multiple victims: see *R (Lumba) v Secretary of State for the Home Department* [2011] 2 WLR 671 per Lord Dyson at para. 167. Assessment is not without difficulties where there is more than one tortfeasor: see Gatley on Libel and Slander, 10th edn, para 9.25

[45] Para 134, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf

[46] Para 147, *ibid*

[47] Part K Chapter 6

be paid; it identifies the general rule that the unsuccessful party will be ordered to pay the costs of the successful party but specifically provides a discretion to make a different order. Included within all the circumstances to which the court must have regard is the conduct of the parties[48] and the concept of conduct includes "conduct before, as well as during, the proceedings".[49] In that context, it is important to bear in mind the overriding objective of the Civil Procedure Rules to enable the court to deal with cases justly.[50]

6.4 There is no doubt that if a party to litigation turns down the opportunity to participate in ADR (particularly if encouraged by the court), costs consequences may follow. Thus, in *Halsey v Milton Keynes General NHS Trust; Steel v Joy,*[51] the court considered the consequences of failure to participate in mediation as a form of alternative dispute resolution. It recognised that unreasonable refusal to agree to ADR could properly be reflected in adverse orders for costs and identified the relevant factors to be taken into account. In those cases, mediation was intended to encourage parties to reach an agreement on a sensible resolution of their dispute; arbitration (as here proposed) provides an alternative to a trial and is intended to be speedy, effective and without the cost implications of litigation in court. It results in a solution that is imposed by a judgment. The case for recognising the value of this form of dispute resolution (and the consequential saving of costs) is, therefore, much stronger and entirely consistent with the overriding objective of the Civil Procedure Rules.

6.5 This analysis provides ample precedent for the use of the powers of the court to encourage appropriate alternatives to litigation and there could be no better method for resolving a dispute with the press than by utilising a specialist tribunal, set up specifically for the purpose; it should be staffed by experts in media law who understood both the law and the practices of the press and so could cut through procedural complexity and resolve the issues speedily, cheaply and effectively.

6.6 It is obviously important that, before taking into account the availability of the remedy, the court would have to be satisfied that a mechanism for dispute resolution set up by one of the parties (in this case the publisher), is fair: it would not be sufficient if the alternative was an ad hoc arrangement in which nobody was representing the interests of the claimant. For that reason, I consider it very important that the arbitral system should be one part of a regulator which is recognised as being truly independent of the press and independent of any other interests which might affect its ability to be seen to be fair. An ad hoc arrangement (or even a settled scheme for one publisher) would be too dependent on the goodwill of those who made the arrangement or the publisher who set up the scheme to guarantee that independence.

6.7 If an arbitral mechanism was set up through the regulator, however, I see no reason why the courts should not embrace it as an extremely sensible method of pursuing the overriding objective in civil cases. In those circumstances, costs consequences could flow both ways. Thus, if the relevant media entity was regulated and thus able to utilise the availability of the arbitration service, it would be strongly arguable that a claimant who did not avail himself of that cheap and effective method of resolving his dispute but, instead, insisted on full blown High Court litigation, should be deprived of any costs even if he is successful: that might

[48] CPR 44.3(4)(a)
[49] CPR 44.3(5)(a)
[50] CPR 1.1(1). By 1.1(12), dealing with a case justly includes, so far as is practicable, (a) ensuring that the parties are on an equal footing ; (b) saving expense; (c) dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues; and to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases
[51] [2004] EWCA Civ 576; [2004] 1 WLR 3002; [2004] 4 All ER 920

also be a powerful incentive for a publisher to join the regulator, particularly if concerned that an extremely wealthy claimant might otherwise seek to overwhelm the publisher with expensive litigation out of all proportion to what was at stake.

6.8 Equally, however, if a publisher did not join the regulator, with the result that the specialist arbitral system was not available to a claimant wishing to pursue a remedy (particularly if of limited means and, thus, unable otherwise to obtain access to justice), I see no reason why the court should not be able to deprive even the successful publisher of costs that would not have been incurred had the alternative arbitration been available. I go further and suggest that, in a case legitimately brought and potentially borderline, the court would even retain the discretion to order the successful publisher to meet the costs of an unsuccessful claimant (although I recognise that this would not be the case if the court was dealing with vexatious or utterly misconceived litigation). Ultimately, the discretion of the court would govern all these issues, but I see only advantage in supporting an arbitral system that could be seen to have been independently set up and operated by a regulator, albeit itself set up by the press but managed and run independently of it.

6.9 It is obviously important that there should not be an ever-running argument about the adequacy of the arbitral mechanism.

In the circumstances, I recommend that the Civil Procedure Rules should be amended to require the court, when considering the appropriate order for costs at the conclusion of proceedings, to take into account the availability of an arbitral system set up by an independent regulator itself recognised by law.[52] The purpose of this recommendation is to provide an important incentive for every publisher to join the new system and encourage those who complain that their rights have been infringed to use it as a speedy, effective and comparatively inexpensive method of resolving disputes.

6.10 It is obviously necessary to consider the alternative, that is to say, what would happen if there was no identifiably independent regulator that could be recognised by the courts as providing an acceptable alternative mechanism for the resolution of disputes. It is here that I share the very real concern expressed by the Joint Committee in relation to access to justice. The prospect of returning to a system whereby only the very rich could pursue defamation, breaches of privacy and confidence or other claims in tort against publishers because of the potential costs consequences would, in my view, be a seriously retrograde step in our attempts to provide justice for all. In my view, it is simply not acceptable. The very least that could be done is to revert to the scheme proposed by Jackson LJ.

In the absence of the provision of an alternative mechanism for dispute resolution, available through an independent regulator without cost to the complainant, together with an adjustment to the Civil Procedure Rule to require or permit the court to take account of the availability of cost free arbitration as an alternative to court proceedings when considering orders for costs at the conclusion of proceedings, I recommend that qualified one way costs shifting be introduced for defamation, privacy, breach of confidence and similar media related litigation as proposed by Lord Justice Jackson.

[52] Part K Chapter 6. The mechanism for achieving this objective could be amendment of CPR 44.3 and, in the discretion of the court, could be of relevance beyond a system of arbitration that is created by a new press regulator

CHAPTER 4
THE PRESS COMPLAINTS COMMISSION AND ITS EFFECTIVENESS

1. Introduction

1.1 The Press Complaints Commission (PCC) has always been a voluntary system based on a network of implied contracts. Accordingly, participation has been optional, and in the event never universal; and has always been contingent on an evaluation by individual titles or publishers of their self-interest. Newspapers notionally sign up, and remain tied into the rules of the system, but only for the period and to the extent that they judge that this is in their best interests. The self-regulatory system as a whole, and by this I include its less visible elements, the Press Board of Finance (PressBoF) and the Editors' Code of Practice Committee, are intertwined legally and functionally symbiotic.

1.2 It follows from this that criticisms of the PCC have often been too specifically directed and as such may have missed their mark; it is the system as a whole which should be the accurate target. The way in which the various parts interact is the hallmark of the system as I have broadly defined it; in a less obvious but equally powerful way it should also be regarded as the key descriptor of the relationship that the industry has with the PCC. Although the system as constituted in this manner unravelled, in spectacular fashion, in July 2011, the inherent weakness was there for all to see almost from the very start.

1.3 There were aspects of the work that the PCC did well which should not be overlooked or minimised as the weaknesses of the system are exposed. The secretariat worked very hard; in many cases the PCC managed to negotiate or mediate settlements which resulted in proportionate redress and satisfied complainants. Some of the pre-publication work undertaken by the PCC was effective and has assisted people under real pressure from the industry. The two directors of the PCC who gave evidence on these matters[1] were impressive and dedicated individuals who worked tirelessly, often in difficult circumstances.

1.4 Throughout, my Report has not sought to blame individuals but to focus on practices and systems. I will continue with this approach although the evidence demonstrates that the stature and profile of the PCC has, to some considerable extent, depended on the quality and personality of its Chairs. In the circumstances, I will refer to each of the four who gave evidence; they tackled different issues at different times and did so with differing degrees of success. This analysis of their stewardship of the PCC is a significant part of the overall narrative. Even so, my headline assessment is that the problem was and is systemic: the PCC is hidebound by its inherent structure such that it has lacked the powers and sanctions required to do an effective job, which was – or at least ought to have been – to regulate the industry under its umbrella. Instead, self-regulation was simultaneously a panacea, a misnomer and a contradiction in terms. The press caused or permitted it to pronounce itself as a model of self-regulation for the press as a whole but the upshot was something well short of regulation properly so-called.

1.5 The PCC was not independent from the industry it was overseeing, causing problems both of substance and of perception. The way in which it and the self-regulatory system more generally conducted itself in public was often unhelpful. The purported investigations into

[1] Guy Black, as he then was, was director of the PCC until 2003, but his evidence did not cover this part of his career. I have no reason to exempt him from the observations I make about his successors

press misconduct, most notably the two reports into phone hacking, were ineffectual and inadequate; and their conclusions, apparently exculpating the News of the World (NoTW), and, as it happens all other titles, from the accusations of serious misconduct, gave false comfort to policy-makers and the public. Taken together these factors caused the self-regulatory system to fail. However good the rest of the work that the PCC did, it steadily lost the trust of key stakeholders, culminating in a final flight of trust and confidence in the wake of the revelations which triggered this Inquiry to be set up.

1.6 By July 2011, some might say somewhat late in the day, key politicians had also lost faith in the self-regulatory system. On 8 July 2011, the Prime Minister said that the PCC had failed and needed to be replaced:[2]

> *"Let's be honest. The Press Complaints Commission has failed. In this case, the hacking case, frankly it was pretty much absent. Therefore we have to conclude that it's ineffective and lacking in rigour.*
>
> *There is a strong case for saying it's institutionally conflicted because competing newspapers judge each other. As a result it lacks public confidence. I believe we need a new system entirely. It will be for the inquiry to recommend what the system should look like.*
>
> *"But my starting presumption is that it should be truly independent, independent from the press, so the public will know that newspapers will never again be solely responsible for policing themselves. But vitally, independent of government, so the public will know that politicians are not trying to control or muzzle a press that must be free to hold politicians to account."*

1.7 The Deputy Prime Minister also agreed that the PCC and the self-regulatory system generally had failed.[3] The Leader of the Opposition, said in a speech on 8 July 2011 that:[4]

> *"…we need wholesale reform of our system of regulation. The Press Complaints Commission has failed. It failed to get to the bottom of the allegations about what happened at News International in 2009. Its chair admits she was lied to but could do nothing about it. The PCC was established to be a watchdog. But it has been exposed as a toothless poodle. Wherever blame lies for this, the PCC cannot restore trust in self-regulation. It is time to put the PCC out of its misery. We need a new watchdog."*

1.8 Significant sections of the press had also lost confidence in the self-regulatory system. In January 2011, by refusing to make the appropriate contribution through PressBoF, Northern & Shell left the PCC which meant that it could no longer offer a service in relation to Express Newspapers or the Star titles. Both Richard Desmond, the proprietor of the Northern & Shell group, and Paul Ashford the Group Editorial Director, gave evidence that one of the key factors that prompted Northern & Shell's withdrawal from the self-regulatory structure was that they had lost confidence in the PCC; in particular, they were not confident of its independence.[5]

[2] *The Independent*, 'PM signals end of Press Complaints Commission', 8 July 2011, http://www.independent.co.uk/news/media/press/pm-signals-end-of-press-complaints-commission-2309210.html; pp58-60, lines 19-4, David Cameron MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf

[3] p4, para 18, and p18, para 85, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf; pp10-11, lines 15-24, Nick Clegg MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf

[4] pp17-18, Ed Miliband, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-EM-22.pdf

[5] p37, lines 12-24, Paul Ashford, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf; pp73-77, lines 25-2, Richard Desmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf

Even if there may have been an element of the self-serving in this assessment, it is not difficult to understand why that might have been. In any event, other key newspaper figures had also begun to lose faith in the PCC. The editor of the Financial Times, Lionel Barber, gave evidence to the Inquiry that the PCC's decision to criticise the Guardian in its 2009 report into phone hacking was a serious misstep, and that "*as a result of that I believe that the body has lost credibility*".[6]

1.9 Furthermore, the self-regulatory system was not trusted by many of the organisations representing the interests of the people and groups who became the subject of media coverage. For example Trans Media Watch, an organisation dedicated to combating discriminatory and or derogatory coverage of transgender and intersex people in the media, submitted evidence that *"The Press Complaints Commission (PCC) is widely regarded as an ineffective joke by the transgender community."*[7] Individuals who were regularly the subject of press attention, and those who had been the victims of press intrusion, likewise did not have confidence in the PCC. The actor Steve Coogan, for example, gave evidence that he did not have confidence in the independence of the PCC, and concluded that "*If I had more faith in it, then I'd use it*".[8]

1.10 Experienced media lawyers, who have dealt routinely with issues of inaccuracy and intrusion, both of which fall within the PCC's remit, also gave evidence that they had lost faith in the capacity of the PCC. Mark Thomson, a lawyer who has represented many victims of press intrusion, was of the view that the PCC was not sufficiently effective or independent of the press.[9] Another media lawyer, Graham Shear, agreed.[10]

1.11 By the summer of 2011, the standing of the self-regulatory system in general and the PCC in particular had deteriorated further. Although key stakeholders and observers may have had differing experiences of the press and their views may have been coloured by various interests, their common conclusion that the self-regulatory structure had failed cannot be explained away by self-interest or subjective perspective.

1.12 Ultimately, this disintegration of trust in the PCC was the straw breaking the camel's back. In the absence of any powers to compel anybody, the PCC was reliant on the continued trust and confidence of the public, politicians and the press in its authority; and in its capacity to enforce proper standards of press behaviour. What remained of the PCC's authority departed with the flight of trust and everyone agrees that it is no longer viable for the current self-regulatory structure to continue in its present form or state.

1.13 I cannot emphasise too strongly that the revelations of July 2011 must not be visualised in any sort of self-contained way as a watershed or a bolt from the blue in the context of the 21 year history of the PCC. To interpret events in such a way would, in my view, amount to a form of historical revisionism which ignores the whole of the post-War narrative and the performance of the PCC since its creation in 1991. Arguably, though, one may detect elements of such an approach in some of the less than wholly self-critical statements by PressBoF and the PCC itself as late as 2009/2010.

[6] p46, lines 20-21, Lionel Barber, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf
[7] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Submission-by-Trans-Media-Watch.pdf
[8] pp45-46, lines 20-12, Steve Coogan, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-22-November-20111.pdf
[9] pp42-45, lines 9-19, Mark Thomson, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-24-November-2011.pdf
[10] pp62-64, lines 15-9, Graham Shear, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-21-November-2011.pdf

1.14 Having introduced the issues in this way, the next section of this Chapter will address these systemic issues on a thematic rather than a chronological basis. To be fair to the PCC, it would be insufficient merely to rehearse the fact that political and public support for it has evaporated. Although I have to record and recognise that, as a practical reality, since on any view it would justify (if not require) fundamental change, the reasons for such loss of support do need to be examined and set out.

1.15 The sections of this Chapter that follow look by turns at the PCC's lack of any meaningful independence from the industry it purported to regulate; the self-association and alignment of the PCC with the interests of the industry rather those who were the victims of mistreatment by the press; the systemic failings in the system of self-regulation; and the failures in regulatory delivery. Lastly, this Chapter will examine the investigatory failures of the PCC both in relation to the findings of Operation Motorman and the allegations of phone hacking at the NoTW both in 2007 and 2009.

2. What the PCC did well

2.1 Before starting on an analysis of what went wrong, I should record what the PCC did well.

2.2 Successive witnesses gave evidence that the PCC secretariat, in particular the complaints officers who handled complaints made by members of the public, were polite, efficient and dedicated.[11] Members of the PCC secretariat worked hard in the public interest, as I have said, in sometimes difficult circumstances. The PCC established and then ran a 24 hour helpline for complainants, staffed by a small number of officers working in rotation.[12] For a relatively small team to have handled the large volume of complaints received by the PCC speaks of the dedication and commitment of individual staff members. I have seen no evidence and heard no suggestion that the manner in which the members of the PCC secretariat have gone about their work has led or, in any sense, contributed to the limitations of the PCC as an organisation. I have no doubt that PCC staff did as well as is possible within the bounds set by the self-regulatory system.

2.3 I also heard evidence from the then current director of the PCC, Stephen Abell, and his immediate predecessor, Tim Toulmin, of the work done by PCC staff on a day to day basis. I should add that Mr Abell's witness statement was a genuine *tour de force* and I pay tribute to the immense care he has taken and the diligence he has shown. Through their respective evidence, each demonstrated his dedication and loyalty to an organisation which faced a naturally daunting task.

2.4 The efforts of the PCC at mediation and conciliation were often helpful. Dr Martin Moore, the Director of the Media Standards Trust,[13] highlighted "*the genuine benefits of the current system, particularly with regard to the secretariat and the role they've played in conciliating and mediating complaints on behalf of complainants, and the very real attempt to both write and evolve the code over that 20-year period* [that the PCC has been in existence]".[14] On most

[11] pp35-36, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf

[12] p171, para 247, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[13] Having paid fulsome tribute to Mr Abell's witness statement, I should also record my admiration for the Media Standard Trust's work in this area. The relevant material and submissions is on the Inquiry website. Given its comprehensiveness, I have sought to boil the issues down somewhat

[14] p26, lines 10-22, Dr Martin Moore, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-10-July-2012.pdf

occasions, complainants were satisfied with the mediated and agreed solutions to problems; and this was a job that the PCC was good at.[15] In appropriate cases, and no doubt there are many, a mediated settlement is a sensible way of dealing with disputes between parties.

2.5 The PCC was also, on occasion, able to mitigate extreme media pressure on newsworthy individuals.[16] Dr Gerry McCann, for example, gave evidence that the PCC managed to limit the intrusion by journalists and press photographers into the lives of his twin son and daughter in the aftermath of the disappearance of his daughter Madeleine:[17]

> *"The PCC was extremely helpful in dealing with the unwanted intrusion into the privacy of our twins. In particular, the press were constantly taking photographs in which our children were included. Having contacted the PCC this quickly stopped".*

2.6 Baroness Buscombe, the former Chair of the PCC, said of this aspect of the PCC's pre-publication work that:[18]

> *"This is an area of [the PCC's] work that has developed in recent years and which has had an enormously beneficial impact… I well recall that when I began working at the PCC, I was amazed by the degree to which we are able to stop within hours or minutes the publication of information, including pictures, where there was a potential breach of the Code. The key to this is strong and very responsive engagement with the industry, night and day."*

2.7 In some cases the pre-publication guidance which the PCC produced was effective, and resulted in some improvements to the press coverage of the issues concerned. For example, the PCC has worked hard to improve the coverage of mental health issues. To this end, the PCC has produced a guidance note on the subject and has delivered training to journalists.[19] It is difficult to form a clear judgment about this, but the sense I have is that press reporting on some aspects of mental health issues has improved, and the insensitive and in many cases offensive language deployed in some sections of the press ten years ago is now rarely used. However, in this context, I note the evidence submitted by organisations such as Mind and Rethink Mental Illness which indicates that problems remain. Recognising this, the points they make reflect on the press in general rather than on the PCC.

2.8 I should record that there are other instances where the efforts of the PCC in respect of pre-publication action have not been so successful. For example, the Inquiry has heard evidence from Helen Belcher of Trans Media Watch, who recalled that this organisation worked with the PCC to try to improve press coverage of intersex and transgender people. The PCC agreed to endorse a style guide prepared by Trans Media Watch. This was completed in February

[15] p69, lines 3-6, Professor Brian Cathcart, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-8-December-20111.pdf; p63, lines 1-5, Graham Shear, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-21-November-2011.pdf

[16] p5, para 6.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tim-Toulmin.pdf; p6, para 25, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Giles-Crown.pdf

[17] p17, para 103, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Gerald-Patrick-McCann.pdf

[18] pp4-5, para 25, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf

[19] pp218-221, paras 304-314, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

2011 and distributed among newspaper editors and to some individual journalists. However, in the view of Ms Belcher *"its impact has, to date, appeared to be extremely limited."*[20]

3. Independence from the industry

3.1 A profound lack of any functional or meaningful independence from the industry that the PCC claimed to regulate lay at the heart of the failure of the system of self-regulation for the press. Independence operates at two levels, one of perception and the other of substance. In terms of perception, just as judges cannot in any sense be perceived as being judges in their own cause, or appearing to be biased or otherwise interested in the outcome, a regulator must be so constituted as to satisfy every reasonable complainant that he or she will receive a fair hearing in all respects and at all levels. In terms of substance, a regulator will not be free to do its job properly if tied functionally to the entities it is regulating. Further, there is a not insubstantial risk that, if those that are being regulated take the view that they are being judged by fierce competitors for whom they have neither trust nor respect (even if there is a majority of lay members of the Commission), they will not regard the discharge of the regulator's duties in the correct light.

3.2 The self-regulatory system for the press, taken as a whole, is not in any way independent of the industry. In particular, two out of the three elements of the self-regulatory structure – PressBoF (on whom the PCC is dependent for its funding) and the Editors' Code of Practice Committee – are wholly composed of serving industry figures and, in both cases, extremely senior industry figures. While the PCC may itself be made up of a majority of lay members, for the reasons explored below this does not make the PCC functionally independent from the industry.

Funding

3.3 The PCC's funding is derived from subscriptions raised voluntarily from the industry. The budget for the PCC is negotiated between the PCC and PressBoF and the agreed funds are then levied from the industry. In the words of Baroness Buscombe, *"[p]ublic confidence is plainly more difficult to establish in this context*".[21] Lord Grade, a lay PCC commissioner, made the point in the following way:[22]

> *"…the fact that PressBoF controls the purse strings leaves them in the position where – which they either do or they don't abuse – I don't have enough experience yet, but it leaves them in the position where they can have a huge influence on the constitution and the running of the organisation. I don't think that's healthy."*

3.4 Of course, other regulators are funded solely with monies raised from the regulated industry. One example of this is the Advertising Standards Authority (ASA), which is wholly funded by a levy raised on the advertising industry through the funding body ASBoF. The difference, as Baroness Buscombe has made clear, is that in contrast to ASBoF, PressBoF sought to be far more 'hands on' in relation to expenditure issues.[23]

[20] p28, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Submission-by-Trans-Media-Watch.pdf
[21] p6, para 37, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf
[22] p46, lines 9-15, Lord Grade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[23] p40, lines 3-6, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

3.5 I recognise that PressBoF itself robustly denies that it seeks to exercise any measure of control, pointing out that there have been no occasions on which a request by the PCC for extra funding has been turned down. However, in my view this misunderstands the nature of the relationship between the two bodies: PressBoF was the ultimate paymaster, and the PCC no doubt understood the difficulties inherent in asking for more.

3.6 In reality, the functional independence of the PCC was restricted by the limited resources which the industry supplied. Here, I am content to adopt Professor Greenslade's analysis which in my view fairly encapsulates the position:[24]

> *"That is the reason I have often referred to the Commission being subject to "string pulling" by its paymasters, the Press Board of Finance (PressBoF). This has been wrongly taken to mean that I was suggesting PressBoF members, or people acting for them, made interventions in individual cases. As far as I'm aware, that never happened, and that indeed was my point: it did not need to happen. The PCC's chairmen and directors could not be other than aware of the vulnerability of the Commission and of their own positions when attempting to hold their own paymasters to account (and I am deliberately choosing to use a phrase borrowed from the journalistic lexicon about "holding power to account"). They were regulating, or seeming to regulate, the people on whose very existence they depended."*

3.7 It is also clear to me that the funding made available to the PCC is barely sufficient to enable it to conduct its complaints handling functions effectively. Further, in so limiting the funding available to the PCC, the organisation was unable to exercise other functions that might be properly expected of a regulator, for example, in relation to investigations into industry conduct, and the promotion of standards. Although in submissions to the Inquiry, Lord Black on behalf of PressBoF has disputed that the PCC is under-funded, I recall two other important pieces of evidence in this regard. First, the lack of funding was characterised by Baroness Buscombe as "*a fundamental problem…I believe that the industry could have and should have done more to support the PCC in this regard, notwithstanding the sector's own commercial pressures*".[25] She continued:[26]

> *"[The PCC's] performance runs the risk of being compromised because of lack of adequate funding…whilst there has been a real desire on the part of all of us at the PCC to raise our game, a significant lack of resource makes this frankly impossible. The PCC functions because the 16 staff work very long hours and the current director [Stephen Abell] is working and on call 24 hours a day, 7 days a week, as is the Head of Complaints and other staff members. This is simply not sustainable and is not reasonable or sensible given the nature of our work (critical judgment calls made within tight time constraints and its importance to society at large."*

3.8 Second, in June 2010, at the request of PressBoF, the PCC Director Stephen Abell undertook a financial review of the organisation. His conclusions were summarised as follows:[27]

> *"The [PCC Business Affairs] Committee, of course, recognises both the financial position of the newspaper and magazine industry and the current economic climate. However, its starting position – having conducted this requested review – is that the*

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[24] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[25] p6, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf
[26] pp6-7, paras 39 and 40, *ibid*
[27] p1, paras 3 and 4, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S11.pdf

> *PCC remains considerably underfunded as an organisation. In the last five years, the work of the PCC has increased significantly (in terms of formal complaints made, resolved, ruled upon; in the proactive work and pre-publication work undertaken by the staff; and in the training of working journalists). Scrutiny of the PCC has also increased. In the same five years, the PCC's funding has not increased in real terms."*

3.9 Although I do not question Lord Black's evidence in this regard, and Baroness Buscombe's evidence does not suggest that any specific requests for additional funding were turned down, in my view the issue may turn on properly defining the nature and function of the body under discussion. A body with limited powers would clearly cost less to run than a regulator properly so-called. I do not overlook the fact that the newspaper industry faces very substantial financial pressures and has done for some time. However, notwithstanding those pressures the industry does not give the PCC enough money to carry out the range of roles and functions it needs to. Beyond providing barely enough to allow the PCC to fulfil what is commonly understood to be its primary role, namely to deal with individual complaints, as the supposed regulator for the industry, it has been hamstrung by a critical lack of resource and is unable to fulfil any of the other functions which would normally be expected from a regulator and which the Articles of Association permitted.

Appointments – the Chair

3.10 The Chair of the PCC is formally appointed by PressBoF, as has been described in Part D Chapter 2.

3.11 The appointment process has evolved over the period for which the PCC has been in existence. When Lord Wakeham was appointed Chair in 1995 the process was informal; he was simply approached by the then Chair of PressBoF, Sir Harry Roche, and his shoulder was metaphorically tapped.[28] For the appointment of Lord Hunt, as more fully discussed below, an independent assessor was involved in the process, as well as involvement by some of the lay members.[29]

3.12 Lord Wakeham identified a number of reasons why he believed that he was considered appropriate for the role of Chair of the PCC, chief among them being that the self-regulatory system was at that point under considerable pressure and the press wanted a candidate who could safeguard that system from what it regarded as the threat of statute:[30]

> *"I think the newspaper industry did not want statutory control and that they accepted they needed someone to be the chairman with a bit of clout, who could stop statutory control by getting the standards up to an acceptable level...They wanted someone on side with the government because they did not want statutory regulation."*

3.13 Lord Wakeham also said that *"I was regarded as a strong supporter of press freedom and self regulation. It was widely known that I had chaired the Committee that had rejected Calcutt and come down in favour of self regulation."*[31] Indeed, he went further and made clear that

[28] p8, para 30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf
[29] p511, para 110, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf
[30] pp15-16, lines 17-13, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[31] p9, para 31, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf

he regarded it as a pre-requisite of anyone being involved in the PCC that he or she should be committed to both these principles.[32] This evidence was as frank as it was unsurprising. In this regard, Lord Wakeham did not buck the trend, nor did any of his successors.

3.14 The appointments process has since become more formalised. However, applicants for the post of Chair of the PCC are still required to have broadly similar qualities to those which led to Lord Wakeham being approached. Both Sir Christopher Meyer and Baroness Buscombe were asked in their appointment interviews whether they were supporters of press freedom and believers in self-regulation.[33] Indeed, Sir Christopher went to some lengths to make clear his support for the principle of press self-regulation on a number of occasions. In a speech delivered at the beginning of his tenure as the Chair of the PCC, Sir Christopher said that:[34]

> *"Liberty and self regulation are inextricably linked. Any infringement of self regulation would not just erode the freedoms of the press. Far more importantly it would curtail the freedoms of the citizen, who in a democratic society will always depend on media uninhibited by both control of the state and deference to the establishment to protect their liberty. That is why self regulation – and all the jagged edges that come with it – must be protected, must be nurtured, and must grow."*

Sir Christopher maintained the same view in evidence given to the Inquiry. He said:[35]

> *"is self-regulation the only way consistent with maintaining freedom of expression and the press' status as an exponent of that? The short answer is: yes."*

3.15 In maintaining his position in this way, Sir Christopher appears to be adopting what I consider to be a somewhat remarkable position. First, the equation between liberty and self-regulation – almost as a philosophical position – is in my view simplistic and capable of being overly alarmist. I have explained why this is so in Part B above, and in Part K Chapter 7 below. Second, and perhaps in this context more significantly, these public statements extolling the virtues of self-regulation (coupled in Sir Christopher's case with equating self-regulation by the PCC with regulation properly so-called) certainly created the impression that the Chair and the industry itself were speaking with one voice on an issue on which they had identical, strong views. It also created the impression that the status quo in what might be called 'very light' regulation was acceptable, and that anything else was not. Ultimately, these amounted to the expression of political judgments which might have left complainants asking the not impertinent question: what about the private rights of the individual?

3.16 Lord Hunt was appointed to Chair of the PCC in October 2011, in succession to Baroness Buscombe who had resigned in July that year. The advertisement for the post had stated that the successful applicant had to be committed to the principles of freedom of the press and of self-regulation,[36] and he confirmed that he was wedded to those principles, and explained why. Lord Hunt also confirmed that Lord Wakeham had had some role in persuading him to

[32] p17, lines 6-12, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[33] p4, lines 4-16, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf; p35, lines 5-24, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf
[34] p2, Sir Christopher Meyer, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-%E2%80%93-D8.pdf
[35] pp7-8, lines 24-2, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[36] p59, lines 1-5, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf

put his hat in the ring,[37] notwithstanding that recruitment consultants were also involved in the process.

3.17 Exactly what happened is somewhat opaque. Despite an on-going process of reform, the appointment process appears to be neither transparent nor impartial. Whilst it is not unexpected that candidates might be canvassed as to their views on self-regulation and expected to support the principles of self-regulation, at the very least the appointments process risked giving rise to the perception that the Chair was beholden to the regulated industry. Further, it is clear that Lord Hunt is the last in a line of PCC Chairs who appears to have regarded freedom of the press, particularly as defined in the Editors' Code of Practice and self-regulation, as synonymous.

Appointment of other members of the PCC

3.18 Lay members of the PCC are also required to be committed to the principles of self-regulation and the freedom of the press. This appears also to have meant that, above all else, they too should be supportive of the idea of freedom of expression or press freedom as set out in the Editors' Code of Practice.[38] In his interview to become a PCC Commissioner Lord Grade recalled that he was asked whether or not he supported statutory regulation.[39] However, it has recently been pointed out by His Honour Jeremy Roberts QC (formerly a distinguished criminal judge) and others that the Inquiry may have received an unbalanced perspective on this point. For example, he recalls that Mr Abell asked him a question at his interview about the balance between Article 8 and Article 10 rights, and Lord Grade now recalls that he was also asked a similar question.

3.19 Whilst acknowledging this point, it is, however, clear that, an *a priori* commitment to the principles of self-regulation amounted in practice to a commitment to the system of self-regulation through the PCC. Having heard some evidence as to the very different individuals who comprise the lay members of the PCC (which I touch on below), it is nevertheless clear that those individuals were all recruited from a narrow class of people already committed to the principle of self-regulation by the industry and, effectively, in the form that it existed, that is to say, to the preservation of the status quo.

Serving editors on the PCC

3.20 Newspaper editors currently in post serve on the PCC, albeit as a minority. This raises at the very least the appearance of bias, creating the concern that the industry was 'marking its own homework'. While editors do not take part in discussions on complaints relating to their own newspapers, or newspapers from the same group, they have and may be seen to have a commonality of interests in directing the overall analysis of the balance between freedom to publish and the rights of third parties in a manner which might overly protect the former over the latter and may not place sufficient restrictions on press behaviour, or at least create the perception of so doing.

[37] p61, *ibid*
[38] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B35.pdf
[39] p33, lines 5-12, Lord Grade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf

3.21 It has been suggested that, since editors are in a minority on the PCC, their presence does not in fact threaten the independence of PCC decision-making.[40] I record that this suggestion was also reinforced in the submission received from His Honour Jeremy Roberts QC, supported by the evidence of his lay commissioner colleagues. I understand and respect the points that have been made, and return to them below, and should not be interpreted as saying that individual lay commissioners have failed in their duty. Rather, the stand out issue is about systems and independence of decision-making viewed in the round.

3.22 On that basis alone, I am unable to accept this argument for a number of reasons. First, even if not a majority, the editors formed a substantial bloc within the PCC who, by dint of their experience and practical knowledge of the industry, would be likely to exercise a disproportionate influence. Even if that is not so, at the very least, this would be how reasonable observers would view the matter. These influences would undeniably be mitigated if the industry had chosen to populate the PCC with more former editors, serving journalists and NUJ members, likely to inject a more independent-minded approach. Instead, expert industry knowledge was concentrated in the hands of editors only.

3.23 Second, the PCC operates a principle of abiding by precedent, looking to previous decisions for guidance when deciding cases and seeking to keep decisions consistent.[41] Key decisions are collated in the Editors' Codebook, an amplified version of the Editors' Code of Practice. A decision in one case would determine or at least influence the approach taken by the PCC in a similar case in future.[42] Although unexceptional when viewed in isolation from all other considerations, this state of affairs far from eliminates the conflict of interest which is acknowledged by editors leaving the room when their own newspaper or a sister paper is being discussed. An awareness that an adjudication in the instant case might well impact on the application of the Code to a future case, in which the adjudicating editor's own title might be involved, creates an inherent conflict between the interests of serving editors and doing of full justice to the complaint and the person who made it.

3.24 This is not a practice shared by other regulators and with good reason. Ofcom, charged with the different but (for these purposes) comparable task of regulating the broadcast media industry, does not have anyone currently active in the industry on the board which adjudicates on breaches of the Broadcasting Code. The Chair of Ofcom, Dr Collette Bowe, described the structure of Ofcom in the following way:[43]

> *"the board member who leads the work on the enforcement of standards in broadcasting is himself a well-known, very distinguished broadcast journalist, formerly of the BBC and then of Channel 4, who brings a large amount of experience to that role, but we do not regard it as appropriate to have people who are engaged very actively in the industry as members of the board.*
>
> *Q. Why is that?*

[40] p54, para 120, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf; p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Sir-Christopher-Meyer.pdf; p17, lines 4-8, Paul Dacre, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-6-February-20121.pdf; pp86-87, lines 25-29, Tina Weaver, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf

[41] Not quite equivalent to the legal doctrine of *stare decisis* which is more rigidly applied

[42] pp 99-153, para 239, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[43] p61, lines 3-14, Dr Collette Bowe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf

> *DR BOWE: Because of conflicts. I'm sure you're familiar with the sorts of issues that arise, and you can manage small conflicts on boards; you can't manage large, endemic ones."*

3.25 I recognise that PCC witnesses gave evidence (which I entirely accept) that the lay or public members of the PCC are independently-minded, often strong-willed individuals who are not intimidated by the presence of editors:[44]

> *"I think if you look at the list of people who served on the Commission, it's an impressive list of people who have either spent a life in public service or politics…they've excelled in their field in one way or another. These aren't patsies at all. Obviously, I was in every single Commission meeting whilst I was director and there would be some excellent knock-about debates. So these weren't people who were in any way cowed by the presence of a few editors."*

3.26 Lord Grade was also asked for his perspective on this point. His answer should be set out in full.[45]

> *"I've never experienced that. I must have attended now eight or nine meetings. Where a case is going against a newspaper, where the recommendation of the officers is that there's been a clear breach of the code – such-and-such a clause in the code, the editorial figures on the board, who are in a minority, are the first to speak out in condemnation and say, "I can't believe they did that, that was a –" you know, it's a very, very honest debate. A very, very honest debate. Anybody with an interest, obviously, leaves the room at that point, if they're part of a group and it's one of their newspapers in the group, whether it's a local newspaper or national newspaper. No, the debates are very, very, very fair. There are debates about the wording and quite often – I can't think of an example at the moment because we get papers that thick every week (indicates). There are examples where editorial figures around that table have strengthened the criticism in the adjudication. So I don't have any issue in that regard whatsoever, and I wouldn't – personally speaking, I wouldn't be there if that was the case. I wouldn't stay there if that was the case."*

3.27 I also expressly record that Tim Toulmin rejected the criticism that there were no representatives of the victims of press intrusion on the PCC, saying that "*people who work at the PCC, whether they're on the board or full time staff, are motivated by trying to assist people who are having difficulties with the press, particularly those vulnerable people who can't afford a lawyer and so on.*"[46]

3.28 It may well be unnecessary, if not inappropriate, to ensure that one or more lay Commissioners should have had experience of having suffered at the hands of press intrusion, since individuals in this category might be expected to be biased the other way, or at least give rise to that appearance.[47] Even so, without doubting the truth of Lord Grade's evidence as to the full and frank exchange of views which attends the deliberations on the PCC's adjudications in individual cases, I do not believe that it really addresses the structural problems I have

[44] p42, lines 16-25, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[45] p47, line 17, p48, line 14, Lord Grade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf

[46] p44, lines 21-25, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[47] I acknowledge that three of the lay commissioners have recently submitted evidence that they or their families had in the past been the subject of press attention. However, there has been no suggestion that they were the subject of the kind of intrusive reporting which has proved most damaging to victims; and which the PCC failed to tackle

identified. Lord Grade's evidence would fail to persuade those who reasonably believe that the system is inherently weighted in favour of the status quo. Neither is this point to doubt the real value that I am sure lay Commissioners have brought to the process.

3.29 Refreshingly, some representatives of the press have accepted that the presence of serving editors on the PCC compromises its independence. For example, the editor of the *Financial Times*, Lionel Barber, was of the view that the PCC had traditionally contained too many serving editors:[48]

> *"It's not a tenable position. We need outsiders. There have been some changes, but certainly for too long the PCC was dominated by insiders."*

3.30 I am not suggesting for one moment that the PCC should have been free from all industry expertise: on the contrary, this always would have been, and is, invaluable. But industry expertise should have been drawn from a broader cohort and should not have been taken from serving editors of large national titles in competition with other national titles at all.[49] I have already said that serving or former journalists (including NUJ members) and retired editors would add a different perspective to the PCC board.[50]

3.31 I do not accept the argument that retired editors would necessarily be out of touch with developments in the industry.[51] The broadcast media industry has, over the past 20 years, changed with extraordinary speed. The rise of the internet and media convergence has impacted upon broadcasters as well as newspapers. In spite of this, Ofcom has successfully employed the expertise of former journalists and media executives on its Board.[52] There is no suggestion that those people have failed to understand or account for the acute changes and associated challenges which have affected the broadcast media. I emphasise that this is not to seek to compare the PCC with Ofcom or to hold one up against the other: it is simply to make the point that similar issues fall to be considered without the absence of serving editors being considered a disadvantage, still less an impediment.

3.32 In my view, the constitution of the PCC Board is a limit on its independence. Serving editors, however dedicated to their role, are *parti pris* in relation to the outcome of adjudications in the sense I have identified, and are capable of influencing both the agenda and the course of debate in individual instances. Additionally, but outside the context of individual adjudications, the system is such that it creates at least the perception that the most powerful individuals on the PCC will direct overall strategy, policy and direction. Alastair Campbell put the point in this way:[53]

[48] pp48-49, lines 25-2, Lionel Barber, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf

[49] The example is often given of doctors serving on Disciplinary Committees of the General Medical Council. If an ENT surgeon from, say, Newcastle, sits on a Disciplinary Committee in respect of an ENT surgeon whom he does not know and has had no contact with from, say, London, he will be able to bring his expertise to bear in a completely impartial way. If one of a dozen or so national editors sits on a PCC panel in relation to a competitive title, it is almost inevitable that he or she will know the editor extremely well and is likely to have a view about the balance of Articles 8 and 10: a complainant may well not feel that such an editor could be entirely impartial. As appears from the analysis of the position of Northern and Shell, the converse might also be true

[50] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Michelle-Stanistreet.pdf

[51] p90, lines 1-10, Tina Weaver, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf; p42, lines 17-23, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-30-January-2012.pdf

[52] pp101-102, lines 7-9, Ed Richards, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf

[53] p26, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf

> *"When I was in Downing Street, I was constantly told by PCC people that the three people who 'counted' there were the chairman, Les Hinton and Paul Dacre."*

3.33 I have no reason to doubt that this is what Mr Campbell was told by the 'PCC people' his witness statement admittedly did not identify. Whether or not they were speaking authoritatively, or accurately, perhaps does not matter; the concern is the perception which arises from the possibility for real power to be concentrated in a few hands.

The makeup of the Editors' Code of Practice Committee

3.34 The Editors' Code of Practice Committee, formally a sub-Committee of PressBoF rather than of the PCC, is responsible for the promulgation of the terms of the Editors' Code of Practice. A list of the current members of the Editors' Code of Practice Committee is given in the witness statement of Stephen Abell.[54] It wholly comprises serving editors and executives.

3.35 The PCC has been able to communicate its views on any amendments to the Editors' Code of Practice, through the Chair or the Director. Although the formal role of the PCC Chair and Commissioners in relation to the Editors' Code of Practice is advisory only, it has in practice been persuasive. One occasion when views were communicated was in the aftermath of the death of Diana, Princess of Wales. Lord Wakeham gave evidence that:[55]

> *"I persuaded the newspaper industry to strengthen its Code of Practice several times, including a wholesale revision, particularly on matters relating to privacy, following the death of the Princess of Wales in 1997."*

3.36 The Inquiry has also heard evidence that the PCC itself (through the Director or the Chair) was involved in feeding back ideas for improvements to the Editors' Code from the coalface to the Editors' Code Committee. There are examples of this in the documentation which the PCC has provided to the Inquiry. One such is a letter from Sir Christopher Meyer to Les Hinton, then Chairman of the Editors' Code Committee, recommending improvements to clause 6 of the Editors' Code.[56] On other occasions, comments on the Editors' Code from external contributors were fed into the Editors' Code Committee's considerations.[57]

3.37 Public involvement in the contents of the Editors' Code was, however, more limited and restricted to an annual consultation session undertaken by the Editors' Code of Practice Committee. Beyond this and the limited role of the PCC, control over the Code was held entirely by the editors serving on the Code Committee.

3.38 In contrast, although a statutory code (which I do not recommend) as a matter of pure structure, it is significant that the Broadcasting Code is drafted by Ofcom employees and approved by the Content Board, under delegated authority from the Ofcom Board. Suggestions are fed into Ofcom by stakeholders in the industry so that the Broadcasting Code develops in consultation with the industry and accounts for changing practices and industry challenges. Ed Richards, the Chief Executive of Ofcom, described the development of the Broadcasting Code in the following way:[58]

[54] p235, para 350, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf
[55] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Wakeham-Letter-to-Inquiry.pdf
[56] pp1-2, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-M7.pdf
[57] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T278.pdf
[58] pp91-92, lines 1-11, Ed Richards, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf

> *"…the way the code would work is so we review it from time to time… we try and update it in the light of practice. It would be drafted by full-time Ofcom employees, and it would then go through our decision-making process for approval, and in this case would be approved by our content board, which is where the hub of our broadcasting expertise lies. It could always, as with any Ofcom decision, be then referred upwards to the main board, but as I recall, I think this [current edition] would have been signed off by the content board in their delegated responsibilities.*
>
> *DR BOWE: Yes.*
>
> *LORD JUSTICE LEVESON: Have you found it necessary … to involve actual programme makers or editors in the creation of this document?*
>
> *MR RICHARDS: I would say that they are involved very closely in its evolution. We have a very close dialogue with actual programme makers, actual journalists, currently practising but also those for whom we can –those who we can draw on who are no longer practising but still have a deep well of expertise, and we draw on that very heavily. So just to underline the point, what does not happen is that half a dozen people in Ofcom hide in a room and write a code. What actually happens is that those people talk on an open way over an extended period, test ideas, examine them, review them, and that process would involve working journalists, working producers, working editors, as well as those of – with previous experience, but the decision on the code would then be ours, and the decision would be made by the content board, so it's incorporating, understanding latest practice and things of that nature, but the decision absolutely remains with us."*

3.39 It is a clear flaw in the self-regulatory system that the Editors' Code of Practice Committee, the body with sole authority to amend the Editors' Code of Practice, is made up exclusively of serving editors and executives. This gives rise to at least the perception that rules are being made which suit the editors themselves and not the public. Of course, as Mr Richards pointed out, a deep well of expertise is obviously necessary but what is also required is the involvement of a broader range of opinion to reflect all relevant constituencies.

Evidence of Northern and Shell witnesses

3.40 Witnesses from Northern & Shell gave evidence of their impression that the PCC was run by and for the benefit of a particular section of the press; this they gave as the principal reason for the January 2011 departure:[59]

> *"…we came into it seeing the sense in a self-regulated press, and we thought to ourselves we were able to regulate ourselves. There are a very large number of very good reasons why a newspaper would want to regulate itself, even without any industry body. We'd been used to doing that on magazines, so we knew of an Editors' Code, and we saw no reason, in principle, why a company in isolation might not apply that Editors' Code and put in its own disciplines and constraints.*
>
> *The difference was the same code was being enforced, but it was a kind of an industry body that – it was a club."*

3.41 Underlying this answer may be both an element of special pleading and of personal acrimony between those at the head of Northern & Shell and those who they perceive as running

[59] For example, p37, lines 12-24, Paul Ashford, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf

this 'club'. From their perspective, the PCC was too close to one or more sections of the press, and Northern & Shell was relegated to the sidelines. I would not wish to comment on whether this perception articulated by Paul Ashford is substantiated, but its very existence does bear on the general issue of independence, the lack of which, and in particular from certain sections of the press, was also the reason given by Ian Hislop for Private Eye's refusal to join the system of self-regulation in the first place.[60]

4. The alignment with industry

4.1 In this section I look at the willingness of the Press Complaints Commission, as putative regulator, to align its interests directly with those of the industry. At times, it seems that the PCC acted as both advocate and champion for this industry, a role that it rarely adopted in relation to those who had been wronged by the press. I will also examine and comment on the response of the PCC in response to criticism and its attitude towards the improvement of its structures and functions as well as calls from outside the industry for reform.

Advocacy of press industry interests

4.2 On occasion, the PCC acted as an unabashed advocate or lobbyist for the press industry. Some of this advocacy was directly in the commercial interests of the press. On other occasions, the PCC advanced the case for the self-regulatory system itself. Promoting self-regulation in principle, and the self-regulatory system as it was established in practice, may have created less obvious difficulties of perception than the promotion of the commercial interests of the regulated industry. However, as the preservation of the *status quo* was in at least the short term interests of the industry, promotion of the merits of self-regulation was an advancement of that interest. In my view, this served to create a real conflict of interest between the core function of the PCC, applying the Code and achieving a balance between the interests of the subjects of stories and the press, and the role it arrogated to itself in advocating the interests of the industry as a whole.

4.3 As has been make clear in earlier sections of the Report, in particular Part I Chapter 5 section 3, Lord Wakeham intervened to influence the content of the Human Rights Act 1998 (HRA), negotiating with the then Home Secretary the Rt Hon Jack Straw MP for the inclusion of section 12 in aid of the press.[61] Lord Wakeham was clear in his evidence that he *"never acted as a 'representative of the press'"*.[62] He viewed himself instead as the representative of self-regulation, which he believed would be undermined by the passage of the HRA.[63] However, he acknowledged in evidence that, while his primary concern was to protect the self-regulatory system, he "*did in [his] speeches make some more general observations about press freedom*".[64] Lord Wakeham also acknowledged that representatives of the press,

[60] pp4-5, paras 12 - 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Ian-Hislop.pdf
[61] p3, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Wakeham.pdf; p12, paras 103-109, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
[62] p14, para 45, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf
[63] p15, para 45, *ibid*; pp46-47, lines 3-13, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[64] p16, para 48, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf

including the then Chair of the Editors' Code of Practice Committee, Sir David English, also lobbied the Government in relation to the HRA.[65]

4.4 Lord Wakeham outlined his reservations about the effect of the Human Rights Bill on the press in two speeches to the House of Lords. He set out his concern in a speech on 24 November 1997 thus:[66]

> *"The Bill as drafted would damage the freedom of the press and badly wound the system of tough and effective self regulation that we have built up to provide quick remedies without cost for ordinary citizens. It would inevitably produce a privacy law, despite the Government's stated opposition to one"*

4.5 The Rt Hon Tony Blair gave evidence to the Inquiry of the lobbying undertaken by Lord Wakeham and the PCC more broadly intended to make plain the detrimental impact of the HRA on the press:[67]

> *"Q. …The Human Rights Act, Mr Blair…Was it the position that News International – I suppose together with everybody else – were lobbying for complete press immunity from the Human Rights Act?*
>
> *A. Yes, that's right. They wanted no suggestion that you would move outside the bounds of the PCC and self-regulation.*
>
> *Q. And were you generally supportive of that position?*
>
> *A. Yes, that was … my view was that if you were to deal with this, you had to deal with it head on, as it were, not through the Human Rights Act, which would be a sort of side way of dealing with it. Also, at that time, I think I'm right in saying it was Lord Wakeham who was head of the PCC, who was something actually I thought was doing quite a good job of that, and the PCC were pretty fierce on this, on behalf the whole of the media, really, not any one particular part of it."*

4.6 Initially, this lobbying was intended to convince the Government to grant the press an exemption from the HRA.[68] The Government was, however, according to Lord Smith of Finsbury, *"fundamentally opposed"* to any such exemption.[69] In the event, the solution, negotiated by Lord Wakeham,[70] between the press and the Government was described by Lord Smith thus:[71]

> *"In June of 1998, agreement was reached across government – and welcomed by the PCC – that a new clause would be brought forward for the Human Rights Bill: giving a steer on the need to respect the media's right to freedom of expression as well as individuals' rights to privacy; requiring the courts to have regard to the PCC Code of Practice and the broadcasting codes; and making it more difficult to obtain injunctions restraining publication".*

[65] p15, para 47, *ibid*
[66] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Wakeham-Exhibit-E.pdf
[67] pp95-97, lines 23-2, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[68] pp4 – 5, para 17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Smith.pdf
[69] *ibid*
[70] p45, lines 11-20, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[71] p5, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Smith.pdf

4.7 The compromise reached was the insertion of what was to become section 12 HRA. Lord Wakeham described this as "*the best compromise that was likely to have been achieved in the circumstances. It tried to tackle the issue of prior restraint and, in Jack Straw's phrase in the House of Commons, 'preserve[d] self regulation'".*[72]

4.8 The Human Rights Bill was not the only contemporaneous legislative matter to alarm the industry. Proposals in the Data Protection Bill were also a cause for concern. Lord Wakeham linked the two in a speech:[73]

> *"The thing that puzzles me is that the Data Protection Bill and the Human Rights Bill which this House has been considering seem to exist almost in different worlds, but the truth is that they present two entirely contradictory sets of policies. The data protection bill does not introduce new powers for the rich and famous; the human rights bill does the opposite. The data protection bill does not introduce a back door privacy regime; the human rights bill does. The data protection bill safeguards the position of self-regulation. The human rights bill may end up undermining it."*

4.9 The substance of Lord Wakeham's objections here demonstrates the difficulty in distinguishing the interests of the press and the interests of self-regulation. I have no doubt that Lord Wakeham, in lobbying the Home Secretary and other Ministers, believed that he was working in the interests of the self-regulatory system. However, Lord Wakeham's interventions were couched not only in terms of protecting self-regulatory structures but also included warnings about the danger to the freedom of the press.

4.10 Lord Wakeham was not by any means the only leading member of the PCC to have been adept at the lobbying and influencing of politicians. When Guy (now Lord) Black resigned as Director of the PCC, Sir Christopher Meyer praised him for his skill in helping to influence Government policy in the interests of the self-regulatory system. In particular, Sir Christopher made reference to the role played by Lord Black in mitigating the impact of a number of pieces of legislation and for helping secure a benign political environment for self-regulation:[74]

> *"Since 1996 he has helped protect self regulation from the threats posed by numerous pieces of legislation including the Human Rights, Data Protection and Youth Justice Acts. And by making the PCC the efficient and effective body that it is today, Guy can rightly claim credit for the generally benevolent political attitude towards self-regulation that we currently enjoy".*

4.11 The PCC actively sought to combat what it perceived as threats to the self-regulatory system. The 2003 Annual Report of the PCC set out the 'external threats' facing the Commission. These included: discussions with European officials "*to protect the special position of self-regulation in the UK*",[75] as well as proposals for amendment of the Communications Bill, which could have brought the PCC under the supervision of Ofcom, and Irish legislators' "*plans to introduce a statutory press council there*".[76] The PCC was particularly concerned at the potential impacts of proposals brought forward by the European Commission,[77] and went so far as to engage a Brussels-based political consultant "*to act, among other things, as an*

[72] p15, para 47, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf
[73] HL Hansard, Series 6, Vol 305, Col 463, http://www.publications.parliament.uk/pa/ld199798/ldhansrd/vo980202/text/80202-09.htm
[74] p2, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E1.pdf
[75] *ibid*
[76] *ibid*
[77] PCC, http://www.pcc.org.uk/news/index.html?article=Mzk

early warning system, and to persuade opinion formers and legislators there of the merits of self-regulation."[78]

4.12 In 2005, the PCC coordinated with PressBoF to lobby in Europe against the effect of the proposed Television Without Frontiers Directive. The then Director of the PCC, Tim Toulmin, wrote to the Secretary of PressBoF in the following terms:[79]

> *"My understanding is that the specific danger in the draft Directive is in its expectation that there will be regulations to ensure that:*
>
> - *there is a (statutory) right of reply to inaccuracies;*
> - *audio-visual material is not distributed in such a way that might seriously impair the physical, mental or moral development of minors; and*
> - *audio-visual information does not contain incitement to hatred on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. "Incitement to hatred" is not defined.*
>
> *These areas clearly touch on editorial content, particularly the first and third points, but the consultation papers only suggest explicitly that the second of these could be dealt with through self-regulation. Worryingly, the relevant paper states that in relation to the proposed rules on discrimination, "some stakeholders argued that co-regulation or self-regulation would be inappropriate", and there is no further suggestion that self-regulation would be adequate.*
>
> *The broader danger, of course, is that unless these areas are carved out for self-regulation, the Directive will effectively have been a Trojan horse, with the regulation of at least some part of newspapers' and magazines' websites becoming for the first time the responsibility of other agencies (probably Ofcom). It can only be a matter of time before this precedent is used to argue for the harmonisation of regulation of broadcasters' and publishers' websites as media convergence continues. Ofcom, incidentally, assures us that it has no 'imperial' ambitions in this area, and the government appears to have taken a strong position against having to regulate the editorial content of websites – although it may of course have no choice eventually".*

4.13 Mr Toulmin's letter is instructive. It is clear that the PCC was working with PressBoF to try to combat a perceived threat not only to the self-regulatory system but also more significantly to editorial freedom. It demonstrates that the PCC sought to influence legislation in a way which favoured the interests of the industry.

4.14 The PCC adopted a similar advocatory role in relation to discussions concerning the introduction of custodial sentences for breach of s55 of the Data Protection Act. On this occasion, it was Sir Christopher Meyer who would play the lead role. Sir Christopher gave evidence that he could not recall any conversations with editors or other representatives of the press industry about the issue.[80] However, he said that he thought it was appropriate for the PCC to campaign on this issue because *"…it was something that we thought would be pretty chilling to freedom of expression"*.[81] In addition:[82]

[78] PCC, http://www.pcc.org.uk/news/index.html?article=Mzk
[79] PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S21.pdf
[80] p61, lines 4-21, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[81] pp61-62, lines 24-1, *ibid*
[82] p63, lines 11-23, *ibid*

> *"It was something I believed in, and if you think Mr Dacre picked up the phone one day and said…"Very helpful if you stick in the annual review something about Section 55" – forget it. Even Jack Straw was on his side as well … and the Information Commissioner was rebuffed by the Lord Chancellor.*
>
> *So it was not as if I was expressing some astonishing view. There was very wide public debate about this, and we decided to take part in it and why the hell not?"*

4.15 Whether or not there were conversations between Sir Christopher and representatives of the press industry about the issue of custodial sentences for breach of s55 of the Data Protection Act, his action in respect of this issue on behalf of the organisation he chaired demonstrates that PCC thinking and priorities were very close (if not identical) to those of the industry it was supposed to regulate. Little consideration appears to have been given to those who might be the subject of intrusive breaches of data protection at the hands of the press without there being the slightest public interest in such breaches. Yet it is the complaints of those people which the PCC exists to mediate or resolve.

4.16 It is not clear to me why the PCC thought it either necessary or appropriate to lobby Government on behalf of the press; it is not as if the press was devoid of its own powerful advocates. It is apparent from Sir Christopher's evidence that the impulse to intervene stemmed from a prior belief that the principle of press freedom was at stake; and that this principle was something the PCC had a role in defending. I do not question the genuineness of Sir Christopher's belief, although I have raised elsewhere my concerns as to whether it was well-founded. The point remains that in picking up the proverbial megaphone in this way, Sir Christopher was in danger of undermining public confidence in the ability or willingness of the PCC to act as an impartial and independent regulator through the clear alignment of the PCC with the interests of the industry.

Protective function of the PCC

4.17 There appears to have been a belief among some sections of the press that one of the functions of the PCC was to act as a shield protecting the press from criticism and litigation. The former editor of the Daily Express, Peter Hill, assigned as one of the main reasons for Northern & Shell's decision to leave the PCC as the fact that the latter no longer prevented complainants from claiming through the courts.

4.18 In 2009, Sir Christopher Meyer wrote to Richard Desmond in an attempt to persuade the Northern and Shell group to remain in the self-regulatory system. He wrote:[83]

> *"…now that the Express has withdrawn from the NPA, it would be helpful to talk about how we can keep the papers within the PCC system. The benefits to newspapers of subscribing to the scheme are numerous: sorting out complaints through us (particularly about privacy matters) minimises the risk of cripplingly expensive court cases and legal settlements; it delivers opt-outs for journalists from numerous pieces of legislation such as the Investment Recommendation Regulations; and it keeps the government from legislating on the areas that the press Code of Practice covers. In fact, last year – when the public used our services in record numbers – the Government, Opposition and the Select Committee for Culture, Media and Sport all came out in favour of self-regulation. I know that the subscription to the PCC is not cheap – around £167k per annum – but I strongly believe that the costs of staying outside the system, particularly in legal fees, would be much higher."*

[83] p1, Press Board of Finance, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Exhibit-Pbof-55.pdf

4.19 In a similar vein, the 2010 financial review (drafted by the then Director of the PCC, Stephen Abell) made the following observation:[84]

> *"A successful PCC is, as everyone recognises, in the interests of the industry, both in terms of staving off statutory regulation and limiting the flow of people to use the courts. The better the service the PCC can offer, the better value it is to the industry."*

4.20 The maintenance of the system of self-regulation through the PCC and, therefore by implication, the ability of the PCC to shield the industry from litigation, was often cited by the PCC as a reason for newspapers to comply with PCC adjudications and decisions. Sir Christopher wrote in February 2007 to Colin Myler, then the editor of the NoTW, to arraign Mr Myler for not having given sufficient prominence to a PCC adjudication. Sir Christopher wrote: "*I was particularly surprised at this oversight given the current context of renewed scrutiny of self-regulation".*[85] The implication of this is clear: failure to comply with PCC decisions risked questions being asked of the self-regulatory system itself.

A pattern of cosmetic reform

4.21 In other parts of this Report, most particularly in Part D Chapter 1, I fully address the history of press self-regulation. As I said on several occasions during the oral sessions this has been characterised by a cyclical pattern of (i) crisis, (ii) the press coming under heavy public and some political pressure, (iii) some reforms, usually of a limited nature, being carried out, (iv) ephemeral improvement, (v) deterioration in press behaviour, and ultimately (vi) another crisis. As I made clear above,[86] the reforms introduced by the industry have not addressed the structural problems which this Part of the Report serves to identify. Put another way, limited programmes of reform have been concerned with relieving pressure on the press, and blunting calls for strengthening the self-regulatory system. A show of reform has been used as a substitute for the reality of it.

4.22 Part D Chapter 1 looked at the history of self-regulation until 2003 which was when Sir Christopher Meyer took over as Chair of the PCC. I will therefore pick up the narrative from then.

4.23 In a speech delivered on 6 May 2003, approximately six weeks into his tenure as Chair, Sir Christopher announced a programme of reform which he described as "*permanent evolution*".[87] It was intended as a process of self-examination and improvement with a view to providing a better service to the public that would be applied not only to the PCC but the self-regulatory structure more broadly.[88]

4.24 The first measures introduced as part of the 'permanent evolution' programme related to the independence of the Commission itself. The number of public members of the Commission was increased to ten (from nine) against seven editorial members.[89] Also, the recruitment process for public members was changed so that positions were advertised, and prospective members were interviewed by an independent panel before the final interview with Sir Christopher and another member of the PCC.

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[84] p1, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S11.pdf
[85] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T180.pdf
[86] Part D, Chapter 1
[87] pp1-9, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-—-D8.pdf
[88] pp42-44, para 86, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf
[89] p11, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E1.pdf

4.25 As I noted earlier, the fact that lay members formed a majority on the Commission has been repeatedly relied upon by the PCC and its supporters as evidence of the independence of the self-regulatory system from the industry. Putting one more lay member on the Commission appears to be a step towards achieving greater independence for the decision-making body, but it was far from being a radical one; the positive impact, if any, is far from clear. This was very much more a cosmetic move towards independence than a substantive one.

4.26 The programme of 'permanent evolution' also saw the introduction of the Charter Commissioner and the Charter Compliance panel. In the PCC's 2004 Annual Report, the role of the Charter Commissioner was described as providing "*an internal 'judicial review' mechanism*".[90] This is not a helpful or accurate description. The Charter Commissioner and Charter Compliance Panel did not have the power to overturn PCC decisions. They did not examine whether decisions of the PCC were reasonable, even in the rather more limited sense permitted by judicial review. Rather, they examined whether the PCC's service standards met their targets; if the review found a procedural defect, it could ask the PCC to revisit a decision.[91]

4.27 What these two bodies offered was effectively an enhanced customer-service complaints body and nothing more. To imply, by describing the powers of the Charter Commissioner and Charter Compliance Panel in the language of judicial review, that they had any more substantial function, or offered the reassurance of oversight of the PCC's activities, is entirely wrong; they were little more than window-dressing.[92] Taken as a whole, the package of reforms introduced under Sir Christopher's 'permanent evolution' did not address, and were not intended to address, the substantive problems with the system of self-regulation. These limited reforms may well have given the appearance of activity and development but did little more than that.

4.28 Nor did the PCC move to address in any meaningful sense the concerns raised by revelations of mobile phone voicemail hacking by journalists working at the NoTW in 2006. Following the completion of the PCC's Report into Subterfuge and Newsgathering in May 2007 (dealt with in more detail below), the PCC made recommendations to newspapers about steps they might take in order to comply with the existing rules in relation to data protection, subterfuge and news gathering.[93] In August 2007, Clause 10 of the Editors' Code of Practice (relating to subterfuge and newsgathering) was revised to prohibit the unauthorised removal of documents or photographs and the accessing of digitally-held private information without consent. In addition, Clause 10(ii) was changed so that the provisions in relation to public interest justifications for subterfuge and misrepresentations extended to the activities of third parties.[94]

4.29 When she took over as the Chair of the PCC, Baroness Buscombe planned an independent review of the PCC's governance, remit, sanctions, budget and the degree of independence it enjoyed from the industry.[95] This became the Independent Governance Review, which was

[90] p7, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E2.pdf; p11, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E1.pdf

[91] pp67-68, paras 164-169, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[92] So that there is no doubt about the matter, I do not in any sense criticise the way in which the Charter Commissioner and Charter Compliance Panel went about the work: my concern is the limit of their power and responsibility

[93] p275, para 425, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[94] p244, para 356, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[95] p4, paragraph 21, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf

set up in August 2009 and reported in July 2010. Despite the planned scope of the project, the governance review which followed was altogether more limited in its scope:[96]

> *"…the industry was very clear that a review undertaken by the PCC should only consider issues solely within its remit. Questions as to funding, independence and sanctions were decidedly off limits".*

4.30 The Independent Governance Review made 75 separate recommendations. According to Stephen Abell, former Director of the PCC, the key reforms which eventuated principally comprised:[97]

> *"A proper statement of aims and duties were to be published by the PCC;*
>
> *An enhanced register of interests would be published to inform the public of any conflicts of interest which Commissioners might have;*
>
> *A public commissioner would be appointed Deputy Chairman of the PCC;*
>
> *New performance objectives would be introduced to measure the success of the PCC's work;*
>
> *A new website would be launched to improve access to complaint statistics, PCC case law and complaint-making facilities;*
>
> *Commissioners would be updated weekly on the day-to-day activities of the PCC's staff; and*
>
> *The PCC would establish working groups to consider questions arising from public concern or complaint trends."*

4.31 Other recommendations included changing the name of the Charter Commissioner and Charter Compliance Panel to the Independent Reviewer and Review Panel respectively.[98] None of these changes addressed the fundamental weaknesses of the self-regulatory system. Nor did the reforms make the PCC, or the wider self-regulatory system, more independent of the press. There were limited moves towards further independence, manifest in the greater involvement of the lay members of the PCC in the appointments process, but given the real constraints on of the independence of the PCC set out at the head of this Chapter, the effect of this was negligible and served only to allow the impression that a process of reform was underway.

4.32 I deal with the substantive detail of the PCC's investigations into phone hacking elsewhere in this Chapter. However, there is value, in the context of the limited and partial attempts at reform made by the PCC, in making some comments about its response to the allegations. Baroness Buscombe gave evidence that she felt pressure to launch an investigation into allegations of phone hacking at the NoTW in 2009 in order to reassure the public that something was being done by the regulator.[99] It may be that the PCC's general approach to the public presentation of itself owed much to the bonds which Baroness Buscombe identified in this instance.

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[96] *ibid*

[97] pp47-48, paras 99-102, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[98] pp 67-69, paras 164-174, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[99] pp50-51, lines 14-21, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

4.33 It was only following the sustained public outcry in response to continued revelations of phone hacking that the PCC announced that it intended to address the fundamental weaknesses in self-regulatory system. In a press release published on 6 July 2011, after the Guardian had published its article alleging that Milly Dowler's phone messages had been hacked, the PCC announced a review of self-regulation to be carried out by lay members of the Commission. The remit was to:[100]

> *"[a] review of all aspects of press regulation in its current form, which will be designed to ensure that public confidence is enhanced. The Commission will wish to review its own constitution and funding arrangements, the range of sanctions available to it, and its practical independence."*

4.34 The proposal is in marked contrast to previous efforts at self-reflection, which had failed to ask pertinent questions about self-regulation and had led only to cosmetic changes.

4.35 The self-presentation of the PCC as a competent regulator with adequate powers perpetuated the unsatisfactory *status quo*. The PCC gave the public a false impression of what it could do and never acknowledged the limitations of its powers. Through acquiescent silence, the PCC permitted policy-makers and the public to make mistaken assumptions about the breadth and depth of the powers and capacity of self-regulation. It is damning of the PCC that it was only when the system of regulation was under unprecedented scrutiny and extreme threat, that a programme of reform was announced that asked questions of import directed squarely at the system's failings.

Restrictions on the PCC's ability to reform itself

4.36 Linked to the apparent unwillingness of the PCC to implement meaningful reform were real restrictions on the ability to undertake reform. The PCC was not permitted by the industry to examine, reflect and then act on its own performance. The evidence of Baroness Buscombe in this respect is instructive. At the beginning of her tenure as Chair of the PCC, Baroness Buscombe was convinced that the PCC was sufficiently independent from the press and that the system did not require substantial reform.[101] In a speech delivered on 15 November 2009, she expressed strong support in principle for the self-regulatory system and in particular sought to rebut criticism that the PCC was not independent from the regulated industry:[102]

> *"The press do not regulate themselves. The PCC is funded by the newspaper and magazine industry but operates independently of it. Is independence is guaranteed by a majority of lay members, and staff who have no vested interest in siding with the press. Is that really so difficult to grasp?"*

4.37 However, Baroness Buscombe reassessed her view of the independence of the PCC from the industry. Shortly before the instigation of the Independent Governance Review, she felt much more constrained in the PCC's approach to this task. In evidence, she referred in general terms to the limitations imposed on her by 'the industry', making clear that she was required to entertain only those issues covered by the PCC's terms of reference:[103]

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[100] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B-258.pdf
[101] pp51-57, lines 22-24, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf
[102] p6, PPC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V22.pdf
[103] pp39-41, lines 22-22, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

"My view changed…in that I realised fairly soon after I arrived that of course I was in a very different world in terms of the self-regulatory system as it applies within the press and magazine industry than as it applies within the ASA … In the ASA environment, there was no micro-managing. The role of the equivalent to PresBoF was very much hands off, except for being a funding mechanism and being there to be supportive of the ASA system.

…

It was terribly important for us to demonstrate … that actually this Commission … [was] an entirely separate part of the industry. But I also … found in practice it was difficult to be independent when I realised that in order to improve our credibility, to continue what Christopher Meyer I know has called an evolution – I wanted a bit more of a permanent revolution … to really improve the governance and structures of the organisation and to try to put pressure, if I could, with the permission and blessing of the Commission, on the industry to accept that … we needed to up our game in terms of our remit, our sanctions and very much our funding. This is where my view of independence changed.

Q. So is the gist of your evidence this, Lady Buscombe: that you were keen for … revolutionary change, but you were facing resistance from the industry against such change?

A. Yes, and that was not at the outset … My issue was with the – those who were in charge of giving us permission, as it were, where we sought it, to try and improve our funding, improve our resource overall so we could do a better job".

Defensive attack and failure to reform

4.38 Representatives of the PCC have tended to reject criticism, and on occasions have made *ad hominem* attacks on their critics, sometimes in intemperate terms. Over time the PCC has reacted strongly to well-informed criticism or what it perceived to be criticism from, amongst others, Sir Louis Blom-Cooper QC who was the last Chairman of the Press Council; the Media Standards Trust; and the journalists John Simpson and Nick Davies.[104] Typically, criticism was repudiated on the basis that the critic had failed to understand the nature of the self-regulatory system and/or had not placed adequate weight on the importance of freedom of expression.

4.39 I draw attention to only two examples in this regard. First, in February 2009 the Media Standards Trust published its report, *A More Accountable Press. Part 1: The Need for Reform*.[105] In my view, this is a measured and punctilious critique of the PCC, justified on the then available evidence and made more prescient by subsequent events. On 19 February 2009, Sir Christopher Meyer wrote to Mr Salz of the Media Standards Trust making a number of observations, including the following:[106]

"I am afraid that we also require some reassurance about the credentials of those carrying out the inquiry. In addition to the inaccuracies ... the report does not appear to have been written by anyone with much understanding of self-regulation or the

[104] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T172.pdf; p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T181.pdf; p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T277.pdf; pp1 – 2, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T2821.pdf
[105] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Third-Submission-by-Media-Standards-Trust.pdf
[106] pp1-5, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T1125.pdf

relationship between the PCC and the law. More fundamentally, we have to ask ourselves whether this enterprise is being undertaken in good faith..."

4.40 Further, on 4 March 2009 the Director of the PCC wrote an internal memorandum to all the Commissioners, which included the following statements:[107]

"As we have maintained throughout, the report is little more than a 'case for the prosecution' ... The question is why they are doing this. To answer this, it is important to understand who these people are, and what the genesis of the Media Standards Trust is. For, while it sounds like an impressive official body, the MST is, in reality, no more than a private pressure group of like-minded people who met on a weekend retreat a few years ago – under the aegis of something called 'Common Purpose' – and decided that 'something must be done' about the popular press. One can therefore surmise that their preferred way of achieving this is to replace the PCC with something that will be more restrictive..."

4.41 Second, in its 2003 report on Privacy and Media Intrusion, the House of Commons Culture, Media and Sport (CMS) Select Committee made a number of recommendations in relation to the PCC. Specifically, it recommended that the PCC Code prohibit payments to the police. It also recommended that there be a ban on newspapers using third parties or intermediaries to access private information about people.[108]

4.42 The PCC did not act on these recommendations. Sir Christopher Meyer gave evidence in relation to the first of these matters. He has said that the making of payments to the police was already a breach of the criminal law.[109] However, this rather simplistic explanation overlooks the fact that the codes of other regulators routinely reflect that prohibited conduct may also amount to a violation of the criminal law. Perhaps more tellingly, the Editors' Code of Practice itself contains provisions (eg clause 13 of the Code, relating to financial journalism) the breach of which might well also constitute a violation of the criminal law.

4.43 Furthermore, as subsequently addressed in Section 7 below, the Code explicitly covers issues concerning subterfuge and mobile phone voicemail hacking which engage the criminal law. Finally, given the information provided to the CMS Select Committee,[110] there was at least some evidence to suggest that newspapers were paying the police. It therefore rather misses the point to say that the existence of a criminal provision obviated the need for the Editors' Code of Practice to proscribe a particular practice.

4.44 In relation to the second recommendation, no action was taken. Sir Christopher could not recall whether this second recommendation was discussed with the Commission.[111] Certainly, no such ban was implemented. Sir Christopher, spoke to the attitude of the PCC in this respect in evidence:[112]

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[107] PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-J31.pdf
[108] p32, para 63, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf
[109] pp75-83, lines 18-5, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[110] p11, para 32 House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf
[111] *ibid*
[112] p78, lines 15-19, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf

> *"we didn't feel under an obligation to put into the code everything that the Select Committee recommended. You'll find other recommendations in other Select Committee reports where we haven't necessarily adopted what they recommended."*

4.45 Whilst it is clear that the PCC was indeed under no obligation to implement Select Committee recommendations, in the circumstances greater consideration of the merits of the recommendations would have been advisable, as well as being more appropriate to an organisation that took its duties as regulator seriously.

5. The PCC as regulator

5.1 In this section of the Report, I examine the issue of the PCC as regulator and examine by turns the perception and reality of the functions of the PCC in that regard. I look at and comment on the structural issues that prevented the PCC from functioning as a regulator, and left it as little more than a complaints handling body.

A fundamental failing: the PCC was not a regulator

5.2 It is abundantly clear from the evidence before the Inquiry that the PCC was not a regulator as that term is commonly understood. It is though perhaps surprising to many of those who have followed the proceedings of this Inquiry that this perception of the PCC has been shared and articulated by some of the most prominent witnesses speaking on behalf of the self-regulatory system.[113] Lord Black, now Chairman of PressBoF and formerly Director of the PCC, gave evidence that "*I never believed the PCC to be a regulator".*[114]

5.3 Lord Wakeham, who was Chair of the PCC from 1995 to 2001, told the Inquiry:[115]

> *"I was always clear that my task was not to be a 'regulator' – the PCC never had formal regulatory powers – but to endeavour to raise standards in the press above the minimum required by law through a process of education, exhortation and adjudication".*

5.4 That said, his position was that the PCC had taken on more features of a regulator:[116]

> *"Over the years, [the PCC] has added on functions that are of a more regulatory nature without its structures or remit being amended accordingly. Most of this happened in the last few years, culminating in the disastrous report on phone hacking. I also suspect that the PCC's Governance Review – with which I was not impressed – tried to remodel it as a regulatory quango, far removed from its original mission, or its powers or expertise, and with little understanding of the nature of the publishing industry."*

[113] pp46-47, lines 18-3, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf; p95, lines 9-17, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf; pp43-45, lines 11-24, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[114] p14, lines 13-14, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf

[115] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Wakeham.pdf

[116] p3, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Wakeham.pdf

5.5 Of the former Chairs of the PCC who have given evidence to the Inquiry, Sir Christopher Meyer is alone in advancing the view that the PCC was a regulator.[117] He said that:[118]

> *"…the press in the United Kingdom is regulated by a hybrid system, which is partly by law and partly through the implementation of the code of practice of the PCC. So what I understood...and still do, by 'self-regulation' was the system which worked through the PCC."*

5.6 In my view, Sir Christopher was utterly mistaken to characterise the PCC as a regulator or the press as a regulated industry. The PCC lacked the structural independence from the press; and the power, the armoury of sanctions or the resources to be a regulator properly so-called. PCC is better characterised as a complaints and mediation service. Nor did it fulfil the function of operating as a standards watchdog within the industry which any regulator properly described would have done.

5.7 I do not condemn Sir Christopher for labouring under this misapprehension. The PCC deliberately and consistently presented itself as the *de facto* regulator. This is not a matter of semantics or opinion but rather of fact. The PCC website, the access point to the Commission for the general public, makes clear in plain English that the PCC is the self-regulator for the press. In this context, it is not necessarily surprising that Sir Christopher was, in this respect, in a minority of one. The candid admissions of Lord Black and Lord Wakeham might be thought more surprising given the public presentation of the PCC.

5.8 Despite the obvious deficiencies in its constitution and make up, the PCC and PressBoF presented the self-regulatory system as a whole as if it were a regulator. This self-presentation took the form both of explicit assertions and the deliberate adoption of the language of regulation in the description of its functions and powers. The effect of this was two-fold. First, it helped to reinforce the perception that the press was subject to an effective system of regulation, as the casual or even the interested observer was capable of being misled, since the distinction between the PCC as it was and as it was claimed to be would tend to be elided in the public mind. Second, the over-statement of its powers weakened the arguments for reform.

5.9 Examples of this form of self-promotion are legion in the evidence heard by the Inquiry, but I will set out a handful. In 2005, Sir Christopher gave a speech to the Society of Editors in which he said that the PCC was, by that stage, so independent that it was questionable whether self-regulation was any longer the correct way of describing it. He said that the PCC was "*the creature that broke free from its creators".*[119] The clear implication of this speech was that the PCC had reached a level of effectiveness and independence which meant that it was better than its original conception.

5.10 This misleading self-presentation continued even after the failings and powerlessness of the PCC had been laid bare. As recently as August 2011, Professor Julian Petley, Professor of Screen Media and Journalism at Brunel University, wrote an article on the New Left Project website, the substance of which was to argue that the PCC was not and never had been a regulator, and would better be described as a mediator.[120] The PCC posted a rebuttal to this

[117] p2, lines 18-25, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[118] p4, lines 17-25, *ibid*
[119] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B58.pdf
[120] Julian Petley, New Left Project, *Press Regulation? – Now There's an Idea*, 24 August 2011, http://www.newleftproject.org/index.php/site/article_comments/press_regulation_now_theres_an_idea

article on its website, which included the following passage in which little room was left for misinterpretation:[121]

> *"Julian Petley is obviously wrong to try to characterise the PCC as merely a mediator and not a regulator. He is wrong to suggest there is nothing in the PCC's Articles of Association to suggest it performs a regulatory function when those articles actually specifically state that the PCC has responsibility to: 'consider and pronounce on issues relating to the Code of Practice which the Commission, in its absolute discretion considers to be in the public interest'."*

5.11 Similarly, the press release announcing the appointment of Lord Hunt of Wirral as the new Chairman of the PCC declared that he was to oversee the regeneration and renewal of the system of non-statutory regulation of the press.[122]

5.12 In addition to this explicit self-description as a regulator, the PCC also used language to describe its powers and functions that gave the impression that it was more potent than it really was. The PCC routinely talked about its 'powers,' for example in relation to its investigations or sanctions. The PCC said that it carried out 'investigations' into complaints, as if it had specific investigatory powers or the capacity to do more than correspond with contacts inside the newspaper. In this respect the PCC projected the impression that it possessed powers, competence, status and capacity which it did not.

5.13 There was also an implicit representation that the PCC was exercising regulatory functions when it accepted responsibility for investigating high-profile scandals involving the printed media, most notably phone hacking. In announcing its investigation into the allegations on 1 February 2007, the PCC committed itself not only to asking questions of the NoTW editor Colin Myler, but also to ascertaining what steps other newspapers had taken to prevent similar activities from taking place elsewhere. The PCC also committed itself to publishing a "*review of the current situation, with recommendations for best practice if necessary, in order to prevent a similar situation arising in the future. This is in line with [the PCC's] duty to promote high professional standards of journalism*".[123]

5.14 The press release set out steps which might be expected of a typical regulator; in particular the initiation of an investigation, taking steps to discover what prophylactic measures were being taken by particular media groups, and the promotion of standards of conduct within the industry. The press release of 1 February 2007 did not admit to any limitations in the capacity of the PCC to investigate, and was therefore apt to raise expectations unnecessarily. As I make clear in Section 7 below, the PCC's deficient powers impacted directly on the validity and credibility of that report. The lack of regulatory authority also severely constrained what the PCC could do in relation to concerns around data protection breaches, as I examine in more detail below.

5.15 At this juncture it is pertinent to note the evidence I have heard that has directly linked the credibility and efficacy of the PCC to the person and authority of the Chair. David Yelland, the former editor of The Sun, said that he took the provisions of the Editors' Code of Practice seriously *"partly because of the respect I had for Lord Wakeham, the then PCC Chair"*.[124] The personal authority and diplomatic skills of Lord Wakeham, in particular, served to camouflage a number of structural weaknesses which prevented the PCC from operating as a robust and independent regulator.

[121] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B-270.pdf
[122] *Lord Hunt appointed as new Chair of the PCC*, http://pcc.org.uk/news/index.html?article=NzQwMA
[123] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B88.pdf
[124] p2, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-David-Yelland.pdf

6. Structural problems with the PCC

Non-universal membership

6.1 Membership of the PCC has never been compulsory for publications. Some publications and media groups, for example, the Northern & Shell Group and the satirical magazine Private Eye, have concluded that it is not in their interests to participate in the system of self-regulation. Northern & Shell left the self-regulatory structure for a second time in January 2011, although its titles still abide by the terms of the Editors' Code of Practice. Private Eye has never joined the self-regulatory structure.

6.2 Baroness Buscombe recognised the lack of compulsory membership as a weakness in the PCC system,[125] as also did the former Director Stephen Abell.[126] Lord Black said that:[127]

> *"PressBoF recognises that this is a weakness in the system, and part of the price we pay for maintaining voluntary membership. We have done everything we can to bring Northern and Shell back into the system, and continue to do so".*

6.3 Lord Black's answer raises a number of issues. First, insofar as Lord Black may be suggesting that the price 'we pay' is an acceptable one, I entirely disagree. This is a fundamental weakness in the system and must be acknowledged as such, as indeed should the ineffective nature of PressBoF's efforts to persuade Northern and Shell to re-join, recognising as I do that Lord Black and his co-Directors made considerable efforts in this regard. Further, it should be recorded that having accepting Lord Black's assurances that every effort was being made to resolve the issue, Baroness Buscombe did not seek to persuade the Northern & Shell Group back into the self-regulatory fold after the departure of the group for a second time in January 2011.[128] Whilst the PCC has never been able to offer redress to complainants across the whole range of publications, this situation has been significantly exacerbated by the position in relation to Northern and Shell. Although the PCC may still technically have at least 90% coverage, this state of affairs is manifestly unsatisfactory.

6.4 There are a number of further issues that link to the voluntary nature of membership and the lack of appropriate incentives to maintain membership. Perhaps most significantly, if an editor disliked a particular decision by or approach of the PCC, newspapers could make credible threats to leave the self-regulatory system. Although there were a number of factors behind the decision of Northern & Shell to leave the PCC, one particular factor identified by witnesses for Northern & Shell was the public criticism by Sir Christopher Meyer of Peter Hill , the editor of the Daily Express, in light of the coverage by the newspaper of the disappearance of Madeleine McCann.[129] Whether that criticism should have been couched differently is not the point: rather the implications of the ability of editors to react to criticism from the PCC in this way are real.

[125] p6, para 35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf
[126] p405, para 725.7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf
[127] p7, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Lord-Black1.pdf
[128] pp82-83, lines 17-19, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf
[129] p76, lines 4-25, Richard Desmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf; pp39-40, lines 9-5, Paul Ashford, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf; pp3-4, paras 6-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Paul-Ashford1.pdf

6.5 It cannot but have shaped the relationship between the PCC and the industry that both sides knew that newspapers could opt out of the system if they chose. Baroness Buscombe gave evidence that during her tenure as Chair, three editors threatened to leave the PCC as a consequence of adverse adjudications.[130] I acknowledge that her version of events has been questioned by the editors concerned, but the point of principle remains: the loss of any editor would naturally be seriously damaging to the effectiveness and reputation of the PCC. Baroness Buscombe acknowledged that it was a weakness of the system:[131]

> *"It is possible for news organisations to register the threat of withdrawing from the system following the issuing of decisions against them. I have been made aware of this in my time as Chairman, although it has never been acted upon. However, it does reveal a potential fragility in the system".*

6.6 The Chair of the PCC, the Director and Commissioners were well aware of the substantial negative impact which the departure of a major newspaper group could have on the credibility of the system of self-regulation. It is hard to think that the need to avoid such a catastrophe did not influence the thinking of these people, committed as they were to the preservation of self-regulation. At the very least, the fact that an editor could make a credible threat to leave on behalf of his or her title would give a reasonable and well-informed observer cause to believe that the PCC might seek to avoid criticising newspapers too often or too heavily, for fear of the consequences to the system of self-regulation.

Investigating complaints

6.7 The PCC has very limited power to investigate complaints. In particular, it does not have the power to compel parties to produce documents or any other evidence in support of, or capable of contradicting, their account of events. The PCC does not have the power to ask for sworn evidence. There is no sanction for an individual who misleads the PCC, tells half-truths or fails to answer the PCC's questions.

6.8 A PCC investigation into a complaint typically involves the complaints officer contacting a newspaper to ask for its version of the events or justification for the content at the heart of the complaint. There then follows correspondence between the PCC complaints officer and a contact at the newspaper, typically the newspaper's legal department or managing editor's office.[132] The PCC does not demand documents or other evidence in support of the positions adopted by the parties, although parties might voluntarily supply these. Complainants have access to all material submitted by newspapers in support of their accounts, but do not necessarily have access to the correspondence between a complaints officer and the newspaper.[133] The PCC does not request statements from the journalists who researched and wrote stories.

[130] p63, lines 5-10, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

[131] p7, para 43, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf

[132] pp86-88, paras 194-198, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf; pp1-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Louise-Hayman.pdf; p4, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Tom-Crone.pdf; p5, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tony-Gallagher.pdf; pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-James-Harding.pdf; p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Liz-Hartley.pdf

[133] pp86-87, para 194, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

6.9 If the PCC is to reach fair decisions, it is reliant on editors and complainants not only telling the truth but providing a full, fair and balanced account. It has been made clear during the course of this Inquiry that when the PCC twice investigated phone hacking this was not the case, as more fully addressed below. It is impossible to say for certain that they were misled on other occasions, but given how many cases the PCC dealt with every year it would be surprising if they were always given the entire picture or told the whole truth. It cannot be the case that entering into correspondence with an editor, or with a legal department or managing editor's office in this way, is tantamount to an investigation in any meaningful sense. Similarly, anyone aware these of the limitations would question whether the PCC was really capable of obtaining facts and coming to safe conclusions about the merits of a complaint.[134]

6.10 On occasion, the lack of investigatory powers meant that the PCC could not resolve a dispute between parties. This happens when the accounts provided by the two sides cannot be reconciled; thus, no negotiated settlement can be reached. The former Director of the PCC Tim Toulmin gave the following account of this type of finding:[135]

> *"There's a rare category of ruling called 'no finding' which occasionally the PCC would deploy … but almost always it was possible to reach an outcome whereby, if there was something wrong, it would be put right."*

6.11 Even if a 'no finding' ruling was rare, it is highly unsatisfactory that such a result should ever come about; a dispute about the facts leaves a title effectively exonerated (there being no adverse finding) and no mechanism for a complainant to obtain redress. It is also illustrative of the weakness of the system. Some newspaper figures have recognised that the lack of any real investigatory powers was a failing. The editor of the Financial Times, Lionel Barber, said that in his view a replacement body for the PCC needed to have the power to investigate and with this I wholeheartedly concur.[136]

Powers the PCC did not exercise – investigations without a complaint and third party complaints

6.12 Subject to a small number of refinements set out in evidence by Lord Hunt during the course of Module Four, which I address further below, the PCC has only investigated complaints which come from the person affected by an article or investigation. Baroness Buscombe said that, in some cases, third party complaints may receive a response as the PCC does on occasion seek to contact a directly affected party and progress the complaint.[137]

6.13 The source of the general practice of the PCC in this respect is Article 53.3(a) of the Articles of Association which govern it:[138]

> *"53.3 A complaint may be made by an individual or by a body of persons (whether incorporated or not) but, in addition to the requirements of Article 53.1, shall only be entertained or its consideration proceeded with if it appears to the Commission that:*

[134] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Michelle-Stanistreet.pdf; pp2, 5-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/First-Submission-by-Media-Standards-Trust.pdf

[135] p66, lines 6-10, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[136] pp47-48, lines 23-7, Lionel Barber, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf

[137] p5, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf

[138] p13, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-A2641.pdf

the complaint is made by the person affected or by a person authorised by him to make the complaint".

6.14 However, the PCC does have a discretion to investigate where there is no complaint from the directly affected party:[139]

"53.4 Notwithstanding the provisions of Article 53.3, the Commission shall have discretion to consider any complaint from whatever source that it considers appropriate to the effective discharge of its function."

6.15 As a linked issue, Article 53.1A provides:[140]

"It shall also be the function of Commission to consider and pronounce on issues relating to the Code of Practice which the Commission in its absolute discretion considers to be in the public interests [sic]".

6.16 The difference between these sub-Articles is probably one of degree. On my interpretation of these provisions (which certainly could be clearer), the PCC has a broad residual power to entertain third-party complaints as it sees fit, although no guidance is supplied as to the type of circumstance which might trigger the discretion. Further, Article 53.4 has to be read in conjunction with Article 53.7,[141] which is heavily weighted in favour of what might be described as Article 10 (as opposed to Article 8) rights as set out in the EHCR.[142]

6.17 As for Article 53.1A, the Commission's discretion under this provision does not presuppose the making of any complaint, third party or otherwise. It is a potentially wide-ranging, roving power, which enables the PCC to issue guidance and carry out investigations to the extent that issues relate to the Editors' Code of Practice. The scope of this latter investigatory power is uncertain: the reference to the Editors' Code of Practice clearly requires the identification of some sort of issue as regards either the interpretation or application of the Code. Whilst these are fluid matters, the discretion of the PCC is, in any event, 'absolute'. I have seen evidence that suggests that this Article appears to have been used a number of times by the PCC, most notably in the two investigations into phone hacking in 2007 and 2009. I use the verb 'appears' because Article 53.1A has not been specifically invoked by the PCC in this context. There does not appear to have been a clear or consistent policy applied to the exercise of this discretion.

6.18 In this regard the evidence of Lord Wakeham and of Tim Toulmin about the investigation of third party complaints illustrates the attitude of both the PCC and the industry to such complaints. Lord Wakeham suggested that following his appointment as Chair, there was pressure from the industry to prevent third parties from complaining about stories which did not directly affect them:[143]

"…when I got there, the Press Council [sic] had fallen into considerable disrepute with the press for one reason – one of the reasons was that a whole lot of people were

[139] *ibid*
[140] *ibid*
[141] *'In carrying out its functions in relation to complaints the Commission shall have regard to generally established freedoms including freedom of expression and the public's right to know, and defence of the press from improper pressure'*
[142] See Tim Toulmin's discussion of this provision: pp22-24, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[143] p24, lines 1-12, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf

> *making a lot of complaints and many of them are pretty frivolous …. and they did say the Press Complaints Commission is there to deal with people's complaints who have an interest in the complaint, a proper interest. In other words, if they [say] something about me, Joe Bloggs can't complain. I can complain. It has to be relative to me. That's what they wanted to do and I was trying to get that system worked."*

6.19 Mr Toulmin gave the following reasons for the failure to exercise the discretion to investigate third-party complaints more regularly:[144]

> *"The position…is that the PCC pretty much takes all complaints but where there is a first party, their engagement is required. The saga of – very much in the early days of the PCC, where Lord McGregor made statements about Princess Diana and so on based on an understanding – a sort of outrage about how she was being treated, was very much seared on the consciousness of the Commission for years to come, which is that it is impossible to really take a view about the merits under the code of particular articles unless you have the involvement of the person concerned."*

6.20 The Inquiry received evidence from a number of witnesses about the impact of this policy; it renders it impossible for individuals or representative groups to bring complaints on behalf of sections of the community who were the subject of misleading or discriminatory articles. Representatives of the Irish Traveller Movement in Britain made the point in the following way:[145]

> *"The result [of the PCC's refusal to accept third party complaints] is that as long as they are carefully worded, derogatory references to Travellers can be published repeatedly, as they were in the Sun's 'Stamp on the camps' campaign, without committing any offence. Yet it is clear that articles of that sort do cause substantial damage to the rights and reputations of Travellers, fanning hostility against them in settled communities."*

6.21 I now turn briefly to the refinement raised in evidence by Lord Hunt to which I referred at paragraph 6.12 above. Lord Hunt said that the practice of the PCC has been to entertain third party complaints "*on accuracy on a point of fact*".[146] However, exactly how this practice has been conducted remains unclear. Many issues of 'fact' may, on analysis, be issues of opinion.

Monitoring and investigations

6.22 The PCC did not monitor for breaches of the Editors' Code of Practice, nor did it launch investigations into potential breaches of the Code of its own volition. In response to comments made in the Report in 2010 by the CMS Select Committee into Press Standards, Privacy and Libel, Stephen Abell wrote that:[147]

> *"The Commission does not accept that it is possible – or appropriate – to monitor widely for compliance with the Code, especially given the vast amount of information that is now being published on and offline across the newspaper and magazine industry. At the heart of the Code is the protection of the individual and the Commission believes*

[144] p75, lines 3-14, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[145] p2, Irish Traveller Movement in Britain, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-The-Irish-Traveller-Movement-April-20121.pdf
[146] p13, lines 4-23, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[147] p4, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-R27.pdf

a model of efficient and transparent complaints handling to be more appropriate to a digital age."

6.23 In a speech made in May 2003, Sir Christopher Meyer, expressed the view that:[148]

"any measure that would turn the PCC into a directive body – initiating complaints at random, intervening in issues which are nothing to do with the Code, or establishing any superior service for the rich and famous. We have a set of rules that work well for everyone – regardless of status – and we move away from them at our peril".

6.24 It is not clear what link is supposed to exist between the initiation of complaints and a differential service being offered to different categories of complainant. It is true that an issue under the Code would always have to arise, but that is so obvious that it goes without saying; the PCC could not act if no question of breach of the Editors' Code of Practice had arisen.

6.25 The reference to moving away from rules 'at our peril' serves to elide two different concerns: the first, that the PCC might apply rules which were not rooted in the Code (a justifiable concern); the second that the PCC might take upon itself the function of investigating clear breaches of the Code in the absence of a direct complaint (an unjustifiable one). Neither do I understand the reference to the rich and famous. They are, presumably, more likely to be aware of the existence of the PCC, their rights and the ability to complain: the willingness to look at a wider picture is more likely to help those who are not in that position.

6.26 There are clearly circumstances when it would have been appropriate for the PCC to launch an investigation of its own motion, deploying the powers at its disposal under Article 53.1A. One clear case is in relation to newspaper coverage following the disappearance of Madeleine McCann. A fuller exploration of the conduct of the press in that case appears in Part F Chapter 5 above, but for present purposes the focus is on the PCC alone. It is easy to see why the McCanns might not have wished to launch complaints on their own account, given the scale and tone of media interest in them, and the nature of Sir Christopher Meyer's advice to Dr Gerry McCann. It is, in my judgment, inexplicable that the PCC chose not to exercise its discretion to investigate in such a case.

6.27 I note in this regard that a number of individuals gave evidence that they did not complain to the PCC because they were concerned that doing so would lead to retaliation from the newspaper industry in the shape of negative coverage or future invasions of privacy. Had the PCC initiated investigations of its own motion, or accepted third party complaints, the issue of retaliation would have been deadened. The PCC's policy served to perpetuate a wholly unsatisfactory state of affairs whereby complaints were (and remain) dis-incentivised and the PCC's own contribution to the evolving principles surrounding the issue of privacy in particular is limited. Lord Wakeham's view was that *"The PCC's absence from the debate about privacy – including high profile adjudications – has … eroded its authority"*.[149] This view was valid in the late 1990s and remains so now.

Powers the PCC did not exercise – investigations where there were criminal or civil proceedings

6.28 Article 53.3 of the Articles of Association further provided:

[148] p6, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-—-D8.pdf
[149] p3, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Wakeham.pdf

> *"A complaint may be made by an individual or a body of persons ... but, in addition to the requirements of Article 53.1, shall only be entertained or its consideration proceeded with if it appears to the Commission that:*
>
> *...*
>
> *the matter complained of is not the subject of proceedings in a court of law or tribunal in the United Kingdom; and*
>
> *where the matter complained of is a matter in respect of which the person affected has a remedy by way of proceedings in a court of law in the United Kingdom, in the particular circumstances it is appropriate for the Commission to consider a complaint about it."*

6.29 There are a number of issues with these provisions which need to be explored. First, they incorrectly draw no distinction between criminal and civil proceedings. In the event that the PCC might become aware that a criminal investigation or proceeding has commenced, it is obviously right that the PCC should defer any investigation it might undertake of its own motion until such proceedings have been concluded. This is the practice of comparable bodies responsible for the regulation of a profession, such as the General Medical Council. Although in cases involving professionals it is standard practice to suspend individuals from practice pending the outcome of the criminal process, I fully recognise that different considerations rightly apply in relation to the press. The deferral of regulatory investigation may be regarded as a self-denying ordinance designed to meet the wider interests of justice and the possibility of creating prejudice.

6.30 The position is different in relation to civil proceedings. There may be reasons, depending on the facts of the particular case, for awaiting the outcome of such proceedings before commencing any regulatory process, but there is no requirement to elevate this into an absolute prohibition; Article 53.3(b) is currently framed in those terms.

6.31 Second, and regardless of whether the proceedings in issue are criminal or civil, the provision has been interpreted by the PCC in such a way that as soon as any proceedings begin the ability of the PCC to entertain a complaint is precluded.[150] But this is not how the provision is framed, as is apparent from the use of the present tense in Article 53.3(b). Neither is it the manner in which most regulators operate: extant proceedings may be a current bar to regulatory action (ie, for so long as the proceedings may continue), but not an indefinite prohibition.

6.32 Third, Article 53.3(c) is potentially of extremely wide application since most breaches of the Code could also give rise to civil action; this provision as drafted therefore suggests that in these circumstances (ie, the paradigm case of Code breach) the entertaining of a complaint by the PCC requires particular justification. Since there is no policy setting out how the PCC will exercise the discretion established by this Article, it is not clear whether the PCC interpreted this provision in so restrictive a manner. What is clear is that these Articles taken together were the purported basis for Sir Christopher Meyer's advice to Dr McCann that the latter should take legal action in relation to highly defamatory and offensive articles above the

[150] p22, lines 3-11, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf; pp38-41, lines 16-5, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf; Ofcom is precluded from investigating complaints whilst civil proceedings are ongoing: see section 114 of the Broadcasting Act 1999, as amended by section 132(2) of the Communications Act 2003. The position is the same as regards the FSA

disappearance of his daughter Madeleine, but that such a course of action would prohibit Dr McCann from seeking redress through the PCC.[151]

6.33 In one area at least, the PCC appears to have been eager to take on cases which might otherwise have resulted in civil actions. Exercising this discretion, the PCC sought to gather in as many cases relating to privacy as possible, thereby restricting the number of privacy actions which went before the courts, despite (or perhaps because of) the option for complainants to bring a civil action for breach of privacy at least since the passage of the Human Rights Act.[152] In my view these provisions have a stifling effect on the operation of the PCC, and are exceptionable. There was a lack of consistency and transparency in the exercise of the PCC's discretion under Article 53.3(c) that militated against the proper function of the organisation as a proper regulator. More so the use of this discretion, particularly with regard to privacy, helped facilitate the PCC's function as a shield for newspapers against litigation.[153]

Powers the PCC did not exercise – failure to hold oral hearings

6.34 The PCC has not held oral hearings in any cases. This means that it has not had the opportunity to ask questions or assess the credibility of parties where facts were contested. This was a deliberate practice and not the consequence of the lack of any relevant powers. The PCC had power to hold oral hearings under the existing Articles of Association, and PressBoF had argued this point in response to recommendations made by the CMS Select Committee.[154] The 2010 Independent Governance Review had also recommended that the PCC move to a policy of holding such hearings.[155]

6.35 The PCC has justified this reluctance to use these powers on the basis that that it might compromise its commitment to being free and fair. It has argued that oral hearings would lead to the involvement of lawyers, and that that would introduce a layer of expense and delay.[156] But this is to overstate the position. First, this line of argument rather conveniently ignores the fact that the industry often engaged lawyers when responding to complaints made through the PCC; this is a feature that I explore in more detail below. Second, oral hearings would not be regarded as the general rule, but would only meet the end of justice in a case of particular complexity or where a dispute of fact arises on the material placed before the PCC. In any event, the PCC would not be looking at a system which encouraged mini-trials and concomitant expense and delay, but something far more streamlined and practical.

6.36 The holding of hearings where appropriate might have allowed the PCC better to demonstrate publicly that it had the capacity to find facts and to question any inconsistencies which emerged from the parties' accounts of events. It may also have helped mitigate the small but unfortunate and, in my view, unnecessary number of cases in which no resolution or finding of fact could be made.

[151] pp84-88, lines 7-25, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf

[152] pp1-4, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T2100.pdf ; pp1-6, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-X26.pdf ; pp1 – 5, Stephen Abell , http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-T1151.pdf ; pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S41.pdf

[153] See for example PCC, pp1 – 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U12.pdf; pp9-13, lines 13-6, Peter Hill, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf

[154] Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-—-D4.pdf

[155] Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-F1.pdf

[156] Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-F2.pdf

Inequality of arms

6.37 The PCC has argued that one of the fundamental advantages of the existing system of self-regulation is that there is no need for complainants to go to the expense of engaging solicitors, as complaints officers employed by the PCC will oversee the process on behalf of the complainant. I note that in some cases complainants have chosen to do so irrespective of the cost. However, this line of argument serves to disguise a fundamental mismatch in terms of both resource and expertise, as the response of individual newspapers to complainants is mostly undertaken by the legal department or managing editors of the newspaper in question.[157] Thus, while respondent publications have the benefit of legal assistance, complainants rely in the main on the PCC complaints officers to act as their advocate in the process.

6.38 There are two fundamental issues at play in this regard. The first relates to the training and experience of complaints officers at the PCC. The second relates to their role in the complaints process. Whilst I am satisfied that the complaint officers at the PCC were highly professional group of people who were skilled at what they did and did their best in trying circumstances, I do not accept that there existed in any way parity of arms between them and the lawyers and managing editors who responded on behalf of the industry. Complaints officers at the PCC are typically recruited straight from university or soon after graduating. There is no requirement that they have any particular experience.[158] As at September 2011, only two of the complaints officers had legal training; the others joined from other industries.[159]

6.39 The past two Directors of the PCC (excluding the present transitional director, from whom the Inquiry has not heard) were also recruited from within the ranks of complaints officers. Neither of them had had any substantial experience outside the PCC secretariat, and both were elevated to the position of Director at a relatively young age.[160] I have already expressed my positive view of the abilities and qualities of Mr Toulmin and Mr Abell. However, the role of Director (effectively Chief Executive) of the PCC necessarily involved dealing with highly experienced figures within the newspaper industry, politics and other areas. There is at least a question mark over whether they had the overall fire-power to handle the leaders of the industry within the PCC's purview. I doubt that the relationship was seen as being equal.

6.40 My second point relates to the function of the PCC complaints officers in this context. As set out above, users of the services of the PCC often spoke of the politeness and helpfulness of these complaints officers, as well as their ability to conjure up imaginative solutions. However, it would be fundamentally incorrect to suggest that the PCC represented the complainant in the process, and in so doing helped to bridge the even greater chasm in expertise and experience that existed between the vast majority of those who made complaints and the

[157] pp86-88, paras 194-198, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf; pp1-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Louise-Hayman.pdf; p4, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Tom-Crone.pdf; p5, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tony-Gallagher.pdf ; pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-James-Harding.pdf ; p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Liz-Hartley.pdf

[158] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B183.pdf; p10, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[159] p56, para 129, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

[160] p10, paras 12-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf; p1, para 1.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tim-Toulmin.pdf

representatives of industry. In most cases, the PCC functioned as a letterbox both for the complainant and the industry, passing on the accounts of events but more damagingly, particularly for the victims of press mistreatment, being unable to challenge in any way the version of events advanced by the industry even in those cases when these were clearly open to question.

Lack of powers – sanctions

6.41 The PCC does not have sufficient sanctions to act as a deterrent against breaches of the Code. PCC sanctions are limited to admonishment[161] and the publication of adjudications. While it may be embarrassing for editors to publish adjudications, this sanction is not enough to deter repeat offending. Further, I have seen no evidence that the sanctions regime overall has had a long-term impact on the behaviour and actions of publications or journalists who were found to have transgressed.

6.42 I am gratified that there is some support even among press figures for the conclusion that the sanctions available to the PCC's battery are insufficient. For example, the Editor-in-Chief of Associated Newspapers, Paul Dacre, said at one of the Inquiry's seminars in October 2011 that, in his view, fines should be available in cases of the "*most extreme malfeasance*".[162] The editor of the Financial Times, Lionel Barber, gave evidence that an ability to impose fines is essential for any replacement for the PCC. However, Mr Barber also emphasised that the printing of prominent apologies or corrections were a real deterrent for editors.[163]

6.43 However, PCC witnesses have defended the current range of sanctions as adequate. Sir Christopher Meyer, for example, gave evidence that:[164]

> *"I had spent some time studying the PCC before taking this job….and what had become clear to me was that editors just did not like having to admit in their own newspapers that they had screwed up, in terms over which they had no control. That is to say the text of the adjudication, as agreed by the Commission, had to be reproduced verbatim, under a PCC rubric in the newspaper…*
>
> *So it wasn't as if the statement 'no editor wants the blemish of a negative adjudication on his or her record' was some rash thing that I pulled from the sky. It was based on my experience, from what I'd read, from the experience of others in the PCC, Lord Black, who had been director for some time, and I have to say to you…after six years, it was an impression, again, that was strongly reinforced from my own experience".*

6.44 The PCC has argued that that fines are unnecessary, disproportionate and liable to create an overly legalistic disciplinary process. This line of argument has been advanced by a number of witnesses from the PCC. Sir Christopher set out the fundamentals of this argument in a speech in 2003:[165]

[161] Of which there were approximately six a year, usually reserved for cases of undue delay and failing to publish adjudications with due prominence: see the evidence of Tim Toulmin; p27, lines 11-18, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[162] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/RPC_DOCS1-12374597-v1-PAUL_DACRE_S_SEMINAR_SPEECH.pdf

[163] p47, lines 9-22, Lionel Barber, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-10-January-2012.pdf

[164] p23, lines 2-20, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf

[165] p5, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-—-D8.pdf

> *"... would invite the colonisation of the system by lawyers, with all the costs and delay that this would entail. You could throw 'free' and 'fast' out of the window. Those who believe that fines mean sharper teeth fail to understand that no editor wants the blemish of a negative adjudication on his or her record."*

6.45 However, the points raised by Sir Christopher misunderstand the difference between providing redress (which must be free and fast) and the maintenance of standards which can be entirely free standing of the mechanism for complaints. Neither do I accept that it would necessarily lead to "*the colonisation of the system by lawyers*": it would depend on the way in which the 'system' was set up and operated.

6.46 Lord Wakeham also gave evidence that explains the thinking underpinning the PCC's historical opposition to fines. First, it would have been inappropriate for editors to be involved in the fining of other editors. Second, fines would have affected publications differentially. Third, in extreme cases newspapers might be put out of business by fines.[166] In my view none of these arguments has any foundation. Clearly, editors should not be involved in decisions leading to the fining of other editors, but this is an argument for removing editors from the decision-making process rather than for failing to empower the Commission where necessary. The economic arguments against fines clearly could be met by requiring the regulator to take ability to pay into account (as is standard in any regime which supports the imposition of financial penalties). In any event, fines would be reserved for only the most serious or systemic breaches of the Code.

6.47 The PCC's opposition to a system of fines is longstanding. Writing in *Risk and Regulation* magazine in Autumn 2008, Tim Toulmin suggested that fines were unlikely to be effective, suggesting that they were a weaker sanction that an adverse adjudication:[167]

> *"[A] common misunderstanding is about the power of peer pressure: some people don't rate it and think that only a system of fines would be an adequate deterrent or punishment. They couldn't be more wrong. When the PCC sharpens its claws for a public criticism of an editor the howls of pain are loud and clear. No editor wants their decisions held up in public by their professional standards body as an example of bad practice. On the other hand, fines are a corporate rather than a personal punishment, and therefore not as keenly felt."*

6.48 I am not impressed by this argument at all. Fines would be in addition to the publication of the companion adjudication. In the appropriate case, the editor could be required to pay an individual fine (whether or not his paper would defray the cost on his behalf would be another matter); and, in any event, a substantial fine imposed on a company would mark the seriousness of the breach and impact on the reputation of the editor.

6.49 Baroness Buscombe raised a different issue; she suggested that the introduction of fines might ruin the collaborative relationship between the self-regulatory structure and the industry and that this would have threatened the PCC's ability to do its work:[168]

> *"…the whole issue of fines is quite fraught, one of the reasons being it has the risk of turning the system from one that is collaborative – which is really important on a Saturday night at 1 in the morning when you have the managing editor of the Sun or*

[166] pp39-40, lines 13-22, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[167] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-I26.pdf
[168] p58, lines 4-19, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

the Mail … discussing with the director whether or not something should be run … I have a hard time with lawyers I know understanding that actually a system where the collaborative can actually produce very good results as opposed to adversarial, and when you introduce a system of fines, there is a concern that that might break down the collaborative relationship."

6.50 This evidence, however, betrays the fundamental flaw at the heart of the relationship between the PCC and the entities that it was supposed to be regulating, that uniquely it depends on an element of consent and collaboration between these parties. Although collusion would be too strong a term, the terms of engagement lack an appropriate deference; the concern to achieve collaboration should not be the order of the day, but rather the press should respect those who are regulating it. One only needs to compare the position of the Bar Standards Board, the Solicitors' Regulation Authority and the General Medical Council to begin to understand the fundamental difference between the colour and dynamics of a relationship between a regulator properly so called and the entities or parties being regulated.

6.51 The point I make here is a cultural one, and does not ignore the fact that the bodies I have identified are regulators of professional people rather than of an industry like the press: I am doing no more than pointing out the nature of the relationship between regulator and regulated. Furthermore, none of what I am saying in this context is intended to suggest that a regulated entity should not be assisting the regulator – in that specific sense, collaborating with it – if and when a complaint is made or the need for an investigation arises.

6.52 There is one further piece of evidence which lays bare the nature of the relationship between the PCC on the one hand and editors in particular in this regard. Until the amendment of the Editors' Code of Practice in January 2011, the only obligation on editors in relation to the publication of adverse adjudications was that they should be given 'due prominence'. Ultimately, this was a matter of judgment for the editor in question, rather than a matter for the PCC to impose. Sir Christopher Meyer was asked why he did not advocate amendments to the Code which would have enabled the PCC to insist on the placement of any adjudication in the newspaper, as it were whether the editor liked it or not. It was put to him that any regulator worthy of the name would have armed itself with such a power; Sir Christopher's answer was that he had other more pressing priorities.[169] Even now, the Code states that "*prominence should be agreed with the PCC in advance*",[170] a provision which sets out the expectation of a negotiation rather than any imposed outcome.

6.53 Overall, it is clear that the armoury of the PCC is limited and needs enhancement. I recognise that the industry has recently come to accept the force of this: the proposal put forward on behalf of the industry by Lord Black confers the power on the new body to levy fines in cases of serious or systemic breaches. Further, I should not be interpreted as suggesting that fines are appropriate in every case. In Part K Chapter 7 below I identify the circumstances in which the ability to impose a fine should exist. I should also make clear that my concern is not with the notion of an adverse adjudication; the Inquiry has heard examples of other regulatory systems in which the publication of an adverse adjudication is a real and effective sanction, but with the particular operation of this system through the PCC.

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[169] pp57-58, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[170] PCC, *Editors' Code of Practice*, clause 1(ii), http://www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf

The sanctions did not bite

6.54 There is no evidence that even the most severe sanctions available to the PCC had a real impact on those who transgressed. Although much emphasis was placed on the editors' fear of an adverse adjudication, the impact of such an adjudication did not go beyond this; newspapers did not lose circulation as a consequence of criticism by the PCC nor is there much evidence that editors or journalists were disciplined in any significant manner[171] or that their careers were in any way affected by PCC criticism.

6.55 In his evidence to the Inquiry, Lord Wakeham set out the steps he made to improve public trust in the work of the PCC: including improvements to the sanctions available to the PCC and particularly the inclusion into journalists' contracts of the Editors' Code of Practice: *"so that in the cases of serious Code breaches, I could refer the matter to the employer*".[172] Lord Wakeham also cited the example of the public admonishment of Piers Morgan by Rupert Murdoch in 1995 following a strong PCC adjudication relating to the publication of pictures of Countess Spencer in the grounds of a private clinic as evidence of the effectiveness of the new sanctions.[173]

6.56 This same episode was dealt with in evidence by Piers Morgan himself. However, the gist of his evidence was somewhat different. Mr Morgan recalled a later conversation with Mr Murdoch in which the latter apologised for having publicly rebuked him. In Mr Morgan's book *The Insider*, it is recorded that Mr Murdoch said *"I'm sorry about all that press complaining thingamajig"*.[174] Mr Morgan has suggested that the rebuke was intended to mitigate pressure for a privacy law.[175] In evidence, Mr Morgan told the Inquiry that it was his impression in light of this conversation that Mr Murdoch "*did not give a toss*" about the PCC.[176] Mr Murdoch, in his evidence, has said that he did not recall speaking in this way, but that he might have said that the matter should be remembered but moved on from.[177]

6.57 A similar pattern of events followed the public criticism of the former editor of the Daily Express, Peter Hill. Sir Christopher Meyer criticised Mr Hill for his newspaper's coverage of the story of the disappearance of Madeleine McCann, coverage for which the Express eventually apologised publicly and paid substantial damages to the McCann family for defamation. However, when, somewhat late in the day, Sir Christopher excoriated Mr Hill and the Express's coverage on the Radio 4 Today programme, the response of Northern & Shell's proprietor Richard Desmond was not to criticise Mr Hill but rather to commiserate with him:[178]

> *"I remember that night after he was attacked by the chairman of the PCC, I remember calling him at 11 o'clock at night. I think he was convinced I was going to fire him. But I didn't fire him, I spoke to him from 11 o'clock for about two hours and my ex-wife*

[171] The available evidence is covered in Part C, Chapter 3 above
[172] p10, para 34, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf
[173] *ibid*
[174] Morgan, P, *The Insider*, p82
[175] Morgan, P, *The Insider,* p82
[176] pp97-101, lines 23-2, Piers Morgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-20-December-2011.pdf
[177] pp60-61, lines 11-14, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-26-April-2012.pdf
[178] p80, lines 1-8, Richard Desmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf

spoke to him for about an hour afterwards, you know, because he'd done to the best ability – report the facts."

6.58 In these two instances, criticism of an editor by the PCC – whether by formal adjudication or very public criticism by its Chair – does not seem to have had any negative effect on the careers of the editors concerned. Mr Morgan went on to continue a very high-profile career in journalism; Mr Hill is still employed by Northern & Shell as Editor Emeritus, although he did resign from the PCC shortly after the events in question. There is nothing to indicate in either case that the involvement of the PCC had the impact which is claimed for it.

6.59 The Inquiry has heard similar evidence from other quarters. For example, a former journalist with the People, was recorded by the film maker Chris Atkins discussing the PCC. It is clear from the conversation that the journalist was not overly concerned about the consequences of getting an adverse PCC decision:[179]

"…getting a PCC isn't great, but a lot of papers just kind of brush it aside – all it is a little apology, somewhere in the paper – you get a slap on the wrists if you get reported by the PCC, but there's no money."

6.60 The Inquiry has heard evidence from a number of editors and representatives of the PCC itself that journalists now routinely have a requirement to comply with the Editors' Code of Practice as a condition of their contracts. It was suggested that this meant that criticism by the PCC had real weight because it might lead to disciplinary action. However, the Inquiry has heard of only one instance of this ever happening. This evidence was provided by Stephen Abell. He recalled the dismissal of the journalists working on the Daily Mirror's 'City Slickers' column for breach of the Editors' Code of Practice. Mr Abell gave the following account of events:[180]

"In an internal inquiry, the company concluded that the journalists involved had breached the Editors' Code; as their contracts of employment had Code compliance written into them, the journalists were dismissed."

6.61 Doubtless the 'City Slickers' journalists were in serious breach of the Editors' Code of Practice. However, given that their activities eventually led to their being convicted for criminal offences, it is impossible to believe that they would not have been dismissed in any case. I also record that the dismissal came following an internal investigation rather than a PCC investigation. It is therefore difficult to draw the inference that the inclusion of provisions requiring adherence to the Editors' Code in journalists' contracts of employment has in itself resulted in improved behaviour or, as asserted by Lord Wakeham, effectively given the PCC an additional, effective, sanction.

6.62 The picture that emerges from this evidence is that while editors and others may have been personally embarrassed by criticisms by the PCC, the sting was the result of the personal dislike of being criticised rather than the sanction.[181] In this respect I am in agreement with the ethicist, Dr Neil C. Manson of the University of Lancaster. In his written evidence he described

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[179] p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-Annex-2-to-Chris-Atkins-Supp.pdf
[180] p44, para 238, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf
[181] pp62-63, lines 18-4, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

the sanctions for breach of the PCC Code as "*woefully inadequate.*"[182] In my judgment, that is a correct assessment. Whatever their limited merits, they did not provide a sufficiently powerful deterrent to prevent journalists and editors from breaching the Editors' Code of Conduct.

Too many negotiated settlements

6.63 Many witnesses and commentators have criticised the PCC for mediating too many complaints to a negotiated conclusion rather than giving formal adjudications.[183] A number of reasons have been advanced for this: newspapers know how to string out the process, causing "*complaint fatigue*"; newspapers prefer to come to some sort of private accord with complainants to avoid the likelihood of an adverse adjudication; and the whole system is geared towards PCC complaints officers acting as mediators and conduits to the compromise of disputes.

6.64 A cursory examination of the statistics shows that few complaints reach the stage of formal adjudication, and that – although the figures vary from year to year – about half of these are resolved in favour of the complainant.[184] This very last statistic does not give cause for concern in itself, but given the number of complaints in any one year what is troubling is the paucity of cases which eventually arrive at the adjudication stage. The PCC would claim that this is a mark of the success rather than the weakness of the system. That is because many complainants welcome a relatively speedy resolution, and in a different context it might be remarked that well over 95% of all civil disputes are resolved consensually, although as I note elsewhere,[185] resolution through mediation is not always speedy. However, given that a mediated complaint does not feature in any statistics as a breach of the Code, is seems clear that from the point of view of public accountability and compliance there is a misleading picture.

6.65 Further, this different context does need to be understood. The policy reasons militating in favour of the compromise of private disputes (cost; avoidance of court time; the preference for settlement over a fight to the bitter end) do not apply with anything like the same force in relation to matters which possess, or at least ought to possess, a regulatory or standards dimension. In most regulatory regimes, the complainant and the regulated party are given the opportunity to sort out the dispute between themselves,[186] but once that process breaks down the regulator takes over and investigates the matter. There is a balance to be struck between mediation and formal adjudication, but I have little doubt but that under the current system that balance has fallen in the wrong place.

[182] p18, para 9(e), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Neil-Manson.pdf

[183] For example pp4-5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf; and http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Sixth-Submission-by-Media-Standards-Trust.pdf, *passim*

[184] For example in 2009 there were 18 adverse adjudications by the PCC; p11, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E72.pdf

[185] Part D, Chapter 2

[186] In relation to barristers, sets of Chambers are required to operate complaints' systems and complainants are also obliged to take their cases to these in the first instance

Lack of transparency about statistics

6.66 The PCC has not been transparent about its own performance and the performance of newspapers. Figures published purporting to demonstrate both were not easy to understand,[187] meaning that the public could not readily assess the performance of the PCC in particular or of the newspapers which came into contact with it. Throughout there is an imprecision as to the use of language which obscures meaning. The words 'ruling', 'decision', 'adjudication' and 'resolution' are nowhere defined and appear to be used interchangeably. Mr Toulmin was taken at length through the statistics for 2007 (this year chosen at random to illustrate the point). From these, it was difficult to understand:

(a) the basis for sifting out approximately 50% of complaints at the first stage;

(b) the basis on which complaints were assessed as raising a *prima facie* issue under the Code at the second stage;

(c) what was meant by the term 'rulings' in this second context given that so many complaints were thereafter mediated to a compromise; and

(d) the exact basis on which certain complaints went forward to adjudication.[188]

6.67 This lack of transparency is strikingly thrown into relief by a comparison between two separate pieces of data. In January 2011, just after the departure of the Northern & Shell titles from the system, the director of the PCC wrote an internal memorandum to the Commissioners informing them of the ramifications.[189] This stated as follows:

> *"In 2009 the PCC received 719 complaints about Express titles...It made 140 rulings, including 52 occasions where there was a breach of the Code that required remedial action.*
>
> *These are significant complaints figures (in comparison all News International titles produced 790 complaints, 292 rulings and 90 breaches of the Code. The complaints also tend to focus on controversial issues such as immigration, and often cluster around articles that cause particular and widespread comment..."*

6.68 A number of points need to be made about this. First, a comparison between these unpublished data and the PCC's published statistics[190] shows a stark discrepancy: for example, whereas the former demonstrate that the PCC apparently upheld 142 breaches of the Code in relation to two publishers alone, the latter appear to show a much lower figure. Furthermore, the PCC appears to be in a position whereby complaints statistics can be given on a publisher specific basis. The clear inference is that more could be done to explain the position to the public.

[187] pp92-98, paras 219-235, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E1.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E2.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E3.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E4.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E4.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E5.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E6.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E72.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E8.pdf; Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-E9.pdf; pp1 – 33, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Submission-by-Media-Standards-Trust.pdf

[188] p57, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

[189] p4, para 1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S5.pdf

[190] see Table D2.2, Part D, Chapter 2

6.69 Overall, these statistics as presented in the Annual Reviews have tended to underplay the significance of mediation as the centre piece of the PCC's work as well as to obscure the fact that many so called 'prima facie' breaches of the Code were, in fact, likely breaches. Further, the PCC have failed to publish aggregate figures for complaints made against newspapers, meaning that neither the public nor policy-makers could get any idea of which publications were most regularly in breach of the Editors' Code of Conduct. In any event, any newspapers who adopted a strategy of settling complaints at a late stage (by which time the merits of the complaints would have been clear) in order to avoid adverse adjudications would not be accurately represented in any league table. Although it is not clear why this practice was adopted, what is clear is that it worked to the advantage of the industry, who could point to near unblemished records in relation to breaches of the Editors' Code of Practice; the evidence as revealed in Mr Abell's memorandum to the Commission was, in fact, manifestly different.

Prominence of the organisation

6.70 A number of commentators have observed that the public profile of the PCC has been too low. However, I have heard little evidence on this matter and will restrict myself to few comments in this respect. The evidence shows that the PCC has had some difficulty in publicising itself and the work that it did. Certainly, the PCC made some efforts to raise its profile, first by asking publications to donate space both in print editions and online to publicising the work of the PCC; and also by engaging in profile raising events around the country.

6.71 Under the Chairmanship of Lord Wakeham, this was done through seeking out high profile complainants, thereby raising the profile of the organisation when it was reported that such a complainant had used the services of the PCC. In Lord Wakeham's view the failure in recent years to attract high-profile complainants has been a real weakness of the system and has contributed to the loss of confidence among the public more generally:[191]

> *"…the respect of the PCC has gone down in recent years because they haven't had the high-profile complaints they used to have, and the high-profile complainers say 'we would sooner take the matter to the courts'" therefore the PCC doesn't deal with them, the PCC's standing goes down…"*

6.72 Other senior figures at the PCC also recognised that the lack of prominence in the public mind was a serious problem which hindered the organisation from doing its work. Mr Toulmin, said in evidence to the Inquiry that:[192]

> *"…one of the things that used to strike me, and upset me…was hearing from members of the public who had a perfectly reasonable complaint to make or we could have helped in some way stopping harassment or helping them with their difficulty and they'd never heard of the PCC … although it does have quite a high name recognition, it's by no means universal, and the newspaper and magazine industry is in a very good position to refer prominently to the existence of this organisation, and whilst they did do some good work and they published numerous free adverts at obviously expense to themselves, their regular references to the PCC were much less impressive, I thought, than they could have been".*

[191] pp34-35, lines 24-5, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[192] pp36-37, lines 23-12, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf

6.73 However, it must be acknowledged that this is not a new issue. For example in August 2004, there was an exchange of letters between Sir Brian Cubbon, then Chair of the PCC Charter Compliance Panel, and Sir Christopher, concerning the very same question of prominence and publicity being given to the PCC.[193]

6.74 In this respect, I understand Mr Toulmin's point; it is well made. It cannot simply be the responsibility of the PCC or the self-regulatory system itself to raise the PCC's profile by attracting well known complainants or otherwise publicising its work. In any event, seeking to attract well known complainants might be thought to be making assumptions about the validity of complaints that they might wish to make: to attract a complaint that is then dismissed would hardly encourage others. The press could and should have done more to assist with that project so that no potential complainant was left in ignorance of the existence of the PCC or of the services it could offer.

7. Investigatory failures

7.1 In this section of this Chapter I will examine the PCC's response, or rather the lack of it, to Operation Motorman before moving to an assessment of the reports of 2007 and 2009 into phone hacking.

Operation Motorman

7.2 The narrative of the detailed discussions that took place between the PCC and the industry on the one hand and the Information Commissione's Office (ICO), on the other is considered in various Parts and Chapters of this Report.[194] and it is unnecessary to revisit the history. Although the involvement of the PCC has been covered, this has been largely through the lens of the Information Commissioner. I take this opportunity to review the matter briefly through the prism of the PCC.

7.3 Richard Thomas, the former Information Commissioner, approached the PCC in the belief that it was the industry regulator. He thus applied to the PCC for assistance in putting a stop to the use by the press of private investigators using illegal techniques to obtain private data. He was hoping, if not expecting, that the PCC might achieve this by way of a general condemnation of the practice, and securing appropriate changes to the Editors' Code.[195]

7.4 Mr Thomas' belief was a misapprehension that the PCC was a regulator; and, indeed, this was one of a number of concerns raised by Sir Christopher about the expectations and helpfulness of the Information Commissioner. Sir Christopher told the Inquiry that at their first meeting, in November 2003, Mr Thomas appeared to be labouring under the misapprehension that the PCC had the ability to enforce the criminal law,[196] which of course it did not. Even a self-regulator properly so called is not able to do that.

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[193] See p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-C15.pdf p1, PCC http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-C16.pdf pp2-3, PCC http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-S31.pdf

[194] in particular Part H

[195] pp119-120, lines 25-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

[196] p106, lines 8-11, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf

7.5 Whilst Sir Christopher was very clear with Mr Thomas that the PCC could not 'take over' specific cases, and that enforcing the law was for statutory bodies, not the PCC,[197] nonetheless the PCC and its representatives appeared keen to present themselves as the *de facto* regulator for the press and the relevant body for any such discussion. Indeed, it is perhaps telling of the PCC's desire to be regarded as regulator that Sir Christopher made no effort to disabuse Mr Thomas of this misapprehension immediately.

7.6 The PCC demonstrated a willingness to play a lead role in dealing with the issue from the press perspective. This was despite the fact that, as Mr Toulmin acknowledged, that:[198]

> *"he probably came to the wrong place anyway. I think he's accepted that. He either should have gone directly to the industry, the trade bodies, or straight to the Code Committee, possibly, which is more representative of the industry."*

7.7 Throughout, the position of the PCC was not, perhaps, as straightforward as might be expected of an industry body presented with allegations of serious wrongdoing. Sir Christopher was evidently interested in what he heard about Operation Motorman; he characterised the ICO as describing a "*fairly apocalyptic situation*".[199] However, Sir Christopher also wanted firm evidence. He said:[200]

> *"I wanted beef. I wanted red meat, Mr Jay, and he didn't give it to me."*

7.8 The initial meetings between Mr Thomas and Sir Christopher, in which Sir Christopher asked for more concrete evidence and Mr Thomas declined to provide it, led to a curious state of impasse. The lack of will underpinning this slow progress is suggested in remarks made by Sir Christopher Meyer in response to questions put by Mr Jay as to whether the PCC could not simply have taken on trust the ICO's indication of the extent of the problem without the underlying data. Sir Christopher's answer was that while, of course, it could be assumed Mr Thomas would not have made the allegations without some substance, they never saw the substance, or the expected litigation.

7.9 The position of the PCC was relatively clear, and remained constant: before they would act, they wanted details of the underlying data, and decisive action from the ICO.[201] Furthermore, the PCC refused to take any action while criminal proceedings were pending or possible. This added to the inertia.

7.10 How they would act should such data be forthcoming was not so clear. It is Sir Christopher's contention that such evidence would have enabled the PCC to "*have gone into some kind of action with the newspapers in question*", and to sharpen and hone their guidance to the press. Exactly, what such action would have involved is unclear, given the limited powers and room for manoeuvre open to the PCC. Certainly the request for concrete evidence sat oddly with the ICO's request for forward looking guidance for the press on data protection issues. Indeed, given the context of the request, it is somewhat surprising that the PCC was not more forthcoming with suggestions of practical further steps.

[197] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT61.pdf
[198] p89, lines 25-20, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[199] p118, line 9, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[200] p111, lines 23-24, *ibid*
[201] p117, *ibid*

7.11 Mr Toulmin said that he was very clearly of the view that the PCC was "*a complaints body looking at breaches of the code of practice rather than the Data Protection Act*", and suggested that it may not even have been appropriate for the PCC to have issued any guidance on the Data Protection Act. However, if this view is correct, then it was and remains inappropriate for the PCC to have held itself out as a regulator and taken the lead in this dialogue. In evidence to the Inquiry Mr Toulmin said:[202]

> *"The question was, I think, where the different responsibilities lay. The PCC, as a platform for discussing the behaviour of journalists and so on in another context, which was about the application of the code of practice, was happy also to say, 'By the way, Richard Thomas has this campaign about the Data Protection Act and he's right to do so', but beyond that, it was difficult really to know what the PCC could do."*

7.12 Mr Toulmin was undoubtedly right that, even if wrongdoing had been demonstrated, the PCC was largely powerless to act. However, it is far from clear that this message was ever communicated properly to the ICO, other than in Sir Christopher Meyer's veiled suggestion that the ICO do more in this area. Rather, the dialogue between the organisations was conducted as if it were one of putative regulatory equals. Any acknowledgement that this was not the case came only much later. It is also quite clear that the resulting stalemate between the two regulatory bodies was to the distinct advantage of the industry: it averted any further criticism and prevented the scrutiny of what were, in some cases, clearly highly dubious practices.

7.13 The PCC did work with the ICO to develop and issue guidance on compliance on the DPA. It took over 16 months from the first meeting between Mr Thomas and Sir Christopher to produce and amounted to no more than three pages of guidance that bore no relation to the 'condemnation' that Mr Thomas had been looking for.

7.14 The guidance note provides a very basic guide to the ideas contained in the Act.[203] The bulk of the note, however, is dedicated to explaining the exemption for journalistic purposes, including the fact that in considering whether a data controller's belief was reasonable that publication was or would be in the public interest, regard may be had by the court to his compliance with the PCC Code of Practice. It then proceeds to remind the reader of what the Code says on the public interest and how the PCC has interpreted it. The note does mention that there is a specific criminal offence of unlawful obtaining of personal data. Moreover no mention whatsoever is made of the Motorman prosecutions or of the allegations that the press had been substantial customers of those prosecuted.

7.15 Furthermore, there is no reference to the risks of using private investigators to obtain personal information or the need to ensure that they do so in accordance with the law. On no level could it be suggested that this guidance note was part of a strategy either to condemn unlawful data use or to warn the industry of the risks that it might be running. On the contrary, if anything the guidance note tends towards reassuring the press that there are sufficient exemptions for journalistic activity to mean that they need not even think about the issues.

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[202] p88, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[203] PCC, *Data Protection Act, Journalism and the PCC Code*, http://www.pcc.org.uk/advice/editorials-detail.html?article=ODg

7.16 There is no doubt that this was a deliberate approach on the part of the PCC, as Mr Toulmin explained:[204]

> *"Q. Would you agree there was no attempt by the PCC in 2005, through its guidance, specifically to warn the press of what they should do in the future by reference to what they might have done in the past?*
>
> *A. I would agree with that. I think this guidance note was what we were asked to do by the Information Commissioner.*
>
> *Q. Did not the PCC form its own view as to what might be appropriate, given what the Information Commissioner was saying about the scale of the activity, namely what warnings should be given?*
>
> *A. Well, this was regarded to be appropriate. There are arguments about whether it should even have done this, given that it was a complaints body looking at breaches of the code of practice rather than the Data Protection Act, but it did want to be helpful and this was the outcome."*

7.17 The inadequacy of this response vividly demonstrates two weaknesses in the PCC's approach. First, despite the apparent protection of privacy afforded by clause 3 of the Code of Practice, the potential widespread use of illegal techniques to secure access to personal data does not seem to have struck the Commission as a potential breach of the Code. Secondly, this is a graphic illustration of the inability of the PCC to act as a regulator in any meaningful sense. These weaknesses in the reaction of the PCC might be explained by the fact that the PCC felt that on this issue they were unable to act without the consent of the industry.[205]

7.18 The efforts made by the PCC did not stop with the issuing of the guidance. Sir Christopher also made some speeches in which he touched on the issue.[206]

7.19 However, it is not particularly surprising that Mr Thomas was unhappy that the PCC had not done more. Eventually, on 13 July 2006, there was a meeting between the ICO and the PCC at which Mr Thomas specifically expressed his disappointment that the PCC had not been more forthright in its condemnation of what appeared to good evidence of wholesale breaches of s55 of the Data Protection Act 1998.[207] Sir Christopher denied that Mr Thomas' disappointment was justified, pointing to his speeches, interviews and the PCC's Annual Reviews,[208] but in my view it was: no formal steps had been taken by the PCC to take up this issue with the industry. Equally, Mr Thomas might well have been disappointed further when he was informed by Sir Christopher that the "*PCC is not able to act as a general regulator*", the reason for this apparently being:[209]

> *"I think what I had in mind there was a notion that we should in some way take on the work of the Information Commissioner by virtue of being a Press Complaints Commission, and this is what I wanted to reject. The point I always made to Mr Thomas, apart from my insistent demands on beef, was to suggest that we had to work in a*

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[204] pp84-85, lines 10-2, Tim Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[205] pp88-89, lines 23-15, *ibid*
[206] p107, lines 3-5, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[207] p1, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[208] p1, lines 22-25, *ibid*
[209] p2, lines 5-18, *ibid*

complementary way. He did his thing, but there were things that we could do to help him, and I've described them in the – before lunch. And I think as a consequence of this precise meeting, it led to direct contacts between the Code Committee and Mr Thomas, which led to a change in clause 10 on subterfuge in the code of practice."

7.20 This introduces a further issue, which relates to the distinction between the PCC and the Editors' Code of Practice Committee. This was a distinction which, without some words of explanation from Sir Christopher, appears to have been was completely (and understandably) lost on Mr Thomas. No such explanation was forthcoming when the matter was first discussed in November 2003; it was only given in July 2006. Sir Christopher was asked why he did not himself raise the issue directly with that Committee rather than leaving it to Mr Thomas to make direct contact. He replied:[210]

"...I thought actually this would be helpful. Rather than mediating his contacts with the Code Committee on the matter of clause 10, the very best thing he could do was to speak to them directly. It was a kind of obvious, common sense practical thing to do, to which he raised no objection, and which bore fruit.

Q. But is this not another example of you adopting a somewhat minimalist approach, leaving it to Mr Thomas to have dealings with, in effect, your own Code of Practice Committee?

A. If that is minimalism, that is a strange concept, considering the amount of effort we had made to exhort journalists to obey the Data Protection Act, without ever having been given evidence of which journalists and which newspapers had committed sins. So I think that – what was this, our third meeting with Mr Thomas, I believe? Yes, third. It might have been fourth but I think it was third. It was a thoroughly positive and constructive thing to do, which bore fruit."

7.21 It would have been helpful had Mr Thomas been appropriately advised of the position much earlier. Sir Christopher could and should have raised the matter with the Code Committee shortly after the first meeting in November 2003; alternatively a joint approach could have been organised.

7.22 Sir Christopher's third concern was that the ICO failed to provide him with hard evidence ('the beef') of criminality by individual journalists and titles. This was a point which he had developed at some length before the Select Committee, and which was probed before the Inquiry in a series of questions:[211]

"Q. The next question and final question on the ICO issue is one which others, I know, want me to put. You get the second report. You get the table in the second report. The Daily Mail happens to be top of the list but maybe it doesn't matter precisely who it is. Why don't you call in the editor, or one of the editors or some of the editors near the top of the list, and ask for an explanation?

A. I was not in the business of calling in editors to explain actions that were perfectly legal. The beef had to be an indication of which newspapers and which journalists had actually hired inquiry agents to procure information illegally. Then we would have been in a different ball game, but we never got there.

Q. But that's a misunderstanding, I think, Sir Christopher, of the table in the second report. The table in the second report evidenced, in Mr Thomas' view, probably illegal

[210] p4, lines 1-20, *ibid*
[211] pp4-5, lines 21-24, *ibid*

> *transactions. So the point I'm putting to you is: on the basis of that table alone and assuming that Mr Thomas it is acting in good faith and has evidence, as he must be doing, why not call in some editors and ask for an explanation?*
>
> *A. He can have all the good faith in the world, but like the chairman of the Select Committee himself, I wanted to see the beef. Then we had something to say to the editors. And it wasn't just me; it was also the Select Committee itself wanted to know the answer. He couldn't He couldn't give it. So by definition, there was a limit to what could have been done."*

7.23 The ICO's second report in particular had clearly explained the basis for the conclusion that the transactions tabulated in Table 6 were likely to be in breach of s55 of the Data Protection Act. The newspapers at the top of the table were plainly identified for all to see. Sir Christopher had enough 'beef' to take these matters up with the editors involved had he chosen to do so, but he did not. I regret that I have a very real concern that even had Mr Thomas supplied the extra slices of evidential beef which might have satisfied Sir Christopher (by some detail) little or nothing would have been done with it, perhaps because of the absence of first hand complaint. The PCC after all lacked the powers to operate as a 'general regulator', and Sir Christopher is unlikely to have knocked on the doors of the editors involved seeking their explanations.

7.24 In my view, the critical fallout from the Operation Motorman episode is not confined to the ICO; it embraces the PCC, for the reasons I have explained. As a whole, the industry response to Operation Motorman, led by the PCC, replicated the pattern of disinterest, intransigence and inertia with which the industry has historically met criticism.

Phone hacking: what powers did the PCC have and what role should they have played?

7.25 Lord Wakeham testified that he did not view it as part of the role of the PCC to investigate criminal or potentially criminal allegations. He described the stance taken by the PCC under his chairmanship as follows:[212]

> *"[I] never considered it was my role to look into allegations of criminality or illegality. Quite apart from the practical implications of trying to run a quasi-police operation, we never had the powers to do so. When matters of a suspicious nature came up we therefore declined to deal with them and referred them to the relevant authorities to take them up."*

7.26 A similar point was made by Baroness Buscombe in her evidence to the Inquiry. She said that "*we [the PCC] have neither the locus, or power to intervene. We were very clear that we could not duplicate the work of the CPS of the police*".[213] She characterised the intervention of the PCC as an effort to try to meet public concern about phone hacking and journalistic ethics generally:[214]

> *"What is sometimes lost in this issue is that the PCC, in trying in 2009 to meet rising public concern about events at News International exceeded its remit. It is an open*

[212] p2, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Wakeham.pdf
[213] p13, para 82, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf
[214] p13, para 83, *ibid*

question as to whether the PCC would now be better placed if it has made publicly clear in 2009 that it was in no position sensibly to examine the charges made about News International".

7.27 This has the appearance of amounting to a form of special pleading. The PCC had previously reassured Parliamentarians that the issue of hacking or listening into private conversations had been addressed. In a submission to the CMS Select Committee in 2003, the PCC wrote that:[215]

"One area of general concern in the early 1990s was the apparent reliance by some newspapers on material that appeared to have been obtained as a result of bugging or eavesdropping on telephone exchanges. Section B 2 [of the submission] outlines how the Code Committee reacted to this concern by introducing, in 1993, a rule forbidding such practices in the absence of a public interest. Since then only one breach of the Code has been brought to the Commission s attention – in 1996 – which clearly shows how the Code can change newspaper behaviour. Since the breach in 1996 there have been no others".

7.28 There is no reason why in principle the PCC should not have investigated or sought to publish a report into allegations of phone hacking. There were no pitfalls so long as the PCC was clear and open about the extent of the powers it had, the extent of the investigations it was able to carry out, and the nature of the investigations it had carried out.

7.29 The 2007 and 2009 investigations, leading to the reports respectively entitled "*Report on Subterfuge and Newsgathering"* and "*Report on Phone Message Tapping Allegations"*, both suffered from similar flaws. Ignoring the issue as to its ability to obtain accurate answers, the PCC did not ask the right questions to discover the true extent of the practice of phone hacking, or whether it was more widespread than had previously emerged; neither did it pay sufficient attention to evidence which suggested that what was being asserted was not the full picture. In both reports, the PCC concluded that there was no evidence that phone hacking was widespread, when at best it should have expressed itself in far more non-committal (if not wholly non committal) terms. In the 2009 report, there was the additional feature of the belittling of those who were contending that hacking was widespread.

2007 investigation

7.30 The PCC made a press statement on phone hacking in August 2006. In that statement the PCC made it clear that, in line with Article 53(3)(c) of its Articles of Association, it would not investigate or comment on the issue of phone hacking before the conclusion of the police investigation into Glenn Mulcaire and Clive Goodman. It did however reserve the right to launch an investigation following the conclusion of that investigation.[216] The PCC also referred to its own 2003 decision in the case of *Foster v The Sun*, in which The Sun admitted that it had printed transcripts of tapped phone conversations between the businessman Peter Foster and his mother at the height of controversy relating to Cherie Blair's purchase of property in Bristol.[217]

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[215] p68, para 20, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-R11.pdf
[216] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U1.pdf
[217] pp377-378, paras 638-639, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Stephen-Abell.pdf

7.31 On 1 February 2007 the PCC announced the action that it would be taking following the conviction of Messrs Goodman and Mulcaire.[218] Sir Christopher Meyer announced that the PCC would be taking steps to ensure that the public could be satisfied *"that lessons have been learned from this episode, both at the newspaper and more generally".*[219] The PCC committed to explore three things:

> *"First, we are writing to the new editor of the News of the World with a number of questions, including what he will be doing to ensure that the situation involving Mr Goodman and Mr Mulcaire does not recur. Second, we will be writing to the editors of national and regional newspapers and magazines to find out the extent of internal controls aimed at preventing intrusive fishing expeditions; and what is being done to instil understanding both of the Code of Practice and the law in this area, and also of journalistic public interest exemptions. The Data Protection Act has an obvious relevance here. Third, the board of the Commission will consider these industry responses with a view to publishing a review of the current situation, with recommendations for best practice if necessary, in order to prevent a similar situation arising in the future. This is in line with its duty to promote high professional standards of journalism."*

7.32 The 2007 investigation was primarily forward looking. The PCC did not set out to discover whether the type of illegal activity which Messrs Goodman and Mulcaire had engaged in was more widespread than the activity of a single rogue reporter in a single newspaper.

7.33 The PCC chose not to engage in a more wide-ranging investigation despite the sentencing remarks of Mr Justice Gross which referred to contact between Mr Mulcaire and "*others*" at the News of the World;[220] and the allegation from the Daily Mail that Mr Mulcaire was being paid £200,000 per annum by the NoTW.[221]

7.34 As a first step in the investigation, Mr Tim Toulmin wrote to Mr Myler on 7 February 2007.[222] He asked Mr Myler a series of questions arising from the prosecution of Mr Goodman and Mr Mulcaire. There was a particular focus on whether or not the employment of a third party, i.e. Mr Mulcaire, had been an attempt to circumvent the provisions of the Editors' Code of Conduct. The questioning also focussed on whether internal procedures had been tightened up since the detection of Mr Goodman's activities, to prevent any repeat. In line with the general approach of this investigation, Mr Toulmin's letter did not seek to explore whether the practice of phone hacking or any other invasions of privacy was more widespread within the NoTW than had previously emerged.

7.35 While the PCC questions were not directed to the question of whether phone hacking was more widespread than had previously emerged, Mr Myler took pains to emphasise that phone hacking was an activity engaged in only by Mr Goodman:[223]

> *"Although, as I said earlier, there can be no question of complacency, this was an exceptional and unhappy event in the 163 years of history of News of the World, involving one journalist."*

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[218] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U3.pdf
[219] *ibid*
[220] See sentencing remarks of Mr Justice Gross in R v Glenn Mulcaire and Clive Goodman, 2007, Central Criminal Court
[221] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U2.pdf
[222] pp1-2, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U4.pdf
[223] p9, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U5.pdf, Colin Myler's evidence, p42, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-15-December-20111.pdf

7.36 He also informed the PCC that *"I do believe that Mr Mulcaire was operating in a confined environment run by Clive Goodman"*[224] Mr Myler's assertion to the PCC was that Mr Muclaire had been engaged by the NoTW to carry out legitimate searches and investigations, and then retained separately by Mr Goodman to carry out illegal phone hacking.[225] Mr Myler further asserted that the illegal aspect of Mr Mulcaire's activities had been completely unknown to anyone at the NoTW other than Mr Goodman.[226]

7.37 The PCC did not interview the former editor of the NoTW, Andy Coulson, in its preparation for the 2007 report or indeed ask him to provide written evidence to the investigation. It is surprising that the PCC was content to direct its questions at Mr Myler, a man who had only taken over as editor of the NoTW a matter of weeks before answering the PCC's questions; had never worked there before, and until he took over as editor of the NoTW had been living and working in New York. In the 2007 report, the reason given for the failure to interview or otherwise question Mr Coulson was that he had resigned from the editorship of the NoTW and therefore no longer came under the PCC's jurisdiction:[227]

> *"Given that the PCC does not – and should not – have statutory powers of investigation and prosecution, there could be no question of trying to duplicate the lengthy police investigation. Furthermore, Mr Coulson was, following his resignation, no longer answerable to the PCC, whose jurisdiction covers journalists working for publications that subscribe to the self-regulatory system through the Press Standards Board of Finance."*

7.38 The first of these points may go to the question of what the PCC should investigate, and how it should do so. It has no bearing on whether or not Mr Coulson should have been interviewed or otherwise questioned. The second point, that Mr Coulson was no longer employed by a publication subscribing to PressBoF, has no merit either. There was nothing to prevent the PCC from asking Mr Coulson to answer questions, even after he had left the employment of a newspaper. The PCC had previously asked questions of journalists after their dismissal, for example in the City Slickers investigation where the PCC approached both journalists, James Hipwell and Anil Bhoyrul for information after they had been dismissed by the Daily Mirror.[228] Sir Brian Cubbon, the PCC's Charter Commissioner, recommended Mr Toulmin in an email on 1 May 2007 that Mr Coulson should be interviewed.[229] If Mr Coulson had declined to answer questions the PCC might have drawn inferences from that refusal.

7.39 In evidence to the Inquiry Sir Christopher said that *"it might have been presentationally better"*[230] if Mr Coulson had been interviewed in the course of the 2007 investigation, but did not say that he believed that the 2007 report would have been better in substance. It is surprising that Sir Christopher did not believe that it would have been better from a substantive perspective had the PCC interviewed Mr Coulson. Any investigator determined to arrive at the truth would have wished to interview the editor of the newspaper at which the alleged wrongdoing took place.

7.40 The process of the investigation revealed the extent to which the PCC's capacity to operate as a standards regulator was constrained by industry control. An email from Eve Salomon, one

[224] p1-5, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U5.pdf
[225] p4, paras 4.5-4.6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U11.pdf
[226] p5, para 4.9, PCC, *ibid*
[227] p1, para 1.6, PCC, *ibid*
[228] PCC, *City Slickers ruling*, http://www.pcc.org.uk/news/index.html?article=MTc4NQ
[229] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U9.pdf
[230] p9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Sir-Christopher-Meyer.pdf

of the lay commissioners at the time, to Mr Toulmin on 2 May 2007, questioned the proposal that the PCC should work to raise standards in respect of data protection within the press:[231]

> *"I remain wary, as calling newspapers generally to account like that strikes me as entering into another level of regulation. Fine if the industry wants it, but we don't want to alienate everybody! If we do say something, my suggestion would be something like we will be contacting the industry again in 6 months to ask what changes they have made in the light of our report."*

7.41 Despite the questioning of NoTW representatives being limited to prospective changes, and the failure to draw upon material which might have indicated otherwise, at least inferentially, the 2007 report purported to come to conclusions about the prevalence of phone hacking within the industry:[232]

> *"No evidence has emerged either from the legal proceedings or the Commission's Questions to Mr Myler and Mr Hinton of a conspiracy at the newspaper going beyond Messrs Goodman and Mulcaire to subvert the law and the PCC's Code of Practice. There is no evidence to challenge Mr Myler's assertion that: Goodman had deceived his employer in order to obtain cash to pay Mulcaire; that he had concealed the identity of the source of information on royal stories; and that no-one else at the News of the World knew that Messrs Goodman and Mulcaire were tapping phone messages for stories."*

7.42 Later in the 2007 report, the PCC once again appeared to accept the position that phone hacking was limited to those who had already been prosecuted, saying that *"[t]he Commission's role here has been additional to the law, which has already investigated, prosecuted and punished the people responsible for the phone message tapping."*[233] The PCC did not ask questions designed to find out whether or not phone hacking had been more widespread than originally supposed. Instead, the 2007 report appeared to exonerate the NoTW from any suggestion that phone hacking had been more widespread than acknowledged.

7.43 The PCC also used the report as an opportunity to continue its advocacy against the introduction of custodial sentences for breaches of s55 of the Data Protection Act. Having suggested a number of steps which should be taken by newspapers to prevent abuses in the form of obtaining private data generally,[234] the PCC concluded that:[235]

> *"The Commission believes very strongly that the impact of these initiatives should be assessed before the government proceeds with its proposals to increase the penalties for journalists who breach the DPA to two years in prison. Such a move would be difficult to reconcile with notions of press freedom. The mere threat of a custodial sentence could be enough to deter journalists from embarking on legitimate investigations, despite reassurances about the public interest exemptions from the Information Commissioner."*

7.44 Press coverage of the 2007 report shows that one of the main points which, at least press observers (some of whom might be thought to have had something of a vested interest

[231] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-U10.pdf
[232] p7, para 6.3, Press Board of Finance, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Exhibit-Pbof-54.pdf
[233] p8, para 6.7, Press Board of Finance, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Exhibit-Pbof-54.pdf
[234] p11, para 10.5, *ibid*
[235] p11, para 10.4, *ibid*

of sorts) took from it was that the PCC had exonerated the NoTW from any suspicion that hacking was more widespread than had been conceded. Under the headline "*News of the World in the clear over Clive Goodman case*", an article in the Guardian dated 18 May 2007 reported that:[236]

> *"The Press Complaints Commission has effectively cleared the News of the World of any illegal conspiracy in the Clive Goodman royal phone hacking scandal."*

7.45 The effect of the PCC's 2007 report was to take the heat out of calls for further investigation or reform of the system of self-regulation. In November 2007 Sir Christopher wrote to Tim Bowdler, then Chairman of PressBoF, in the following terms:[237]

> *"I have to say that … I was extremely worried by the possible political fall-out from the Goodman/Mulcaire case and the damage this could do to self-regulation. [The PCC's report into Subterfuge and Newsgathering] put a premium on responding fast, comprehensively and effectively. Despite some carping at our decision not to interview Andy Coulson, the report has gone down well, effectively killing the case as an issue in Westminster and Whitehall. It has, as you know, been welcomed by the Government, the Opposition and the Select Committee; and, I believe, has contributed to the current and welcome bipartisan consensus behind self-regulation and against a privacy law, buttressed by the Prime Minister himself."*

7.46 It is frankly difficult to avoid the conclusion that with the publication of the Report on Subterfuge and Newsgathering, not only was yet another chance for the self-regulatory system to reform itself was missed, but the PCC actively attempted to avoid external scrutiny that might have increased pressure for reform of the system from elsewhere.

2009 investigation

7.47 On 9 July 2009, the Guardian published an article entitled "*Revealed: Murdoch's £1m bill for hiding dirty tricks*."[238] The substance of the article was that News Group Newspapers (NGN) had paid over the odds to settle phone hacking cases in order to try to secure confidentiality. The article revealed that one of the cases involved Gordon Taylor, the former Chief Executive of the Professional Footballers Association. In a separate comment piece printed in the Guardian on the same day, Mr Davies challenged the 'one rogue reporter' defence which had been advanced by News Group Newspapers (NGN) since the allegations about Clive Goodman's conduct were revealed.

7.48 In response to the allegations, the PCC issued a press statement announcing that it would seek further information about the allegations from the Guardian and from the Information Commissioner.[239] The PCC did so and eventually prepared a report based on those findings published on 9 November 2009.[240] The report was drafted by Mr Toulmin, with the conclusions in particular being approved by the Commission collectively.[241] The 2009 report was withdrawn on 6 July 2011.

[236] Stephen Brook, *News of the World in the clear over Clive Goodman case*, 18 May 2007, http://www.guardian.co.uk/media/2007/may/18/newsoftheworld.pressandpublishing
[237] p2, Press Board of Finance, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Exhibit-Pbof-79.pdf
[238] Published in the *Guardian* on 08 July 2009, in the online edition, available at: Nick Davies, *Revealed: Murdoch's £1m bill for hiding dirty tricks*, 09 July 2009, http://www.nickdavies.net/2009/07/09/murdochs-1m-bill-for-hiding-dirty-tricks/
[239] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B164.pdf
[240] PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V21.pdf
[241] pp48-49, lines 10-2, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf

Why the PCC investigated

7.49 By 2009, senior figures at the PCC felt obliged to try to assume the responsibilities of a regulator in relation to the phone hacking allegations which had, by then, grown in volume. Baroness Buscombe gave evidence that she felt obliged to make some sort of intervention because there was nobody else able to fulfil that role:[242]

> *"Q. …you might have said 'This is really only a complaints mechanism. This is nothing about regulation'"*
>
> *A…at the time we felt that we did have a regulatory role…to perform. There was nothing else. There were no other layers that were, at the time, coming into play".*

The Investigation

7.50 The 2009 report sought to answer two questions. First, whether the PCC had been misled when preparing the 2007 report and in particular whether there was any evidence that phone hacking was not confined to the single rogue reporter, Mr Goodman, acting through the agency of Mr Mulcaire. Secondly, the PCC sought to establish whether there was any evidence that phone message tapping had occurred since 2007.

7.51 Mr Toulmin wrote Mr Myler on two occasions in the course of the 2009 investigation: on 27 July 2009[243] and 3 September 2009.[244]

7.52 The first letter asked a series of questions which included references to: (a) the sentencing remarks of Mr Justice Gross in which the judge referred to Mr Mulcaire dealing with individuals at News International (NI) other than Mr Goodman; (b) the 'for Neville' email; (c) internal investigations at the NoTW following the arrest of Mr Goodman and Mr Mulcaire in 2006; (d) payments in relation to information supplied by Mr Mulcaire about Gordon Taylor; (e) whether the NoTW still believed that the 'single rogue reporter' line was the correct interpretation of events.

7.53 Mr Myler sent a response on behalf of NGN by letter dated 5 August 2009.[245] The substance of Mr Myler's response was that the NoTW still believed that phone message tapping was the act of a single rogue reporter. Mr Myler dealt with the 'for Neville' email in the following way:[246]

> *"Our internal enquiries have found no evidence of involvement by News of the World staff other than Clive Goodman in phone message interception beyond the email transcript which emerged in April 2008 during the Gordon Taylor litigation and which has since been revealed in the original Guardian report…*
>
> *Email searches of relevant people, particularly the junior reporter [who sent the 'for Neville' email], [REDACTED] and [REDACTED] failed to show any trace of the email being sent to or received by any other News of the World staff member.*
>
> *Those who might have been connected to the relevant story, particularly [REDACTED] and [REDACTED], denied ever having seen or knowing about the relevant email and no evidence has been found which contradicts these assertions."*

[242] p51, lines 4-10, *ibid*
[243] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V12.pdf
[244] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V15.pdf
[245] pp1-16, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V14.pdf
[246] p2, PCC, *ibid*

7.54 Later in the same letter, Mr Myler responded to the direct question about why an email with the transcript of a message from Mr Taylor's phone was entitled 'for Neville'. Mr Myler gave the following response:[247]

> *"From June 2001 to April 2003 [REDACTED]...*
>
> *During that time Glenn Mulcaire was hired to provide numerous services including land registry checks, credit status checks, electoral roll checks, directorship searches, court record checks, surveillance, and the provision of telephone numbers of sports stars from his vast database of personal contacts."*

7.55 It is surprising that Mr Myler's reply did not prompt further enquiries by the PCC. Given the ongoing criminal investigations, it is inappropriate for me to be too specific, but to explain the 'for Neville' email in the context of Mr Mulcaire's supposedly legitimate work for the NoTW appears to make little sense, given that there was the transcript of a hacked phone message attached. The failure to pick up on the inadequacy of this response and to seek to probe further was a clear flaw in the PCC's investigation.

7.56 The PCC asked about Mr Justice Gross's sentencing remarks both in the first letter dated 27 July 2009 and in the second letter dated 3 September 2009. In his letter of 5 August, Mr Myler gave a short response to the point, saying that the NoTW could not explain to what Mr Justice Gross was referring.[248] In his reply to the second letter, Mr Myler simply said that Mr Mulcaire had had contact with several NoTW reporters on the point.[249]

7.57 The PCC did not have power to compel anyone to disclose relevant documents or to gain access to relevant records. Nor did they ask for any such documents or access. Further, when investigating whether or not they had been misled in 2007, the PCC relied on the honesty and thoroughness of executives at the organisation alleged to have misled them.

7.58 The PCC press release covering the publication of the 2009 report, issued on 9 November 2009, contained the following paragraph:[250]

> *"The PCC received information from a number of sources. It found no evidence that it was materially misled by the News of the World, and no evidence that phone message hacking is ongoing. The Guardian's sources suggesting a greater culture of intrusion at the News of the World were anonymous and could not be tested, while the Commission noted that there were 'a significant number of on the record statements from those who have conducted inquiries, and have first-hand knowledge of events at the newspaper' who were prepared to state a contrary position."*

7.59 In addition to asking questions of Mr Myler, the PCC also asked for evidence from the solicitor Mark Lewis,[251] from Mr Davies,[252] from Mick Gorrill of the Information Commissioner's Office,[253] and from Mark Maberly, the policeman with whom Mr Lewis had had a conversation about the extent of phone hacking.[254] Mr Maberly did not respond. The PCC also had access to the evidence given by, among others, Mr Lewis and Mr Davies to the CMS Select Committee in

[247] pp3-4, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V14.pdf
[248] p3, PCC, *ibid*
[249] p267, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V19.pdf
[250] p1, Stephen Abell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/SA-B182.pdf
[251] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V110.pdf
[252] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V16.pdf
[253] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V17.pdf
[254] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V111.pdf

which both gave their reasons for believing that phone hacking was more widespread than had previously emerged.[255]

7.60 The PCC also relied upon the public statements of Assistant Commissioners John Yates and Andy Hayman.[256] The evidence of the police that there had only been a handful of phone hacking victims was set against the evidence from, among others, Mr Lewis that there had been up to 6,000.[257] Of course, the number of alleged victims was closely linked to the issue of how many perpetrators there had been.

7.61 Mr Davies, among other things, told the PCC that he was not able to reveal all of the sources of his stories about the extent of phone hacking because of the fear voiced by some people when dealing with a powerful organisation such as NI.[258] Mr Gorrill was not able to supply the PCC with information flowing from the Motorman investigation because the information seized was personal information.[259]

7.62 The PCC did not ask for disclosure of documents from the NoTW, or any other form of documentary evidence. Whereas there was no formal power allowing the PCC to demand disclosure of key documents from NGN, there was nothing to stop the PCC asking to see such documents. Had NGN refused, it was open to the PCC to make that public, and take any such refusal into account when publishing its conclusions on the back of the 2009 investigation.

7.63 The 2009 report concluded:[260]

> *"The PCC has seen no new evidence to suggest that the practice of phone message tapping was undertaken by others beyond Goodman and Mulcaire, or evidence that News of the World executives knew about Goodman and Mulcaire's activities. It follows that there is nothing to suggest that the PCC was materially misled during its 2007 inquiry".*

7.64 The 2009 report's conclusions preferred the accounts of the police to the allegations of widespread phone hacking contained in the Guardian:[261]

> *"Set against the Guardian's anonymous sources are a significant number of on the record statements from those who have conducted inquiries, and have first hand knowledge of events at the newspaper. While people may speculate about the email referencing 'Neville', the Taylor settlement, and the termination payments to Mulcaire and Goodman, the PCC can only deal with facts available rather than make assumptions."*

7.65 The 2009 report concluded by observing that:[262]

> *"…the Commission could not help but conclude that the Guardian's stories did not quite live up to the dramatic billing they were initially given. Perhaps this was because the sources could not be tested; or because Nick Davies was unable to shed further light of the suggestions of a broader conspiracy at the newspaper; or because there was significant evidence to the contrary from the police; or because much of the*

[255] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V19.pdf
[256] pp5, 7-8, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V21.pdf
[257] p2, para 5, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V112.pdf
[258] p118, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V112.pdf
[259] p1, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V18.pdf
[260] p9, para 13.2, PCC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V21.pdf
[261] *ibid*
[262] *ibid*

> *information was old and had already appeared in the public domain (or a combination of these factors). Whatever the reason, there did not seem to be anything concrete to support the implication that there had been a hitherto concealed criminal conspiracy at the News of the World to intrude into people's privacy".*

7.66 The PCC might reasonably have concluded that there was insufficient evidence for it firmly to say that its investigation in 2007 *had* been misled. However, to conclude that there was *nothing* to suggest that the 2007 investigation had been misled was to ignore at least four significant facts from which inferences might reasonably have been drawn casting doubt on the 'one rogue reporter' defence.

7.67 The first of these facts was the so called 'for Neville' email. The second was Mr Taylor's settlement which was for a very large (some might say an astonishingly large) sum. Third, evidence from Mr Lewis of his conversation with a police officer suggesting that phone message tapping was much more widespread than had previously been made public. Fourth, there were the sentencing remarks of Mr Justice Gross in the Goodman and Mulcaire prosecution (to which one might add the words of both prosecuting and defence counsel). It would have been reasonable for the PCC to conclude that none of these facts, taken individually or collectively, proved for certain that it had been misled in the course of their 2007 investigation, but there was certainly reason to believe that it might have been.

7.68 On the question of whether there was ongoing phone message interception, the 2009 report concluded that:[263]

> *"…there is no evidence that the practice of phone message tapping is ongoing. The Commission is satisfied that – so far as it is possible to tell – its work aimed at improving the integrity of undercover journalism has played its part in raising standards in this area".*

7.69 Baroness Buscombe gave evidence that she was not comfortable with the conclusion reached in the 2009 Report that *"the Guardian's stories did not quite live up to the dramatic billing they were initially given"*.[264] However, she was equally uncomfortable about the PCC failing to come to a conclusion:[265]

> *"If we'd done nothing…and I know some have said we should just have said, 'Sorry we can't do anything.' I've tried to imagine the reaction if we'd said that and we're calling ourselves the PCC and we're trying to be credible.*
>
> *I thought – unless we can probably [sic] investigate, perhaps we shouldn't have done anything, but on the other hand if we'd done nothing we would have been accused of being useless for doing nothing. It's very, very difficult".*

Reaction to the 2009 report

7.70 There was a strong response to the 2009 Report from the Guardian. Editor in Chief, Alan Rusbridger, resigned from the Editors' Code Committee in protest. Mr Davies gave evidence that the 2009 report caused him to change from being a supporter of the self-regulatory system to being an opponent:[266]

[263] PCC, p10, para 13.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V21.pdf
[264] PCC, p9, para 13.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V21.pdf
[265] pp50-51, Baroness Buscombe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-7-February-2012.pdf
[266] pp95-96, lines 25-24, Nick Davies, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-29-November-2011.pdf

> *"We published the Gordon Taylor story in July, and in November, the PCC published the second report on phone hacking. Different personnel, different chair. The former – well, I think the same director, but the man who is now director was involved in the production of that report, Stephen Abell, who I regard as a good man.*
>
> *But the report was terrible. Just an awful piece of work. You know, my editor resigned from the code committee in protest. He went on the radio and said, 'This is worse than useless', which I think was an understatement. And that shifted me across the line. I just think – I do not trust this industry to regulate itself. I say this as I love reporting. I want us to be free … But it obviously doesn't work. We're kidding ourselves if we think it would, because it hasn't.*
>
> *Q. This is the report, which is no longer on the PCC website, which referred to, I paraphrase, some of the Guardian's more dramatic claims not being borne out by the evidence or words to that effect?*
>
> *A. Yes, and along the way there was some slippery behaviour, slippery handling of evidence."*

7.71 Thus the effect of the 2009 investigation was to alienate and anger the sole newspaper which had taken this issue seriously. The report and a subsequent speech by Baroness Buscombe to the Society of Editors,[267] also angered Mr Taylor's former solicitor Mr Lewis to the extent that he successfully pursued proceedings for libel.

7.72 It was not too late, even in 2009, for the PCC to have been more open with the public and to have said that it lacked the powers and was not competent to carry out an effective investigation into allegations of phone hacking. That would have avoided the danger that politicians, the public and potential claimants might conclude that a competent regulator had investigated the allegations and found them to be baseless. It is completely unconvincing to contend that the PCC had to be seen to do something in order to maintain public confidence in the self-regulatory system. There was no public interest in the PCC purporting to exonerate the NoTW when it did not have the proper evidence to do so, still less to uphold the values of self-regulation. In particular as regards the disparaging conclusion about the Guardian, the PCC was clearly taking an enormous risk. That risk was that the situation would speedily unravel against it if (as happened) it was contradicted by subsequent events.

7.73 The immediate consequence of the PCC's failed investigation, as with the 2007 report, was to dampen down calls for further investigation. The continued pursuit of the issue by journalists such as Mr Davies, solicitors like Mr Lewis and a handful of politicians meant that the issue would not be buried. However, the PCC's contribution to the phone hacking saga seeped into the political arena: for example, the Prime Minister, the Rt Hon David Cameron MP, gave evidence that in deciding to employ Mr Coulson, he relied in part on the reports of the PCC.[268]

8. Conclusions

8.1 The PCC is constrained by serious structural deficiencies which limit what it can do. The power of PressBoF in relation to appointments, the Code Committee and the funding of the PCC means that the PCC is far from being an independent body. The lack of universal coverage, most notably after the withdrawal of the Northern and Shell titles from the self-

[267] pp1-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-SA-V22.pdf
[268] Specifically the 2009 report in relation to Mr Coulson's appointment in May 2010; p118, lines 5-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

regulatory system in January 2011, gave cause for observers and complainants to lose faith in the system.[269]

8.2 The PCC is barely given enough money to perform its key function of complaints handling, let alone to expand its activities in order to raise standards across the board. Funding has been an issue for some time; almost a decade ago the CMS Select Committee recommended that PressBoF heed a plea from Sir Christopher for additional funding.[270] In more recent years Baroness Buscombe was obviously concerned about funding levels but does not appear to have made formal requests for additional funding.[271]

8.3 The PCC has been seen to associate itself with the interests of the press, has lobbied for the press on key policy issues, and has acted as a shield against moves which might threaten the *status quo*. Minor changes to the Editors' Code of Practice and the self-regulatory system has been deployed as a substitute for real, substantial reform which might have improved press standards and provided a real basis for trust in self-regulation. The PCC has expressed a willingness to listen to constructive criticism but has consistently displayed a reluctance to act upon it.

8.4 The failure by the PCC to initiate its own investigations – other than in circumstances where an investigation was needed to head off criticism of the press or self-regulation – or to accept complaints from third parties across the board and on a transparent basis, has meant that the PCC is not able to act as a regulator properly so called. It has also meant that bodies representing the interests of groups or minorities cannot complain to the PCC about discriminatory or inaccurate coverage. These are points which have been repeatedly identified as a weakness in the self-regulatory system.

8.5 The failure by the PCC to investigate where press actions might give rise to a criminal charge or civil claim is a limitation on its effectiveness. The resources of the police are limited; similarly, resource restraints mean that individuals often cannot afford to proceed with a civil action. Even where there were *prima facie* serious breaches of the Editors' Code of Practice, the PCC typically failed to take any steps to investigate. Examples of this (including alleged payments to police officers) emerged before the CMS Select Committee in their hearings leading to the 2003 report, and the Select Committee at that stage made clear its view that the PCC should investigate allegations of this type.[272]

8.6 When the PCC failed to initiate an investigation over newspaper coverage of the McCann case, once again the CMS Select Committee criticised the PCC for this failure.[273] That report concluded:[274]

> *"In any other industry suffering such a collective breakdown – as for example in the banking sector now – any regulator worth its salt would have instigated an enquiry. The press, indeed, would have been clamouring for it to do so. It is an indictment on the PCC's record, that it signally failed to do so."*

[269] p40, 42, paras 165-166, 179-180, Joint Committee on Privacy and Injunctions, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf
[270] p38, para 86, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf
[271] para 41, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Baroness-Buscombe1.pdf
[272] pp40-42, paras 92-95, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf
[273] p89, paras 364-365, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf
[274] p91, para 374, *ibid*

8.7 The PCC does not have sufficient powers to investigate alleged breaches of the Code. As the Joint Committee on Privacy and Injunctions concluded, this meant that the PCC "*was not equipped to deal with systemic and illegal invasions of privacy*".[275] In particular, it does not have powers to demand the production of documents or to run investigations which strike at the heart of complaints. At every step it has to trust that newspapers are properly examining the issues and are not being economical with the truth. In relation to its investigations into phone hacking, it is common ground that it was misled. In addition and in any event, it did not use the powers which it had to best effect. For example, it did not initiate investigations as often as it might have done nor did it hold oral hearings to determine cases, despite having the power to. Once again, these points were picked up in the CMS Select Committee's 2003 Report.[276]

8.8 The weaknesses in the PCC's powers and its reluctance to seek to compel newspapers to get to the truth were exposed by its inaction after the ICO's reports arising from Operation Motorman, and in the 2007 and 2009 reports into phone hacking.

8.9 The PCC does not have adequate sanctions to dissuade newspapers from repeating their transgressions and satisfy complainants that the wrongs against them have been redressed. Negotiated apologies, published adjudications and letters to proprietors are not in themselves adequate to prevent reoffending. The lack of a power to fine, even in relation to serious and systemic breaches of the code, has meant that the PCC is not a body whose adjudications have force against the industry.

8.10 These points have been consistently picked up in external reviews of the PCC's performance. The CMS Select Committee's 2003 report recommended that a system of fines be introduced, as well as a strengthening of the sanctions already in place.[277] The CMS Select Committee's 2007 report into self-regulation of the press also heard evidence that some complaints were not satisfied with the strength of sanctions; that there were not enough adjudications given, as distinct from negotiated settlements; and recommended that the issue of fines be considered further.[278] The failure to identify for public consumption the number of breaches of the Code that the PCC concluded had occurred serves to preserve an erroneous impression of the level of compliance with the Code.

8.11 In addition, the evidence overall demonstrates that complainants to the PCC tend to feel pressurised into accepting a negotiated settlement rather than having a decision made on whether or not there has been a breach of the Editors' Code. This failing was identified by witnesses who gave evidence to the CMS Select Committee in preparation for their 2003 report:[279]

> *"There was a great deal of praise for the staff of the Commission in assisting complainants through the process but there was also a backdrop of frustration that nothing was going to change and nothing was going to happen to an offending newspaper. In one case, the witness encapsulated the feelings of many in saying that, even though she had, eventually, won the argument and got an apology, she*

[275] p39, para 160, Joint Committee on Privacy and Injunctions, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf
[276] p30, para 58, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf
[277] pp36-38, paras 77-85 , *ibid*
[278] pp31-33, paras 65-72, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcumeds/375/375.pdf; pp44-45, paras 193-202, Joint Committee on Privacy and Injunctions, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf
[279] pp29-30, para 57, House of Commons Culture, Media and Sport Select Committee, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf

was left with the feeling that the newspaper had 'got away with it' (and no sense that someone else would not get the same treatment…The complainant told us: 'I never had the sense … that at any time anybody actually sat down and made any decisions about it.' She described the to and fro of letters and added 'I kept saying 'I press you to adjudicate' … but, in fact I was pressed to accept the final offer of The Daily Mail, which was to publish an apology on page 31.' This experience seems at odds with the PCC's stated policy that 'complainants can of course at any stage ask the Commission itself to take a formal view on their complaint' Another witness described the complaints process as like climbing a staircase with 'the Commission' as the 'big thing in the sky'. However, he told us 'You get to the top of the steps, you are looking around, and 'it' is not there'".

8.12 The failings which have fatally undermined the PCC and caused policy makers and the public to lose trust in the self-regulatory system are not new. They have been consistently identified by external scrutiny for at least a decade. The twin failure of both the self-regulatory system and the industry to address these problems is itself evidence that there has been no real appetite for an effective and adequate system of regulation from within the industry, in spite of a professed openness to reform and self-criticism. It is difficult to avoid the conclusion that the self-regulatory system was run for the benefit of the press not of the public.

8.13 In the circumstances, it is not surprising that change is inevitable. On 9 March 2012, there was a press release to the effect that the PCC had unanimously agreed in principle to the proposal that it will now move into a transitional phase, transferring its assets, liabilities and staff to a new regulatory body.

PART K

REGULATORY MODELS FOR THE FUTURE

CHAPTER 1
CRITERIA FOR A REGULATORY SOLUTION

1. Introduction

1.1 In order to make recommendations for a new more effective regulatory regime, as required by the Terms of Reference of the Inquiry, it is essential first to consider what a regulatory regime should be seeking to achieve. There are three aspects to this question: first, what a regulatory regime should do; second, how it should be structured to achieve that; and third, the detailed rules that are put in place to achieve the objectives. The 'what' is about outcomes and the 'how' is about processes, structures and accountabilities. The detailed rules should be dealt with in the substance of any code or regulations. These three aspects of a regulatory regime need to be considered separately as they are not necessarily dependent on each other and it may be possible to achieve the desired objectives by different combinations of solutions.

1.2 This Chapter is specifically about the 'what'. In May 2012 I published on the Inquiry website a set of draft criteria for a regulatory solution that aimed to set out what any regulatory solution should seek to achieve. This was not concerned with how those outcomes should be achieved, or the structures through which they should be achieved, but simply what the outcomes should be. Those draft criteria were:

> ***"1. Effectiveness***
>
> *1.1 Any solution must be perceived as effective and credible both by the press as an industry and by the public:*
>
> (a) It must strike a balance, capable of being accepted as reasonable, legitimate and in the public interest by all.
>
> (b) It must recognise the importance for the public interest of a free press in a democracy, freedom of expression and investigative journalism, the rule of law, personal privacy and other private rights, and a press which acts responsibly and in the public interest.
>
> (c) It must promote a clear understanding of 'the public interest' which would be accepted as reasonable by press, industry and public alike.
>
> (d) It must be durable and sufficiently flexible to work for future markets and technology, and be capable of universal application.
>
> ***2. Fairness and objectivity of Standards***
>
> *2.1 There must be a statement of ethical standards which is recognised as reasonable by the industry and credible by the public. This statement must identify enforceable minimum standards as well as articulating good practice that should be aimed for.*
>
> *2.2 All standards for good practice in journalism should be driven by the public interest and must be benchmarked in a clear objective way to the public interest.*
>
> *2.3 The setting of standards must be independent of government and parliament, and sufficiently independent of media interests, in order to command public respect.*
>
> ***3. Independence and transparency of enforcement and compliance***
>
> *3.1 Enforcement of ethical standards, by whatever mechanism, must be operationally independent of government and parliament, and sufficiently independent of media interests, in order to command public respect.*

3.2 In particular all relevant appointments processes must be sufficiently independent of government, Parliament and media interests to command public support.

3.3 Compliance must be the responsibility of editors and transparent and demonstrable to the public.

4. Powers and remedies

4.1 The system must provide credible remedies, both in respect of aggrieved individuals and in respect of issues affecting wider groups in society.

4.2 The regulatory regime must have effective investigatory and advisory powers.

4.3 The system should also actively support and promote compliance by the industry, both directly (for example by providing confidential pre-publication advice) and indirectly (for example by kitemarking titles' own internal systems).

4.4 The system should be a good fit with other relevant regulatory and law enforcement functions.

5. Cost

5.1 The solution must be sufficiently reliably financed to allow for reasonable operational independence and appropriate scope, but without placing a disproportionate burden on either the industry, complainants or the taxpayer."

1.3 I sought comments on these draft criteria. Most of those who have submitted evidence on regulation have accepted the criteria without comment. Some, including Ofcom,[1] made substantive comments on the criteria, suggesting that further consideration was needed on a number of areas. Where appropriate, I address these comments later in this Chapter. I am, however, satisfied that the broad categories are correct and they continue to form the basis of what I would hope could be achieved through the recommendations set out later in this part of the Report.

2. Effectiveness

2.1 The ultimate test of any new regime is that it must work in practice, in terms of ensuring that the press comply with agreed standards. But that simple statement itself begs three questions. The first is what is meant by 'ensuring'; the second, what is meant by 'the press'; and the third is what is meant by 'agreed standards'. I address all of these points in this section of the report. The Inquiry has heard over and over again that aspects of the current PCC based regime may be good in principle but that they simply do not work in practice. The essential flaws of the current regime have been examined elsewhere.[2] At one fundamental level, the current 'self-regulatory' regime has failed to achieve continued universal coverage of the main national newspaper titles with the withdrawal of Northern and Shell. I do not consider that it is possible for a regime to be considered effective if a major national newspaper group can choose to sit outside it without consequences. This should not be a controversial view, as it essentially echoes Lord Hunt's opinion that:[3]

> *"the credibility of the new system could be fatally undermined if any genuinely big fish seek to escape the net."*

[1] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Covering-Letter-from-Ofcom.pdf
[2] particularly in Part J, Chapter 5
[3] p14, para 42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf

Lord Hunt went on to confirm that Northern and Shell would qualify as a 'big fish' in this context.[4] The very fact that the industry has sought to put forward what it believes to be a new and fundamentally different approach to self-regulation constitutes a clear recognition that the existing regime is no longer effective.

2.2 Other aspects of external regulation, including the criminal and the civil law, have significant structural weaknesses, as is more fully discussed elsewhere in the Report.[5] An effective regulatory regime will need to take account of those shortcomings and find ways of rectifying them or otherwise dealing with them as far as possible.

2.3 There are a number of different aspects of effectiveness. Views on what constitutes effectiveness vary, but the broad headings included within the draft criteria have not been contested. The draft criteria indicated that, in order to be effective, a regulatory regime for the press must be accepted as credible both by the press and the public and this proposition has not been seriously disputed by anyone. This does not mean that either the industry or interest groups should have a veto over the solution, but it is important that the regime should be grounded in an understanding of the industry, the law, the rights and freedoms of both individuals and the press, and the public interest in its widest sense. A regime that fails to take any of those factors fully into account will fail to meet the expectations and needs of the public.

2.4 The draft criteria set out a broad perspective on the public interest. As with the concept of effectiveness, there are many different aspects to the public interest in this context. The public interest in the freedom of the press and freedom of expression, including the public interest in a diverse and vibrant press, are the most obvious. Any regulatory regime that compromised the freedom of the press to hold authority to account, or to investigate wrongdoing by the powerful, would not qualify as effective according to any reasonable person's definition of that term. The public interest in the rule of law is also important. The law applies to journalists and the press as it applies to everybody else. This is not to say that journalists cannot sometimes break the law in the pursuit of public interest journalism, but that does not override the general public interest in the rule of law: on the contrary, it recognises that a clear countervailing public interest must be identified before the rule of law may yield. Finally, there is a public interest in the protection of the private rights of individuals, including the right to privacy, which falls to be weighed in the balance against the public interest in free speech. Providing this requisite balance is one of the most difficult challenges for any regulatory regime.

2.5 The Inquiry has heard evidence that different editors weigh up these countervailing public interests in different ways. That may not be unreasonable looking at individual cases alone, but from an enforcement perspective it is only fair for both the public and the press themselves that each relevant enforcement authority should be clear about the basis on which they will reach such judgments. It also seems reasonable that, if there is to be a body adjudicating on press or media standards, such a body should set out for the public and the industry some guidance on what might be meant by the public interest in this context. The PCC Code, as most recently revised, sets out the following non-exhaustive definition of the public interest: [6] [7]

[4] p1, lines 15-17, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[5] Part J, Chapters 2 and 3
[6] pp8-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[7] PCC code, http://www.pcc.org.uk/cop/practice.html

"The public interest

*There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.*

1. The public interest includes, but is not confined to:

(i) Detecting or exposing crime or serious impropriety.

(ii) Protecting public health and safety.

(iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child."

2.6 There are a number of references to the public interest in the Ofcom Broadcasting Code.[8] There is no definition of the public interest as such, but the code does provide this:

"Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."

2.7 The BBC includes a definition of the public interest in its editorial guidelines:[9]

"The Public Interest

Private behaviour, information, correspondence and conversation should not be brought into the public domain unless there is a public interest that outweighs the expectation of privacy. There is no single definition of public interest. It includes but is not confined to:

- exposing or detecting crime
- exposing significantly anti-social behaviour
- exposing corruption or injustice
- disclosing significant incompetence or negligence
- protecting people's health and safety
- preventing people from being misled by some statement or action of an individual or organisation
- disclosing information that assists people to better comprehend or make decisions on matters of public importance.

There is also a public interest in freedom of expression itself.

[8] Ofcom's Broadcasting Code, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Exhibit-OFCOM11.pdf
[9] BBC Editorial guidelines, http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidelines-privacy-introduction

When considering what is in the public interest we also need to take account of information already in the public domain or about to become available to the public.

When using the public interest to justify an intrusion, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it."

2.8 Although these definitions, or examples, have a lot in common there are naturally some differences. Views have been advanced on each of them, but it is not for this Inquiry to draft a comprehensive working definition: this would be both an overly ambitious and inappropriate exercise. However, given that this is the **public** interest, and that it must explicitly relate to interests outside those of the media enterprise concerned, it must be reasonable to conclude that whatever interpretation of the public interest is to be used in a new regulatory regime, it should be recognised, understood and accepted by both the media and the public.

2.9 Finally on the question of effectiveness, the criteria spoke of a durable solution, and one sufficiently flexible to work in the future. It is, of course, the case that, as many witnesses have told the Inquiry, the media market is changing. Rupert Murdoch predicted that the printed press might coexist with online news sources for possibly 20 years, but he also commented that others estimated that the print versions may not survive for more than five or ten years.[10] Without needing to take a view on how long the printed press will survive, it is unquestionably the case that a large proportion of people now receive at least some of their news and current affairs content, and their entertainment, from the internet. Ofcom estimated that 41% of people today use the internet for news and current affairs coverage, and that the internet accounts for 21% of news and current affairs consumption; this compares with 53% of adults using a newspaper, but newspapers account for only 11% of news and current affairs consumption.[11] Furthermore, the trend towards online consumption is rising. This makes it abundantly clear that, for a regulatory regime to be effective, it must be capable of delivering any perceived benefits to online publication as much as to print.

2.10 The Inquiry has also received evidence that a single regulatory regime across all media would be desirable.[12] The Inquiry has heard some evidence on the nature and effectiveness of the existing statutory regulatory framework for broadcast media; but this has been largely for the purposes of comparison with the regime currently in place for print and to learn any relevant lessons. I have not sought to take evidence on the adequacy of the regime for the broadcast sector and, accordingly, it is not my intention to examine the fitness of that regulatory regime, or to make any recommendations as to how the broadcast sector should be regulated.

2.11 Ofcom correctly commented that the published draft criteria did not mention membership.[13] The criteria aimed to set out what a new regulatory regime should achieve, not the means by which it should be achieved. The draft criteria provide that a new solution should be 'capable of universal application'. My starting point, as set out above, is that any regime which did not at the very least cover all major national newspapers and their online presence, would not be

[10] p76, lines 17-20, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-26-April-2012.pdf
[11] p16, para 4.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[12] pp6-7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Sumission-from-Jeremy-Hunt-MP.pdf; p8, para 3.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[13] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Covering-Letter-from-Ofcom.pdf

effective. The Inquiry has received submissions suggesting that standards regulation might be limited to those of a particular size or with particular economic power.[14] Ofcom say:[15]

> *"Committed participation by the whole of industry would be fundamental to a successful new regulatory regime"*

It has been made abundantly clear in the proposals presented during Module Four of the Inquiry that the vast majority of interested parties agreed with that. All the proposals that have come to the table have sought to compel or entice the whole of industry into the tent. Any disagreement has been about whether compelling or enticing is the best way to achieve the objective of committed participation, coupled with what have been described as principled concerns about the use of legislation to compel any part of the press to do anything. I have no doubt that committed participation by the whole of industry is fundamental to an effective new regime.

2.12 My conclusion is that Criteria 1 as originally drafted continues to reflect the essential elements of a new effective regime.

3. Fairness and objectivity of standards

3.1 The draft Criteria set out three aspects of fairness and objectivity of standards which I considered were fitting attributes of a new regulatory regime. The first was that there should be a statement of ethical standards which is recognised as reasonable by the industry and as credible by the public. This statement must identify enforceable minimum standards as well as articulating the good practice that should be targeted.

3.2 The Inquiry has not undertaken a full systematic examination of the existing Editors' Code but it has identified some deficiencies that have been identified in evidence presented to the Inquiry.[16] Many witnesses have maintained that it is a good Code; others have argued that it has weaknesses. In this context I simply note that the current Editors' Code appears to be a mix of broad statements of principle (for example *"the press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact"*); specific requirements (for example *"even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication to others, not should they pass such information to others"*); and requirements that can sometimes be disregarded (e.g. *"the press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so"*). In addition, there are examples of each of these types of statement which can be disapplied where doing so can be demonstrated to be in the public interest. Professor Megone commented that a code of practice needs to be presented in the context of the specific critical contribution that a free press can make to the public interest. Overall, there is room for improvement of the current Code. [17]

3.3 Second under this broad heading, the draft Criteria specified:

[14] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Further-submission-from-the-Media-Standards-Trust.pdf; p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[15] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Covering-Letter-from-Ofcom.pdf
[16] Part J, Chapter 5
[17] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Further-Submission-from-Professor-Christopher-Megone.pdf

"All standards for good practice in journalism should be driven by the public interest and must be benchmarked in a clear objective way to the public interest."

3.4 Associated News Limited (ANL) have raised a concern about this, stating that the press should be free to publish material of their choice without always having to justify it on grounds of public interest. I accept entirely that the vast majority of material published in most newspapers and magazines will not infringe other peoples' rights or the law and has no need to be justified on public interest, or any other, grounds. It was not the intention in these draft criteria to suggest that all material in a newspaper should be able to pass a public interest test. However, ANL also raised the issue of *"information which might be thought to constitute a low-level interference with personal privacy"* and, in the same context, observed that standards of this sort *"would constrain newspapers from providing the broad mix of newspaper that…….ensures the very survival of the industry."*[18] Here, the authorities do recognise that a minimum threshold of interference must be attained before the right itself may be said to be infringed. Exactly how this should be formulated would be for any future code-maker to consider. Subject to that, any infringement of the substantive right must be justified.

3.5 Finally under this heading, the criteria specified that the setting of standards must be independent of Government and Parliament, and sufficiently independent of media interests in order to command public respect. In some ways this has sparked the most debate. Whilst there is universal agreement on the principle of the independent setting, there are also many proposals that would see Parliament laying down some basic criteria which such standards must attain. This is the case with, for example, the Irish Defamation Act, which has been cited by many as a successful example of how Government can incentivise independent regulation. There is also disagreement about what constitutes 'sufficient' independence of media interests. Lord Black on behalf of the industry proposed a system in which serving editors still had a majority on the committee which set the standards,[19] whereas Ofcom, by contrast, considered it to be "*unimaginable*" to have anyone currently active within the industry as part of the standards setting body.[20]

3.6 It would therefore appear that, whilst everyone is willing to support the theory of independence, it is difficult to find any particular consensus on what independence looks like in practice.

3.7 My conclusion is that Criteria 2 as drafted remains the right articulation of fairness and objectivity of standards, but with an explicit recognition that not all material published in newspapers would or should need to satisfy a public interest test as opposed to providing material which merely entertains or interests the public. The standards must, however, recognise that any infringement of individual rights should only be acceptable where there is a sufficient public interest rationale.

[18] p18, para 40, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf

[19] p41, para 80, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

[20] pp101-102, lines 7-9, Dr Colette Bowe and Ed Richards, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf

4. Independence and transparency of enforcement and compliance

4.1 The draft Criteria provided that enforcement of ethical standards must be operationally independent of Government and Parliament and sufficiently independent of media interests. This, by contrast with the setting of standards, has proved relatively uncontroversial. All the proposals put forward to the Inquiry included an independent approach to complaint handling, and most attempted to describe a broader independent standards enforcement role. There were, inevitably, different views on what constitutes independence, but at a level of principle this seems to be genuinely uncontentious.

4.2 The draft Criteria also provided that all relevant appointments processes must be sufficiently independent of Government, Parliament and media interests. This raises the basic conundrum of who appoints the appointers. None of those who have provided evidence to the Inquiry have suggested that the appointments processes should not be sufficiently independent of the interests listed, but there are differences around what constitutes 'sufficiently', and at what level the independence needs to be demonstrated. By way of example, in the proposal from Tim Suter, the Ofcom Content Board would need to approve the independence of the appointment process for any self-regulator, whilst the Content Board[21] itself is appointed by the Ofcom Board, which is appointed by Government.[22] Lord Black's proposal, on the other hand, would rely on an appointment committee composed half and half of industry appointees and lay members to appoint the Chair of a new regulator. I do not accept that an appointment procedure that allows an effective veto to the industry could be considered to be sufficiently independent. Similarly, it must be the case that in relation both to specific enforcement and overarching standards compliance the operation and decisions of the regulator are fully independent from those being regulated.

4.3 Finally under this heading, the draft Criteria specified that compliance must be the responsibility of editors, and must be transparent and demonstrable to the public. One of the strong themes emerging from the proposals submitted to the Inquiry was the emphasis on the need for companies to take more responsibility internally for compliance and for dealing with complaints about standards. This is addressed in Lord Black's proposal through the presumption that all complaints should be dealt with in the first instance by the company concerned, the requirement for a named senior executive to have responsibility for compliance and the requirement for each regulated entity to provide an annual compliance report. There may be some question as to whether it is specifically the editor, as opposed for instance to the managing editor, who should be responsible for compliance; but the Inquiry has seen nothing to suggest that the principle underlying this criteria has anything other than full support.

4.4 My conclusion is that Criteria 3 as drafted remains an appropriate benchmark for independence.

[21] p2, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[22] p24, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

5. Powers and remedies

5.1 The draft Criteria indicated that an effective new regime must provide credible remedies, both in respect of individuals and of issues affecting wider groups in society. The concept of 'credible remedies' has been the subject of some debate. For many, the publication of an agreed correction or apology constitutes a credible remedy; for others it does not. The draft Criteria made no mention of sanctions, as opposed to remedies, but there have been representations suggesting that a new regulatory regime should include sanctions, including power to fine, as well as remedies in respect of particularly serious or systemic breaches.[23] I freely accept the argument that sanctions are different in kind to remedies, in that the former aim to punish and deter breaches of standards, whilst the latter aim to provide solace for the individual affected. I further accept that an effective regulatory regime must have some form of sanction, at least for systemic or egregious breaches of standards.

5.2 There is broad agreement that there must be a system of credible remedies for individuals who have been adversely affected by a breach of standards. However, there are widely differing views when it comes to the rights of third parties or groups of people to make complaints or have access to remedies. In relation to third parties, there is a clear, and reasonable, concern about the risk of such persons or groups making a complaint where the individual directly concerned either is not troubled by the article or, more realistically, would prefer to let the matter drop. Some have argued that the subject of an article should have a veto on the consideration of a complaint. Plainly, a number of issues arise here. If the system is based solely on remedies then there is little point in taking a complaint from anyone for whom the range of potential remedies would not be meaningful. Ofcom has argued that, if there has been a breach of regulatory standards, then the regulator should have the discretion to investigate regardless of whether the subject of the relevant article wishes to take the matter further. In this context the issue is one of industry standards, not abuse of personal rights; but this is pertinent only to the extent that the regulator can issue some kind of adjudication, guidance or sanction that will inform subsequent behaviour, as well as seeking to provide redress to an individual who has suffered harm.

5.3 The British and Irish Ombudsman Association has pointed out that for practical reasons there needs to be some limitation on who can bring a complaint. This has been echoed by others, who fear that in allowing third party complaints, and in particular group complaints, the standards regime could be hijacked by groups wanting to fight political battles on the pretext of complaining about standards. In particular, ANL has argued:[24]

> *"This would potentially subvert the purpose of the regulatory system, which is to protect the rights of those affected by the press and promote high standards. It is not to provide a means by which special interest groups can seek to impose their views on society at large by controlling what is written in the press about them and the interests they represent."*

[23] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Covering-Letter-from-Ofcom.pdf; p10, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf; p8, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf; p20, para 3.35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf; p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf; p13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf

[24] p18, para 42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf

p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf

5.4 I am confident that, at some level, it must be possible within any effective new system for breaches of the relevant code to be drawn to the attention of the enforcement body by those affected by the breach, whether in the form of a direct personal reference or more indirectly. There is clearly room for debate as to precisely how this may be achieved and what sort of remedies or sanctions might be appropriate should a breach of standards be found. I do not believe that it is right to characterise the desire of groups to see agreed standards upheld as an attempt to *"impose their views on society at large by controlling what is written in the press about them"*.[25] If a title has agreed to conform to certain standards then it is a reasonable expectation that they should do so without any group who maintains that those standards are not being upheld being accused of trying to interfere with freedom of expression.

5.5 The draft Criteria indicated that a new regime must have effective investigatory and advisory powers. Inevitably, there will be disagreement about what constitutes 'effective' in this context, but overall this has proved particularly uncontentious in principle, with most proposals including investigatory powers of some sort.

5.6 The draft Criteria also proposed that any new system should actively support and promote compliance with standards. Again, at a level of generality this has not proved to be a contentious issue, although quite who would be responsible for taking a proactive approach to promoting compliance varies from model to model. In this context, the draft Criteria suggested a few examples of ways in which active support and promotion of standards might happen. One of these was kitemarking; the provision of a kitemark is widely seen as an important part of any voluntary self-regulatory scheme. Some have suggested that the commercial value of a kitemark would be limited, but others believe that the public would want to buy a product that advertised its commitment to standards.

5.7 The draft Criteria also mentioned the example, under this rubric, of providing confidential pre-publication advice to editors. This has proved somewhat controversial, but it was not the intention of the Inquiry by including this feature in the draft criteria to advance any specific proposal. In the event, proposals have been submitted to the Inquiry under which some facet of a new regulatory system could offer confidential advice to editors, in advance of publication, on the merits of any public interest arguments that might later be relied on in actions relating to breach of privacy or breach of standards. Such advice would not be binding in any way, but the fact that advice had been sought (and either followed or ignored) could be taken into account in any subsequent enforcement action.[26]

5.8 Concerns have been advanced about such proposals on the grounds that any intervention pre-publication is a fundamental breach of freedom of expression.[27] For example, ANL contend that *"for a regulator to involve itself in pre-publication decisions is to trespass on the editor's role"*.[28] There are additional questions to be answered about who the appropriate body would be to provide such advice, the relationship between that body and the enforcement body. Notwithstanding the concerns which have been expressed, for reasons which will be elaborated subsequently it remains my view that the provision of pre-publication advice to editors, on request, would be a useful service for a regulatory body to provide.

[25] p19, para 42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf
[26] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf; pp3-4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[27] p43, para 14, Sir Charles Gray, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf
[28] p19, para 43, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf

5.9 Finally under this heading, the draft Criteria indicated that the new regime would need to be a good fit with other relevant regulatory and law enforcement functions. This, as one might have expected, is completely uncontroversial at the level of principle, but may prove more difficult to implement in practice. There have been a number of concerns raised about the boundary between whatever new regime is proposed in this context and the existing broadcasting regulation. Some suggestions envisaged bringing together all media under a unitary approach to regulation, although no-one has gone as far as suggesting a single regulator for all media. Others have expressed concern about the jurisdictional difficulties of regulating online content, and yet others about the boundary with the statutory requirements on online TV-like services imposed by the Audio Visual Media Services Directive. I share these concerns and consider that it will be important that the coverage of any new regime is clearly articulated and avoids any overlap between media regulators.[29]

5.10 The Inquiry has heard little about the need for any new standards system to fit within an overall effective regime, including criminal and civil law enforcement, although that is obviously essential, indeed, some witnesses have suggested that effective criminal law enforcement would be a sufficient answer to the problems exposed by the Inquiry. I have set out earlier in the report why this is not, and never will be, a credible solution. I do not see any reason why, where standards and the criminal law overlap, there should not be an expectation that the regulator would continue to perform its core regulatory functions as it would in respect of any other standards.[30]

5.11 My conclusion is that Criteria 4 as drafted provides a satisfactory set of requirements in relation to powers and remedies, subject to the introduction of a further point that the regime should include appropriate and proportionate sanctions for systemic or egregious breaches of standards.

6. Cost

6.1 The draft Criteria stipulated that the solution must be sufficiently reliably financed to allow for reasonable operational independence and appropriate scope, without placing a disproportionate burden either on the industry, complainants or the taxpayer. As drafted, it is difficult for anyone to disagree with that proposition and no-one has sought to do so. However, it is very difficult at this point to predict what the cost of any of the various approaches that have been put forward to the Inquiry might be. Lord Black estimates that his proposal would cost in the region of £2.25m[31] but many editors, in particular from the regional press and magazines, have expressed concerns about the robustness of this estimate and whether the industry will be able to afford the attendant costs.[32] Other proposals have suggested that

[29] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Sumission-from-Jeremy-Hunt-MP.pdf

[30] Part J, chapter 2

[31] p45, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Fourth-Witness-Statement-of-Lord-Black.pdf

[32] p2, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Ian-Stewart1.pdf; p3, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-WS-of-Rosie-Nixon2.pdf; p2, para 6c, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Adrian-Faber-in-response-to-Module-4-Questions.pdf; p3, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Peter-Charlton-Yorkshire-Post-Newspapers.pdf

Government funding for part of a new regulatory regime might be reasonable, though it is worth noting that this is rejected by Lord Black as a matter of principle.[33]

6.2 Ofcom has argued that fixed term funding settlements are necessary to provide the level of operational independence that any regulatory body would need.[34] Any funding approach which relied on year by year agreement of the regulator's budget would allow too much potential for the funding body to influence the approach to compliance and enforcement taken by the body.

6.3 A common theme running through these proposals is that it should be free for persons aggrieved to bring complaints. Obvious questions have been raised about the risk of frivolous or vexatious complaints but, making due allowance for the fact that mechanisms can be put in place to deal with those issues, essentially this is another area on which the Inquiry has seen consensus.

6.4 My conclusion is that Criteria 5 as drafted is an appropriate measure, albeit recognising that 'reliability' of funding means multi-year settlements to protect the independence of the regulator from undue influence from those funding it.

7. Accountability

7.1 Ofcom suggested that a further criteria for the accountability of the new regime should be added. Specifically, they contended that there should be an independent review of whatever new regime is put in place after three years. Arguably, this is of particular relevance in the context of the history of press self-regulation which demonstrates that historically it has been difficult to secure any lasting effective change.[35] I agree that an independent review of any new regulatory regime would be an important benchmark in testing effectiveness.

[33] pp70-71, lines 23-3, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[34] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Covering-Letter-from-Ofcom.pdf
[35] Part D, Chapter 1

CHAPTER 2
THE SELF REGULATORY MODEL PROPOSED BY THE PCC AND PRESSBOF

1. Industry acceptance of the need for reform

1.1 In the early days of the Inquiry I made it clear that I was keen that the press industry should come forward with a credible proposal for the future regulation of standards across the press. I said that it was critical that the press should engage in the debate about how its regulation should move forward,[1] that this was a problem for the industry and that the industry had to solve it.[2] I also explained that it was important that a solution should be found which worked both for the press and for the public and I looked to the press to come forward with proposals that would fit that brief; however, in the meantime I would continue looking for ways to improve the system.[3] It is difficult to find an objective test for what 'works for the public'. The public have three distinct roles here: first as readers of newspapers, second as citizens of a democratic country and third as the people about whom newspapers write. It is important that the interests of the public in all three roles are recognised and protected: the Prime Minister said that the test must be whether a solution works for the Dowlers and the McCanns.[4]

1.2 It has been common ground that PCC does not offer a credible form of self-regulation and that significant change is needed. The current PCC Chair, Lord Hunt agreed that *"tinkering around the edges"* would not be sufficient and that this was an opportunity for the press to come forward with *"the sort of system Sir David Calcutt was asking for."*[5] Lord Black, Chairman of the Press Standards Board of Finance (PressBoF), said he had never believed the PCC to be a regulator,[6] and accepted that the PCC had failed:[7]

> *"The evidence submitted throughout the Inquiry into Press Standards has made clear that the Press Complaints Commission ultimately failed. While it had some significant achievements to its name, particularly in its early years, it proved incapable of dealing with the major ethical and cultural issues that have arisen in recent times. The scandal of phone hacking – and the PCC's inadequate response to it – underlines that point. As a result, the existing system lost the confidence of Parliament, of the public and of the judiciary, all of whose support is essential if self regulation is to flourish. Crucially, the Commission also lost the support of parts of the newspaper and magazine publishing industry. The industry accepts the need for wholesale change, but within the framework of self regulation."*

[1] pp66-67, lines 18-1, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[2] p36, lines 1-8, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf
[3] p36, lines 9-20, Lord Black, *ibid*
[4] pp66-67, lines 13-2, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[5] p67, lines 1-12, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[6] p14, lines 13-14, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Morning-Hearing-1-February-2012.pdf
[7] p13, paras 1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

1.3 In recognition both of the failure of the current system of 'self-regulation' and the need for an industry generated proposal for the future, Lord Hunt developed a set of proposals which have been further developed by Lord Black, on behalf of the industry. A version of that proposal, representing the fruits of over 12 months work by the industry, has been submitted by Lord Black as *"working documents in draft"*.[8] There has been a process of consultation with many parts of the industry, resulting in the following statement from the Newspaper Society, the Newspaper Publishers Association (NPA), the Scottish Daily Newspaper Society and the Professional Publishers Association:

> *"While a lot of detailed work is still to be done, the proposals have the broad support of the organisations and their members. The proposals are being further developed in the light of comments received as part of the ongoing consultation process. This process will take into account the deliberations and recommendations of the Leveson Inquiry and the Government responses to its findings."*

1.4 It is important to recognise that publishers have not yet been asked to sign the contracts that underpin this proposal (so that at the time of publication of this report it remains open to doubt, if not considerable doubt, as to precisely what a final agreement might look like, or even whether such an agreement could be reached and which publishers would be willing to join). This Section of the Report looks at the proposal as it was submitted to the Inquiry.

2. The proposal: overview

2.1 The proposal is based on a voluntary model described by Lord Black as "*independently led self-regulation*". The key features are:

(a) the creation of a new self-regulatory body, under an independent Trust Board, with greater independence from the industry than the PCC currently has and the power to impose fines for particularly serious or systemic failures;

(b) a contractual relationship between the regulated body and each of the publishers to provide for medium term commitment to the system;

(c) a continuation of the complaints handling role of the PCC;

(d) the creation of a separate arm of the regulator with powers to investigate serious or systemic failures; and

(e) the establishment of a new industry funding body to provide financial stability for the regulatory body.

2.2 The proposal is set out in full in Lord Black's submission,[9] together with a draft contractual framework,[10] draft Articles of Association of the new Regulator[11] and draft Regulations[12] that the members (or 'regulated entities') would have to comply with. Here I describe the key relevant features of the proposal in order to consider the extent to which it is capable of delivering the objectives set out earlier.[13] They will be analysed later in the Report.[14]

[8] p2, para 3, *ibid*
[9] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[10] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[11] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-D1.pdf
[12] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[13] Part K, Chapter 1
[14] Part K, Chapter 4

3. Governance and structures

3.1 Figure K2.1 below provides a pictorial representation of the composition of the various bodies and how they relate to each other. The regulatory body itself is comprised of the Trust Board, which has overall responsibility for the self-regulatory regime, with subcommittees dealing with complaints and compliance and investigations respectively. Sitting outside the self-regulatory body are the Industry Funding Body (IFB), which is responsible for setting and delivering the funding for the regulatory body, and the Code Committee, which is responsible for agreeing the Code with which all regulated entities will have to comply.

The Independent Press Trust

3.2 The Independent Press Trust will be established as a Community Interest Company.[15] The draft Articles of Association set out the objects of the Trust:[16]

> *"The objects of the Company are to carry on activities which benefit the community and in particular to promote and uphold the highest professional standards of journalism in the United Kingdom, the Channel Islands and the Isle of Man, including by:*
>
> - Establishing the Regulatory Scheme for regulating Regulated Entities;
> - Promoting compliance with the Editors' Code of Practice;
> - Encouraging conciliation between Regulated Entities and complainants;
> - Investigating and adjudicating on complaints from the public about Regulated Entities;
> - Publishing its findings; and
> - In accordance with the Regulatory Scheme, levying fines on Regulated Entities found to be in significant, systemic breach of the Editors' Code of Practice, such fines to be proportionate to the nature and effect of the breach;
>
> *having regard at all times to the importance in a democratic society of freedom of expression and the public's right to know."*

3.3 The principle decision making body of the Trust would be the Trust Board[17] with a Complaints Committee which would have primary responsibility for dealing with public complaints and an Investigations and Compliance Panel.[18] Operationally the Trust would be run by a Chief Executive Officer (CEO), who would be appointed by the Board and report to them. There would also be a Head of Complaints, supporting the Complaints Committee, and a Head of Standards and Compliance, supporting the Compliance and Investigation Panel, who would each report to the CEO and ultimately to the Board.[19, 20]

[15] p21, para 30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[16] pp4-5, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-D1.pdf
[17] paras 3.9-3.14 below
[18] p7, para 15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[19] p2, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[20] see Figure 1

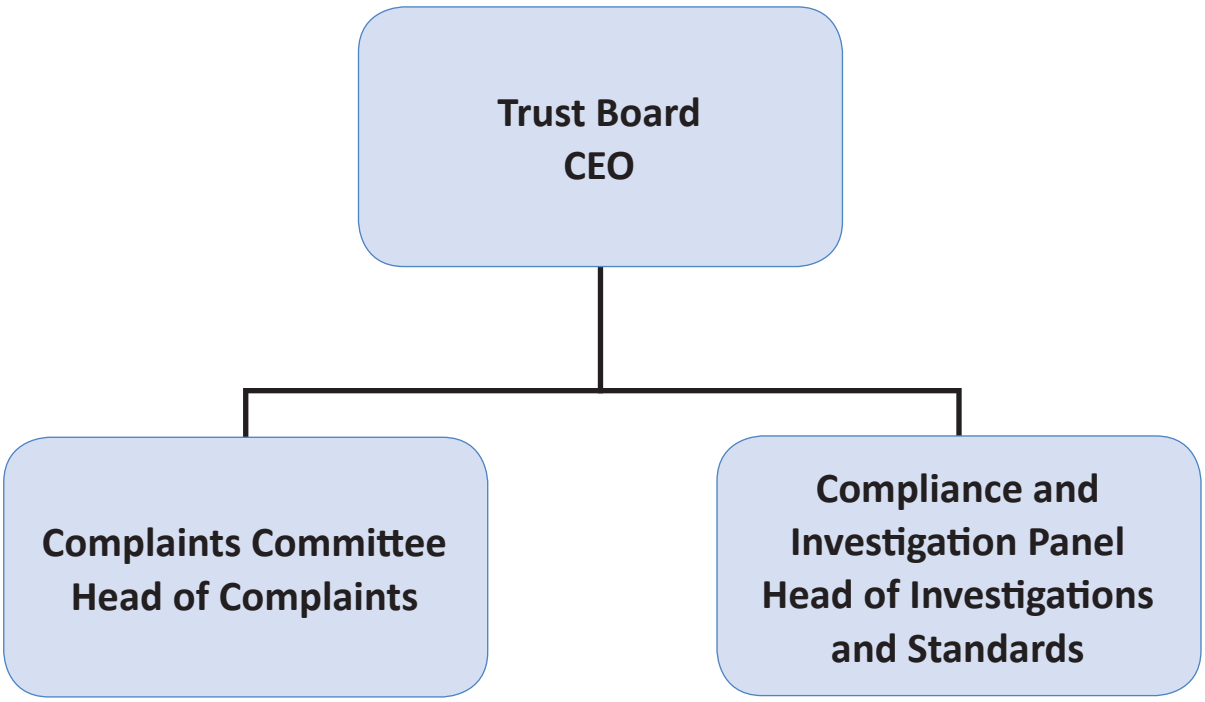

Figure K2.1: Structure of the Independent Trust

3.4 The Trust will be able to cover companies in the UK, the Channel Islands and the Isle of Man who are responsible for publishing printed newspaper or magazine titles in the UK, and their related websites, and web only publisher or news aggregators with content viewable in the UK.[21] Membership will not necessarily be open to any company meeting those criteria. The Industry Funding Body would have:[22]

> *"ultimate discretion to refuse membership to any publishers wishing to join the scheme, even if such a publisher falls within the definition of a regulated entity."*

3.5 In his oral evidence Lord Black explained that this provision was in order to allow membership of the Trust to be refused to what he described as *"top shelf publications"* whose membership would be *"wholly inappropriate"* as the only complaints in relation to them were likely to be about taste and decency.[23]

3.6 As drafted, this provision does not appear to place any restrictions on who could be refused membership by the IFB, or on the reasons for such a refusal. Neither does it allow the Press Trust itself any say in whether membership should be granted to an applicant. This could be an issue of particular concern if there were significant benefits to membership, or disadvantages attaching to non-membership.

3.7 In terms of content, the remit of the Trust covers editorial content in printed newspapers and magazines (but not books) and on websites and apps.[24] The Trust would not cover broadcast content, advertising, taste and decency, impartiality, copyright issues or employment

[21] p22, para 31, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[22] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[23] pp106-107, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[24] p1, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf

issues. In addition, the Trust will not cover issues in relation to current or possible criminal proceedings. The Trust will not cover non editorial content in newspapers or magazines, or content over which the publisher has not exercised editorial control.[25]

3.8 The functions of the Trust are to deal with complaints and mediation and to deal with standards and compliance.[26] These are dealt with in more detail below.[27]

The Trust Board

3.9 It is proposed that the Trust Board will guarantee the independence of the new system. It will be responsible for the management of the company's business, specifically supervising the governance of the company, managing its finances and audit, being responsible for the appointment of independent members, and liaising as necessary with the industry's trade associations.[28] The Trust Board has no role in the investigation of individual complaints from members of the public. By contrast, the Trust Board has to trigger any investigation into serious or systemic breach. The Trust Board is also responsible for establishing any appeal panel in relation to an investigation and for exercising the power of sanction in response to an investigation where that is appropriate.[29]

3.10 The 'Regulator', or in practice the Trust Board, will have responsibility for any changes to the Regulations, although any such changes must be approved by the IFB before they are made.[30]

3.11 The Trust will not be responsible for the Editors' Code of Practice[31] but any changes to the Code will have to be ratified by the Trust Board before they come into effect.[32]

The Trust Board: membership and appointments

3.12 The Trust Board is to comprise seven directors, four of whom (including the Chair) are to be independent, and three of whom are to be press directors.[33] Members will serve a three year term, renewable once.[34] No Trust Board member has more than one vote. The Chair has a second and casting vote in the case of a tied vote.[35]

3.13 The appointment of the Chair would be by a four person panel comprised of two industry members, appointed by the IFB, and two lay members, entirely independent of both the industry and the Trust and appointed by the Trust Board.[36] The panel would appoint a search consultant to draw up a shortlist for the post of the Chair. The panel would then interview the shortlisted candidates and make the appointment by unanimity.[37]

[25] p1, para 3, *ibid*
[26] p4, para 4, *ibid*
[27] Part K, Chapter 2, sections 4 and 5
[28] pp23-24, para 37, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[29] pp23-24, para 37, *ibid*
[30] p4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[31] part K, chapter 2, section 8
[32] p4, para 37, *ibid*
[33] p23, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[34] p23, para 38, *ibid*
[35] p7, para 15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-D1.pdf
[36] see para 3.14 for an explanation of the appointments process for the first Board
[37] pp40-41, para 76, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

3.14 The three other independent members of the Trust Board are to be appointed through an independent appointments process determined by the Trust Board itself.[38] A 'shadow' Trust Board will be set up by Lord Hunt to manage the first appointments process. Once the first permanent appointments have been made the Shadow Board will be disbanded.[39] The submission does not say whether the panel to appoint the first Chairman will be appointed by the Shadow Board or the first permanent Board appointees. The three press members of the Trust Board will be appointed by the IFB and are expected to be individuals with senior editorial or publishing experience but not currently serving editors.[40]

Relationship between the Trust and publishers 'regulated entities'

3.15 Publishers who join the Trust will be required to enter into a contract with the Trust which will require the publisher to:[41]

(a) comply with the Editors' Code;

(b) comply with the Regulations;

(c) cooperate with any standards investigation;

(d) abide by the Trust's decisions; and

(e) commit to funding for the period of the contract.

3.16 The Regulations set out the remit and functions of the Trust, the procedures for handling and mediation of complaints, the procedures for any investigations, the powers of the Investigations and Compliance Panel, the powers of the Board to impose sanctions, including fines, and the detail of the annual certification process.[42] All this is, therefore, contained within the contractual framework. The Regulations are the responsibility of the Trust, but can only be amended with the approval of the IFB.[43] The contract will also set out the obligations of the Trust to deal fairly and proportionately with the contracting parties.[44]

3.17 The original contract will be for a minimum of five years from the inception of the system[45] and then continue on an annual rolling basis.[46] Contracts will be between the publisher and the Trust and all contracts will be identical.[47] The Trust has the right, as one of its powers of sanction, to terminate the contract with an individual publisher.[48] An individual regulated entity has no power to terminate the contract.[49] If a majority of contracting parties agree to terminate the contract then all contracts can be terminated on 12 months notice, although not before the expiry of the original five year term.[50] The contracts can be varied by a majority of contracting parties, and where that is agreed the other contracting parties will be bound by the change.[51] If a contract is terminated, the contracting party is still liable in respect of

[38] p24, para 38, *ibid*
[39] p25, para 39, *ibid*
[40] p24, para 38, *ibid*
[41] p34, para 61, *ibid*
[42] paras 5.3-5.5
[43] p4, para 6.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[44] p34, para 62, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[45] p34, para 63, *ibid*
[46] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[47] p1, para 1.2, *ibid*
[48] p5, para 10.3, *ibid*
[49] p4, para 10.1, *ibid*
[50] p5, para 10.4, *ibid*
[51] p4, para 7, *ibid*

the time during which they were party to the contract.[52] If a title is transferred then the regulated entity has an obligation to use all reasonable endeavours to ensure that the new owner enters into a contract with the Trust.[53]

3.18 A 'majority' for the purposes of contract variation and termination is yet to be defined.[54] Lord Black explained that this would not be a simple majority of members, as that would mean the magazine sector would have the ability to outvote the rest of the members. Instead there would need to be a system of weighted votes that would give no sub sector the power of veto over changes and that would reflect the nature and diversity of the market.[55]

3.19 The regulated entities have no contractual liability towards each other.[56] The Regulator has no liability for failure to exercise its powers and functions,[57] and third parties have no rights under the contract,[58] so victims of press abuse and those complaining about press behaviour have no enforceable rights under this system. It has been suggested that the Trust could be subject to judicial review and Lord Black said that the industry would be unlikely to contest the justiciability of the body if an action for judicial review were brought.[59]

4. Complaints

4.1 There would be a Complaints Committee composed of 13 members: the Chair of the Trust, seven independent members, and five serving editors (two nationals, one Scottish, one regional and one magazine). The independent members would be appointed by the Trust. The industry members are to be nominated by their trade associations.[60] As with members of the Trust Board, members of the Complaints Committee would serve for a three year term, renewable once. [61]

4.2 Lord Black describes the proposed complaints handling regime as *"building on the widely regarded conciliation techniques of the PCC"*.[62] In a departure from current practice it is proposed that wherever possible a complaint should be handled directly by the editor of the publication concerned, and that only where a complaint cannot be resolved bilaterally should it become a matter for the regulator.[63] Lord Black recognises that this would require the strengthening of internal compliance systems within publishers and argues that the new regulatory structure, including the annual compliance reports,[64] would support this.[65]

[52] p5, para 11, *ibid*
[53] p3, para 3.1.8, *ibid*
[54] pp33-34, para 63, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[55] p116, lines 13-22, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[56] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[57] p4, para 8.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[58] p5, para 15. *ibid*
[59] pp117-118, lines 23-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[60] p27, para 46, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[61] p28, para 47, *ibid*
[62] p26, para 42, *ibid*
[63] pp25-26, paras 40-41, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[64] paras 5.3-5.5
[65] p25, para 40, *ibid*

4.3 The Trust will consider complaints about the failure of a regulated entity to meet the standards set out in the Editors' Code. Complaints will be accepted from people who have been directly affected by the matters complained of. In addition, the Head of Complaints will have discretion to consider third party complaints where there has been a significant breach and there is substantial public interest in allowing the complaint to be brought.[66] In his oral evidence Lord Black said that third party complaints on accuracy were currently accepted by the PCC, that that practice would continue under the proposed model and that the draft regulations were not intended to restrict that practice.[67]

4.4 A complaint must be made within two months of the date of first publication of the article complained of, or within two months of the end of correspondence between the complainant and the publisher, as long as that correspondence was started straight after publication.[68] Where the disputed article is published online and remains online at the time of the complaint, the Head of Complaints may consider the complaint if the company declines to remove the article.[69]

4.5 The proposed process appears to mirror closely the existing PCC approach. Once a complaint has been accepted by the Head of Complaints, the Trust will write to the regulated entity with a copy of the complaint. The company must then respond and a copy of that response is sent to the complainant. Any response from the complainant then goes back to the company. If the complaint has not been resolved by that stage then the primary aim of the Trust is to find a mediated resolution. If mediation is successful then a summary of the outcome would be published on the Trust's website. If mediation is not successful the complaint is passed to the Complaints Committee.[70]

4.6 The Complaints Committee must decide whether or not there has been a breach of the Code. If the Code has not been breached then the Committee will reject the complaint. If the Code has been breached then the Committee must take a view on whether sufficient remedial action has already been taken. If the Committee considers that the breach has been remedied then the Head of Complaints must decide whether it is appropriate for details of the outcome to be published on the Trust's website, but no other action is taken. If the breach has not been remedied then the Committee will make a public ruling upholding the complaint. The company will be obliged to publish the critical ruling with due prominence.[71]

4.7 Due prominence is to be interpreted in line with the Code.[72] The current PCC practice under the existing Code is that the prominence of publication of critical adjudications to be agreed between the PCC and the publisher. Lord Black explained that it would be for the Trust to negotiate any changes to the Code in this respect with the Code Committee.[73] The proposal itself does not give the Trust any powers to insist on the location or prominence of the publication of an adjudication.

[66] p2, para 8-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[67] pp11-16, lines 10-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[68] p2, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[69] p2, para 11, *ibid*
[70] p3, para 15, *ibid*
[71] pp3-4, para 16, *ibid*
[72] pp26-27, para 43, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[73] pp17-18, lines 17-25 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf

4.8 The sanctions available to the Trust in relation to complaints may include informal resolution, published apologies, a formal reprimand and critical adjudication.[74] The Trust will have no power to award compensation to a complainant.[75] Neither will the Complaints Committee have any power to levy a fine. In the case of a particularly significant breach of the Code, the Trust may instigate an investigation which would then bring other sanctions into play.

4.9 The complainant will have the right, within 14 days of the original decision, to appeal the decision to an Independent Assessor. The Independent Assessor will have the power to confirm the decision of the Complaints Committee or refer it back to the Committee with a different decision.[76] The publisher has no right of appeal against a decision of the Complaints Committee.[77]

4.10 The Independent Assessor will be appointed by the Trust Board for a three year term, renewable once. The Assessor must not be a member of the Complaints Committee and must not be connected with the industry.[78]

5. Standards and compliance

5.1 As explained above,[79] there will be a Head of Standards and Compliance, and it is proposed that there will be a small number of full time staff within the Trust who would service the Investigation and Compliance Panel. The Compliance Panel, however, would not be a permanent body but would be created on an ad hoc basis when required.[80] Despite this ad hoc existence, the Panel would have a number of ongoing core functions assigned to it according to Lord Black's submission. These would include:[81]

> (a) "overseeing the process of annual certification by publishers about ethical and governance issues among their titles;
>
> (b) monitoring and analysing the responses to that process and taking up issues that arise from them;
>
> (c) monitoring trends in individual complaints dealt with by the Complaints Committee to detect issues of concern on individual titles or across individual publishers; and
>
> (d) analysing public or Parliamentary reports about press standards within specific areas to see if there is a substantive compliance issue highlighted by the that requires investigation."

5.2 In each of these areas the Panel is expected to make recommendations to the Trust Board if they feel that an investigation should be undertaken.[82] If the Board agrees that an investigation

[74] pp26-27, para 43, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[75] p27, para 44, *ibid*
[76] pp42-43, para 85, *ibid*
[77] p20, lines 5-15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[78] pp42-43, para 85, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[79] para 3.3
[80] pp53-54, lines 11-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[81] p29, para 50, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[82] p29, para 51, *ibid*

is appropriate they will then appoint an Investigation Panel from within a pool of experts, drawing on appropriate experience and expertise.[83] There is an obvious scheduling difficulty here, since the recommendation that an investigation be carried out has to be made by the Panel, but a Panel is not appointed until the Board has authorised an investigation. In practice it is likely that the core functions described above would sit with the Head of Investigation and Compliance and its small staff. It is not entirely clear whether this executive team would be overseen on an ongoing basis by a public member of the independent Trust Board, appointed by the Trust Board.[84] [85]

Annual certification and compliance

5.3 Each regulated entity will have to submit an annual statement of its editorial practices covering the following information:[86]

(a) concise factual information about the publisher, including the titles published and their circulation, and the name of the publisher's compliance officer;

(b) copies of relevant manuals, codes or guidance;

(c) brief details on compliance processes, including how the publisher deals with pre-publication advice, verification of stories, compliance with the Editors' Code, editorial complaints and the training of staff;

(d) details of any incidents during the year involving a material breach of the Editors' Code or the Regulations, and the measures taken in relation to such breaches; and

(e) details of the steps taken in response to any adverse adjudications by the Trust during the year.

The requirement to compile and submit this annual statement is set out specifically in the draft contract framework, together with requirements on the regulated entities to use their best endeavour to ensure full cooperation with, and disclosure to, the Trust.[87]

5.4 The matter of whether these annual statements would be made public is left open. Lord Black told the Inquiry that the assumption was that the document would be published, with only commercial or personal confidential information redacted.[88] The draft Regulations leave publication of the annual reports to the discretion of the Trust.[89]

5.5 When the Trust receives the annual reports they would be reviewed by the Head of Standards and Compliance, who would raise any concerns directly with the company involved, before putting a report to the Trust which would identify any issues of concern or that require further investigation.[90]

[83] pp53-54, lines 11-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[84] para 5.1
[85] p26, para 49, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[86] p11, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[87] pp2-3, para 3.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[88] p60, lines 10-17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[89] p5, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[90] p5, para 24, *ibid*

Requirement for a named compliance officer

5.6 The draft contractual framework requires the appointment within each regulated entity of a senior individual who will take responsibility for ensuring that the regulated entity, and all its staff and subcontractors, comply with the contract.[91] Lord Black describes this role as having responsibility for overseeing monitoring and compliance.[92]

Investigations

5.7 Both the structural aspects of the standards and investigations arm of the proposed Trust and the proactive compliance requirements placed on regulated entities are set out above.[93] The Trust also has its own proactive powers of investigation, over and above specific reactive response to complaints, where there is cause for concern. An investigation by the Trust may be triggered in the following circumstances:[94]

(a) "where it appears there have been significant systemic breaches of the Editors' Code or in general of ethical behaviour;

(b) where serious breaches of the criminal law have been found by the courts; or

(c) where annual certification identifies significant and substantive issues of concern in relation to a single incident, compliance processes or a long term pattern of code breaches."

This list of circumstances in which an investigation may take place is not exhaustive.

Investigation process

5.8 Where it appears to the Investigation and Compliance Panel (the structural difficulties in this are noted above)[95] that there is a need for an investigation into a particular publisher for one of the reasons above, they would make a report to the Trust Board, together with a recommendation for an investigation.[96] The Trust Board can instigate an investigation in response to a recommendation from the head of Standards and Compliance or on its own initiative.[97]

5.9 If the Board believes that a full investigation is required, it would decide the remit and terms of reference for an investigation. It would then write to the proposed subject of the investigation, setting out the remit and terms of reference, and explaining why an investigation was thought necessary. The Trust Board will then take any response from the regulated entity into account in reaching its decision on whether to instigate an investigation.[98]

5.10 Once the Trust Board has decided that an investigation should take place they appoint a member of the Trust Board to have *"day to day oversight"* of the investigation, which is

[91] p3, para 3.1.7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[92] p32, para 57, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[93] para 5.1-5.2 and paras 5.3-5.6 respectively
[94] pp29-30, para 51, *ibid*
[95] para 5.2
[96] p29, para 51, *ibid*
[97] p5, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[98] pp6-7, para 27-28, *ibid*

undertaken by the Head of Standards and Compliance.[99] At the same time, the Trust Board must appoint an Investigation Panel. The Panel will comprise three people, two of whom will be public representatives with no connection to the press; and the third an individual with a senior newspaper or digital background, but not a serving editor.[100] The Panel are all to be appointed from a pool of people with relevant expertise whose names will be published.[101]

5.11 The investigation would be carried out by the Head of Standards and Compliance, who must ensure that the investigation is independent, proportionate, fair, objective, open-minded and consistent.[102] In pursing the investigation the Head of Standards and Compliance can request documents, answers to questions and access to key personnel. If the subject of the investigation refuses to provide the information required then the fact of the refusal, and the reasons for it, will be notified to the Investigation Panel.[103] The Panel, however, have no role in resolving the situation.

5.12 If there is any dispute between the Head of Standards and Compliance and the subject of an investigation about the scope of an investigation, that dispute would be referred to the Trust Board. If the subject of the investigation continues to refuse to provide documents that the Head of Standards has properly requested then the Trust can take legal action under the contract for specific performance. A decision to bring legal proceedings to compel production of documents has to be approved by the Trust Board. There is no equivalent power to seek specific performance in relation to access to personnel.[104]

5.13 Once the Head of Standards and Compliance has completed his investigation he would prepare a report detailing the conclusions and any recommendations. That report would be provided to the subject of the investigation, who then would have 28 days to provide written submissions to the Investigation Panel. The Investigation Panel would meet to consider the report from the Head of Standards and Compliance, together with any representations received from the subjects of the investigation.

5.14 At that meeting the Investigation Panel would *"in most cases"* hear a presentation on the report from the Head of Standards and Compliance. It is not clear in what circumstances a presentation from the Head of Standards and Compliance would not be appropriate. In all cases the Panel will invite representatives from the subject of the investigation to attend the meeting, where they will be entitled to make representations and they could be asked questions by the Panel. The representatives of the subject of the investigation would leave the meeting when the Panel discusses and reaches its decision.[105]

5.15 At the meeting the Panel can request further work to be done, or it can reach a preliminary conclusion. The conclusions open to the Panel are:[106]

(a) that there is no evidence of any, or of significant, wrongdoing;

(b) to make non-binding recommendations about best practice, whether directed

[99] p7, para 29, *ibid*
[100] p30, para 52, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[101] pp53-54, lines 24-6, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[102] p6, para 29, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[103] p6, para 31, *ibid*
[104] p6-7, paras 32-33, *ibid*
[105] p7, paras 35-36, *ibid*
[106] pp7-8, para 38, *ibid*

specifically at the subject of the investigation or at the industry more generally;

(c) to reprimand the subject of the investigation;

(d) to refer a systemic failure to the Trust Board to consider a fine;

(e) to direct the publication, by the subject of the investigation, of a summary of the Panel's finding. The wording and prominence of that publication are to be agreed between the regulated entity and the Trust Board;

(f) to refer the matter to the Trust Board to consider a cost contribution; or

(g) to require undertakings from the subject of the investigation in respect of future conduct.

Further consideration of these sanctions is made below.[107]

5.16 The decision of the Panel must be sent in draft to the subject of the investigation, who has 14 days to make comments on the draft, including correcting mistakes or arguing that anything has been misunderstood or that incorrect conclusions have been reached. Having received those representations the Panel will then reach a final decision.[108]

5.17 The subject of the investigation can ask for a review of that decision by writing to the Trust Board within 14 days of receiving the decision of the Panel. A review can be sought on the grounds that either the process or the decision were fundamentally flawed.[109] The Trust Board will consider the evidence, including any new evidence submitted to it, and decide whether to accept the review request. If the Trust Board accepts the review request then they will establish a Review Panel.[110] The composition of a Review Panel is exactly the same as that of an Investigation Panel but must not contain any of the members of the original investigations panel.[111]

5.18 The Review Panel would consider all the information provided to the Investigation Panel and, at their discretion, any new evidence provided. The draft decision of the Review Panel would be sent to the subject of the investigation who will have 14 days to make representations including, as at the earlier stage, to correct any mistakes, argue that anything has been misunderstood or that the wrong conclusions have been reached.[112]

5.19 The Review Panel would consider any representations made by the subject of the investigation and then reach a final conclusion, against which there is no further right of appeal.[113] There is no role in this process for anyone who has been the victim of any of the behaviour under investigation. Complainants have no power to submit evidence or to provide submissions on the decisions.[114] Complainants will generally not be aware of an investigation until a final decision is published.

5.20 The decision of the Investigation Panel, or, if there is a review, the decision of the Review Panel, and the reasons for it, would normally be published.[115]

[107] paras 5.21-5.25 below
[108] p8, para 40-41 *ibid*
[109] p8, para 44-46, *ibid*
[110] p8, paras 47-49, *ibid*
[111] p9, paras 54-55, *ibid*
[112] p9, para 52, *ibid*
[113] p9, para 52-53, *ibid*
[114] p7, para 34, *ibid*
[115] pp8-9, paras 42 & 53, *ibid*

Sanctions

5.21 The range of sanctions available to the Trust starts with a 'reprimand' about which no further information is provided. It is not clear how a reprimand would be issued, or whether it would be published, although publication of a summary of the Panel's findings is also an available sanction. The Trust can also require, and monitor, undertakings in respect of future conduct.

5.22 If the Investigation Panel (or the Review Panel) concludes that there has been a systemic failure the Trust Board has the power to levy fine on the relevant regulated entity.[116] A 'systemic failure' is one: [117]

> *"where it appears there has been one or more significant or serial or widespread breach or breaches of the Editors' Code or of ethical standards which indicate a systemic or serious failure at one or more Regulated Entity".*

5.23 The Trust Board would decide the level of the fine. The criteria to be followed by the Trust Board in determining the level of fines is to be set out in the Financial Sanctions Guidelines. The Financial Sanctions Guidelines are to be issued by the IFB.[118] A draft of those guidelines has been provided and would allow the Trust Board to impose a fine of up to 1% of the turnover related to the publication found to have committed a systematic failure up to a maximum of £1,000,000.[119]

5.24 In setting the level of any fine the Trust Board has to take account of the following factors:[120]

(a) the nature of the regulated entity;

(b) the nature of the systemic failure and its impact;

(c) whether the systemic failure was inadvertent or deliberate or reckless;

(d) any aggravating or mitigating factors (including whether the regulated entity brought the failure to the attention of the Trust, cooperation with the investigation, whether the management were aware of the failure and what steps, if any, they took to prevent it, and the previous record of the publisher);

(e) any adjustments for deterrence; and

(f) any discounts for early settlement.

5.25 Finally, it is open to the Trust Board to require the regulated entity to make a contribution to costs. The Regulations indicate that there will be separate guidance on how the Trust Board should determine a cost contribution, but this is not covered in the material provided to the Inquiry.[121]

6. Potential for growth

6.1 The proposal allows for the addition of an arbitral arm to deal with matters of libel and/or privacy issues. Lord Black states that a proposal along these lines has not been included in the submission to the Inquiry because the nature of any such arbitral system would be dependent on changes to the law, including the Defamation Bill currently before Parliament.

[116] p12, para 2.1, *ibid*
[117] p5, para 25.1, *ibid*
[118] p3, para 5.1.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[119] p12, para 2.1-2.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[120] pp13-14, para 2.3-2.4, *ibid*
[121] p8, para 38.6, *ibid*

The Inquiry is told that the industry is keen to pursue this option and is satisfied that the proposal submitted is sufficiently flexible to allow for such a development.[122]

7. Funding

7.1 The proposed system would be fully funded by the industry through the payment of membership fees to the Trust. The funding arrangements for the standards and compliance part of the structure are slightly different, and are explained below, but again the process is fully funded by the industry. Lord Black, on behalf of the industry, has said that it would be inappropriate for the taxpayer to make any contribution towards a system of self-regulation. Similarly, it would be wrong to require complainants to pay any charge in relation to complaints. The fully funded self-regulatory proposal is submitted to the Inquiry as a sign of the industry's commitment to protecting the public and putting right things which have gone wrong.[123] [124]

7.2 The funding for the Trust will be guaranteed as part of the contract. Publishers will commit to making payments for the duration of the contract.[125] The core cost (excluding compliance and standards work to be funded separately) is estimated to be around £2.25 million per annum.[126] The fees payable by each publisher will be calculated according to an "agreed formula".[127] That formula is to be set by the IFB and can be changed at their discretion.[128] Lord Black has told the Inquiry that it is:[129]

> *"impossible to predict how [the costs of the new system] might be fairly and proportionately divided within the industry."*

7.3 At a subsectoral level, the shares of the cost of the PCC are generally 54% for national newspapers, 39% for Scottish and regional newspapers, and 7% for magazines. These proportions have changed for the 2012 financial year, with national newspapers taking a 59.1% share, Scottish and regional newspapers a 34.4% share and magazines a 6.5% share.[130] The current distribution of costs for the PCC between national newspapers has never been disclosed on a publisher by publisher basis as they are considered to contain commercially confidential information.[131] The Inquiry has been told that the national newspaper publishers are currently looking at the funding formulae to see how they could better reflect the realities of new business models.[132] Lord Black expressed the hope that whatever funding formula emerges from this process it might be possible to be more transparent about precisely who was paying what.[133]

[122] p23, para 36, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[123] para 7.6 below
[124] p12, para 26, *ibid*
[125] pp43-44, para 89, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[126] p45, para 94, *ibid*
[127] pp43-44, para 89, *ibid*
[128] p4, para 9.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[129] p8, para 28, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Fourth-Witness-Statement-of-Lord-Black.pdf
[130] p2, para 6, *ibid*
[131] pp2-3, para 7, *ibid*
[132] p8, para 29, *ibid*
[133] p92, lines 13-21, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

7.4 The IFB will publish the list of publishers who have signed a contract with the regulator and an annual record of the proportions of funding met by different parts of the industry.[134]

7.5 The IFB has the responsibility both to set the formula and to collect the membership fees from the publishers. There is no mechanism set down for the IFB to agree the overall level of funding with the Trust Board. Lord Black explained that the core costs are expected to be reasonably predictable at £2.25m,[135] that these were significant sums for the industry in the current commercial climate,[136] but that he had no doubt that sufficient funding would be made available to allow the regulator to fulfil its function.[137]

7.6 The standards and compliance costs are more difficult to predict and consequently will be subject to a different funding approach.[138] The Trust will be established with a ring-fenced enforcement fund of £100,000 to cover the costs of the Investigations and Compliance Panel. It is anticipated that, over time, the costs of the compliance arm will be met from fines levied on publishers found responsible for wrong doing. Once the enforcement fund reaches £500,000 the original £100,000 contribution will be repaid to its initial contributors.[139]

8. The Code and the Code Committee

8.1 The whole proposal relies on the existence of the Editors' Code as the statement of standards to which publishers commit when entering into a contract with the Trust. The Editors' Code is currently owned by the Code Committee, which is comprised of 13 serving editors, drawn from across the industry.[140] Under the proposal, that structure would remain in place, but there would be five additional members: the Chair and the Chief Executive of the Trust, and three further public members appointed by the Trust Board. The Chair of the Code Committee would be elected by the members of the Committee from among the editorial members.[141]

8.2 Under the draft contractual structure the Code is the responsibility of the IFB, although the relationship between the Code Committee and the IFB is not spelled out in detail. Any changes to the Code would need to be approved by the Trust Board before they could come into effect.[142]

9. The Industry Funding Body

9.1 The model presented is one of "*independently led self-regulation*".[143] The industry is represented in the system largely by the IFB, which has various roles and responsibilities.

[134] p44, para 90, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[135] p74, lines 1-5, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[136] p45, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[137] p73, lines 2-9, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[138] p74, lines 6-11, *ibid*
[139] p45, para 93, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[140] pp40-41, para 79, *ibid*
[141] pp40-41, para 79-80, *ibid*
[142] p4, para 6.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[143] p45, line 19, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

Each of those roles have already been touched on in the paragraphs above, but this section sets out the totality of the IFB's role in relation to the proposed self-regulatory regime.

9.2 Lord Black said:[144]

> *"In any self-regulator regime there will always be a need for the industry to be involved in some way. In this case, the publishing industry's chief involvement will be through the operation of the Code Committee [….] and some form of industry co-ordination body to be responsible for funding. This is currently provided through the Press Standards Board of Finance. Its structure and role may change so for the purposed of this note this entity is referred to as the Industry Funding Body."*

9.3 The IFB is obviously responsible for setting and collecting the membership fees. The IFB would set both the overall level of funding to be provided to the Trust and the distribution of that funding between the regulated entities.[145]

9.4 The IFB has the power to enforce the contract between a publisher and the Trust in respect of the payment of the membership fee.[146]

9.5 The IFB is responsible for the Editors' Code. Any changes to the Code will have to be approved by the Trust Board.[147]

9.6 The IFB is responsible for appointing the two industry members of the appointment panel that appoints the Chair of the Trust.[148]

9.7 The IFB must approve any changes to the Regulations.[149]

9.8 The IFB is responsible for the Sanctions Guidance which will be used in setting the level of any fine as a result of an investigation.[150]

10. Incentives to membership

10.1 It is recognised by the industry that it is important to have incentives for publishers to join the proposed system. Four such incentives are outlined in the proposal submitted to the Inquiry by Lord Black. These are:

(a) the provision of press cards;

(b) the use of agency copy through the Press Association;

(c) a "kitemark" for publications which are part of the system; and

(d) the way in which advertisers can support the system.

[144] p21, para 29, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[145] paras 7.2-7.4 above
[146] p4, para 9.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[147] para 8.2 above
[148] para 3.13 above
[149] para 3.10 above
[150] para 5.23 above

Press cards

10.2 Press cards are currently issued under the banner of the UK Press Card Authority (UKPCA) by 17 gatekeepers ranging from the NPA to the National Union of Journalists. At present the press card simply confirms the identity of the holder and the fact that they meet the criteria of their gatekeeper, which loosely means that they are engaged in journalistic work.[151]

10.3 Lord Black told the Inquiry that under the proposal the issuing of press cards would be limited to journalists working for publications who were signed up to the self-regulatory regime, or other organisations such as a relevant industry body or a trade union.[152] The basis on which bodies were accepted as 'relevant' in this context has not been set out in any detail.

10.4 In addition to a limitation on who could be issued with press cards, the proposal is that the courts, Parliament, local councils, police, and sports and entertainment bodies would agree only to deal with journalists accredited with the new press cards.[153] The Inquiry has seen no evidence of any discussions between the industry and these bodies on the proposal, nor has any evidence been taken from those bodies as to their willingness to participate in such an approach.

Access to agency copy

10.5 Paul Dacre, editor in chief of Associated Newspapers told the Inquiry that the newspaper industry owns the Press Association (PA) and that there are "*significant steps afoot*" to examine how the service could be denied to publishers who were not members of the new self-regulatory system.[154] This proposal was described by Lord Black as "*legally challenging*", particularly because of the competition issues raised; these are dealt with later in this Report[155] and will be the subject of a report to the PA Board by September 2012.[156]

Kitemark

10.6 The provision of a kitemark as a badge of quality would be a matter for the Trust itself. Mr Dacre suggested that such a mark could be carried alongside corrections and clarifications columns to tell the public how to make a complaint and provide information on the process.[157] Lord Hunt said that those who join the new regime should carry its badge with pride.[158]

Support from advertisers

10.7 No detailed proposal in relation to what support advertisers could give to the self-regulatory system has been provided. Mr Dacre suggested that advertisers, in particular Government and public sector bodies, might be persuaded not to advertise in newspapers which were

[151] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[152] p22, lines 3-9, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[153] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[154] p7, *ibid*
[155] Part K, Chapter 4
[156] pp23-24, lines 14-11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[157] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[158] p17, para 53, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf

not subscribers to the scheme.[159] The Inquiry has seen no evidence that any discussions have been held with any bodies which might be able to deliver a proposal in this regard and I cannot think of any commercial reason why advertisers would wish to go down this route, which could threaten to deprive them of access to one route to what might be a significant market.

[159] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf

CHAPTER 3
ANALYSIS OF THE MODEL PROPOSED BY THE PCC AND PRESSBOF

1. Introduction

1.1 The last Chapter set out the key features of the model presented by Lord Black on behalf of PressBoF and the industry. This Chapter analyses that proposal, in particular in relation to the criteria set out in Chapter 1 above.

2. Effectiveness

The model must be perceived as credible by the industry

2.1 In the criteria for a new effective regulatory regime I said that a new model must be perceived as credible by the industry. One aspect of that credibility is the willingness of the industry to participate in it. It was recognised by Lord Hunt that a new system would not be perceived to be effective if a 'big fish' were not a part of it, accepting that Northern and Shell qualified as a 'big fish' for these purposes.[1] He went further:[2]

> *"Q. ... of course if they don't sign up and the devil is in the detail, then immediately the credibility of the new system would have been fatally undermined. That must follow, mustn't it?*
>
> *A. Yes."*

2.2 Lord Black also accepts this by implication when he identifies the withdrawal of Northern and Shell from the PCC as evidence of a *"significant structural problem"* within the existing system.[3] My own strong view is that no system of press standards regulation could be considered to be credible if one or more national newspaper publisher were not covered by it in some way, without any consequences as a result.

2.3 So, does the model proposed by Lord Black meet that test? The proposal was submitted to the Inquiry by Lord Black in his capacity as Chairman of PressBoF, which is the co-ordinating body for the newspaper and magazine publishing industry's trade associations. Those trade associations said:[4]

> *"While a lot of detailed work is still to be done, the proposals have the broad support of the organisations and their members. The proposals are being further developed in the light of comments received as part of the ongoing consultation process."*

[1] pp1-2, lines 14-14, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[2] p3, lines 11-15,Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[3] p3, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[4] pp2-3, para 5, *ibid*

2.4 Whilst this model has been offered to the Inquiry by the industry as a whole, some national publishers argued for 'even tougher' controls.[5] Lord Black explained that that editors at The Independent, The Financial Times and the Guardian had wanted to look at the whether some form of statutory underpinning might be necessary.[6]

2.5 These proposals have been the subject of three consultation processes, first on the broad architecture, then on an initial draft contract and set of regulations, and finally on a revised set of those documents together with draft articles of association for the new company. The proposal submitted to the Inquiry is the result of that extended consultation process.[7] The consultations were primarily conducted through the trade associations, but the documents were also made available to those in the industry who are not members of any association.[8]

Industry readiness

2.6 Despite this extensive consultation process within the industry, it is clear that the proposals have not been developed to a stage where many, if any, publishers are yet willing to sign a contract with the new regulator. Section 6 below looks in detail at the evidence the Inquiry has had from the editors of national and regional newspapers, magazines and blogs about their views of Lord Black's proposal and the extent to which they are now ready and willing to sign up to it. In summary, however, there are a handful of national newspapers which are signalling a clear willingness to join, almost irrespective of the final detail of the contract. A substantial number of other national titles have indicated willingness, in principle, to join but have indicated concerns on matters of detail and, in some cases, principle as well. Those national titles belonging to the Northern and Shell Group have indicated significant concerns about the proposals and reservations about joining the system.

2.7 Among both magazines and local and regional newspapers there is broad support for the principles that underpin the proposals, coupled with a natural caution about committing to a contract where the details remain to be settled. A number of the editors who have given evidence have identified issues with the proposals that remain to be addressed, and which would prevent them from signing up to the proposal as currently drafted. None identified any points of principle that would prevent them joining at all if the proposal could be amended to meet their concerns.

2.8 The editors of blogs who have provided evidence to the Inquiry largely felt that the proposal was irrelevant to them and offered them nothing.

2.9 It is clear from this that Lord Black's proposals enjoy wide support throughout the newspaper publishing industry, and that magazine publishers are also generally sympathetic to the approach. However, the nature of the views expressed is evidence of the process by which the proposals have been developed, with the national press at the heart of the structure. The fact that a number of major national newspaper publishers are willing to tell the Inquiry that they are committed to signing up to the proposed scheme is undoubtedly a positive sign. However, the fact that some of the national publishers are still expressing doubts on points of detail means that there must be doubt about the ability of PressBoF to secure the agreement even of these publishers to the model as presented. Further, the significant concerns on points of principle expressed by editors from the Northern and Shell group publications must indicate doubt about the likelihood of Northern and Shell ultimately deciding in favour of membership of the proposed body.

[5] p2, para 4, *ibid*
[6] p10, lines 10-22, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[7] pp8-9, lines 3-3, Lord Black, *ibid*
[8] p9, lines 4-12, Lord Black, *ibid*

2.10 Under these circumstances, whilst it is clearly possible that all national newspapers would be prepared to join a system along the lines proposed, I cannot conclude with any certainty that the system proposed by Lord Black would have any greater coverage among the national press than the PCC currently does. This must be regarded as a significant flaw, albeit one that could be remedied by all major national newspapers signing a contract for membership of the new system.

2.11 A new regulatory system must work for the whole press and the emerging digital market, not just for the national press. The local and regional press, with some magazines and online news providers, have identified a number of concerns about the compliance burdens, the cost, the ability of that part of the press to influence the system and the ability of the regulator to vary the contract without the support of all members. These are real concerns and I would anticipate that the publishers will want to see real answers to them before agreeing to sign up to the system. It might, for example, be sufficient to re-balance the burden of the costs between local and national publishers but, without detail, it is impossible to say. It would obviously be important from a credibility perspective that resolving these concerns should not significantly weaken the independence or regulatory power of the body proposed.

Incentives to join

2.12 Lord Black sets out four potential incentives that could be developed to encourage membership of the system. The first would be to limit the provision of press cards to journalists who work for an organisation that had signed up to an ethical code.

2.13 The Inquiry has been provided with a copy of a proposal which was considered by the UK Press Card Association (UKPCA).[9] The proposal would involve two changes to the process by which press cards are currently issued. First, the cardholder would have to make a declaration that they would abide by an appropriate ethical code. Second, there would be a requirement for the ethical compliance of the cardholder's employer or, if he or she was freelance, his or her main client, professional association or trade union.[10]

2.14 The proposal would not include any change in the process by which foreign journalists are able to be issued with press cards.[11] The UKPCA note that, in respect of broadcasters and newspaper and magazine publishers who are members of the industry self-regulatory body, there would effectively be no change to the current system. Broadcasters are already regulated by Ofcom and the UKPCA would accept membership of the new self-regulatory body as sufficient evidence of ethical compliance.[12]

2.15 The UKPCA notes that press agencies and picture agencies would need to become ethically regulated by subscribing to an appropriate code. The Press Association (PA) is currently subject to the PCC code.[13] There would also be significant changes for individuals who operate on a freelance basis and for those organisations, such as professional organisations and trade unions, who act as press card gate keepers for them. In these circumstances the UKPCA would expect the gate keeper organisation to have or subscribe to an appropriate ethical code. It is noted that the NUJ already has its own code. In addition, these gatekeepers would have to certify that, where they were issuing a card to a journalist who is an employee,

[9] UKPCA proposal, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Second-submission-from-Mike-Granatt1.pdf
[10] p5, para 12, *ibid*
[11] p6, para 16, *ibid*
[12] pp6-7, paras 20-21, *ibid*
[13] p7, paras 22-23, *ibid*

that the employer is itself signed up to appropriate ethical regulation. In other words, a union could *"not issue a UK press card to an employee of a newspaper not signed up to the PCC's successor"*.[14]

2.16 In the case of unaffiliated freelancers (those who are not members of a professional association or a trade union who acts as a gate keeper for the UKPCA) a UKPCA subcommittee would be established to consider eligibility; those found to be eligible by the subcommittee would be helped to find a gatekeeper.[15]

2.17 Some significant questions remain unanswered by the proposal. Specifically it is recognised that the scheme would need to deal with questions of eligibility, complaints, misuse, misbehaviour and breaches of ethical codes. The UKPCA proposal says that withdrawal of a card should only be by decision of the gatekeepers' committee.[16]

2.18 This proposal was considered by the UK Press Card Association on 10 July 2012 but did not achieve the 75% majority required for a rule change. The UKPCA has no plans to revisit this issue.[17] Mike Gannatt, the Chair of the UKPCA, gave it as his opinion that this was due not to any objection in principle to incorporating an ethical dimension to accreditation, but to the attempt to link that with a regulatory regime:[18]

> *"The kitemark proposal foundered over its additional intention to coerce compliance with self-regulation. This created insurmountable conflicts of opinion and interest."*

2.19 Despite the UKPCA decision, it is worth considering the merits and disadvantages of the proposal in case it should be raised again. A number of witnesses to the Inquiry have raised substantive concerns about it. Harriet Harman QC MP pointed out that the risk with this proposal that citizens and bloggers could be excluded from access to public information. The many private organisations, such as sports clubs, who hold press conferences might not want to be a part of such a proposal. The more significant risk was that individual journalists might lose their accreditation when a wider culture within a publication was to blame. Essentially, she said, this proposal was akin to licensing and could inhibit a free press.[19]

2.20 Angela Philips echoed all of these concerns, saying that it would, in effect let the tabloid press decide who was going to be allowed to be a journalist.[20] There would be no way to protect a journalist who fell out with management at his or her newspaper who could then simply revoke his or her press card.[21] Similarly, Ofcom noted that there would be some definitional difficulties in defining a journalist in a digital environment and that such a system could potentially have a restrictive effect on rights of freedom of expression.[22] The Media Standards Trust regarded the proposal as:[23]

[14] pp7-8, paras 24-26, *ibid*
[15] p8, para 27, *ibid*
[16] p9, para 30, *ibid*
[17] p1, *ibid*
[18] p2, *ibid*
[19] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[20] Senior Lecturer in the Department of Media & Communications, Goldsmiths, University of London
[21] pp35-36, lines 3-13, Angela Philips, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[22] p10, para 4.13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[23] p60, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf

> *"flawed; it is outdated in an age of digital media; discriminatory against the individual blogger or concerned citizen; most likely at odds with the commercial interests of many of the organisations it seeks to engage with; and perilously close to a licensing of journalism by non-state means."*

2.21 By contrast, the Media Regulation Roundtable[24] and Professor Roy Greenslade[25] noted the proposal was a worthwhile potential benefit to being a member of a self-regulatory system.

2.22 I share the concerns of those who liken this proposal to the licensing of journalists. It seems to me that the risk of this working in a way which is damaging to competition and freedom of speech is high. It also seems to me that it puts individual journalists very much at risk of being expected to take the consequences of ethical breaches that they may have been pressured into by the culture or practice operating inside the newsroom in which they were working. In addition to those concerns, I am not convinced that those who want to get their message across to the media will see any benefit in cooperating with this proposal, so its effectiveness as an incentive to membership of a self-regulatory regime may well be limited. I do not regard this as either a sufficient, or a desirable, approach to encouraging publishers into a self-regulatory standards regime.

2.23 The second incentive proposed is that the Press Association was looking to see whether it could provide an incentive to membership of the self-regulatory body by varying the terms on which it supplies services to non-members.[26] A proposal of this sort would undoubtedly raise serious questions about compatibility with competition law. PressBoF has helpfully set out the arguments that support the theory that such an arrangement could be considered.[27] Even if it were to be in breach of s2 of the Competition Act 1998, such an arrangement might be allowed if it were inherent to the regulatory proposal or if it could be objectively justified as being in the public interest in raising the professional and ethical standards of the press. It is not possible to take a view on whether a proposal of this sort would, in fact, meet any of those tests without seeing the detail of the proposal. Even if it were to meet those tests it would also have to be proportionate and the least restrictive method of achieving the desired outcome: I am not at all satisfied that this would be the case.

2.24 The impact of this proposal would also depend heavily on what was involved. There is a substantial difference, for example, between refusing to supply publishers with copy or supplying them on different terms and conditions. In any case, other press agencies exist and it is possible that a publisher outside the system may be able to replace PA services.

2.25 The third incentive proposed is access for members to a kitemark to signify quality, and the fourth is an entirely undefined suggestion that the advertising industry might be able to help. I look at these ideas in a little more detail later on, but essentially there is little to suggest that either would be particularly effective as incentives.[28]

[24] p21, para 72, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[25] p16, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[26] pp23-24, lines 23-11, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[27] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Second-Submission-from-PressBof-in-relation-to-Module-4.pdf
[28] section 5 of Chapter J5

2.26 I cannot escape the conclusion that this package of incentives, particularly given the position now reached by the UKPCA, does not constitute a compelling argument for any publisher to join the body if they were otherwise not inclined to do so. I am very keen to find incentives to persuade publishers into independent voluntary regulation and I find it somewhat disappointing that the industry, with their own knowledge of what is important to them, have not managed to come up with a more compelling package than this.

Contract issues

Contract term

2.27 Membership of the system would be by a five year rolling contract. The contract would require members to pay the agreed levy for the duration of the contract and would bind members to comply with the provisions of the contract, including compliance with the code and co-operation with investigations, even if they were otherwise to leave the system during the term of the contract.[29] Should such a five year contact be signed, it would provide a reasonable degree of certainty for the system for five years. However, there is no certainty over what might happen next. Lord Black suggested two possibilities:[30]

> *"It could work on a 12-month rolling cycle after the five-year term has ended. There is another possibility, that the five-year break term could be used to review the terms of the contract and publishers, if they agree, could then enter another five-year contract."*

2.28 The continuation of the system proposed by Lord Black beyond the initial five year period would be entirely dependent on the willingness of the industry to enter into a further contract. Furthermore, it is entirely possible that at that point the majority might decide to create a much less robust system. Lord Black told the Inquiry that he could not see circumstances in which that would happen. Instead, it would be an opportunity for consideration of how well the system worked and any improvements that could be made.[31] He said:[32]

> *"So it's a break-point that should work, I think, in both ways."*

2.29 In practice, this must represent a very real risk to the sustainability of the proposed model beyond the first five year term. I recognise that no system of regulation could be expected, or wished, to last for ever, but this degree of built in failure seems problematic. Nor is it clear to me how this could be remedied. I entirely accept that it is not possible to bind people to a contract in perpetuity, in which case this would appear to be a fundamental problem with a system which is held together only by contract.

Transfer of title

2.30 Should a member wish to transfer a title to a non-member they are required to use *"all reasonable endeavours"* to ensure that the new owner is a member of the regulatory scheme.[33] This stops short of the more obvious requirement that a title may not be transferred

[29] p5, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[30] p43, lines 7-11, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[31] p44, lines 1-12, Lord Black, *ibid*
[32] p44, lines 12-13, Lord Black, *ibid*
[33] p3, para 3.1.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf

unless the new owner signs a contract with the scheme. Lord Black explained that the looser formulation was intended to protect the position of proprietors of local newspapers, where a degree of consolidation in the market is expected and proprietors are reluctant to have their hands tied in the matter of potential purchasers. However, Lord Black pointed out that most transfers of titles were likely to be between publishers who were already members of the system so the issue would not arise often.[34] I recognise the concern expressed in relation to the economic difficulties faced in particular by local newspapers. However, this is a rather obvious weak link in the argument that the contract binds newspapers into the system.

Contract variation

2.31 The structure of the system is that all publishers would enter into a bilateral contract with the regulator. Those contracts would all be identical. The contract could be varied where a majority agrees to variation. The precise mechanism for this is not set out in the proposal put to the Inquiry. Lord Black explained that the majority would have to be calculated on the basis of weighted votes:[35]

> *"If it wasn't weighted votes, you could have a situation in which, because they are much greater in number, the magazine publishers could change the contract by outvoting everybody else. So we need to have (sic) find some way of doing that which gives no group of regulated entities a power of veto over changes, but that the voting procedure reflects the nature and diversity of the market. I can't pretend we've cracked that one."*

This is a potentially significant issue. Some in the industry have raised their unease about being subject to a contract which could be varied without their agreement. Clearly the exact nature of the weighting will be an important issue for all in the industry and may be difficult to resolve. Should it not be possible to reach agreement on a method of varying the contract by majority, the only alternative would be for any change to require unanimity; this would make changes extremely difficult to achieve.

Enforcement

2.32 As further explained in paragraphs 5.23-5.35 below, the contract model is designed to introduce a measure of internal enforceability. I underline 'internal', because it is of the essence of the contractual arrangement that it is not intended to be enforceable at the suit of a third party – a reader, say, or member of the public. It relies in other words on a credible prospect of (expensive and uncertain) litigation proceedings between the press organisations themselves to enforce the contract against each other. There must be real questions about that credibility in real life. The likely motivations of press organisations to contemplate suing each other to retain commitment to the contract are very far from clear. In any event, classically, contractual disputes tend to be settled commercially by the payment of compensation rather than the specific enforcement of the terms of a contract. Even within the terms of the contract, there is at the very least an area of doubt and complexity about the extent to which financial penalties could be enforced in a contract action.

[34] pp108-109, lines 21-16, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[35] p116, lines 13-22, Lord Black, *ibid*

The model must be perceived as credible by the public

2.33 Any new model must also be perceived as credible by the public. The industry has not attempted to conduct any consultation with the public on the proposals put forward or taken any steps to understand public expectations of press standards. Lord Black told the Inquiry that this was due to a lack of opportunity to do so but suggested that newspapers would be uniquely well placed to *"take the temperature of the public"* on the proposals if that was felt to be helpful.[36] Similarly, Lord Hunt said:[37]

> *"One thing which I had been contemplating is that at some stage we ought to have a public consultation, but I felt that to do anything in that direction would be wrong pending the result of this Inquiry."*

2.34 I find it extraordinary that, given the acceptance by Lord Black and the newspaper industry that the current system of press regulation has lost public confidence, they did not regard public views on the matter as of sufficient interest or importance to make any effort to ascertain them. I find it more extraordinary that, having had its attention drawn to this point by the Inquiry, there is still no sign of the industry making any effort to understand public expectations in relation to press standards. This lack of interest in the views of the public may be symptomatic of the approach that the press has consistently taken towards regulation over many decades. It demonstrates the extent to which the press continue to prioritise their own interests, with consideration of the wider public interest only in as much as it applies to the importance of protecting the freedom of the press, and only then to the extent that they can appoint themselves the arbiter of it.

2.35 The Inquiry placed Lord Black's proposal on the Inquiry website and sought comments from interested parties and the general public. For the most part the responses have been from those already engaged with the Inquiry.

2.36 A submission on behalf of the Core Participant Victims said:[38]

> *"The Module 4 CPVs have considered the submissions and evidence of Lord Hunt and Lord Black. The Module 4 CPVs all agree that the proposal advocated by Lord Hunt and Black for a new contractual self-regulatory body would not be a satisfactory solution. The proposal is considered to be an insufficiently clean break from the current PCC and the failings associated with that organisation. In the event that this system was established, it is anticipated by the Module 4 CPVs that complainants would be likely to prefer court proceedings as a forum for seeking redress."*

2.37 Harriet Harman QC MP listed her concerns with the proposal:[39]

> *"Our concerns are:*
>
> *The system would remain voluntary – newspapers would be free to choose whether to opt in or not. Members of the public who wanted to complain about non-members would have no redress*

[36] pp34-36, lines 24-1, Lord Black, *ibid*
[37] pp20-21, lines 24-2, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[38] p2, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[39] p2, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf

It is by no means certain that all publications will sign the contract, whether new entrants to the market would sign in future, or whether signatories would renew any contract

There would be a chilling effect on the system as adverse adjudications could deter proprietors from signing the contract or renewing the contract

The system would not be independent – it would still be run by the industry, for the industry

Contracts would be between the press itself – they would not necessarily help the public."

2.38 The Media Standards Trust similarly raised concerns that there were insufficient incentives either to join or to stay in the system and that the reliance on goodwill to keep publishers in the system would make it difficult to impose any meaningful sanction on a publisher.[40]

2.39 The British and Irish Ombudsman Association said that they did not consider the proposed model to be appropriate because it would be wrong for the dispute-resolution body not to be independent of the regulator and the remedies proposed were too limited.[41]

Benefits to the public

2.40 It is important to note that the proposal put forward by Lord Black gives no rights of any sort to members of the public. The contracts are between the publishers and the regulators. Third parties have no rights under the contract and nothing else in the proposal gives those who are either customers of the press or victims of press behaviour any rights in relation to complaints or redress. Lord Black acknowledged this, but suggested that the rights of third parties would be protected by the potential to take an action for judicial review.[42] Whilst it is arguable whether the Trust, as envisaged in this proposal, would be subject to judicial review, Lord Black repeated to the Inquiry that it would be unlikely that the industry would contest that point.[43]

2.41 This is not a sufficiently credible answer. It is surprising, given the evidence that has been put before the Inquiry of the harm that the press can do, and have done, to the lives of ordinary individuals, that the industry has not felt it necessary to address anywhere in the system the rights of individuals. I have said, many times, that any new regulatory system must work for the public and for a system to work for the public it should have the rights and interests of the public at its heart. This proposal manifestly fails that test.

What difference will it make?

2.42 The credibility of the system must also depend on the impact that it would have. The Inquiry sought evidence from editors as to the practical differences that the proposal would make if it was implemented. The detail of those responses is set out below,[44] but the overwhelming answer was that it would make no practical difference whatsoever. Some editors noted that

[40] p35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[41] p14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-British-and-Irish-Ombudsman-Association.pdf
[42] p117, lines 23-25, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[43] p118, lines 5-8, Lord Black, *ibid*
[44] Section 6

they would have to make procedural or administrative changes, but there was no suggestion from any editor that Lord Black's proposal would require any changes to the ethical conduct or approach to standards within their title.

2.43 It is fair to say that all the editors who provided evidence argued that standards in their newsrooms were already high and it might be argued that the question could be said to assume, for each title, that change was necessary. I simply note that the abuses of which the Inquiry has heard evidence, and which are documented in this Report, have happened under the current systems of standards governance in place within newsrooms and that all have recognised that the public has lost confidence in that system. If the proposals put forward by Lord Black would not make any practical or cultural difference, then it is difficult to see how they could be said to be a sufficient answer to the problem that the Inquiry has identified.

Scope and membership

2.44 The proposal includes provision to allow the Industry Funding Body (IFB) absolute discretion to refuse membership. Lord Black explained that this provision was essentially to allow the industry to refuse membership to top shelf publications, whose membership would be wholly inappropriate because they would only give rise to complaints about taste and decency, which was outside the scope of the body.[45] I find this problematic. First, it is difficult to see why it should be the IFB, rather than the Trust itself, which takes decisions on whether or not it is appropriate for a publisher to be a member of the Trust. Secondly, and of greater significance, the provision as drafted allows the IFB to refuse membership to any publisher for any reason, giving rise to the possibility that a publisher could be excluded for commercial or other reasons. Finally, I do not understand the problem about taste and decency. If such a complaint is outside the scope of the code (as at present), it will be very easy to deal with it. It seems to me that it is essential that any regulatory body, self or otherwise, should be open to all in the industry to participate in on a fair, reasonable and non-discriminatory basis.

3. Fairness and objectivity of standards

3.1 This criterion specifies the need for a credible statement of ethical standards, set in a way that is sufficiently independent of media interests to command public respect.

3.2 Under Lord Black's proposal the Code Committee would retain responsibility for defining the standards to be complied with by the press, including the definition of the public interest, albeit with the regulator having to approve any changes to the code. The Code Committee would comprise 17 members, of whom 12 would be serving editors, with three public members and the Chair and Chief Executive of the regulator.[46] This clearly puts the definition of the public interest in the hands of industry, not of the public as represented by the majority independent members on the Board. Lord Black was reluctant to contemplate the idea that the Committee might instead, have an equal number of public members and serving editors:[47]

[45] p106, lines 11-15, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[46] p38, lines 4-14,Lord Black, *ibid*
[47] p39, lines 4-12,Lord Black, *ibid*

> *"I think that the Code Committee is, in effect, the only – because there are independent majorities throughout the rest of this, the Code Committee is the only genuinely self-regulatory bit. I think there is significant moral authority that comes from a code which is written by a committee with significant public involvement but that is written by editors. So I think there would be some fairly robust views expressed about a view that there should be parity on that."*

He indicated that, in his opinion, the industry would be unlikely to accept such a change.[48]

3.3 If one were to accept that it is reasonable for the industry to be in a majority in writing the code, it is also worth considering whether it is appropriate that those representing the industry should be serving editors. Lord Black argued that this was essential:[49]

> *"this has always been the Editors' Code and it has always been the view that it is important that editors write it. That is the way that their newsrooms buy into it. That is the way the publishers buy into it."*

3.4 Lord Black denied that serving editors would have a degree of self-interest in how the standards set in the code:[50]

> *"LORD JUSTICE LEVESON: It might be thought they have a certain degree of self-interest.*
>
> *A. They have self-interest in making the code work.*
>
> *MR JAY: I think it was you, Lord Black, who used the phrase "buy into it", which is a synonym for self-interest, isn't it?*
>
> *A. No, I don't think it is a synonym for self-interest. I meant "buy into it" in terms of they are the ones that have got to make sure their colleagues stick by the letter of it, they're the ones that have to deal with any complaints that come in under the terms of it. They need to know that it is a practical document. They need intellectual buy in, as much as anything else."*

He argued instead that only serving editors would have the practical day-to-day understanding of what life was like in newsrooms and how the rules needed to change to reflect that.[51]

3.5 I simply do not accept that. Whilst I recognise the importance of having a strong editorial voice advising on standards, it seems to me quite wrong that editors should actually be responsible for setting standards. It would be quite reasonable for the Trust Board to be advised by the Code Committee, constituted as Lord Black proposes, but the Board should retain responsibility for the code. It is arguable that the Trust Board does have the final say on the code in this proposal, as they would have to agree any changes to the code, but the distinction is important. Whatever mechanism is put in place as to the weight to be attached to advice from the Code Committee, I am not clear that allowing serving editors to set the code provides sufficient independence from the industry to command public respect.

[48] p39, lines 12-18,Lord Black, *ibid*
[49] p40, lines 4-8,Lord Black, *ibid*
[50] p41, lines 10-16,Lord Black, *ibid*
[51] pp40-41, lines 16-3, Lord Black, *ibid*

4. Independence and transparency of enforcement and compliance

4.1 This criterion covers the mechanisms for enforcement and compliance, the independence of the bodies carrying out those roles and the methods by which they do so.

'Independently led self-regulation'

4.2 Lord Black presented the model as 'independently led self-regulation':[52]

> *"it is a self-regulatory system because it is generated from within the newspaper industry and relies on the newspaper industry for funding, but it is independently led in that all the component parts of the regulator have very clear independent majorities in it and that those independent majorities are guaranteed by the independent appointment processes that the trust board will put into place. So it is self-regulation but it is led and managed by a wholly independent body."*

4.3 It is worth considering what is meant by 'independently-led' here and the extent to which the proposals address the fundamental requirement for independence. The first issue that commonly gives rise to an impression that the current system is not independent is the presence of serving editors on both the Code Committee and the Complaints Committee. The proposal before the Inquiry retains both, albeit with the addition of an independent voice in the Code Committee.

4.4 Lord Black defended this position:[53]

> *"I used the phrase earlier "independently led self-regulation". If the "self" in that phrase is to mean anything, then it has to mean the presence of editors on the Code Committee, albeit buttressed by a minority of lay members, and it has to mean the expertise of senior serving newspaper figures on the complaints committee, again, though, in a substantial minority.*
>
> *What we've tried to do here is to make sure that actually the complaints arm and the standards investigation arm are structurally shielded from the industry funding body, whose powers are significantly diminished from the existing Press Standards Board of Finance, which is why the key in this body is the presence of this new trust board."*

4.5 I do not accept that the concept of 'self-regulation' requires the presence of serving editors either on the body that sets the standards, although, as I have indicated, I recognise that it would certainly be desirable that serving editors should have an advisory role in standards setting, or on the body that takes decisions on complaints. Self-regulation can equally mean self-owned and self-designed regulation, by independent people, led by a Chairman appointed by a panel which included 'self'. The Industry's unwillingness to address public concern on this matter is a real indication that the proposal to a significant extent represents a broad continuation of the status quo rather than a fundamental shift in attitude or an acceptance of the need for independent regulation.

4.6 The second issue that has been raised, particularly in the context of Mr Desmond's decision to leave the PCC, is the way that a few powerful individuals have been able to dominate the system. This has been an observed flaw in the existing system and Lord Black acknowledged

[52] pp45-46, lines 21-4,Lord Black, *ibid*
[53] pp78-79, lines 14-3, Lord Black, *ibid*

that there is nothing in the new system to prevent it from recurring or continuing.[54] This therefore remains a weak point in the proposed system, which would need to be addressed for the new system to be genuinely independent.

Objects

4.7 It has been pointed out by a number of commentators that the proposal is very much focused around the industry's interests. This is particularly evident in the formulation of the objects of the Community Interest Company that would be the regulator:[55]

> *"Activities which benefit the community, in particular to promote and uphold the highest professional standards of journalism."*
>
> *[.....]*
>
> *"Having regard at all times to the importance in a democratic society of the freedom of expression and the public's right to know."*

There is nothing in these objects about the rights of individuals or the importance of the public interest in other rights beyond freedom of expression, such as an individual's right to privacy. Lord Black argued that these concepts were embodied within the phrase *"the highest professional standards of journalism"*.[56] I can see no reason why it would not be sensible for these matters to be reflected explicitly in the objects of the regulator, and I welcome Lord Black's statement that he has no objection to the Article 8 rights being set out.[57]

Independence from Government

4.8 This criterion, which is clearly extremely important, requires that the enforcement of standards should be independent of Government. Lord Black argued that the only way to ensure this independence was to have full self-regulation with no statutory involvement of any kind. I look in detail at the arguments surrounding statutory recognition of self-regulation and statutory underpinning to self-regulation later in the Report.[58] Here it suffices to say that the proposed industry model has no point of contact with Government and would certainly remain independent from Government.

Structures and appointments

4.9 The independence of the system will depend largely on the structures, but also on the independence of the procedures by which key post holders are appointed.

The Trust Board

4.10 The most important appointment, self evidently, is the Chair of the Trust Board. The appointment of the Chair, who would have no press background, would be made by a four person panel with two industry members and two public members, making a unanimous decision.[59] Lord Black defended this process as *"independent of press interests"* on the

[54] pp79-80, lines 15-5, Lord Black, *ibid*
[55] p4, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-D1.pdf
[56] pp27-28, lines 25-3, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[57] pp28-29, lines 25-1,Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[58] Chapter 5
[59] p50, lines 7-11, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

grounds that it was a *"balance"* with neither press nor lay interests having control of it.[60] I do not find this entirely convincing. A requirement for unanimity across an equally weighted panel effectively gives a veto to either side. That is certainly balance of a kind, but it puts a considerable amount of influence in the hands of the industry in relation to what should be an independent appointment. Lord Black indicated that the proposal in front of the Inquiry was the industry's *"best current shot"*[61] and that he would look at an alternative model that would provide a majority of lay members on the panel.[62] In my opinion, it is of fundamental importance that the Chair of any regulatory body should be independently appointed, and a mechanism that puts a veto in the hands of the industry does not constitute an independent process.

4.11 The other members of the Board would be three lay people and three press representatives. The lay people would be appointed by an independent process to be determined by the Board. The industry representatives would be individuals with senior editorial or publishing experience, but not serving editors, and would be appointed by the IFB.[63] If the issue around the appointment of the Chair were resolved, these procedures would appear to provide for independently appointed independent members to hold the majority on the Trust Board. It would also be important that, if those appointed with editorial or publishing experience remain in employment, they are appointed with true independence and not merely as proxies.

The Code Committee

4.12 The Code Committee would comprise 12 or 13 industry members, drawn from across the industry.[64] These 12 or 13 would be serving editors but no evidence has been presented on how they are to be *"drawn from across the industry"*. The Chairman and the CEO of the Trust would automatically sit on the Code Committee, and the Trust Board would appoint a further three public members who may, but do not need to, be members of the Board or of the Complaints Committee.[65] The proposal to introduce public members to the Code Committee must be regarded as a positive step.

4.13 I have already set out my views on the extent to which it is inappropriate to have serving editors responsible, albeit subject to the approval of the Board, for setting the standards to which they are expected to adhere. I do not, therefore, regard the Code Committee, in a standards setting capacity, as sufficiently independent of industry. As I have equally made clear, however, I do think that the body as described could operate appropriately as an advisory body with the Trust Board having final responsibility for the code. I appreciate that advice from such a body would have to be accorded appropriate respect, that it would be important for editors to 'buy into' the code and that the Trust Board would therefore be extremely reluctant to approve a change contrary to the views of the Committee but, although to some extent symbolic, the difference is important. As will equally be clear when considering the Complaints Committee below, the suggestion that those in charge of the regulated entities should be responsible for the code pursuant to which they are regulated is not one that would (or should) command support.

[60] p94, lines 16-21, Lord Black, *ibid*
[61] p95, lines 23-24, Lord Black, *ibid*
[62] p96, lines 16-18, Lord Black, *ibid*
[63] p24, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[64] pp40-41, para 79, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf says *"13 members drawn from across the industry"* whereas in oral evidence Lord Black said that there were 12 industry members
[65] p41, para 80, *ibid*

The Complaints Committee

4.14 The Complaints Committee comprises the Chairman of the Board, seven lay members appointed by an independent process, and five working editors.[66] One concern would be that having serving editors on the complaints body creates the perception, at the very least, of a lack of independence. Indeed, it is the presence of serving editors on the Complaints Committee that gives rise to the concept of editors marking their own homework. Ed Richards and Colette Bowe from Ofcom gave their clear opinion that:[67]

> *"in terms of code setting, in terms of sanctions, in terms of corrections or anything of that kind and in terms of policy making overall, you need to have a bright line separation between those who are regulating and making decisions and those who are regulated, and I think any breach of that [….] means that you will immediately undermine the perception and indeed in reality the actuality of your independence."*

Lord Black argued that the industry view was that:[68]

> *"these need to be people who are absolutely at the cutting edge of their trade."*

He said that the independence of the Complaints Committee was adequately ensured by the independent majority on the Committee and the right of appeal to an independent assessor:[69]

> *"I think that body is constructed so that it has a tangibly clear independent majority on it, and we're also, as you're seeing at the bottom, building in an independent assessment of that. So if there was a member of the public who had any concern about the process in the way it had been handled, that one of these minority editors had had some sort of undue influence, that independent assessment, which would be by somebody who had nothing to do with the newspaper industry, would be thrown up."*

4.15 The possibility that retired editors, for example in academic positions, or an NUJ representative, could provide the required knowledge to the Committee was dismissed by Lord Black, although someone who edited a 'website within a newspaper' might be considered.[70]

4.16 Again, I do not consider that this brings the required degree of independence from industry to the enforcement of standards. An argument is often advanced that doctors sit on the British Medical Association disciplinary panels so there cannot be a problem with editors on the Complaints Committee. The problem with this argument is that individual doctors are not to be compared to editors: there is only a very small pool of national editors to draw from, making it impossible to create a panel where the members would not know the people on whom they were adjudicating and have views about them and their title. I have not considered whether it would be appropriate for there to be a role for a serving editor to be able to provide written advice to the Complaints Committee, but I do not accept that the Committee should have serving editors sitting on it.

[66] pp50-51, lines 24-5, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[67] pp101-102, lines 7-9, Ed Richards and Colette Bowe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[68] p52, lines 14-17, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[69] p52, lines 9-18, Lord Black, *ibid*
[70] pp52-53, lines 19-7, Lord Black, *ibid*

The Compliance and Investigation Panel

4.17 The Trust Board would maintain a 'pool of experts' from whom they could appoint a Compliance and Investigation Panel when the need arose. The names of the people in the pool would be published and each specific panel would be appointed, by the Trust Board, to suit the specific demands of an investigation.[71] The basic structure here seems sufficiently independent from any relevant interest. The Inquiry has not been given enough information about the methods by which the experts will be appointed to the panel to take a view on the adequacy of those processes, but there are no immediate concerns here.

The Industry Funding Body

4.18 The Inquiry has been given no information about the composition or, of appointment procedures for, the IFB as Lord Black explained:[72]

> *"while we have been able to establish some general principles about its operation, the details are still in progress, and will need to be subject to a further round of industry consultation."*

Clearly the IFB will not, and cannot, be independent of industry. It is undeniable, however, that there is very real merit in it being considerably more transparent so that the public are aware of the different influences within the IFB. The most significant point of interest is around the relationship between the IFB and the Trust Board.

Relationship between the IFB and the Trust

4.19 One of the arguments put forward by Lord Black as to the enhanced independence of his proposal, by comparison with the PCC, is the fact that the IFB has a relationship only with the Trust Board, not with the operational parts of the regulatory organisation. This assertion bears closer scrutiny, in particular as it impacts on the investigations and compliance role of the regulator. An exchange between Mr Jay and Lord Black sets out clearly the extent to which the Trust Board, with whom the IFB have their direct relationship, has responsibility for all the significant decisions in relation to an investigation:[73]

> *"Q…but are we agreed to this extent: that trust board approval is required to establish an investigation? Is that right?*
>
> *A. Yes.*
>
> *Q. Trust board approval is also required to take action to enforce the contract in relation to an investigation; is that right?*
>
> *A. Yes.*
>
> *Q. The trust board, you've told me this earlier, handles appeals against a finding of the compliance and investigation panel.*
>
> *A. By setting up a new panel.*
>
> *Q. By setting up a new bundle (sic). And the trust board must take the decision on raising any fine in relation to an investigation; is that right?*

[71] pp53-54, lines 16-6, Lord Black, *ibid*
[72] p1, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Fourth-Witness-Statement-of-Lord-Black.pdf
[73] pp101-102, lines 10-3, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

A. Correct.

Q. And the trust board also ratifies changes to the code, doesn't it?

A. Yes."

4.20 Whilst there is nothing objectionable in the Trust Board having these roles in respect of investigations, it is not possible, in the light of this, to also argue that the IFB, by interacting only with the Trust Board, has no interactions with parts of the body that are taking regulatory decisions. The Trust Board is quite clearly taking regulatory decisions here; indeed, it is responsible for all of the most significant regulatory decisions in relation to an investigation. Lord Black argued that this would not matter as investigations would be funded from a ring-fenced enforcement fund, which is to be established at the outset and will not be the responsibility of the IFB.[74] This is not a sufficient argument. The influence of the IFB derives from its position as the funding body for the regulator, but is not therefore limited to matters that fall to be funded by it. The risk, surely, is that the Trust Board might seek to avoid causing friction with the IFB in relation to investigations in order to preserve a good relationship on the wider funding issue.

4.21 The IFB has a number of other roles in the system. It is responsible for the code, although the code must be agreed by the Trust. The Trust is responsible for the Regulations, though they must be agreed by the IFB. These complementary roles provide a model of regulation in which the industry has a very strong say, both through being in the lead in setting standards and having a veto over the Regulations governing the maintenance of those standards. Lord Black argued that this was a very important system of checks and balances, to protect the industry from a regulator which might want to make changes that would destroy the industry whilst simultaneously protecting the regulator from any attempt by the industry to scale back regulation. He did, however, suggest that a stipulation could be added to the contract that no changes to the contract or to the regulations could ever dilute the power of the regulator.[75] In relation to changes to the code, Lord Black said that the Trust Board would have the ultimate responsibility for a change, with the IFB essentially having a role in managing a prior consultation process. He recognised that this was not what the documents provided to the Inquiry set out and that some redrafting would be necessary to achieve that effect.[76]

4.22 The powers of the IFB, which run throughout this proposal, undermine claims to independence of the regulatory system. Lord Black talks of independently led-self regulation but it is not clear that leadership in this system can come from the Trust. Rather, there is a joint system of leadership between the Trust and the IFB in which the IFB has the lead in many important issues, in particular the funding of the body, the definition of the code and setting sanctions guidelines; it also has significant influence in many others, such as the appointment of the Trust Chair and changes to the Regulations. Removing the IFB from decision relating to appointments, the code, the Regulations and sanctions would go a long way to enhancing the independence of the proposed system.

Complaint handling

4.23 Members of the new system will be expected to try to resolve complaints directly with the complainant in the first instance. The intention here is to improve transparency and accountability within publishers, as well as to reduce the workload for the regulator.[77] This is a sensible development.

[74] p102, lines 13-18, Lord Black, *ibid*
[75] p111-112, lines 18-7, Lord Black, *ibid*
[76] pp115-116, lines 1-2, Lord Black, *ibid*
[77] p2, lines 11-16, Lord Black, *ibid*

Third party complaints

4.24 The proposal would give the regulator the power to take up a third party complaint where there has been a significant breach of the Editors' Code and there is a substantial public interest in allowing the complaint to be brought.[78] Lord Black gave evidence that the new body, in line with current practice in the PCC, would always be able to take third party complaints on a matter of accuracy.[79] That is not reflected in the drafting of the regulations, which would appear to restrict third party accuracy complaints to *"significant breaches"* with a *"substantial public interest"*. Lord Black provided assurance that it was not intended to have that effect, but on the contrary was intended to make it easier for groups to bring discrimination complaints under the discrimination clause of the code;[80] it remained important, however, for the regulator to have discretion over when to take up third party or group complaints on issues such as discrimination.[81] As it stands, this wording appears to significantly raise the threshold for third party complaints about accuracy. I accept Lord Black's assurance that this is not the intention but it is important that that point should be clarified.

Compliance reports

4.25 The proposed scheme introduces annual compliance reports which would set out compliance systems and report on any compliance breaches and the steps taken to remedy them. These reports form an important part of the standards function of the new model. The reports would be sent to the Head of Standards and Investigations (an official position at the Trust) whose team would analyse the reports. It is anticipated that this will lead to dialogue with the publishers about the actions that they have taken over the year and the extent to which the report demonstrates active compliance with the standards. Once the reports are finalised it is expected that they will be published. The contract would require regulated entities to be open and cooperative towards the regulator and to disclose any significant breaches of the code promptly.[82] It would be open to the Trust to take action, including potentially the launch of a full scale investigation, to require the reports to be full and frank should that be necessary. The process of reaching agreement on the annual report between the publisher and the regulator would be a proportionate one, taking into account the size and nature of the publisher.[83]

4.26 This proposal strikes me as an eminently sensible one. It must be right that the primary responsibility for compliance lies with the company and they should be encouraged to take that responsibility seriously. A requirement of this sort should significantly enhance the transparency of compliance across the industry and put pressure on management within each title to ensure that they have a good story to tell. It might also be reasonable to suggest that newspapers should publish their annual compliance reports in their own pages to ensure that their readers have easy access to the information.

[78] p2, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[79] p13, lines 6-23, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[80] p16, lines 19-21, Lord Black, *ibid*
[81] p14, lines 11-14, Lord Black, *ibid*
[82] p2, para 3.1.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[83] p61, lines 2-9, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

4.27 The proposal also requires publishers to identify a named senior individual within each company who is responsible for the maintenance of standards, compliance with the code of practice, reporting annually to the regulator and then dealing with the follow up from the regulator.[84] Arguments may be made about whether that senior individual should, of necessity, be the editor or the proprietor but, in any event, this also seems like a sensible innovation that could, if operated properly, encourage real change within organisations.

Whistleblowing

4.28 Lord Hunt raised a concern that had not been picked up by the industry proposal, namely that there should be a whistleblowing hotline into the new regulatory structure for those who feel that they are being asked to do things which are contrary to the code.[85] It is a shame that this has not been taken on board by the industry proposal: it is obviously sensible.

5. Powers and remedies

5.1 The sanctions available to the regulator differ substantially depending on whether an issue is dealt with via the complaints arm or the standards arm. The Complaints Committee has the power to issue an adverse adjudication, and to negotiate the wording, size and placement of a correction or apology, but it cannot impose a fine, even in an egregious case.[86]

Complaints

Lack of adjudication

5.2 Lord Black explained that conciliation remained at the heart of the proposed complaints process because *"the bulk of complaints will lend themselves to conciliation."*[87] It would be open to the regulator, in the case of a serious breach that could nonetheless be resolved to the complainant's satisfaction by way of conciliation, to reach a full-scale adjudication. The Complaints Committee can call on a publisher to take disciplinary action against an editor.

5.3 My concern in this context is that a great proportion of the complaints made to the PCC currently are rejected at the first point of contact, and the vast majority of those that are looked at are resolved through mediation. Just because it has proved possible to resolve a complaint to the satisfaction of the complainant without a formal adjudication there is no guarantee that a breach of the code was not committed; indeed, the reverse is likely to be the case on the basis that the clear cases will be conceded and redress provided. On the other hand, only those few that go to a full adjudication ever get to the stage at which a breach of the code is recorded. This allows the fiction that only a handful of breaches of the code occur each year to go unchallenged.

[84] p29, lines 11-15, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[85] p80, lines 20-24, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[86] p63, lines 7-10, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[87] p64, lines 9-12, Lord Black, *ibid*

5.4 Lord Black told the Inquiry that it would be open to the regulator to decide that it wished to adjudicate more. In particular this would be helpful for the regulator when considering best practice guidelines which would tend to be informed by adjudications. Lord Black accepted that there was no principled objection to setting some sort of threshold above which cases would automatically go forward to adjudication:[88]

> *"Q. Do you think it might be better to have a sort of threshold written into the regulations which, if the regulator thought that there was prima facie evidence of a serious breach of the code or breach of the code which was other than minimum or raised minor questions of inaccuracy, then unless the complainant wished otherwise, almost as a matter of obligation, the regulator should take that forward to an adjudication?*
>
> *A. I would expect that to be the best practice of the regulator. If there's a case for writing that in, if it can be codified in a way which can be written into regulations, then I wouldn't see a principled objection to that……I would hope it would be a matter of best practice, but if there is merit in codifying it, we will."*

5.5 I think this is very important: the regulator must have a clear sense of the scale of code breaches that it is dealing with both in relation to individual publishers and in relation to the industry as a whole. This information about breaches of the code would be of critical importance to the management at the individual publishers and to the regulator in its role of promoting and maintaining standards. It is also important that mediated complaints are recorded, with code breaches identified. It is difficult to see how systemic failures in code compliance could be detected if code breaches are not identified as such by the Complaints Committee.

Remedies and sanctions available for complaints

5.6 The remedies and sanctions available to the Complaints Committee are described as:[89]

> *"…a ladder of sanctions from a fairly straightforward correction through to a breach of the code that's remedied and identified in statistics, through to a formal reprimand of the editor, right up to where there has been a very serious breach and that leads to a referral from the complaints arm to the publisher because it raises contractual disputes…"*

5.7 Whilst this was presented as a change, the only thing that this proposal adds to the current armoury of the PCC is the power to refer the matter to the complaints arm. Lord Hunt did not dissent from that, saying *"it's a simple codification of it…."*[90]

5.8 It is notable that the regulations do not appear to give the regulator the power to determine where an adjudication or apology should be placed. Lord Black suggested that it was possible that this could be changed but that it would be a matter for the Code Committee, subject to Trust Board ratification, to change.[91] I welcome Lord Black's implication that this is an area where some movement may be seen, but it is, again, surprising that the industry has not already moved on this issue if they are inclined to do so. It is, frankly, absurd that the regulator should not have the power to determine the location of an adjudication or apology.

[88] pp10-11, lines 13-9, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[89] pp6-7, lines 21-3, Lord Black, *ibid*
[90] p8, line 23, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[91] pp18-19, lines 9-15, Lord Black, *ibid*

Compensation

5.9 The regulator is given no powers to award compensation. The explanation for this is that if compensation were available to complainants through the regulatory process it would complicate the conciliation process.[92] Lord Black suggested that if the regulator were to have the power to award compensation then complainants would always tend to want the regulator to deal with their complaint rather than getting the individual publisher to deal with it; furthermore, it is likely that the publisher would be even more defensive than presently is the case.

5.10 There is also another substantial difficulty. Although it might be possible to specify a right to compensation for a breach of the code that did not involve breach of the civil law (as can be awarded by Ombudsmen for maladministration), in the main the issues likely to lead to a reasonable expectation of compensation are those which give rise to a claim for civil damages. If the regulator had the power to award compensation, it is likely that it would be sought as a matter of course; instead of providing what should be speedy redress by way of apology and correction, arguments will develop about the extent of the breach and the way in which compensation should be approached. There is a real risk that lawyers for both sides would become involved, with the result that the system could collapse under its own weight. An arbitral arm could provide swift financial redress in appropriate breaches of the civil law. In the circumstances, I am inclined to agree with Lord Black that it would be better for the complaints arm not to have the power to award compensation.

5.11 Limiting the sanctions available to the Complaints Committee to those set out in paragraph 5.6 does mean that, short of legal action by a complainant, a publisher is unlikely to suffer financial penalties for a single abuse, no matter how egregious it might be. However, in the event of a complaint about a particularly egregious breach of the code, it would be possible for the Complaints Committee to refer the matter to the Investigations arm, which could then, with the approval of the Trust Board, initiate an investigation. This could culminate in a fine if the single egregious breach were considered to demonstrate a complete failure of internal governance within the company.[93]

Contemporaneous civil proceedings

5.12 The proposal does not allow for the regulator to hear a complaint if it is the subject of current legal proceedings. A joint submission from ANL, GNM and TMG points out that s114 of the Broadcasting Act 1996 prevents Ofcom from considering fairness cases where the matter is the subject of proceedings in a court of law.[94] That submission argues that the nature of defamation means that it is essential that both sides in a civil case should be able to argue their case freely, and that the existence of parallel regulatory proceedings might make it difficult for the defendants to offer a full defence because of regulatory concerns. Notwithstanding that, Lord Black conceded that there was a case for allowing the regulator to look at pure code or ethics issues that are unconnected to the libel proceedings whilst those proceedings are underway.[95]

[92] p66, lines 3-13, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[93] p63, lines 16-19, Lord Black, *ibid*
[94] p24, paras 3-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Joint-submission-from-Associated-GNM-3-Telgraph-media-for-module-2.pdf
[95] p68, lines 6-19, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

5.13 Lord Black further considered that there was nothing to stop the Complaints Committee considering a complaint before a libel action was brought, and went further saying that he would expect the new regulator to take the view that this could happen.[96] Lord Black also expressed the view that a successful court action might *"almost be an automatic trigger for a full scale investigation,"*[97] thus ensuring that the regulator would look at the standards implications of successful civil action against a publisher.

5.14 I remain to be convinced that there is any particularly unique problem associated with defamation that makes it impossible for court and regulatory action to be taken simultaneously. It seems reasonable that a court should be able to stay the regulatory action if continuing it would endanger the civil action, but that is no reason for a blanket ban on the regulator considering regulatory issues without waiting for any legal action to be completed first. I very much agree with Lord Black that a new regulator should take the view that a complainant can bring a complaint prior to taking legal action if they so wish, and I would consider that it should be made clear in the contract and regulations that this is the case.

Investigations

5.15 An investigation can be triggered by a number of events, described as *"serious or systemic breaches"*. It is accepted that this could include one serious breach where it was clear that the breach had arisen because controls were not in place in the newsroom to prevent it.[98]

Process

5.16 An investigations panel, once established, would have the power to view documents and, in theory, to summon witnesses. It was accepted, however, that, whilst the power to view documents could be enforced through the courts, the power to call witnesses would not be enforceable,[99] although failure on the part of a publisher to provide a witness once called for would constitute a breach of an obligation.[100]

5.17 The investigation procedure is set out in some detail, requiring a substantial amount of oversight by the Trust Board and offering a number of opportunities for the investigated party to make representations or appeal. First, the investigation can only be established by the Trust Board.[101] The regulated entity has an opportunity to make representations that the investigation should not be set up.[102] If a dispute arises between the Head of Standards and the regulated entity it must be referred to the Trust Board.[103] Any requirement to bring legal proceedings to compel production of documents must be approved by the Trust Board.[104] Once a report has been prepared in draft it must be sent to the regulated entity, which has 28 days to make submissions.[105] The regulated entity is then invited to the meeting of the investigation panel to discuss the draft report in order to be able to make further representations.[106] The

[96] p69, lines 5-19, *ibid*
[97] p69, lines 15-23, Lord Black, *ibid*
[98] p48, lines 13-21, Lord Black, *ibid*
[99] pp84-85, lines 16-2, Lord Black, *ibid*
[100] p85, lines 3-10, Lord Black, *ibid*
[101] p5, para 25-26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf
[102] pp5-6, para 27, *ibid*
[103] p6, para 32, *ibid*
[104] p7, para 33, *ibid*
[105] p7, para 34, *ibid*
[106] p7, para 36, *ibid*

preliminary decision of the panel must be sent to the regulated entity, which then has 14 days to make comments.[107] Once the investigation panel has made its final decision, having had the benefit of all these submissions, the regulated entity can appeal to the Trust Board for a new panel to be set up to look at the matter again.[108] The regulated entity then similarly has the opportunity to make representations to the review panel preliminary findings.[109]

5.18 There can be no objection to procedural fairness, and it is right that the subject of an investigation should have an appropriate opportunity to make their case and to ensure fair treatment. However, the process described above appears somewhat extreme and could be thought to give so many opportunities to the regulated entity to challenge every single step so as to frustrate the investigation and make it very difficult for the regulator to reach a conclusion, particularly if that conclusion was adverse. Lord Black defended the process, arguing that:[110]

> *"I don't think it can be overstated quite how serious an adverse finding from the standards and compliance panel of the new regulator would be, and therefore I think the regulated entity needs to be dealt with fairly and proportionately and that means they should have the ability to put their case at certain points during this. That would just seem to me to be natural equity and natural justice."*

5.19 He went on to say:[111]

> *"I think it highly unlikely that during the course of an investigation a regulated entity would take every single opportunity to try to derail it, but even if it did, then the trust board and the investigation and compliance panel must plough on and it will get to the right place in the end."*

5.20 I am not sure that this is acceptable. These provisions have obviously been drafted to take into account the anxieties of the publishers about the implications of an investigation and I do, of course, recognise the need for them to have a full say in the process. However, if there is to be any value in the investigations process, which is itself the only genuinely new part of this proposal from the industry, then it is essential that it should be capable of operating without continually being frustrated by those subject to regulation. I do not have a particular view on what is the right number of opportunities for an investigated party to appeal against the process but I am clear that, as currently drafted, it goes too far in that direction with the serious risk of entirely undermining that effectiveness of the investigation remit of the regulator.

5.21 I note that the investigations process is entirely between the regulator and the publisher. There is no role at all for the victim, or victims, of the behaviour that has given rise to the investigation. There is no opportunity for them to submit evidence to the investigation, and no opportunity for them to challenge the outcome of the investigation. I recognise that if an investigation is looking at systemic failures of governance it may not be easy to identify the victims. There is no reason, though, why this should prevent the investigations process allowing a role for victims (or, at the very least an obligation on the part of the standards investigator to consult the victim) where an investigation relates to one or more specific events in relation to which victims can be identified.

[107] p8, para 40, *ibid*
[108] p8, para 44, *ibid*
[109] p9, para 51, *ibid*
[110] pp33-34, lines 17-1, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[111] p34, lines 16-21, Lord Black, *ibid*

Fines and Sanctions Guidance

5.22 The regulator has the power to impose fines and sanctions, but this must be done in accordance with the Fines and Sanctions Guidance issued by the IFB.[112] Whist it is entirely reasonable to have fines and sanctions guidance, I am completely at a loss as to why that guidance should be set by the industry rather than by the regulator. Lord Black did not provide any insight into this, but pointed out that once the guidance had been incorporated into the contract the IFB would have no power to amend it.[113] This is a minor point, but is indicative of the extent to which the industry has kept to itself control of the tools that the regulator has.

Enforcement

5.23 As a result of the contractual nature of the proposal, the regulator has only one method of enforcement of its decisions, whether in relation to a complaint or an investigation, which is to take action in the courts for an order for performance of the contract. There are a number of implications to this. The first, and most obvious, is the cost that the regulator would incur in seeking to get his decisions enforced. There will always be a matter of judgment for the regulator as to whether it is a good use of his resources (both in time and money) to take proceedings. It also means that, even where a regulatory decision has been taken according to the Regulations and all possible appeal routes have been exhausted, the publisher will still be able to argue as to whether the fine or other decision can be properly enforced under the contract.[114] This adds a layer of expense and complexity to the regulator's enforcement processes.

5.24 It is argued, rightly, that if a publisher were to fail to comply with reasonable requests from the regulator, or with regulatory decisions, that this could lead to the opening of a full scale investigation. However, the same concerns apply to the enforcement of the outcome, or indeed the conduct, of any investigation. There is a risk that the proposed system could be frustrated by a publisher who, although having joined the system, was not inclined to cooperate and who could appeal every decision and argue every point, with the risk that the regulator would either have to devote a substantial amount of his resources to dealing with the problem or abandon the attempt to enforce decisions. This strikes me as a structural flaw in the proposal, although I do not immediately see a way around it. A body which derived its authority from statute or by reason of statutory underpinning would similarly be open to challenge on every decision and might similarly face a concerted effort to frustrate its ability to make and enforce decisions. The contractual system does, however, provide an extra level of potential challenge that would not be available in a system, independently appointed, which derived a measure of authority by law.

5.25 A further point also arises, which is about the willingness of the regulator to take any action in court to enforce the contract. Any decision to take action against a member to compel disclosure of documents must be approved by the Trust Board, and it seems likely that any decision with the reputational, operational and financial implications of taking legal action against a member would generally be referred to the Board.[115] I have already referred to Lord Black's assertion that the complaints arm and the standards investigation arm are structurally shielded from the industry funding body. This is certainly true in terms of direct appointments

[112] p3, para 5.1.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-B1.pdf
[113] p111, lines 1-8, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[114] pp83-84, lines 6-15, Lord Black, *ibid*
[115] p7, para 33, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf

and day to day operation but the argument wears thin in relation to enforcement if the decision to enforce a judgment of the regulator sits with the Trust Board. This could be avoided by giving the Head of Complaints and the Head of Standards the power to take action against member companies, for enforcement purposes, without reference to the Trust Board, but it is hard to reconcile that with the Board's overall responsibility for the regulator and, in particular, its budgetary responsibilities.

6. Cost

6.1 The estimated cost of the proposal is £2.25m per annum, with a separate enforcement fund plus set-up costs.[116] The cost of the PCC has been in the region of £1.75-£1.95m per annum in recent years.[117] The proposal is that the industry would pay the full cost of the new system, as they currently pay the full cost of the PCC. This was presented by Lord Back as an essential aspect of a self-regulatory system and a demonstration of the industry's commitment to standards:[118]

> *"The industry invests in the regulatory system as a sign of its commitment to protecting the public and putting right things which have gone wrong."*

6.2 It was made clear by a number of witnesses that one of the keys to any independent regulatory system was the independence of its funding. Ofcom recommended that any system should be based on fixed long term (three or four year) funding agreements which, once fixed, could not then be influenced by the funding body. Others have emphasised the need for funding to be sufficient to enable the regulator to carry out its duties effectively. I have dealt elsewhere with criticisms that although the PCC was funded adequately to operate the complaints and mediation service, that funding was sufficiently limited to prevent them from exploring other powers, such as powers to investigate, which theoretically were open to them. Lord Black's model seeks to address both points.

Adequacy of funding

6.3 The body described in the proposal includes the Trust Board, a Complaints Committee and the associated complaints arm, with a full time staff, an Independent Assessor, a Head of Standards and Compliance, with a small full time team, and a panel of experts from whom investigations panels can be drawn. The Board, the complaints arm and the Assessor will be funded from the main budget of £2.25m. This is a larger body than the PCC because, under the PCC model, the Board and the Complaints Committee are the same body. Investigations undertaken by investigations panel will be funded from the separate enforcement fund. It is not clear whether the full time administrative staff in the standards and compliance arm will be funded from the main budget or from the enforcement fund. If the full time staff is to be funded from the main budget this is an expense not currently incurred under the PCC model.

[116] p45, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[117] PressBof Annual Reports 1990-2010, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Appendix-C.pdf
[118] p20, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

The enforcement fund

6.4 The enforcement fund is set to start at £100,000,[119] thereafter being supplemented by any fines, or contributions to investigation costs, that are levied. If the permanent standards and investigations staff were to be funded from this £100,000 it is hard to see how there would be any capacity at all for ad hoc investigations; this would effectively render the standards arm irrelevant. I therefore conclude that the permanent staff will be funded from the main budget, with the enforcement fund being held in reserve to pay for investigations when the need arises. It is suggested that, with the addition of fines and cost contributions, the size of the enforcement fund might rise to £500,000. Given that cost contributions can only at best replenish what has been spent on an investigation, this must mean that there is an expectation that fines will be levied. It is not clear what is to happen to the enforcement fund should early investigations not result in any fines, for it is obviously quite wrong for decisions to be made about financial penalties based on the needs of the regulator rather than the gravity of the behaviour of the regulated entity.

6.5 It is worth recalling that cooperation with an investigation is expected to be enforced as a contractual obligation through the courts if necessary. The enforcement fund would be exhausted quickly should there be the need for any such enforcement action; there is a risk that this could be exploited by a publisher who might adopt an attitude, not unknown in litigation, of fighting every single decision and appealing every decision until the other party runs out of money. Lord Black took the optimistic view that:[120]

> *"I would hope that in a system into which publishers voluntarily entered into a contract that they wouldn't do that."*

6.6 This is only a partial answer. Publishers may voluntarily enter into this agreement because of the fear of what might happen otherwise, but the fact that these changes have explicitly only been offered because of the threat posed by the Inquiry indicates that the proposal presented is not one born of conviction but of expediency. These are not changes that the industry was eager to make and, consequently, the idea that publishers will cooperate with investigations because they join the system voluntarily rings rather hollow. It is not inconceivable that some would join the system voluntarily because they can see the weaknesses in the system that would allow them to frustrate its effective operation.

6.7 When these points were put to him Lord Black effectively agreed:[121]

> *"That may well be the case. I think we've tried in the best way we can to make sure that the trust board has the powers and the money available to enforce the contract. I think it's always going to be an issue to do with the nature of contract. If one party wants to grind everybody down with legal action, that is going to happen, but in any structure of law that's going to be the case."*

6.8 The concept of providing a ring-fenced enforcement budget is a good one, but in order to be effective it must be enough to allow the regulator to be able to undertake investigations even where the publisher concerned might not cooperate. A regulator who cannot afford to take enforcement action will lose credibility with both the industry and the public. I am not

[119] p45, para 93, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[120] p103, lines 1-8, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[121] pp103-104, lines 22-4, Lord Black, *ibid*

well placed to say what the appropriate level of an enforcement fund should be, but what is proposed has the appearance of a very limited and inflexible enforcement budget that may simply be wholly inadequate to do the job in hand, with no obvious mechanism for addressing such difficulties if they arise.

The operational budget

6.9 Lord Black stressed that the £2.25m figure was an estimate. He suggested that the new complaints arm would be dealing with far fewer complaints than the PCC because improved governance in newspapers would lead to fewer complaints, and more of those complaints that are raised would be dealt with successfully by the publisher rather than the regulator.[122] Against that I set the larger administrative role, with the need to support the Trust Board and a full time standards and compliance team in addition to the current PCC structure, and Lord Black's assertions, reflected above, that the new regulator might move to adjudicate a higher proportion of complaints in order to ensure that a breach of standards was properly recognised and properly dealt with.

6.10 Lord Black said that if there were a need for more funding then the industry would have to sit down with the new regulator and look at how much the elements of the new system would cost. He said:[123]

> *"I have no doubt that sufficient funding will be made available to the regulator to fulfil its function."*

I cannot be so sanguine. Lord Black acknowledged that the level of funding to be made available to the regulator was solely in the hands of the industry. The requirement to pay will be in the contract that publishers sign with the regulatory body, but the amounts that they pay will be fixed by the IFB. There are no requirements on the IFB to meet the needs of the regulator, who will have to make do with whatever is provided by the IFB. Again, my concern is not specifically about the level of funding estimated to be required for the core operations of the regulator, but about the absence of any power on the part of the regulator to set the funding levels required.

Independence of funding

6.11 This brings me to the most significant issue in relation to funding. Publishers will sign contracts with the regulator that bind them into the system for five years, and those contracts will require them to pay the fees set by the IFB. So far, so good. However, Lord Black was clear that this commitment was to the principle of funding, not to any particular amount:[124]

> *"I can't give you guarantees over a five-year period. The industry might face a complete economic collapse in that time. What we are doing is making a commit through contracts to provide funding over a five-year period. I think it unlikely that we would be able to actually build exact figure into that contract because of course, the needs of the regulator may change over time."*

[122] pp72-73, lines 17-1,Lord Black, *ibid*
[123] p73, lines 2-7, Lord Black, *ibid*
[124] p76, lines 9-16, Lord Black, *ibid*

6.12 The effect of this proposal, therefore, is that the IFB will set the budget for the regulator on a year by year basis. This has practical implications for the regulator, which may not be able to plan its operations effectively on a long term basis, but much more significantly it has implications for the independence of the regulator.

6.13 The IFB is comprised of representatives of the industry that the regulator is regulating. It is easy to see how a regulator which is dependent for the next year's funding on the goodwill of its regulated bodies might be expected to operate with a light touch, and to seek to avoid conflict – particularly with those publishers who have the most influence on the IFB. I noted earlier that the composition and appointment processes of the IFB remain entirely opaque, so the public will never even know who wields that influence and, therefore, who the regulator is most likely to want to propitiate.

6.14 This direct relationship between major publishers and the core decisions over funding of the regulator is possibly the single biggest problem with the proposal that Lord Black has presented. There are, of course, ways in which it could be ameliorated. A system which envisaged a fixed budget for the full five year term would significantly address the concerns about the continual need for the regulator to appease his funders. A system which required the budgets to be set by negotiation between the regulator and the IFB would give the regulator more power to articulate, and fight for, the resources he needs to do an effective job and to make it clear to the public if this need was not being met.

Transparency of funding

6.15 A final point on funding is the extent to which it is apparent who is funding the regulatory body. The funding of the PCC is shared between national newspapers (59.1%), regional and Scottish newspapers (34.4%) and magazines (6.5%).[125] However, due to what is described as 'trade association politics', Lord Black was unable to tell the Inquiry how the national newspaper share of the funding is made up.[126] He indicated that there might be greater transparency on this issue in the future, but was not able to give any guarantees.[127]

6.16 This is a matter for concern and I would urge those responsible to resolve the matter so that there is full transparency over the funding of any self regulatory body.

7. Response of editors and proprietors to the PCC and PressBoF proposals

To what extent is the industry ready to sign up to these proposals?

7.1 The Inquiry sought evidence from those editors who had previously given evidence as to the extent to which they were ready and willing, on behalf of their titles, to sign up to the proposals presented by Lord Black.

[125] p2, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Fourth-Witness-Statement-of-Lord-Black.pdf
[126] pp91-92, lines 23-2, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[127] pp92-93, lines 4-6, Lord Black, *ibid*

Views from national newspapers

7.2 Some of the national titles have indicated a firm readiness to sign up to the proposal, specifically the Telegraph Media Group,[128] Trinity Mirror[129] and Associated News.[130]

7.3 Lionel Barber, editor of the Financial Times, expressed a willingess in principle to join the scheme, but warned that his view of the proposals might change as the details evolved:[131]

> *"I am happy to state that in broad terms I am supportive of the proposals and if the discussions to finalise them continue as they have to date, then I would anticipate recommending to the FTL board that FTL becomes a signatory to the contract. I would add that Lord Black's system appears to preserve the largely useful and effective service of complaints handling and mediation currently carried out by the PCC.*
>
> *It is important to note that Lord Black has made clear that the proposals as submitted to the Inquiry remain a draft that is subject to industry comment and which may also need to evolve dependent on the recommendations in the Inquiry's final report. As such my view of the proposals may change depending on any changes made to them in the course of future consultation. As you might expect, there is certainly some devil in the detail to be worked out before the contract is ready for signature."*

7.4 Within News International there was support for the principles underpinning the proposal but still, according to the editor of The Sunday Times, a need to sort out details:[132]

> *"I am ready to commit to the broad principles of the new contractual obligations though, of course, the final authorisation by News International will be made by the News International CEO in consultation with all three Editors. Whilst there are a number of details about the proposal that have yet to be worked out, I am hopeful that all industry participants will be able to reach final agreement."*
>
> *"I am in principle in favour of the proposal to bind participating members of a new press body by contracts."* [133]
>
> *"The Sunday Times is ready to recommend in principle that the regulated entity (Times Newspapers Limited) enter into these contractual obligations…..There is some finessing in the detail of the framework proposals still to be done which I would hope can be achieved by discussion between participants."* [134]

They were not able to indicate readiness to sign contracts now.

[128] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Tony-Gallagher-signed-.pdf
[129] p3, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Lloyd-Embley.pdf
[130] pp3-4, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Fourth-witness-Statement-of-Paul-Dacre.pdf
[131] p4, paras 12-13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Lionel-Barber.pdf
[132] p2, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Dominic-Mohan1.pdf
[133] p1, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Third-Witness-Statement-of-John-Witherow3.pdf
[134] pp1-3, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-James-Harding.pdf

7.5 Alan Rusbridger, editor of the Guardian, indicated that, if Lord Black's proposal was adopted after the Inquiry, the Guardian would be prepared to sign up to such a contract, subject to negotiation.[135] However, he was clear that the proposal did not have his unqualified support:[136]

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

7.6 Chris Blackhurst, editor of The Independent, said that he was broadly supportive of Lord Black's proposals, in particular in relation to the contractual basis for the relationship with the regulator and the regulator's investigative and fining powers.[137] However, he went on to outline three key issues on which the group would need to see more detail before being able to commit to enter into the new system. First, that the system proposed might not be sufficiently compelling to persuade all publishers into it, and that:[138]

> *"…without the complete support of at least the major publishers, the new system may not have sufficient credibility in the eyes of the public and will be hamstrung from the outset."*

Second, Mr Blackhurst raised a question about the appropriateness of the maximum fine proposed and the levels at which fines were likely to be levied, and finally, he expressed concern about whether the proposed budget of £2.25m was realistic and what the actual costs might be.[139]

7.7 By contrast, Northern and Shell were clear that they were not yet willing to sign up to the scheme; they had specific concerns about the proposal. The editors of The Daily Star, The Daily Express, The Sunday Express and The Daily Star Sunday all expressed reservations about aspects of the proposals:[140]

> *"The Daily Star Newspaper is not ready or committed to sign up to the Proposals in their current form and in any event, this commitment can only be made at board level.*
>
> *Certainly any decision to sign up to a contact under which there is the potential for incurring fines of up to £1,000,000 is a decision which would be taken by the board of the Company.*

[135] pp3-4, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Alan-Rusbridger.pdf
[136] p3, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Alan-Rusbridger.pdf
[137] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Chris-Blackhurst.pdf
[138] p2, para a, *ibid*
[139] p2, paras b-c, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Chris-Blackhurst.pdf
[140] p3, paras 4-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Dawn-Nessom.pdf

> *In addition, I personally have concerns in respect of who will be selected to run the new regulatory body, how the decision will be made as to who runs it, and how decisions are made more generally in terms of how the body will be funded."*

And:[141]

> *"At present, and with the Proposals in their current form, I would not be able to recommend to the Board that The Daily Star Sunday sign up to these contractual obligations contained in the Proposal for, among others, the following reasons:*
>
> *The proposals appear to take a 'one size fits all' approach to the contractual obligations to which we would be expected to adhere. I do not think that this would be in the best interests of the Group titles, other national and regional newspaper titles and the public. Indeed, I would go so far as to say that I consider the proposals as drafted do not appear to represent equally the interests of those in the industry;*
>
> *The proposed contract and its associated penalties are too draconian. The contract could damage the commercial prospects and the very future of many titles that are bound by it. For example there is no redress if a publisher believes the regulator is behaving ill an inappropriate manner.*
>
> *The Proposals do not appear to address any potential wrong doing for which there is not a ready adequate protection in place under the law;*
>
> *The proposals includes(sic) provision for the regulator to decide to carry out an investigation and impose a sanction even after civil and/or criminal proceedings have taken place, irrespective of whether any such proceedings result in the Newspaper being found liable and/or guilty.*
>
> *This list is illustrative of my concerns and is not to be considered exhaustive."*

7.8 Similarly, Ian Hislop, editor of Private Eye, which is not currently a member of the PCC, said:[142]

> *"Private Eye is not "at present fully ready and committed" to enter into these contractual obligations."*

He explained that, whilst he did regard the proposal as a *"significant improvement"* on the PCC, his concerns with the proposal centred around the importance of independence and impartiality of any panel or committee involved in decisions on complaints. He further identified that none of the incentives proposed by Lord Black for membership of the new regulatory body would, in fact, provide any incentive to Private Eye.[143]

Views from the Scottish, Welsh and regional press

7.9 Moving away from the UK national titles there is clearly much more work to be done before publishers are ready to sign up to the scheme. None of the Scottish, Irish, Welsh or regional titles who gave evidence to the Inquiry said that they were ready to sign up to the PressBoF proposal in its current form, though they all supported the broad principles upon which it is based. For example, Ian Stewart, editor of the Scotsman, said:[144]

[141] p3, paras 9-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Gareth-Morgan.pdf
[142] p3, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Ian-Hislop1.pdf
[143] pp4-5, paras 9.1-9.5, *ibid*
[144] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Ian-Stewart1.pdf

> *"I agree with the general thrust of Lord Black's proposal, though I have reservations with regard to its likely cost and the bureaucratic burden it could impose. Nevertheless, bearing in mind JP's commitment to the PCC and its Code, I am confident that the company will continue to support the principle of self regulation, though whether it will support all aspects of Lord Black's proposals I do not know."*

7.10 A number of regional titles raised concerns about the cost, bureaucracy and other details of Lord Black's proposals, generally pointing out that there was a need for more clarity and more negotiation. For example, Anne Pickles, Associate Editor of Cumbrian News said:[145]

> *"so far as I am able to do so, I'd suggest CN would not immediately be ready to commit to all the specifics of Lord Black's proposals for self-regulation. That's not to say they are dismissed as wholly inappropriate or unworkable. But they do beg more time for careful consideration and perhaps some amendment."*

Jonathan Russell, editor of the Glasgow Herald, was very supportive in principle but raised a number of concerns that would need to be resolved:[146]

> *"As an editor, I believe the publications for which I have responsibility are ready and committed in principle to entering into these contractual obligations, subject to clarification of certain detail and any conclusions the Leveson Inquiry itself may reach. I also believe my view broadly reflects the attitude of Newsquest Media Group as a whole."*

And:[147]

> *"However, I do not see the system as fully developed in Lord Black's proposals and I do think there will be the need for some mechanical adjustments here and there. On my reading of it, the framework leaves the Regulator to decide whether and what changes should be made, and then the Industry Funding Body has to approve them. It puts the publishers, locked into the endless contract, at the Regulator's mercy if the system does not work smoothly from day one. In reality, I expect the Regulator will be sensitive to concerns of this kind and will listen to us. But I have to note the lack of an express provision for the members themselves to propose changes without actually having to terminate or threaten to terminate the contract: a safety-valve, if you like. There is also a concern over the extra workload which may be placed on the senior member of staff tasked with dealing with PCC issues. This cannot become more onerous than it currently is. On the other hand, I appreciate that the public need to see a strong Regulator in place, serving a set of established principles and who is not at the beck and call of the members. I think editors like myself have to accept that this is a leap of faith we have to make in order to win back the trust of the public."*

7.11 Lord Black did not seek to consult with those blogs currently outside of the PCC so it is no surprise that Paul Staines (Guido Fawkes) and Camilla Wright (Popbitch) indicated that they were not ready to join the system. Nonetheless, Ms Wright's assessment of the proposal offers some relevant insights into whether such a system would be likely to be welcomed by the new internet providers such as Popbitch:[148]

[145] pp1-2, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Anne-Pickles.pdf
[146] p1, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Jonathan-Russell-of-the-Glasgow-Herald.pdf
[147] p1, para 4, *ibid*
[148] p1, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Response-from-Camilla-Wright-to-Module-4-questions.pdf

"The proposal set out by Lord Black is undoubtedly a well-meaning attempt to provide a basis under which the major newspaper publishers, who have seemingly on occasions ignored the already established PCC code when it suited (thus creating the culture, practices and ethics for which this Inquiry was established to investigate), might be persuaded to follow their own code.

As such, the proposal appears to be written by and for the vested interests of the newspaper business. It appears to have almost no relevance to editors of independent web publishers such as myself.

Being asked, as an obvious outsider to the national newspaper industry, to sign up to a contract whose architects and principal beneficiaries were the same media bosses in this gentleman's club, undoubtedly has limited appeal. The composition of the trust board and complaints committee would appear to be drawn from, and relevant to, national newspapers rather than digital media."

What difference would these proposals make?

7.12 The Inquiry also sought the views of editors on what specific differences membership of a system of the kind set out by Lord Black, underpinned by contractual obligations, would make to the culture, practices and ethics of their publications. The responses are informative. Among the national titles, only James Harding[149] and John Witherow[150] from The Times and The Sunday Times, Chris Blackhurst[151] from The Independent and Lloyd Embley[152] from Trinity Mirror, indicated that procedural changes would be required. Not a single editor indicated that the changes would have the effect of raising standards in respect of their own publication and most said that there would be no practical effect whatsoever:

"In my first witness statement, I explained the basis upon which The Daily Express operates. In light of those matters, I do not think that joining a system such as that described in the Proposals would make any significant difference to how The Daily Express is run." [153]

"I would not expect that membership of a system based on contractual obligations would have a material impact on the running of the Daily Star newspaper." [154]

"As the editor of The Daily Telegraph, while there will be new requirements placed upon us, I do not envisage that the existence of a new self-regulatory system will have much practical impact upon the publication." [155]

"I would anticipate generally that there would be a continuation of the changes to the culture, practices and ethics that have been occurring at newspapers over the past five to six years." [156]

[149] p3, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-James-Harding.pdf
[150] p1, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Third-Witness-Statement-of-John-Witherow3.pdf
[151] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Chris-Blackhurst.pdf
[152] pp3-4, paras 9-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Lloyd-Embley.pdf
[153] p4, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Hugh-Whittow.pdf
[154] para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Dawn-Nessom.pdf
[155] P3, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Tony-Gallagher-signed-.pdf
[156] pp3-4, paras 9-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Lloyd-Embley.pdf

Consequently, we do not consider that the culture, practice and ethics of our journalism would be significantly altered by membership of the kind of system proposed by Lord Black." [157]

"We do not foresee membership of this system altering our approach to any great extent, That said, we would work with the new regulator to ensure that our approach is entirely aligned with their standards and processes" [158]

"Lord Black's proposals complement new governance that News International has already introduced." [159]

"I do not therefore believe that Lord Black's proposals, if implemented, will have any effect whatsoever on the quality of the FT's journalism or the culture of the FT's newsroom." [160]

7.13 The message was essentially the same from the editors of the non-national press and magazines who provided evidence on this question:

"If JP were to agree to Lord Black's proposals, I am confident that compliance with them would make little practical difference to the way my staff and I operate." [161]

"Membership of a system of the kind set out by Lord Black, underpinned by contractual obligations, would do little - if anything - to alter the culture, practices and ethics of Cumbrian Newspapers." [162]

"If it were to be implemented, we do not consider that the system envisaged by Lord Black will have any effect at all on the current culture, practices and ethics of our respective newspapers." [163]

"In terms of the stories we carry and the way we go about our work, Lord Black's proposals would make little difference to us….." [164]

"Notwithstanding the reservations I have in respect of the Proposals as they currently stand, I do not think that 'there would be any particular differences in the way OK! Magazine is run if such a system were to be introduced." [165]

7.14 Having said that, some responses did emphasise that changed processes would be required:

"One clear area of change would be within our administration. All correspondence with statutory bodies, members of the public and the courts concerning complaints are carefully filed. However in honesty our systems for recording the route of decision making over particular stories would have to be improved in order to satisfy the the (sic) demands of an annual audit, I do not think this would take much." [166]

[157] p3-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Chris-Blackhurst.pdf
[158] p4, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Alan-Rusbridger.pdf
[159] pp3-4, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Dominic-Mohan1.pdf
[160] p7, para 24, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Lionel-Barber.pdf
[161] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Ian-Stewart1.pdf
[162] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Anne-Pickles.pdf
[163] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Terry-Hunt-Editor-of-East-Anglian-Daily-Times1.pdf
[164] pp1-2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Adrian-Faber-in-response-to-Module-4-Questions.pdf
[165] p3, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Lisa-Byrne.pdf
[166] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-Mike-Gilson-Belfast-Telegraph.pdf

> *"Therefore, I believe that any specific difference would be more about further strengthening the current practices at my publications, and the checks that are already in place (such as the need to verify any potentially contentious stories with at least two independent sources and to seek advice from the legal team as necessary). It is also likely to make the journalists more aware of the consequences of not complying, I believe that any such changes will only make a publication stronger."* [167]
>
> *"Insofar as PressBofs submission may though require us to collect and store information on stories that we might be asked to justify at a later date, whereas currently we may have discussions about these types of stories, under PressBofs proposals we would likely have to note conversations and decisions made regarding these types of stories."* [168]
>
> *"None, other than in terms of the additional paperwork required under the new regime, for example, in terms of annual returns to the regulator. The bureaucratic burden would not be an insuperable objection to participation in a new scheme. The underlying culture, practices and ethics would, most likely, remain the same."* [169]

7.15 The only response that suggested that any substantive change would be required was that from Paul Staines, who runs the Guido Fawkes blog, who said:[170]

> *"It would bog us down in bureaucracy by opening a channel for politically motivated nuisance complainants. Every single article we write that voices an opinion is challenged by our readers in the comments, on Twitter and via email. If we were obliged to respond to complainants we would be overwhelmed. It is ridiculously impractical given the volume of specious complaints."*

Not all blogs took the same line. Camilla Wright, editor of Popbitch, said that *"it would be unlikely to have much effect."* [171]

7.16 It is difficult, in the light of these comments, to conclude that the press themselves believe that the system proposed by Lord Black would drive up standards. It is true that, in all cases, it is said that there would be no impact from the proposals because the relevant title already respects the PCC standards. However, in the light of the practices that have been identified by the Inquiry this view, at least in some parts of the press, must display a degree of complacency that argues against the prospect of real change under the proposed system.

8. Summary and conclusions

8.1 The proposal put forward by Lord Black does represent a significant improvement on the PCC as currently constituted and I recognise and appreciate the efforts that he and others have gone to in order to be able to present this proposal in such detail to the Inquiry. However, this proposal does not, in its current form, meet any of the criteria that I set out in May.

[167] p6, paras 19-20, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-David-John-Brookes.pdf
[168] p4, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Second-witness-statement-of-Timothy-John-Gordon.pdf
[169] p7, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Ian-Hislop1.pdf
[170] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-Witness-statement-from-Paul-Staines.pdf
[171] p2, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Response-from-Camilla-Wright-to-Module-4-questions.pdf

8.2 I have repeatedly made it clear that in order to be considered effective a new regulatory regime would have to work for the public as well as for the industry. That means that, besides promoting the highest professional standards of journalism and the importance in a democratic society of free speech and freedom of expression, a new regulatory regime must cover all significant publishers; it must also be capable of raising standards while at the same time protecting both the public interest and the rights of individuals. This proposal fails to meet the requirement for effectiveness on two of those points.

8.3 First, the proposed contractual basis has some benefit in keeping publishers within the system for a period of time once they have signed up. However, it does nothing to require them to sign up and the evidence before the Inquiry makes it clear that there is a substantial distance to go before all significant publishers could be persuaded to join the system. In those circumstances it is not possible to say with any confidence that this proposal would have sufficient coverage within the industry. Furthermore, I realistically have to identify that the main incentive to any publisher to sign up to this system is the threat that the Inquiry will recommend some form of regulation that is less to their taste. Once this Report has been published, that power to bring publishers to the table will no longer exist, so to the extent that publishers have not yet signed contracts there can be no reliance on them ever doing so.

8.4 Even if all significant publishers were to join this proposed contractual system there is no guarantee that the system would continue to operate, or to operate at the standards currently proposed, beyond the first five year period. In addition, titles may leave the system if ownership is transferred to a non-member. This does not provide sufficient long term stability or durability.

8.5 A number of incentives have been proposed to entice publishers into the system and to keep them there. Unfortunately those incentives are very weak and it is difficult to see them having any impact on a publisher who does not in any case consider membership to be in his interest.

8.6 Second, the proposal is structured entirely around the interests and rights of the press, with no explicit recognition of the rights of individuals. The system gives no rights at all to complainants and the regulator is set up without any remit to protect the rights of third parties. At its heart, an effective regulator should have the interests of those likely to be affected, alongside the interests of freedom of expression and the freedom of the press.

8.7 A new system must have an independent process for setting fair and objective standards. In my opinion, this proposal fails to meet that test by leaving the setting of standards in the hands of the industry, albeit with a check by the Trust Board. A relatively small change to the proposal, making it clear that the Code Committee is advisory and that the Trust Board is responsible for establishing and altering the code, would go a considerable way to deal with this concern.

8.8 A new system must have an independent enforcement and compliance mechanism. This proposal makes real advances under this heading. I welcome the emphasis on improving internal governance within publishers. I support the proposal that complaints should be dealt with in the first instance by publishers. I endorse both the requirement for an annual return on compliance to the regulatory body and a named senior individual within each title with responsibility for compliance and standards. These are real innovations and are very welcome. However, the proposal still has serving editors on the body making decisions on complaints and this does not provide the required degree of independence of enforcement.

8.9 I welcome the proposal for a standards and compliance arm, with both its ongoing monitoring role and its ability to carry out investigations. Again, these are both real innovations and are much needed. However, there are substantive concerns about the ability of this part of the organisation to function effectively given the procedural arrangements proposed. I am sure that this could be resolved by addressing the procedural issues, but they are not insignificant and it would be important to have an independent review of the operation of the standards arm after a short period, say a year, to ensure that they had been addressed effectively and to consider the possibility of making further procedural changes if they were needed.

8.10 Overall, however, I have serious reservations about the independence of the appointment process for the Chair of the Trust, and about the role of the Industry Funding Body throughout this model. I believe that sufficient independence cannot be achieved while the industry has a veto on the appointment of the Chair, has the right to define the standards and has the right to define the sanctions available. All these concerns could be remedied by reducing the IFB's role in the operation of the proposal.

8.11 A new system must have the ability to offer meaningful remedies of correction and apology to those who have been harmed and to apply effective sanctions to those who continue to breach standards (or fail to comply with directions as to correction and apology). The remedies offered to individuals under the proposed system are exactly the same as those currently offered by the PCC, albeit with some potential improvements in transparency. This does not seem to me to be sufficient. The regulator should have the power to determine the prominence and placing of an apology, correction or adjudication and all breaches of the code should be identified and recorded as such, even where the publisher cooperates with a mediated settlement.

8.12 As has been made clear earlier, the creation of the investigations process is to be welcomed, and both the investigatory powers and the range of the sanctions available do look to be potentially effective if publishers cooperate. I repeat, however, that this process cannot be effective if it is prevented from operating by oppressive procedures; changes therefore need to be made to ensure that this does not arise, even where a publisher might try to frustrate the process.

8.13 An effective regulatory system must be adequately financed and have sufficient independence from its funding body to operate independently. I have significant concerns on both those fronts in relation to this proposal. First, the sums proposed both for core funding and for the enforcement fund look tight. This is particularly the case in relation to the enforcement fund which could easily be used up on investigations into a recalcitrant publisher. Second, the role of the Industry Funding Body throughout the proposal and the fact that the funding will not be settled in advance for the full contract period, give far too much influence to the IFB. It is welcome that the industry is keen to fund this regulatory regime itself without input from the taxpayer or from complainants; however, the extent to which the largest players must shoulder the bulk of the burden of the cost for the good of the industry as a whole, along with the extent to which the funding mechanism should be open and transparent, are also issues which would have to be addressed.

CHAPTER 4
OTHER PROPOSALS SUBMITTED TO THE INQUIRY

1. Introduction

1.1 Chapter 2 above described the proposal that has been put to the Inquiry by Lord Black, as Chairman of PressBof, on behalf of the industry. There have been some 45 other proposals for complete or partial regulatory regimes submitted to the Inquiry and many more submissions with ideas and comments on the way forward. I am very grateful to all those who have taken the time and gone to considerable trouble to offer their assistance to the Inquiry in this way. Whilst some of these proposals are complete in themselves, I intend to consider all the elements of a regulatory regime that have been put forward, rather than to describe each model as presented. All of the submissions are part of the evidential record of the Inquiry and can be seen in their entirety on the website. Rather than looking at each individual proposal for an entire answer it is more useful to look at the range of proposals made each of the issues covered, by way of building up a complete picture of the ideas that have been submitted.

2. A new regulatory body

2.1 All the proposals submitted have made two basic assumptions. First, that the Press Complaints Commission (PCC) as currently constituted is not delivering adequate regulation of press standards and, second, that some form of new regulatory body is required. The first of those assumptions is important only in that it reinforces the conclusion I have already reached[1] that leaving the current system unchanged is not a credible option.

2.2 The second assumption, that a new press regulatory body is required, is more interesting and requires some examination. All those submitting proposals for the future envisage the establishment of a new body with responsibilities for press standards. These proposed bodies obviously differ significantly in their scope, authority and powers, but no one has suggested that press standards could be supported adequately though changes to the general law or through strengthening law enforcement. Neither has anyone suggested that improvements in internal governance in the press would, of themselves, be sufficient guarantee of adequate standards.

2.3 This does not mean that the creation of a new press standards body is the only possible answer to the problems with press standards identified in this Report. It does, however, mean that I have not received evidence on potential alternative approaches.

3. Functions and structures

3.1 A variety of functions for a new press standards body to cover have been put forward. Essentially they fall into the categories below.

[1] Part K, Chapter 2

Setting standards

3.2 By 'setting standards' I broadly mean the establishment of a code of practice that sets the minimum standards to which relevant organisations are expected to adhere and against which their conduct should be judged. Three different approaches have been adopted to standards setting. The first is that contained in the industry proposal, namely that the setting of standards should be essentially a matter for the industry, albeit with some lay input, and that it should sit outside of any body with responsibility for enforcing the standards. This position is put forward by Lord Black and supported by all publishers or editors who have commented on the issue. It is also the position supported by Lord Prescott's working group.[2]

3.3 The second proposition is that standards setting should be the responsibility of an independent regulatory body that is also responsible for enforcement of the standards. This is the position put forward by the Campaign for Press and Broadcasting Freedom (CPBF),[3] the Co-ordinating Committee on Media Reform,[4] Ofcom,[5] the Media Regulation Round Table[6] and Professor Roy Greenslade.[7]

3.4 The third proposition, only explicitly put forward by Max Mosley,[8] is that there should be separate independent bodies which set the standards and enforce them. This would allow for statutory enforcement of press standards without the standards themselves being set by a statutory body. A joint submission on behalf of the Core Participant Victims (CPVs) argues for separate mechanisms for rule making, adjudication and investigations, but is not specific in terms of whether this means separate bodies.[9]

Promotion and enforcement of standards

3.5 Where the issue is addressed specifically, all the proposals submitted envisage a new press standards body having a broad regulatory role involving the promotion and enforcement of standards. This is often described as requiring investigative powers.

Complaints handling

3.6 All the proposals submitted envisage that some part of their proposed regulatory structure would have the responsibility to hear complaints about breaches of a press standards code. In most cases the proposals are not specific about the degree of relationship between the more general standards enforcement role and the complaints handling role. In the case of the industry proposal, it is quite clear that it is envisaged that both are done by the same body, albeit by different parts of that body. The British and Irish Ombudsman Association was clear

[2] p8, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[3] p15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Campaign-for-Press-and-Broadcasting-Freedom1.pdf
[4] p11, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[5] p102, lines 1-9, Ed Richards and Colette Bowe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[6] p3, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[7] p14, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[8] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[9] p1, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf

that a true ombudsman, dealing with complaints, would be separate both from the body that set the standards and the body that enforced standards more generally (although they made no comments on whether those two roles should be separate).[10]

Championing freedom of expression

3.7 Some proposals explicitly recommend a role for the press standards body in acting as a champion for freedom of expression or the freedom of the press.[11] The National Union of Journalists (NUJ) says that the primary duty of a new press standards body should be to ensure the freedom of the press from both the state and editors and owners.[12] The Media Regulation Roundtable sets out two objectives for their proposed new Media Standards Authority, one of which is:[13]

> *"To promote and protect the right of the media to publish information on public interest matters and the right of the public to receive it by promoting and protecting public interest journalism in all its forms and by protecting and encouraging high standards of ethical and responsible journalism."*

Adjudication of civil claims

3.8 Adjudication of civil claims is considered as essential in a number of proposals. Specifically, Early Resolution, the Alternative Libel Project and Max Mosley build their proposals around the provision of dispute resolution procedures. The Early Resolution proposal suggests a statutory basis for the regulator and the adjudication process, ensuring that all relevant claims are dealt with though this means.[14] Similarly, Mr Mosley proposes a structure based around a statutory tribunal with authority over all printed press, its agencies and the internet.[15] By contrast the Alternative Libel Project and the Media Regulation Roundtable suggest that access to a cheap, fast and fair way of resolving defamation claims would be a strong incentive to publishers to join a voluntary regulation system.[16] The CPVs argue that the regime should oversee issues covering libel, privacy and harassment (as well as broader standards concerning accuracy, publishing and information gathering) but do not present any specific proposals as to how that should be done.[17]

[10] p10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-British-and-Irish-Ombudsman-Association.pdf
[11] p11, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf; p2 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Sumission-from-Jeremy-Hunt-MP.pdf
[12] pp3-7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[13] p3, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[14] pp8-9, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Early-Resolution.pdf
[15] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[16] p4, para 1.12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Alternative-Libel-Project-English-PEN-and-Index-on-Censorship.pdf; pp3-4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[17] p2, para 7, point 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf

Pre-publication functions

3.9 Few of the proposals address the question of whether the press standards body should have any functions prior to publication. Early Resolution recommends that the issue of advisory 'desist notices', to deter actual or threatened media misconduct, is an important function.[18] The Media Regulation Roundtable proposes a specific role for the media standards body of providing pre-publication advice, including being able to request a publisher to demonstrate evidence of an appropriate public interest prior to publication of material that invades an individual's privacy.[19] This approach was strongly criticised by Sir Charles Gray of Early Resolution,[20] who argued that involvement of a standards body prior to publication in that way would constitute an interference with the freedom of the press.

Roles for other bodies

3.10 George Eustice MP, in his proposal, suggested additional roles for bodies other than the proposed press standards body. Specifically, he suggests that Ofcom should have a role in ensuring adequate governance within press organisations. He does not suggest that Ofcom should have any role in dealing with disputes about individual news stories,[21] but does suggest a right of appeal to the Information Commissioner in respect of privacy cases. He proposes that this right to appeal should apply in respect of all media, irrespective of whether they were participants in any system of voluntary regulation.[22] This is perhaps best considered in relation to the suggestions for reform of the Data Protection Act elsewhere in the Report.[23]

3.11 A different approach was put forward by the Media Standards Trust (MST) and the communications consultant Tim Suter. Both proposed a system based around a statutory oversight body that would have the role of approving self-regulatory bodies. Under this approach the focus is not on the functions of the self-regulatory body itself, but the minimum requirements that such a self-regulatory body should have to meet. Under the MST model the oversight body would only approve bodies that meet:

(a) minimum commitments within a code of practice;

(b) basic requirements of a contract of membership, including sanctions;

(c) adequate independence; and

(d) adequate governance arrangements with regard to proportionality, accountability, consistence, transparency and targeting.[24]

3.12 Under Mr Suter's proposal the oversight body (which in his case is the Ofcom Content Board) would have to satisfy themselves as to:[25]

[18] p12, 9.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Early-Resolution.pdf
[19] pp3-4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[20] pp44-46, lines 22-11, Sir Charles Gray, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf
[21] pp5-6, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[22] p6, para 4, *ibid*
[23] Part H
[24] pp89-90, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[25] pp3-4, para 17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf

(a) governance arrangements guaranteeing independence from both Government and industry;

(b) adequate regulatory scope, industry coverage and powers; and

(c) adequate operational and funding arrangements.

3.13 The oversight body would establish basic rules around independence and effectiveness but the rest would be for the self-regulatory body, which would have at least the standards setting and complaints roles otherwise described.

3.14 Under this approach the oversight body would have significant powers to determine the regulatory framework, but no regulatory powers over press organisations themselves. The effect of an oversight body withholding its approval from a self-regulatory body, or of a press organisation refusing to join an approved self-regulatory body, is a key point under these proposals and is considered later in this chapter.

4. Should coverage be voluntary or mandatory?

4.1 The proposals submitted to the Inquiry are split on whether compliance with press standards that go beyond the existing criminal and civil law should be voluntary or mandatory. Those arguing that regulation or adherence to standards should be voluntary offer four reasons as to why. First, there is an argument that any form of mandatory regulation of press standards is an infringement of the freedom of the press. Lord Prescott warns that a mandatory system risks turning into, or being perceived as, a state licensing system.[26] Paul Dacre said that he feared any Parliamentary involvement would be the '*thin end of the wedge*'.[27] Similarly, Lord Hunt has expressed strong reservations about the risks to freedom of the press should any measure relating to regulation of the press come before Parliament.[28] Lord Black argues that any form of statutory intervention would inevitably undermine the "constitutional principle" of independence.[29] Ed Richards was clear that a licensing regime, such as that which Ofcom operates in respect of broadcasting, would not be an appropriate model for the press because:[30]

> *"freedom of expression works in a different way, and a more unqualified way, for the press."*

The Media Regulation Roundtable asserts that compulsory regulation would have to be backed by compulsory registration and that this might be difficult to justify under Article 10(2) of the ECHR.[31] Hugh Tomlinson QC said that regulation of the print media could, in some circumstances be compatible with the ECHR, particularly if limited, for example, to a set of mandatory standards for publications with a large circulation, but that general regula-

[26] p6, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[27] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[28] p64 line 23 – p66 line 4, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf; pp5-7, paras 14-18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf
[29] pp11-12, lines 20-3, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf; pp13-14, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[30] pp95, lines 9-11, Ed Richards and Colette Bowe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[31] pp17-18, para 58, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf

tion which might amount to a licensing regime would not.[32]

4.2 Second, it is argued that the effectiveness of a standards regime depends on the active support of the participants, that a mandatory scheme would not have the support of those compelled to comply and consequently would not be as effective as a voluntary system could be.[33] Mr Richards pointed out that for self-regulation to be effective it requires 'genuinely willing participants' in the enterprise. The point was also made by Ofcom that self-regulation is most likely to be effective where there is a strong alignment between the industry interest and the public interest,[34] leading to the conclusion that active support could best be secured by the right range of incentives within a self-regulatory system. The Media Regulation Roundtable argued that a voluntary system would be designed to obtain the fullest cooperation of the media; as a result, it would be more likely to command support and be effective in practice.[35]

4.3 Third, it is argued that there are numerous practical difficulties with making a system mandatory. Any mandatory system would require some form of legislation; it is argued that this would make the resultant system inflexible and unable to move to react to changes in the market or in technology.[36] As an example, Lord Black points out that the broadcasting complaints regime is governed by the Communications Act 2003, which doesn't even mention the internet.[37]

4.4 Finally, issues have been raised about for whom any such regulation or standards would be mandatory. Specifically there are concerns about the ability of legislation to identify relevant online providers in a world where anyone might contribute to news and current affairs discussion online, via Twitter or blogs, alongside big news providers (including newspaper websites).[38] There are obvious difficulties about seeking to apply regulation to providers of internet services that are not based in the UK.[39] Equally there might be a risk of any providers moving out of the UK in order to avoid mandatory standards regulation.[40]

4.5 Generally, even where there is strong support for a voluntary system, those proposing such systems are keen for all news providers, particularly all national newspapers, to be part of the system. Lord Hunt said that the industry's proposed voluntary scheme would be '*fatally undermined*' if a big fish, such as Northern and Shell, were to escape the net.[41] Accordingly, all of the proposals that rely on voluntary membership of a press standards body also stress

[32] p39, lines 1-13, Hugh Tomlinson QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[33] p13, lines 9-15, Lord Black p13/9-15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[34] p7, para 3.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[35] p19, para 64, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[36] pp13-14, paras 39-40, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf
[37] p19, para 24, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[38] p6, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[39] pp18-19, paras 61-63, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[40] p13, lines 3-8, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[41] pp1-2, lines 14-14, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf; p14, para 42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf

the need for appropriate incentives to ensure universal membership of relevant news organisations. The range of incentives proposed is considered in more detail in below.[42]

4.6 By contrast, those arguing for a mandatory standards regime simply point to the failure of the voluntary self-regulatory approach over the last century and, in particular, the difficulty of ensuring that all relevant publications comply with any voluntary regime. Separate issues are also raised about the ability to require both claimants and defendants to use an alternative dispute resolution mechanism. However, whilst the rationale for making some form of standards regulation compulsory is common to a number of proposals, the concept of what might be made compulsory differs widely between them. Whether some form of mandatory standards regulation amounts to a form of licensing will depend heavily on the consequences of non-compliance. The following paragraphs briefly outline both the mandatory elements of proposals and the proposed consequences of non-compliance.

4.7 The CPVs argue that all newspapers and magazines should fall within the jurisdiction of the regulatory regime and comply with the requirements of adverse adjudications or investigations.[43] This appears to be an argument for compulsory coverage by implication, rather than specifically stated as such.

4.8 Sir Louis Blom-Cooper QC recommends mandatory coverage for a Standards Commission that would adjudicate on complaints as well as having investigatory powers and a role to promote freedom of expression. However, the only sanction underpinning the mandatory standards would be its own publication of its critical verdicts.[44] This is a proposal that enhances transparency around the standards applied by the press but would not be regulation in any usual sense.

4.9 The Campaign for Press and Broadcasting Freedom (CPBF) outlines proposals for a body that would have the power to adjudicate on breaches of its code of ethics and order the wording and placement of publication of apologies and retractions. This would be enforceable by a court and the CPBF suggest that, where a publication is outside of UK jurisdiction, then distribution could be suspended until '*the matter is resolved*'.[45] This approach limits the mandatory nature of regulation to the publication of apologies and retractions, but is silent on what might happen if a publication refused to comply with a direction or a court order enforcing it. In a submission on behalf of the Labour Party, Harriet Harman QC MP makes a similar suggestion, emphasising that the important element is the ability of the body to enforce its decisions across all newspapers. In Ms Harman's model the courts would be able to fine the newspapers if they failed to comply with an order of the body.[46]

4.10 Mr Eustice challenges the idea that statutory regulation of any sort would have a chilling effect on freedom of expression, pointing to the substantial statutory regulation of broadcasting, whilst underlining that broadcasting is home to '*some of the best investigative journalism in Britain*'.[47] The statutory provision he envisages is a role for Ofcom in overseeing governance standards in the press, with no involvement in day to day disputes on individual stories,

[42] section 5
[43] p2, para 7.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[44] pp15-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[45] pp4-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[46] pp4-5, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[47] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf

and a role for the Information Commissioner in providing redress for individuals in relation to breaches of privacy. He does not set out what the consequences might be for a press organisation which refused to comply with either element of statutory regulation.[48]

4.11 Early Resolution propose a system of mandatory regulation that requires media disputes that would otherwise have gone to the courts to be subject to a statutory dispute resolution scheme.[49] Although not spelt out, the decisions of the dispute resolution body would be enforceable by the courts. Mr Mosley proposes a similar scheme, but with the proposed tribunal having powers to investigate and adjudicate on any breach of the rules established by an independent Press Commission. The decisions of the tribunal would be able to be appealed to the High Court and decisions of the tribunal would be enforced by the High Court.[50]

4.12 The NUJ proposes a statutory regulatory body with jurisdiction over all publications of a certain size and their associated websites. Various options are suggested for the size trigger. The regulatory body would have the power to impose fines for breaches of standards as well as to order the publication of corrections and apologies in respect of the publications over which it had jurisdiction.[51] The NUJ does not elaborate on the consequences of failure to comply with an order of the body.

4.13 Professor Greenslade concludes that there has to be some form of compulsion for the larger publishers but he would rely on a system of incentives for smaller and online publications.[52] The body would adjudicate on complaints and be able to order publication of an adjudication.[53] Professor Greenslade does not elaborate on what the consequences would be of a larger publisher failing to comply with an order from the body.

4.14 As already mentioned, Mr Suter and the MST each propose a statutory requirement that media organisations should belong to an approved self-regulatory body. Under the MST proposal the statute would apply only to big media companies, and would require internal governance standards in individual companies and membership of an approved self regulatory body.[54] Failure to do either could result in a fine enforced, if necessary, by the courts.[55] The powers of the self-regulatory body in respect of breaches of standards would be a matter for the body itself; this would be by agreement with its members, as long as it could satisfy the backstop regulator that it was sufficiently robust.

4.15 Under Mr Suter's proposal there would be a general authorisation regime, which would allow anyone to publish but would require them to do so in a way which met any regulatory requirements set down. Ofcom would define the characteristics of media services that should be regulated, including with reference to the size of the undertaking. Those services falling with the definition would have to join an approved self-regulatory body. The Ofcom Content Board would then be responsible for approving self-regulatory bodies, in line with the

[48] pp5-6, paras 2 and 4, *ibid*
[49] pp8-9, paras 6.1-6.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Early-Resolution.pdf
[50] pp3-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[51] pp10-11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[52] pp37-38, lines 12-8, Professor Roy Greenslade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[53] pp12-14, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[54] p72, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[55] p81, *ibid*

regulatory outcomes set out by Ofcom.[56] As with the MST proposal, the self-regulatory bodies would be free to define their own codes and sanctions, but would need to satisfy the Content Board that they had adequate governance arrangements, scope, coverage and powers in order to be approved. Any organisation falling within the characteristics defined by Ofcom but refusing to join a relevant self-regulatory body would be regulated directly by Ofcom, using the self-regulatory code considered by the Content Board to be most appropriate.[57] Mr Suter does not say so in terms, but the ultimate sanction in a general authorisation regime is withdrawal of authorisation to carry out the regulated activity.

5. Incentives for membership

5.1 As described above,[58] where compliance with press standards is proposed as a voluntary matter there is considerable desire to craft incentives that would encourage publishers to join a voluntary standards organisation. A number of potential incentives have been set out in the proposals submitted to the Inquiry and they are considered here.

Kitemarking

5.2 Kitemarking is the most straightforward of the incentives proposed. The issuing of a kitemark would rest solely with the regulatory body and no cooperation from outside the industry is required. A kitemark would stand as a symbol of the quality of a publication in terms of its adherence to the professional and ethical standards set out in the code of practice. The commercial value of the kitemark would be wholly dependent on the extent to which the purchasing or reading public were aware of its existence, and of what it meant, and the extent to which that affected purchasing decisions. Essentially a kitemark has no value unless a product carrying it succeeds better in the market than a competing product without it.

5.3 Mr Dacre suggested that a kitemark would be effective. It would signal to the public which publications had signed up to self regulation and as such would provide an incentive not only to newspapers but also to internet news providers to join the system.[59] The Media Regulation Roundtable suggested that a kitemark might be of particular value to smaller publishers and bloggers.[60] Lord Hunt told the Inquiry that he thought publishers would carry a kitemark with pride. He accepted that there would always be some publications which might take equal pride in not carrying the badge and signalling themselves as outside the system, but he felt that it was important to make adherence to the new regime more visible.[61]

5.4 I suspect that, while a kitemark might be seen as a benefit by some publishers, it is unlikely to have a significant impact in persuading publishers who do not otherwise want to join a self-regulatory standards regime to do so.

[56] p2, paras 8-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[57] p5, paras 21-22, *ibid*
[58] paragraph 4.5
[59] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[60] p21, para 72, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[61] pp19-21, lines 17-7, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf

VAT zero-rating

5.5 An idea which was much discussed during the early months of the Inquiry was the possibility of removing the VAT zero-rating for publications that were not members of a self-regulatory scheme. Given the currency this idea gained, it has been considered in depth and it is important that that the issues are set out. The essential background is that printed material is zero-rated for VAT purposes, that is to say, no VAT is charged or payable. It is an important point that this is not an exemption from VAT. The proposition is that a newspaper that is not signed up to a self-regulatory standards regime should, instead, have VAT levied on it at the standard rate (currently 20% in the UK).

5.6 John Evans, Deputy Director in the Solicitor's Office at HM Revenues and Customs (HMRC), with responsibility for advising on legal issues relating to VAT, has provided the Inquiry with expert evidence relating to this proposal.[62] He explains that VAT is a European tax, and that one of the intentions of the EU VAT Directive 2006/112/EC is to ensure that the application of VAT does not distort competition, whether at national or community level.[63] VAT is a tax on the final consumer, not the business. The effect of standard rating newspapers supplied by publishers outside the self-regulatory system would, in fact, be an increase in price for the consumers, or a squeeze on profit margins for the publishers, depending on how the publisher chose to manage his pricing.[64] Either would have an impact on competition; indeed, that would be the point of the proposals, since the aim is to provide a strong commercial incentive on the publisher to join the self-regulatory regime.

5.7 The UK does not generally have the ability to determine which products are subject to VAT and which are not. There is no general discretion available to Member States to apply or dis-apply VAT to a particular product or service. Under the Directive, and pending full harmonisation of VAT, Member States have been permitted to, amongst other things, maintain some zero-rates.[65] The zero-rate applied to printed matter (including newspapers and magazines) is one of those. The UK does have discretion to remove those zero-rates and apply VAT at the standard rate to those products or services.[66] However, once a zero-rate has been withdrawn it cannot be reinstated.[67]

5.8 All UK application of VAT must be consistent with the principle of fiscal neutrality, which precludes treating similar goods differently for VAT purposes.[68] It follows that in order to implement the proposal described above, one would have to be confident that a newspaper published by a publisher within the self-regulatory regime and a newspaper published by a publisher outside the self-regulatory regime were not 'similar goods'.[69] Mr Evans drew the attention of the Inquiry to a judgment of the Court of Justice of the European Union (CJEU)[70] in which the court had been very clear that different legal regimes or different systems for control and regulation were of no relevance when assessing whether or not supplies of products or services were similar.[71] Mr Evans also drew the attention of the Inquiry to a

[62] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/HMRC-submission-by-John-Evans.pdf
[63] p2, paras 5-6, *ibid*
[64] p4, para 10, *ibid*
[65] p4, paras 11-12, *ibid*
[66] p5, para 14, *ibid*
[67] p11, para 30, *ibid*
[68] p7,para 18 *ibid*
[69] para 5.5
[70] The Rank Group plc (Joined Cases C 259/10 and C260/10)
[71] p9, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/HMRC-submission-by-John-Evans.pdf

further decision[72] in which the CJEU had concluded that similar services could not be treated differently for VAT purposes simply because one was lawful and the other was not.[73]

5.9 Mr Evans told the Inquiry that, in the view of HMRC, the supply of newspapers was likely to be similar whether supplied by a member or by a non member of a self-regulating body. HMRC therefore considered that a challenge against the proposed change, either through the UK courts or by the EU commission, would be highly likely to be successful.[74]

5.10 It is worth bearing in mind the provision noted at above,[75] that once a zero-rate has been removed from a product or service the UK has no discretion to reinstate it. It follows that if the zero-rating were to be removed from newspapers outside of the self-regulatory regime, and that distinction was found by the CJEU to be a breach of fiscal neutrality, the UK would be unable to reinstate zero-rating for those newspapers outside the self-regulatory regime and would therefore be required to withdraw the zero-rating from all newspapers in order to preserve fiscal neutrality.[76]

5.11 Mr Evans made a number of other points about the proposal. If the proposal were successfully adopted, the decision over whether or not VAT were charged on a newspaper would effectively reside with the self-regulatory body. However, ultimately HMRC must be able to reach its own view on whether those decisions were being reached in a fair way, and HMRC and the Government could become involved in a legal challenge to a decision of the regulatory body. This would effectively give the Government a significant backstop role in decisions of the regulator over who could join or remain a member of the system.[77]

5.12 There is also a risk that differential VAT treatment of newspapers inside the self-regulatory system could be considered to be a state aid. Unless such aid had been cleared in advance by the European Commission (and the likelihood of getting such clearance would require detailed consideration) the aid, in the form of the difference between the levels of VAT, would have to be paid back to HMRC by the newspaper publishers who had benefited from it.[78] Mr Evans also drew the attention of the Inquiry to potential risks that the proposal could constitute a barrier to freedom of establishment under the Treaty on the Functioning of the European Union,[79] and that it could constitute an infringement of the right to freedom of expression under the ECHR.[80] Finally Mr Evans noted that there would be a potentially significant compliance cost for small businesses who sell newspapers, some of whom may have to register for VAT where they were not already so registered, and in being able to correctly identify which publications were subject to VAT and which were not.[81]

5.13 It is noticeable that very few witnesses have supported this proposal during Module Four of the Inquiry. Professor Greenslade[82] and Ofcom[83] float it as an idea in their submissions,

[72] Fischer v Finanzamt Donaueschingen (Case C-283/95)
[73] p9, para 24, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/HMRC-submission-by-John-Evans.pdf
[74] p10-11, para 29, *ibid*
[75] para 5.7
[76] p11, para 30, *ibid*
[77] p12, paras 33-34, *ibid*
[78] p12-12, para36-39, *ibid*
[79] p13, paras 40-42, *ibid*
[80] p14, para 43, *ibid*
[81] p14, para 44, *ibid*
[82] p16, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[83] p19, para 4.18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf

but without any detailed explanations of how it might be possible. Ms Harman,[84] and the Media Regulation Roundtable[85] explicitly recognise that there may be insuperable barriers to this in European law. The MST looks at the issue in considerable detail and identifies that the current zero-rating of newspapers for VAT is worth nearly £400m collectively to national newspaper titles[86] but recognises that, although the removal of VAT zero-rating as an incentive to join a self-regulator scheme is possible in theory, it would require considerable political will and would likely take some years to come into practice.[87] I see this as a considerable understatement. The political will and the time required to overturn the principle of fiscal neutrality are, in my opinion, incalculable. Put simply, this is not a credible option.

Journalistic accreditation

5.14 Mr Dacre first raised the possibility that the provision of press cards to journalists could be restricted only to journalists working for publishers subscribing to the new regulatory body.[88] This proposal is one of the four potential incentives to membership of the industry proposal put forward by Lord Black, and is explained in basic terms in Chapter 3 above. The proposal has now been rejected by the UK Press Card Authority (UKPCA).

Access to industry services

5.15 There are a number of services, where the newspaper publishing industry works together, which, it has been suggested, could be withheld from those who do not join a self-regulatory press standards body. The first is access to Press Association (PA) copy. The PA is a private company, with 27 shareholders, most of whom are national and regional newspaper publishers.[89] It is the main multimedia news agency in the UK and Ireland, providing newspapers with access to its news content, as well as images, listings, sport and weather information.[90] The proposal is that access to PA copy might be denied, or at least supplied on differential terms, to publishers who refuse to comply with a code of practice.[91]

5.16 Newspapers, both regionally and nationally rely heavily on PA wire copy for content. It is a fundamental resource, particularly with current business models, and a newspaper denied access to PA services would have to find an alternative source for such material, such as producing its own foreign and national news content, or do without such information.[92] Mr Dacre argues that denying access to news publishers to the PA service would be a 'crushing blow'.[93] The MST agrees that this would have a significant impact on publishers outside the system, but argues that restricting it would be undesirable because of its impact on the market.[94]

5.17 The second industry service it has been suggested could be denied to those outside a self-regulatory system is coverage within the Audit Bureau of Circulations (ABC) and the National

[84] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[85] p21, para 73, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[86] p52, table 3.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[87] p54, *ibid*
[88] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[89] http://www.pressassociation.com/about-us/shareholders.html
[90] p55, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[91] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[92] p56, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[93] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[94] p56, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf

Readership Survey. At present, ABC provides a vast range of media organisations, advertisers, academics and public members with data on circulation and web traffic. The data provided is used by the media owners and advertisers to calculate the value of advertising space. The ABC Board consists of members nominated by the trade bodies of both media owners (the NPA, the PPA, NS) and the advertising industry (Institute of Practitioners in Advertising (IPA) and the Incorporated Society of British Advertisers (ISBA)).[95] Whilst ABC is the dominant provider of this data, it is open to publishers to find other sources. The National Readership Survey is governed by the IPA, the NPA and the PPA and provides data for the size and nature of the audience reached in relation to over 250 newspapers and magazines.[96]

5.18 Professor Greenslade suggests that this would deny such publishers the 'currency' that advertisers use to buy space,[97] thus having a potentially significant economic impact on them. The MST says that, whilst denial of access to both ABC and NRS figures would be likely to add to the costs of a publication, it seems unlikely to represent an overriding economic incentive for membership of a new regulatory system that may apply further costs to news publishers.[98]

5.19 The Media Regulation Roundtable notes that membership of collective commercial partnerships such as participation in industry standards could offer a commercial incentive to join a self-regulatory standards body,[99] but goes on to comment that, whilst incentives of this kind could be of some commercial value to publishers, they would not be strong enough to guarantee participation.[100]

5.20 The MST further argues that application of these incentives would be undesirable for two reasons. First, that it would concentrate power within the industry, and second that it would provide direct commercial benefits to publishers through their ability to restrict the business practices of existing or potential rivals and could thus be viewed as anticompetitive.[101] The question of whether these incentives might give rise to competition law problems is considered above.[102] I agree that this combination of incentives has the potential to make it very inconvenient for a major publisher to sit outside the self-regulatory regime. However, I also agree with the MST that this is essentially an economic calculation and that the extent to which they could actually encourage membership of the regime will depend on the costs of the impact of not being able to access these services together with the costs of compliance with the regime. Quite apart from the legal question of whether incentives such as these might be in breach of competition law, I would also have some concerns about the potential impact on small businesses and bloggers for whom the costs of compliance might be disproportionate. It would also be essential that membership of the self-regulatory regime should be available on fair, reasonable and non-discriminatory terms to all who want to join if there are to be real commercial effects from being outside the regime.

[95] http://www.abc.org.uk/About-us/Who-we-are/
[96] http://www.nrs.co.uk/index.html
[97] p16, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[98] p55, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[99] p21, para 72, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[100] p21, para 74, *ibid*
[101] p56, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[102] at paragraph K4.2.22

Assistance from the advertising industry

5.21 Lord Black suggests that there may be ways in which the advertising industry can help with building incentives for membership of a self-regulatory standards system.[103] Ms Harman suggests two specific ways in which this might be done, first by requiring publishers who are not members of the system to pay a levy on adverts carried and secondly by advertisers agreeing to withhold advertising from publications that are not members.[104] The latter is also hinted at by Mr Dacre.[105] The levy concept has not been the subject of elaboration in evidence by anyone and, as such, is difficult to consider here. The concept that advertisers might withhold advertisements from non-member publications would require high levels of commitment from advertisers who, themselves, have nothing to gain from higher standards in the newspaper industry. The Inquiry has not been presented with any evidence to suggest that advertisers are ready to engage, or even contemplating engaging, in discussions around this. Furthermore, it is difficult to see what incentive there would be for the advertiser whose concern is to ensure that its product or the subject of its advertisements reaches the widest possible audience. Although this might be a powerful incentive if it could be put in place, I have seen nothing to suggest that it has any prospect of being adopted and see no reason why it should be.

Access to a dispute resolution mechanism

5.22 Many of the proposals present access to an alternative dispute resolution mechanism as an incentive to membership of a self-regulatory press standards system. Dispute resolution more generally is covered below. At this stage I am only concerned with its value as an incentive for, if it is to be seen as such, it must be something that is not available to non-members.

5.23 The Media Regulation Roundtable proposal largely centres on its proposals for dispute resolution. Under this model, any complaint against a member organisation would go first to mediation by the regulatory body. If a complainant wished to start court proceedings in the case of a complaint of a legal wrong, then the court would stay the proceedings pending adjudication from the regulatory body's tribunal. If mediation was unsuccessful then, where the complaint relates to a legal wrong, it would go to an adjudication process. This would provide a compulsory alternative dispute resolution mechanism that would have to be used by all complainants against members of the body, and all members of the body. If either party was unhappy with the result of the adjudication process they could, by agreement, go to the body's Dispute Resolution Tribunal which would reach a conclusion binding on both parties. If the complainant was not happy with the result of the adjudication process it would still be open to him to pursue his complaint in court.[106]

5.24 This would serve as an incentive for publishers to join the self-regulatory standards body because it would ensure that all legal challenges against them would go, in the first instance, through a fast, fair and cheap adjudication process, thus hopefully reducing their exposure to expensive and slow court proceedings. As set out, this proposal would not prevent individuals from exercising their right to have a court consider their case; however, they would have to

[103] p36, para 69, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[104] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[105] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[106] pp8-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf

go through an adjudication process first, and the court would be likely to take the result of the adjudication process into account when considering their case.

5.25 Sir Charles Gray (a retired High Court judge whose expertise is in media law) told the Inquiry about Early Resolution, a voluntary service providing dispute resolution in media matters. He made it clear that Early Resolution had not been as effective as they had hoped because, whilst it was very popular with publishers, it was meeting with resistance from claimants, possibly because of the incentives acting on those advising claimants.[107] For this reason, Sir Charles had reached the conclusion that a voluntary ADR scheme would not be able to act as an incentive; it would have to be mandatory, and mandatory for everyone, thus excluding the possibility of using such a system as an incentive for membership.[108]

5.26 The Coordinating Committee for Media Reform (CCMR) proposed an approach under which complaints, including enforcement of civil rights, relating to those publishers that have signed up to the scheme would be dealt with through the fast track tribunal system.[109] Angela Philips accepted that it would be unfair to citizens who would get treated differently depending on who has traduced them, but said it was a necessary price for a significant incentive.[110]

5.27 Lord Hunt raised the question of why the industry would agree voluntarily to subject itself to a cheap system of arbitration which would potentially open them up to claims brought by members of the public who could not afford to pursue legal redress. He also asked why wealthy people would submit voluntarily to arbitration if they felt they might be able to intimidate a publisher with threats of a full court hearing.[111]

5.28 Taking a different view to Lord Hunt in relation to the industry, Mr Dacre suggested that access to swift and cheap resolution of defamation and privacy cases would be a major boon for both the industry and the public, and that it would be a huge incentive for a cost conscious publisher to sign up to a new regulatory system. Mr Dacre did not explain what he had in mind in any more detail but acknowledged that legislation would be required to deliver it.[112] Ms Harman suggests that damages might be capped for member organisations or be higher for non-member organisations, but goes on to recognise that it might not be acceptable for a victim to receive less compensation because they were libelled by an organisation belonging to a regulatory regime.

5.29 I agree with Ms Harman on this latter point. I do not believe that damages should be assessed at different levels or that the press should be given additional legal protection if they are members of a regulatory system, because any injury suffered by a claimant is no less simply because the title has signed up to a regulatory regime to which it then does not adhere. But it may be that the title would be able to rely on its membership of a regulatory regime as demonstrating adherence to standards of behaviour, on the basis that a title that is not a member would have the rather more difficult burden of proving that it adhered to appropriate

[107] pp39-41, lines 19-19, Sir Charles Gray, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf This is likely to be related to the availability of Conditional Fee Agreements and After the Event Insurance, now substantially affected by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: see Part I Chapter 3 above

[108] p35, lines 7-10, Sir Charles Gray, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf

[109] p13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf

[110] pp36-37, lines 14-13, Professor Angela Philips, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-8-December-20111.pdf

[111] p38, para 119, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Hunt-of-Wirral.pdf

[112] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf

standards. The Irish model has this type of provision and they believe that proof would be difficult to achieve.[113] In order to establish the incentive, it is also necessary to examine whether and, if so, how, claimants could be mandated or encouraged to use the ADR process.

Benefits in legal proceedings

5.30 A number of the proposals put before the Inquiry suggest that a publisher should be able to benefit from some form of preferential treatment in libel proceedings as a result of membership of a self-regulatory forum. In this context, the Irish Defamation Act and its provisions for recognition of the Press Council and Ombudsman are sometimes offered as an example.[114] Dealing here only with the proposals that have been made for aspects of the scheme to be adopted in the UK, this section looks at the potential for the courts to treat defendants favourably because of voluntary participation in some form of regulation and the extent to which this would form an incentive to membership.

5.31 The Alternative Libel Project suggests that membership of a self-regulatory scheme could be incentivised by costs orders made by the courts but offers no detail as to how that might work.[115] Ofcom also refers to this suggestion, but goes further and suggests that the level of damages might also be affected by whether a self-regulatory complaints handling system has been used.[116] The Media Regulation Roundtable suggests specifically that additional damages might be awarded against those who are not members of a self-regulatory system and who publish defamatory material in contravention of the code of practice. No such additional damages could be awarded against a member of the system even where they were in contravention of the code.[117] The Media Regulation Roundtable also proposes a form of statutory support for those wishing to bring proceedings against publishers outside of the self-regulatory system, by allowing such proceedings to be brought with conditional fee arrangements. In addition, costs would not normally be recoverable against unsuccessful claimants.[118]

5.32 It is possible to envisage a process by which costs might not be awarded even to a successful defendant where they were not a member of a credible self-regulatory system that offered access to ADR. With appropriate discretion in the court, that could potentially be extended to make the defendant responsible for all costs. It could also potentially extend to consideration of the costs implications of a claimant pursuing a title through the courts when there was a cheaper, faster ADR mechanism available because the publication was in a self-regulatory system which provided such access. Such an approach might be expected to encourage any publisher who felt they were at risk of defamation or privacy actions from those with very deep pockets to be a part of the self-regulatory system.

5.33 It is less clear that any differentiation could (or even should) be applied to the level of damages. As identified above, I find it difficult to understand why it could ever be appropriate for the remedy offered by the courts to a victim of defamation or invasion of privacy to be affected by the defendant's membership or otherwise of an industry body. By definition, having succeeded in a claim for damages, the relevant publisher will have failed to meet

[113] p54, lines 8-10, Professor Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[114] the Irish Press Council and Ombudsman along with the Defamation Act are considered in Chapter J6.1.
[115] p3, para 1.7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Alternative-Libel-Project-English-PEN-and-Index-on-Censorship.pdf
[116] pp18-19, para 4.16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[117] p25, paras 86-87, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[118] p25, para 89, *ibid*

those standards. Whether a deliberate decision not to participate in a voluntary regulatory mechanism might show disregard for standards (potentially justifying aggravated or exemplary damages) is another matter but I do not see how the compensatory award could be affected.

5.34 Lord Prescott[119] and Ofcom[120] go further than considering damages and refer in their submissions to the suggestion that access to certain defences in libel or defamation might be available to those who were part of a self-regulatory system. The essence of the proposal is that a defendant would be able to rely on compliance with a self-regulatory system and code of practice as evidence of responsible journalism and that this would constitute a defence. Professor Greenslade goes slightly further and suggests that a publisher standing outside of a self-regulatory system would be regarded as '*failing to favour responsible journalism*'.[121]

5.35 The Media Regulation Roundtable makes specific proposals for a defence of 'regulated publication,' which would allow a defendant to rely on the fact that they had complied with directions or requirements of the self-regulatory authority in relation to the relevant published material. Similarly, it would be a sufficient defence in a privacy claim to demonstrate that the public interest requirements of the code had been complied with.[122] In relation to the latter, however, it is again difficult to see why, as a matter of legal fairness, such a defence should not also be available to a non-regulated entity that claims to have equal or higher standards with which it complied (even though, in the absence of membership, that fact might be more difficult to prove).

New legal rights and remedies against non participants

5.36 The Media Regulation Roundtable proposes the introduction of a statutory right of reply or correction, with appropriate prominence. These would be available only in respect of publishers who were not members of the self-regulatory body.[123] These rights would be enforced by the courts. The effectiveness of the right to reply or correction as an incentive to membership of the self-regulatory body would depend on the relationship between the statutory right and the equivalent provisions in the self-regulatory code. If the statutory right is less onerous than the code provisions then it is unlikely to offer much of an incentive. If, on the other hand, the statutory provision were to be stronger than, or the same as, the code provision there might be some question as to the benefits to the public of the self-regulatory system. It is not entirely straightforward to see why publishers should effectively be able to opt out of a statutory obligation by joining a trade body that does not give equivalent public protection.

5.37 That is not the only problem with this idea. The critical features of a right of reply are its immediacy and its ready availability. It is difficult to see how providing a mechanism through the courts will achieve either of these objectives.

[119] p7, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[120] pp18-19, para 4.16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[121] p16, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[122] p24, para 85, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[123] pp25-26, paras 88-91, *ibid*

Exemption from ATVOD

5.38 One final incentive, suggested by the Media Regulation Roundtable,[124] is that a press self-regulatory body could take on the statutory responsibilities under the Audio Visual Media Services (AVMS) Directive for regulation of audio visual content published by its members. This would ensure that newspaper websites would be regulated by the self-regulatory body, rather than ATVOD as would now be the case if any of them were to fall to be regulated under the AVMS Directive. This would also be in line with the proposal from Jeremy Hunt MP, then the Secretary of State for Culture, Media and Sport,[125] in which he hypothesises a converged news regulator that would both provide self-regulation of the press and take on the statutory role required by the AVMS Directive, to ensure that the minimum standards laid down by the Directive are met.

Effectiveness of incentives overall

5.39 In any voluntary system of regulation it would be necessary to accept that some of the organisations who fall within the scope of the regulator might choose to sit outside the regulatory regime. If staying outside the regime is not a legal possibility, then it is not a voluntary system. It is common ground that, in order to be effective, any new system of press standards should cover all the national newspapers and at least the main magazines and regional and local newspapers. If publishers are not to be compelled to join then there must be a reason why they would wish to do so. The question that needs to be addressed is whether a sufficient package of incentives can be crafted that makes it strongly in the interest of all publishers to be a part of a voluntary standards system, without actually compelling them to do so. In the absence of a sufficiently strong package of incentives, one must either accept a voluntary standards system that some publishers chose not to be a part of, or find a way of compelling, rather than incentivising, membership.

5.40 The possible incentives examined above are a comprehensive list of those that have been put to the Inquiry in evidence. There may well be others, but if there are I have not had them brought to my attention. I am satisfied that in kind, if not necessarily in detail, the list above includes all the obvious possible approaches to incentivisation (and some that are not so obvious).

5.41 Of those proposed, I can see merit in kitemarking. There are clear benefits to providing consumers with information, though no evidence has been presented on whether a kitemark would have any effect on readers' buying habits. Some publishers might be keen to demonstrate that they operate to the highest standards. On the other hand, no evidence has been presented to suggest that kitemarking would be anything other than a minor incentive and those least likely to want to join a voluntary press standards body are likely to be the least concerned to demonstrate their adherence to standards.

5.42 The concept of a package of commercial benefits from membership would bear further investigation. Any specific proposal would need to be tested against competition law. Even where limiting a commercial benefit to members of a voluntary standards body would be possible legally, it is not axiomatic that it would also be desirable. Any of these proposals would need to be looked at and evaluated in detail; this has not been possible because they have only been presented to the Inquiry in the most general of terms.

[124] p21, para 72, *ibid*

[125] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Sumission-from-Jeremy-Hunt-MP.pdf

5.43 The benefits to publishers of an ADR regime seem obvious, and if individuals could be compelled to use such a regime that would be a powerful incentive. However, it is not possible to deprive individuals of their right to pursue or defend their rights in court and, on its own, any voluntary ADR mechanism is in my view unlikely to prove significantly compelling to publishers. I do not accept that it would be appropriate for differential damages to be awarded depending on the regulatory status of the defendant. However, there does seem to be real potential in constructing a costs regime in relation to privacy and libel cases that would make membership of a voluntary system a significant benefit to any publisher likely to face such challenges. Whether the benefit would be significant enough to encourage all national publishers into a voluntary system is impossible to forecast at this stage. Furthermore, if it is to be fully recognised within the costs regime operated by the courts, it would be highly desirable, if not essential, that the regulator providing the ADR mechanism be formally recognised and, thus, validated.

5.44 I am satisfied that there is no realistic prospect of using the VAT zero-rating, or any other method of discrimination based on tax, as an incentive for membership of a press standards body. I conclude that restricting journalistic accreditation to members of a press standards body would be difficult and runs the risk of being a real threat to freedom of expression.

5.45 Ultimately, the one incentive that we have heard about that has been demonstrated to be effective is the realistic threat of press standards legislation if an adequate voluntary body with full coverage is not forthcoming. Professor John Horgan, the Irish Press Ombudsman, told the Inquiry that the creation of the Irish Press Council had been under consideration for decades before eventually significant political pressure for statutory regulation of the press made the industry focus:[126]

> *"Then in the middle 90s, after the collapse of a big newspaper group, the government set up a commission on the newspaper industry, of which I was a member, and which all major newspaper interests were also represented.*
>
> *The report of that body recommended the establishment of a Press Ombudsman in 1996. But nothing really happened after that. Nobody took ownership of it, and it wasn't developed in any sense. Then after the 2002 general election, the then minister for justice, Michael McDowell, set up an expert group to make recommendations to him. And that expert group reported in 2003, recommending a statutory system of regulation for the press. I think it's fair to say that that lit the fire under the topic in a way that it hadn't been lit before, and the press industry realised that if this eventuality was to be avoided, they would have to come up with something that was credible, authoritative, independent and on all these fronts sufficiently acceptable to government, so the government would not proceed with its plans.*
>
> *They then set up the Press Industry Steering Committee, which negotiated and deliberated for some four years."*

And in a subsequent exchange he said: [127]

> *"LORD JUSTICE LEVESON: But behind it all, do I gather from what you were saying somewhat earlier, was the threat of statutory regulation?*
>
> *A. Absolutely.*

[126] pp51-52, lines 2-1, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[127] pp55-56, lines 23-18, Professor John Horgan, *ibid*

> *LORD JUSTICE LEVESON: So in other words, it behoved the press interests to come up with a solution that was less than the club that was being held over them?*
>
> *A. That is absolutely the case. And in fact my membership, or our membership of the Alliance of Independent Press Councils of Europe indicates that in quite a few countries this threat has been the engine which has generated or promoted the successful establishment of press councils of the same kind in many European countries.*
>
> *So even though before this threat was made, there had been moves towards the establishment of something like this, the 1996 report of the commission, which wasn't under such a threat, recommended the establishment of an ombudsman. As I said, it was the real and present danger of that that created the situation in which we found ourselves."*

5.46 Similarly, Lara Fielden, in her comparative study of international press councils published by the Reuters' Institute, says:[128]

> *"While..., the Press Councils considered here adopt many highly distinct approaches to their functions, frameworks, and powers, and while each has been established against a very different historical, political, and cultural backdrop, a common theme emerges in the form of the galvanising effect of the threat of statutory intervention. A recognition of the importance of ethics and accountability, and debates between publishers and journalists, may be significant. However the decisive trigger to the establishing, or reform, of a Press Council is commonly a proposal for statutory regulation that is held to threaten press freedom and results in a determined, pragmatic alternative response from the industry."*

5.47 This has also been broadly the case in the UK, as demonstrated in Part D, Chapter 1, where I note that there has been a pattern of the press undertaking to make changes when faced with a threat of legislation. The fact that these promises have often not been followed through with meaningful action may demonstrate that, in order to be effective in securing real industry action, the threat must be exceptionally credible; to date, that has not generally been the case in the UK.

5.48 Such a threat could be perceived to exist now and I have no doubt that the proposals put before me by Lord Black spring solely from the fear that I might recommend a legislative regulatory solution and that such a recommendation might be accepted by the Government. Indeed, Lord Black described the process of arriving at his proposals as a substantial one, leading to something completely different from anything that has gone before,[129] going on to say:[130]

> *"That has only come about, I think, because of the opportunity that this Inquiry has given us to be able to analyse the things that have gone on in the past and see how we can try and rectify them for the future."*

5.49 Whilst it is no doubt true that the mere existence of this Inquiry has focussed minds, I do not think it is possible to rely on any perceived threat from the Inquiry itself to encourage publishers to join a self-regulatory system. Any such threat would have to be provided by the Government of the day and credibly represent a real intention to legislate quickly should an

[128] pp21-23, para 2.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Reuters-Institute-for-the-Study-of-Journalism-submission-April-2012.pdf
[129] pp27-28, lines 14-8, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[130] p28, lines 9-12, *ibid*

acceptable industry solution not be forthcoming: that was tried by Sir David Calcutt but the effect was merely to postpone the issue until other more pressing political concerns took their place.

6. Statutory recognition

6.1 Even in an entirely voluntary self-regulatory system it might be considered desirable to have some form of statutory recognition for the purpose of encouraging or rewarding membership of, and compliance with the standards set by, the voluntary body. This is perhaps best illustrated by reference to the Irish Press Council, which is fully independent of Government and membership of which is entirely voluntary. An Irish Press Council could exist in any form, with any structure, but the Defamation Act 2009 in Ireland provides for a defence of fair and reasonable publication,[131] with the courts taking into account the extent to which the publisher has adhered to the standards set by the Press Council or, if the publisher is not a member of the Press Council, equivalent standards.[132]

6.2 Recognition of this sort would require the voluntary body to have some statutory existence. In the Irish case, the Defamation Act includes substantial detail on the composition and appointment of the Press Council and the appointment and procedures of the Press Ombudsman, but only a few overarching points about the existence and coverage of the standards code.[133] It also sets out the process for recognition of the Press Council by the Parliament, once the Minister has satisfied himself that it meets the criteria set out in the Act.[134]

6.3 Lord Black's proposed solution did not include any incentives that would require statutory recognition, but did include the potential to include an 'arbitral arm'. He recognised that the creation of an arbitration system of that sort would require changes to statute but was unclear precisely what sort of changes would be required.[135] Lord Black was emphatic that he did not consider that any other area of statutory relationship was necessary or desirable in order to implement his proposal.[136] Mr Dacre said that although the introduction of an arbitral arm would require changes to libel legislation it deserved the fullest support.[137]

6.4 Lord Black was strongly of the view that any statutory involvement in press regulation would give rise to concerns about freedom of the press:[138]

> *"I've never seen a model of statute proposed which would not in some way invite the state into the regulation of editorial content."*

[131] s26, Defamation Act 2009
[132] pp53-54, lines 16-7, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[133] schedule 2, Defamation Act 2009
[134] s44, Defamation Act 2009
[135] pp54-56, lines 7-21, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[136] p57, lines 11-20, Lord Black, *ibid*
[137] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[138] p30, lines 18-20, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf

6.5 Other proposals generally did not deal with this issue of statutory recognition explicitly. Lord Prescott states that "*some incentives will need statutory support*."[139] Ofcom sets out a number of potential statutory incentives, including costs in legal cases and a new defence for defamation.[140] The MediaWise Trust,[141] through positive reference to the Irish model, implicitly accepts the need for a statutory basis for such incentives but makes no comment on the desirability or otherwise of it. Similarly, the CCMR[142] and Professor Greenslade[143] implicitly accept a role for the state by promoting the application of VAT zero-rating as an incentive for membership, but do not explicitly comment on the implications of such statutory recognition. The Alternative Libel Project argues for voluntary ADR which is supported by new rules on costs and more consistent and robust case management.[144] They are not precise on whether this would require legislative changes.

6.6 Professor Greenslade explicitly accepts that some legislation might be required to construct 'sanctions' for non compliance, without being specific on what that might be. He is clear, though, that this is to be an arms length relationship with statute:[145]

> *"I would therefore urge that the state's role is restricted to creating a framework at arm's length in order to create a regulator that is both independent of the industry and independent of the state."*

6.7 He also argues that the judiciary should take into account whether a publisher has signed up to a regulatory system,[146] but does not propose any statutory basis for that:

> *"just sticking to the press regulator itself, in my view it is quite clear that you are not going to keep everyone on board, not going to be able to levy sanctions against them, unless there's a method of compulsion. I have tried to devise a way in which this is as far away from state intervention as it can be."* [147]

6.8 Lord Soley suggests that a regulatory body should have the power to take a case to court if necessary.[148] It is not clear whether he means in relation to existing criminal or civil law or with respect to any new rules on standards.

6.9 Generally, it would appear that there is a divide between those, exemplified by Lord Black, who have concerns that any reference in statute to press standards regulation would be a potential risk to freedom of expression and those who see no immediate problem with legislation that recognises a voluntary self-regulatory regime. It is not, however, clear that

[139] p2 and p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[140] pp18-19, para 4.16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[141] pp14-15, para 3.04, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[142] p12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[143] p16, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[144] pp4-5, para 1.14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Alternative-Libel-Project-English-PEN-and-Index-on-Censorship.pdf
[145] pp10-11, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[146] p16, para 14, *ibid*
[147] pp22-23, lines 23-5, Professor Roy Greenslade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[148] pp3-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Second-Submission-by-Lord-Soley-of-Hammersmith.pdf

the extent to which statutory recognition of a self-regulator would need to, or could, go into detail about the scope, governance and processes of that self-regulator have been fully considered by all of the witnesses.

7. Statutory provision

Statutory underpinning

7.1 Many of the proposals submitted to the Inquiry go beyond statutory recognition and advocate some form of statutory underpinning for regulation of press standards. There are a number of different statutory models proposed which I briefly set out and consider here individually. The level of statutory underpinning differs from proposal to proposal. At one end of the spectrum are those that simply use statute to define the characteristics of an otherwise independent and voluntary body. At the other end are models that also use statute to compel compliance. This difference was set out clearly by Mr Suter:[149]

> *"What's the difference between statutory underpinning and state control? By state control I think everybody has set up this dangerous notion that the state would dictate what the press could do, would dictate the standards by which the press had to operate and would form judgments as to what was or was not acceptable. I see statutory underpinning as being further removed from that, or setting a framework within which the regulation happens, but where the regulation itself is carried out by independent bodies dealing directly with the press and the regulated entities."*

I have essentially used this distinction in considering the models that have been presented to the Inquiry. Models that put the definition and enforcement of standards in the hands of a statutory body are considered below as statutory regulation.[150]

The industry position

7.2 It is worth starting by considering the industry position on statutory underpinning. Lord Black makes it very clear in his submission that the industry rejects, as a matter of principle, any form of statutory involvement in, or underpinning of, press standards regulation.[151] This is not an argument about the strength of regulation but rather about the freedom of the press from state control:[152]

> *"I have always believed – and I believe it is a view across the bulk of the industry – that self-regulation is the guarantor of press freedom and interference (sic) from state control."*

7.3 Lord Black argued that self-regulation could be tougher than a statutory system and that this meant that statutory control was not needed.[153] He further argued that, as a matter of

[149] p48, lines 14-25, Tim Suter, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[150] para 7.20 -7.25
[151] pp17-20, para 16-27, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[152] p11, lines 21-24, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[153] p11-12, *ibid*

principle, it was essential that press regulation should be free of statutory intervention.[154] He raised three specific reasons why a statutory basis for regulation would be inappropriate. The first was speed. He argued that no form of statute could keep pace with a fast moving industry in the way that self-regulation could.[155] I accept the point that the regulations themselves need to be capable of relatively swift amendment, but I am at a loss to see why the overall structure of regulation would need to be affected by change in this way. It is entirely possible to imagine a statutory framework, at a very high level, that would simply require some form of regulation to exist and define the accountability structures, leaving all the material regulation to a separate, possibly self-regulatory, process. This does not seem to me to be a compelling argument in relation to establishing a regulator, still less providing for the recognition of a self-regulatory body, in legislation. I note in passing that other industries also operate in a fast moving environment – for example, broadcasting and telecommunications – where the speed of technological and market change is no less then in the press and media industry, and nonetheless manage to exist perfectly well with statutory regulation frameworks.

7.4 The second reason advanced for avoiding statute was the risk of '*losing coverage from the system*'.[156] The argument here is that if publishers did not want to comply with the statutory regulation they might relocate their operations outside the UK in order to place themselves outside of the jurisdiction of the statute. I can accept that this is potentially a valid argument in relation to the economic effect of any compulsory regulation. Clearly, if regulation is to be compulsory then some people may seek to evade it. This may be a simple step for those whose business is primarily online, although I am less convinced that it is a realistic prospect in relation to a printed product which would need to be imported to the UK and distributed on a daily basis. In any event, I cannot see how that is relevant to the impact on the 'coverage of the system'. A publisher wanting to avoid a compulsory system would have to take steps to do so and may or may not be able to achieve that. A publisher wanting to avoid a voluntary self-regulatory system would simply have to put themselves outside it. It is not at all clear how this would achieve greater coverage.

7.5 The third reason advanced was that a statutory system would be subject to constant legal challenge.[157] This gets to the heart of the industry's position on any form of statutory underpinning for regulation, or indeed, any proposal other than their own, which is that they will render it ineffective by whatever means possible. This was articulated quite clearly by Lord Black: [158]

> *"A statutory system which would be forced on a majority of unwilling publishers is likely to become a target to be aimed at rather than something – a framework within which to be worked for the benefit of both the public and the public interest."*

This is not the attitude of an industry committed to raising standards and acting in the public interest and must be seen as what it is likely to be: an attempt to use the economic and political power of the press to defend their own interests.

7.6 It is worth reflecting a little on the evidence that Lord Black gave in respect of his objections to any statutory involvement. Robert Jay QC pointed out that a statute could do exactly what the proposed contract does, both in terms of giving powers to the regulator and by way of

[154] pp11-12, lines 20-3, *ibid*
[155] pp12-13, lines 21-2, *ibid*
[156] p13, lines 3-5, *ibid*
[157] p13, lines 9-15, *ibid*
[158] p17, lines 16-21, *ibid*

imposing limits on what the regulator could do. Lord Black did not dissent but expressed a 'philosophical objection':[159]

> *"I – there is a fundamental objection that I have and I believe that the bulk of the industry has in allowing the state to write the rules of a regulator that governs editorial content. It's not just writing the rules, but presumably producing the style of the system and the type of the system that will be there to enforce it. It's not a circle, I think, that can be squared. It is a fundamental philosophical objection to the role of the state in the content of newspapers and magazines."*

7.7 In a subsequent exchange he emphasised the point:[160]

> *"LORD JUSTICE LEVESON: Well, that means there may be a statute which does not create a difference between what the statute could do and what the contract could do.*
>
> *A. The fundamental philosophical objection to it would remain!"*

and again, later:[161]

> *"Q. We've defined our terms according to your lexicon, although, looking at Dr Moore's evidence, he would define the statutory underpin system as equally one of self-regulation because there would still be a significant press component or press representation within such a system. Do you accept that?*
>
> *A. No, I don't – I don't – I don't believe that – statutory underpinning is simply a term of art for a form of statutory control. I don't believe there is a halfway house between them."*

7.8 It is not clear, though, that Lord Black is entirely consistent in his opposition to statutory involvement. His proposal envisages the possibility of an arbitral arm as part of the regulatory body. This, he acknowledges, would require some form of statute in order to make it compliant with Article 6 ECHR.[162] Whilst Lord Black was clear that he has no precise proposal for legislation on this issue at present, he was equally clear that his principled objection to statutory control did not apply in this context:[163]

> *"I have no idea exactly how we would manage that, which piece of legislation we could do it in. All I know is it's not immediately on offer. The point of highlighting this here is that the structure of the system would allow it, if at some point Parliament saw fit in order to – saw fit to institute it."*

7.9 Lord Black was not able to articulate why this from of statutory recognition or underpinning for a form of press regulation was acceptable to the industry whilst any other form of statutory recognition or underpinning, no matter what its form or content, could not be. The only conclusion I can draw is that statute providing for an arbitral system would be in the interests of the press whereas, in their perception at least, statute providing the framework for robust independent regulation would not be.

[159] p32, lines 12-20, *ibid*
[160] p33, lines 16-21, *ibid*
[161] pp46-47, lines 19-3, *ibid*
[162] p54, lines 17-21, *ibid*
[163] p56, lines 16-21, *ibid*

7.10 Lord Hunt clearly shares Lord Black's principled objection to a high degree. However, it is perhaps not so clear cut. He told the Inquiry that recognition of a code, as in the Irish Defamation Act, would not constitute a statutory regulatory system.[164]

View of others

7.11 The MST put forward an approach which would place statutory obligations on large news publishers to regulate themselves by providing internal complaints and compliance mechanisms and by joining an external self-regulatory body.[165] The statute would then establish a 'Backstop Independent Auditor' (BIA) which would oversee compliance with those obligations. The self-regulatory bodies would be responsible for setting their own standards, governance arrangements and funding but the BIA would have to approve them, having regard to a set of issues already set out in para 3.2 above.[166] The BIA would have the power to fine a large news organisation that failed to comply with required governance standards[167] or to join an approved self-regulatory body.[168] Where a self-regulatory body is found to be in breach of required standards, the BIA would have the power to report publicly on the failure, hold public hearings, impose fines and, in extremis, remove the recognition.[169]

7.12 One specific concern about this proposal is the risk that a body such as the BIA, whether an individual or a corporate entity but one with no track record, limited powers and limited duties, would simply not have the strength and credibility to stand up to the press industry should the need arise. As has been seen throughout the Inquiry, the press is very active and very able when it comes to lobbying for their interests. I have identified in Part H how successive Information Commissioners have been persuaded that they should not concern themselves with the activities of the press. It is only to be expected that the press, if faced with a new regulatory system over which they do not have complete control, will seek to mitigate its impact by whatever means are open to them. Given that this includes the potential use of their megaphone to criticise heavily any organisation, and the individuals who run it, it follows that a high degree of resilience and strength would be required by any organisation required to take on the role.

7.13 Mr Suter's proposal shares a number of features with the MST but is closer to statutory regulation, as I have defined it here, than statutory underpinning. In Mr Suter's model, Ofcom would have a statutory duty to establish a set of regulatory outcomes, which would define what activities or media services must be subject to regulation; these could be determined by a number of factors including the size of the organisation and the nature of the services it provides, and could define the outcomes expected as a result.[170] These outcomes would be rooted in four principles:[171]

> *"– respect for privacy;*
>
> *– respect for the truth and fair dealing in reporting;*

[164] pp65, lines 3-13, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[165] p72, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[166] pp89-90, *ibid*
[167] pp65, lines 3-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-10-July-2012.pdf
[168] p81, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[169] p90, *ibid*
[170] p2, para 8-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[171] P2, para 10, *ibid*

– *upholding ethical standards of behaviour in news-gathering;*

– *providing information to allow vulnerable audiences to make informed choices."*

7.14 Under Mr Suter's proposal those services identified by Ofcom would be required to join an authorised self-regulatory body. The authorisation process, and regular auditing, would be carried out by a re-structured Ofcom Content Board.[172] The requirements to obtain authorisation a self-regulatory body are set out at para 3.3 above and relate to independent governance, scope, powers and funding.[173] If an organisation falls to be regulated under Ofcom's framework, but declines to join an authorised body, then it would fall to Ofcom to regulate that organisation against the authorised code considered most appropriate by the Ofcom Content Board.[174] Where Ofcom has deemed that regulation is required and no authorised industry body yet exists to define a code of its own, the Content Board would draw up a relevant code itself.[175] It is this final element of the proposal that makes Mr Suter's approach potentially cross the boundary from statutory underpinning (requiring self-regulation) to statutory regulation where the regulator both sets the standards and enforces them.

7.15 Ms Harman considers an approach which would use statute to provide for the independence of a standards body and to give it jurisdiction to enforce its decisions across all newspapers. In this model online news outlets would be able, but not required, to join the system.[176]

7.16 Mr Eustice recommends giving Ofcom powers to require adequate governance from newspapers to ensure that they are:[177]

> *"organised in such a way that allows them to comply with both the Editors' Code and the law."*

This would not give Ofcom any jurisdiction over standards.[178] He also advocates giving a right of appeal to the Information Commissioners' Office in relation to privacy complaints. This would apply to all media, including the internet, and the ICO would be enforcing existing laws.[179]

7.17 Ofcom suggests that statute might be necessary in order to set out the governance standards for a voluntary regulator, including appointment processes, independence and accountability.[180]

7.18 Sir Charles Gray, on behalf of Early Resolution, argues for the establishment of a statutory independent media regulator and compulsory ADR.[181] Sir Charles does not specify in detail what the role of the statutory regulator would be or how much should be laid down in statute but his primary concern is that compliance with standards should be statutory, as an essential

[172] p3, paras 13-16, *ibid*
[173] pp3-4, para 17, *ibid*
[174] p5, paras 21-23, *ibid*
[175] p5, para 23, *ibid*
[176] p4, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[177] pp5-6, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[178] *ibid*
[179] p6, para 4. *ibid*
[180] pp13-14, para 4.24-4.30 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[181] p12, para 9.1-9.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Early-Resolution.pdf

partner to his proposed mandatory ADR route. He did not express any opinion on by whom standards should be set.[182]

7.19 The NUJ put forward a proposal for a statute setting up a new regulator which would be able to take complaints, enforce penalties, carry out investigations and monitor performance. The legislation would define the membership and jurisdiction of the body and how the body was to be funded.[183] The regulator would have a role in, but not control of, drawing up a code of practice.[184] The regulator would have statutory jurisdiction over all publications of a certain size and their associated websites,[185] as well as statutory power to fine for breaches and to insist on the size and placement of a correction or apology.[186] Membership would draw on journalists, the public, newspaper owners and editors and pressure groups.[187]

7.20 Mr Mosley proposes an independent but non-statutory standards setting body that would have much in common with the current PCC but with a more independent appointments process and a greater proportion of independent membership. The standards body (rather than serving editors as now) would be responsible for setting the standards.[188] There would also be a statutory tribunal with the power to enforce those standards, with compulsory jurisdiction over all of the press, agencies of the press and the internet (where not subject to Ofcom).[189] The Tribunal would have statutory powers inter alia to deal with complaints, to require disclosure of information, to award damages, to levy fines, to order a correction (specifying content, location and prominence), prevent publication of a story and order an item to be removed from the internet. The statute would also provide a statutory public interest test in relation to privacy matters, impose a prior notification requirement in relation to publication of private matters and provide that such prior notice is confidential.

Statutory regulation

7.21 There are some proposals that go beyond a call for statutory underpinning to self-regulation and suggest statutory regulation which is not based around industry ownership of standards or process.

7.22 Sir Louis Blom-Cooper QC proposed the establishment of a statutory Commission on the Media.[190] Members of the Commission would be appointed by an appointments commission established for the purpose by Parliament. The functions of the Commission would be:[191]

(a) to receive and adjudicate on readers' complaints of breaches of the code of ethics; and

(b) to carry out public inquiries, with power to subpoena witnesses and require disclosure of evidence, into press activity that has aroused public concern.

[182] pp36-37, lines 5-8, Sir Charles Gray, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf
[183] pp8-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[184] pp8-10, *ibid*
[185] pp10-11, *ibid*
[186] pp10-11, *ibid*
[187] pp1-12, *ibid*
[188] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[189] pp2-4, *ibid*
[190] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[191] pp15-18 *ibid*

Sir Louis does not elaborate on what powers of remedy, redress or sanction this statutory body should have.

7.23 The Campaign for Broadcasting and Press Freedom recommend the establishment of a statutory Media Standards and Freedom Council.[192] In the first instance the Council would be appointed by an appointments commission set up by the Ministers. The Council would be made up in the following proportions:

(a) media owners and editors – 20%

(b) media trade unions – 20%

(c) members of the public nominated by civil society organisations – 50%

(d) members of the public selected by a process of application – 10%.

7.24 The Council would produce a code of ethical standards, adjudicate on complaints about compliance with that code, administer a public right to redress and keep and publish records relating to compliance. The Council would also issue guidance and advice to the media and report annually to Parliament. Where the Council found that standards had been breached it would be able to require a printed clarification, retraction or apology in a corrections page in the publication. The Council would be able to apply to the courts for an order to enforce its ruling where necessary.

7.25 The Media Regulation Roundtable proposes a largely statutory, but voluntary, approach. Mr Tomlinson QC explained that in his view self-regulation was not an appropriate tool:[193]

> *"Well, by "self-regulation" I understand that ultimately, whatever the industry or the body is, it's regulating itself. And it seemed to us that actually there are two interests at play. There's the interests of the media and there's the interests of the public. And unless the regulation is independent of both, you're not going to have true and effective regulation. So I don't myself agree that an independent self-regulation, if that is a meaningful phrase at all, is the proper way to proceed."*

7.26 Under the Media Regulation Roundtable proposal, a Media Standards Authority would be established by statute, with its governance arrangements set down in legislation.[194] The statute would also impose a duty to uphold the freedom and independence of the press.[195] The Authority would have statutory duties to establish a Code Committee (with a minority of working editors and journalists) to prepare a code of practice. The Authority would also have to establish a system of regulation, including pre publication advice and complaints handling, and to set up dispute resolution tribunals. The Authority would, however, only have jurisdiction over those who chose to join it.[196]

Summary

7.27 It is clear from the descriptions above that there are many different possible approaches to the use of statute in relation to securing the highest press standards. These approaches range

[192] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[193] p6, lines 5-14, Hugh Tomlinson QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[194] pp5-6, paras 8-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[195] p7, para 13, *ibid*
[196] pp7-8, paras 14-15, *ibid*

from establishing in statute the characteristics of a self-regulatory body that would have some standing in civil law, through the statutory establishment of a body that would recognise one or more self-regulatory bodies, to the statutory establishment of a body that would define a set of standards to be adhered. Any of these approaches could, but need not be, coupled with a statutory requirement for compliance with a set of standards. There are a different set of questions about the use of statute in relation to improving the handling of civil cases; those are considered in section 13 below. Strong cases have been advanced for each of these different approaches and it seems to me that any of them might have merit. The essential point is that a balance must be struck between the use of statute to deliver independence from industry and the risk that the use of statute might introduce some element of state control of the press which is clearly unacceptable.

7.28 I do not accept that there is any issue of principle preventing, in any circumstance or howsoever framed, the use of legislation in respect of press standards. The question whether any particular statutory provision might give rise to any potential infringement of freedom of expression or the freedom of the press, or even the remotest risk of such an infringement, can only be looked at in the context of the specific provision and any statutory or other protections that could be built in.

8. The Code

8.1 Each of the models for standards regulation put before the Inquiry includes the existence of a code of standards that those within the regulatory system should comply with. The Inquiry considered a range of evidence in relation to two specific issues: who should be responsible for drawing up the code; and what should be contained within it. I deal with those two issues separately.

Who should be responsible for drawing up a standards code?

8.2 Four different options have been put forward as to who should be responsible for drawing up the code. The first is that proposed by Lord Black, and endorsed by Lord Hunt and Mr Dacre, that the code should be developed by a committee comprised of a majority of serving editors with some lay membership. The second, advanced by, among others, the MST and Lord Prescott, is that the code should be drawn up by the industry, possibly in conformity with very broad standards set out either in regulation or by an independent body. In these models a code that did not meet relevant standards would not be acceptable. In the third model the code would be drawn up by an independent body with representation from both industry and the public. In the final model the code would be developed by an independent regulator.

8.3 I will look first at the situation where a code is to be devised by a set of serving editors, albeit with some support from lay members. Professor Greenslade argues that there has been little if any controversy about the code and little or no criticism of the changes made by the editors' committee.[197] He therefore concludes that editors should remain in the majority on the code committee, but that they should be joined by a new Press Ombudsman, public representatives and some representatives from the NUJ.[198] The Carnegie Trust urges that industry representatives, including editors and journalists, should continue to play a significant

[197] p7, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[198] p14, para 12, *ibid*

role in overseeing the standards required of the industry, but they do emphasise the need for citizens and members of civil society to be given a more prominent role in the process. It is suggested that this might be achieved by adding lay members to a code committee but that this could be strengthened by an ongoing programme of research into the standards to which citizens feel the press should adhere.[199]

8.4 The advantages of having standards set by serving editors are reasonably self evident. Current editors will be best placed to understand the industry, its practices and the impact of technology and competition, in order to take a view on what is practical to deliver. Similarly, as the Carnegie Trust points out, the involvement of industry in drawing up the code of practice should ensure buy-in in terms of adhering to the standards set out in it.[200] Professor Greenslade took the view that the performance of the Code Committee to date was proof that the system was effective:[201]

> *"the Code Committee is a very, very straightforward matter, not problematic in my view, and working editors on it makes sense. It's not as if they've designed the code in private to favour themselves. The code has, in fact, constrained them, and so – you pointed out that it's largely very negative in that sense. So I would have thought the code is an example of the editors having behaved rather well."*

8.5 However, the disadvantages also seem to me to be clear and are persuasive. Mr Richards was extremely clear that, from an Ofcom perspective, it would be entirely inappropriate for serving editors, or others currently active in the industry, to have any part in approving the standards to which the industry should conform. He said: [202]

> *"I think we would draw a very very strong and clear distinction between advice which I think it is very important to take from those with experience and ideally recent experience of the relevant industry in which we do our sales, and the precedents on decision-making or determinative functions of the regulator of participants and active – people actively involved in the industry at present. I think that is quite the wrong thing to do and makes effective and reliable independent decision-making extremely difficult, and to be honest in our context is unimaginable.*
>
> *The idea that we would have and we could stand up in public and defend decisions we made if we had serving broadcasters on our decision-making bodies or on our code-setting bodies, I think is –*
>
> *LORD JUSTICE LEVESON: Even on the code-setting body?*
>
> *MR RICHARDS: Yes.*
>
> *DR BOWE: Yes.*
>
> *MR RICHARDS: Yes, absolutely. And I will say in terms of code setting, in terms of sanctions, in terms of corrections or anything of that kind and in terms of policy making overall, you need to have a bright line separation between those who are regulating and making decisions and those who are regulated, and I think any breach of that in my view, in our experience, means that you will immediately undermine the perception and indeed in all reality the actuality of your independence."*

[199] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[200] p6, *ibid*
[201] p32, lines 6-15, Professor Roy Greenslade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[202] pp101-102, lines 7-9, Ed Richards and Colette Bowe, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf

8.6 That is a general matter of good regulatory practice, but it seems to me that there is also an industry specific point to consider here. In most models of self-regulation where serving professionals are involved in any way in the process of regulation, the pool from which those serving professionals can be drawn will be many thousands of people. In terms of editors of national newspapers, however, the pool is limited to no more than 20 or so. It is in this context that editors have been described as 'marking their own homework'. Indeed, when it comes to the role of serving editors on the code committee, it might just as aptly be seen as editors setting their own homework. It is clear that there are a number of very powerful individuals within the industry who have, or are perceived to have, a strong influence on others in the industry. This means that, if serving editors are in the majority on a code committee, there is the risk of power being located in the hands of one or two people who have the most to gain from setting standards that they are prepared to live with, rather than standards that are set with the best interests of the public in mind. None of this is to argue that serving editors do not have an important role to play in advising on the standards to be set. The issue here is simply about whether they should be responsible for taking the actual decisions as to what standards should apply.

8.7 The second model I consider is one whereby the press (quite possibly, but not necessarily, including serving editors) draw up the code but the code then has to be approved or recognised by some independent body. Lord Prescott says that it makes sense for the industry to remain the primary drafting body for the code but:[203]

> *"that in order to maintain credibility in the eyes of the public the code should be reviewed and endorsed by 'a body with the interests of the public, not the press, at heart, which could be the regulator, Parliament of another body appointed by Parliament."*

8.8 This model is also adopted by the MST and Mr Suter, who both put the need for self-regulatory industry bodies, setting their own standards, at the heart of their models. In the MST model, the Backstop Independent Auditor would provide written guidance on the minimum commitments that it expected to be contained within a code of practice and would then look for those minimum commitments to be met when considering approval of a self-regulatory body.[204] In Mr Suter's model, Ofcom would set out high level regulatory outcomes to be achieved and the Ofcom Content Board would look to see that the self-regulatory body had given itself appropriate scope and powers to deliver those outcomes in considering authorisation.[205] In both models the detail of the standards code, and the process of arriving at that detail, would be a matter solely for the relevant self-regulatory body.

8.9 The third model I look at is that of an independent body with a mix of industry and public representation. Mr Mosley proposes replacing the PCC with a Press Commission with an independently appointed chairman but membership otherwise largely unchanged. His approach involves this body being solely responsible for making and amending the code of practice.[206] This Press Commission is not a regulator as it has no powers of enforcement and simply sets the standards.

8.10 Finally I come to the model which has standards setting simply in the hands of the independent regulator. The Media Regulation Roundtable makes the drawing up of a code the 'central

[203] p14, para 14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[204] p89-90, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[205] p2, para 9 & p3-4, para 17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[206] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf

function' of their proposed Media Standards Authority. In order to do this they would establish a broadly representative committee, including serving editors, as well as journalists and independent figures.[207] The Campaign for Broadcasting Standards and Press Freedom proposes that a statutory Media Standards and Freedom Council should be responsible for producing a code of ethical standards "*in consultation with the media industry and the general public*."[208] Sir Louis Blom-Cooper advocates that a statutory independent regulatory body would be responsible for a code of ethics.[209] The CCMR would give full responsibility for establishing and updating standards to its statutory, but voluntary, News Publishing Commission. The Commission would include editors, journalists and members of the public.[210]

8.11 A number of the proposals leave the matter of ownership of the code somewhat obscure. The MediaWise Trust talks of a new code[211] but does not say who is to be responsible for drawing it up. The NUJ says that "*the new regulator should have a role in drawing up a code of practice*"[212] but stops short of saying who should have the ultimate responsibility for deciding on the contents of the code.

8.12 In many ways this issue of who is responsible for setting the standards goes to the very heart of a new regime. It is important to balance the current industry expertise inherent in serving editors and journalists with the need for independence in setting standards. It seems to me that the appropriate balance is provided by some form of system that draws heavily on current editorial expertise via an advisory body, but leaves the ultimate approval of the code to a more independent regulatory body which has the primary duty of serving the public interest in respect both of the freedom of the press and the rights of individuals.

Contents of the code

8.13 I turn now to the content of the code. It has been said by many witnesses to the Inquiry that the current Editors' Code of Practice is a good code. There certainly seems to me to be a substantial consensus that the existing code captures much good practice. Ms Harman, for example, sees no need for changes to the code:[213]

> *"It is widely acknowledged by editors, journalists, campaigners, and academics that the current Editors' Code of Practice is broadly fit for purpose – the key issue is its enforceability. The Code – which covers fairness, accuracy, the differences between reporting and comment – could continue to be used."*

However, there have also been reservations expressed in relation to some aspects of the code.[214] This chapter reflects any proposals made for changes to the content of the code and does not attempt to be an assessment of the value of the current code.

[207] p11, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[208] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[209] p15, part III, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[210] p11, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[211] p20, para 3.35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[212] pp, 8-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[213] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[214] Part J, Chapter 5

8.14 The Inquiry heard evidence from a number of academics with specific expertise in ethical issues who felt that the code could benefit from revision. Professor Chris Megone described the code as:[215]

> *"a code that has been developed primarily from the point of view of things that can go wrong in media practice. It has a view of ethics as something to be turned on in order to stop people behaving badly, rather than of ethics as being concerned more broadly with good judgement and a positive contribution to society."*

He goes on to point out that the code is largely a series of prohibitions but that it is not very precise in terms of what is an absolute prohibition and where there is a prohibition that can be overridden. He says that '*this imprecision is likely to lead to a certain laxity of interpretation*'.[216] His conclusion is that the code needs to be set more in the context of the specific critical contribution that a free press can make to the public interest, and that it should be developed in terms of the duties to the key parties with whom the relevant press interact in different ways.[217]

8.15 Dr Rowan Croft suggested that there would be merit in the code requiring proprietors, editors and journalists to declare their financial and political interests to their readers. Similarly, there could be a requirement for declaration to readers of any payment made or received for information relating to the publication of a story.[218] This would help to give readers the information that they need in order to be able to accurately assess what they are being told in the newspaper.

8.16 A number of the proposals suggest that more thought needs to be given to the meaning of 'public interest' in the context of the code. The Media Regulation Roundtable suggests that some guidance on how the code should approach the public interest should be set out in statute.[219] Lord Prescott said that, though much of the code needs no amendment, there needs to be a wider debate on the definition of the public interest, in particular if it is to gain enhanced status as a defence in the courts.[220] The Carnegie Trust agrees that understanding the public interest in the context of the code requires more thought and recommends ongoing research to understand citizens' views on the matter.[221] Lord Soley also raises issues of concern around both the definition of the public interest in the code and its application.[222] This question of what is the public interest in the various different contexts in which it is used in relation to the press is, of course, a central one and is dealt with in detail at the start of this Report.[223]

8.17 Dr Neil Manson queries the effectiveness of the code provisions on accuracy:[224]

[215] pp10-11, para 9a-b, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Professor-Christopher-Megone.pdf
[216] p11, para 9c, *ibid*
[217] p13, para 11, *ibid*
[218] p8, para 9a, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Rowan-Cruft.pdf
[219] p11, para 28, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[220] p2, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[221] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[222] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Lord-Soley-of-Hammersmith.pdf
[223] Part B
[224] p16, para 9a, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Neil-Manson.pdf

> *"It is good that the Code places "The Press must take care not to publish inaccurate, misleading or distorted information, including pictures" to the fore. But, unfortunately, there is no account given of what constitutes accuracy, or distortion or misleading. This is, of course, problematic for it leaves considerable interpretative leeway in deciding what constitutes acceptable communication."*

8.18 Separately, Professor Manson queries the inclusion of the 'public's right to know'. The scope of the right is undefined, the nature of the right (a positive right to know or a negative right not to be prevented from knowing) is unclear and neither is practical. Professor Manson concludes that:[225]

> *"In any replacement code of practice there should be no mention at all of "the right to know" unless some decent argument can be given to show how it denotes a coherent right."*

8.19 Another issue that has been raised in relation to the code is the separation of fact and comment. Mr Eustice urges that the Code should be redrafted to strengthen the requirement to separate comment and fact. His specific proposals are:[226]

> *"A greater emphasis on this principle might be achieved by setting out in the code a presumption against using conjecture or opinion in a news story headline. It could also state far more clearly a presumption that opinion must appear in a separate editorial article and that, where practical, the basis for any conjecture should be sourced."*

8.20 A final point worth considering here is that the code itself, although important, can only achieve any improvement in standards if it is followed. The Inquiry heard evidence from many editors and journalists who claimed that the current code was the touchstone of their every decision. Doubtless in many (if not most) cases it is but, in the context of the extensive evidence the Inquiry has been given of behaviour in clear contravention of the code, this assertion can be taken too far and there is clearly room for improvement. The Inquiry has also been told many times that there is nothing wrong with the code, only with the enforcement of the code. Similarly, many industry witnesses told the inquiry that the problem was not with the self-regulation of the industry but with the enforcement of the law, as though the code did not prohibit illegal activity. In order to achieve anything the code needs not only to be well drafted, it must also be lived by the individuals and organisations to whom it applies.

8.21 Professor Baroness O'Neill reflected that professional codes on their own have a limited efficacy, particularly where 'professions' lack powers or willingness to discipline their errant members. This, she says, sets limits to the effectiveness of any ethical codes adopted by parts of the media and means that ethical codes, while important, are not enough.[227] She goes on to say:[228]

> *"traditionally ethical codes worked because they were embedded in cultural and social norms that were widely respected and adhered to, making shame and exclusion the principal sanctions for violations. Adherence to these ethical norms standards cannot be achieved in a scattered workforce, without entry requirements, agreed standards of practice, benchmarks of progression or ways of barring inadequate practitioners."*

[225] p16, para 9a, *ibid*
[226] p6, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[227] pp7-8, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Professor-Baroness-ONeil.pdf
[228] pp7-8, para 8, *ibid*

8.22 Professor Megone suggested that:[229]

> *"to make a code a lived code, media organisations need to attend to the critical factors that can bring about an ethical organisation, or promote integrity in an organisation. These factors include tone from the top (or leadership), an open and honest culture, and so on."*

8.23 Dr Manson noted that:[230]

> *"where ethically problematic 'cultures' or sets of practices are entrenched, there may be no plausible 'quick fix'……..However, it is a fallacy to argue from the fact that a quick fix is unavailable to the conclusion that nothing can be, or ought to be, done."*

9. Complaint handling

9.1 Complaint handling forms by far the largest part of the work of the PCC and a consistent and effective approach will be required in any new regulatory system. Two specific issues have arisen here. The first is by whom complaints should be resolved. The second is from whom complaints should be accepted. I look at the two in turn.

Who should adjudicate on complaints?

Internal complaint handling

9.2 The first point to address in this context is how complaints are handled internally by publishers and what has been described as the 'outsourcing' of complaints to the PCC. It seems clear that, under the existing PCC regime, few national publishers have effective mechanisms in place to deal with complaints from readers or others with concerns about their content; I have not taken sufficient evidence in relation to the regional and local press to know whether this holds true for them as well. There are beacons of good practice, and The Guardian's 'Readers' Editor' is the most developed that has been evidenced before the Inquiry. At one of the Inquiry's opening seminars, Mr Dacre announced the creation of a corrections column in the Daily Mail[231] and there have been suggestions that others might follow suit. However, as a general rule it appears that national publishers have been content for complainants to go directly to the PCC and are content for the PCC then to attempt to mediate the matter. Certainly the PCC protocols do not include encouraging bilateral resolution between the publisher and the complainant.

9.3 This has two significant consequences. First, the PCC has a large workload of minor complaints that can be easily resolved by mediation and that could possibly be resolved more quickly, more easily and more cheaply on a bilateral basis. The provision of a central clearing house for this type of complaint makes little obvious sense. Second, there is a risk that editors may outsource the judgment over whether material they publish is compliant with the code, or its use is ethical, at the same time as they outsource the process of handling the complaint. Lord Black accepts that complaints should, in the main, be dealt with directly by the editor of the

[229] p13, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Professor-Christopher-Megone.pdf
[230] p19, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Neil-Manson.pdf
[231] p3, Paul Dacre, Supporting a free press and high standards – approaches to regulation, seminar 12 Oct 2011, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/RPC_DOCS1-12374597-v1-PAUL_DACRE_S_SEMINAR_SPEECH.pdf

publication concerned, as that is likely to be the fastest way to resolve a dispute; the dispute should only then become a matter for the regulator when bilateral resolution is not possible. He argues that the changes to internal compliance systems inherent in his proposal should ensure that this would happen more often than it does now.[232]

9.4 The MediaWise Trust proposes that publishers should take a number of measures to strengthen in-house handling of complaints as part of a wider set of recommendations around re-building trust in the media:[233]

- *"An in-house but independent Reader's Editor on every publication above an agreed circulation/ratings threshold;*
- a regular Corrections column or programme, which might include review of the company's own journalism; and
- a commitment to give suitable prominence to upheld complaints (and to offer compensation if appropriate)."

9.5 Lord Prescott made this point in his submission, commenting that complaints currently seem to be 'outsourced' to the PCC, making them seem distant from the ongoing operations of the newspaper in question. He goes on to suggest that the new system should look to see more complaints being resolved via the organisation's internal mechanisms.[234]

9.6 I certainly agree that publishers should take more responsibility for their own compliance with standards and that having an effective and independent mechanism for dealing with complaints in-house is an important part of this.

Complaint handling by a regulatory body

9.7 All of the proposals submitted to the Inquiry envisage complaints handling to be one of the key functions of their proposed regulatory body. Relatively few go into any detail about how, or by whom, those complaints should be handled. Lord Black's proposal on behalf of the industry envisages a Complaints Committee comprising some serving editors and a lay majority. Although it is clear that, on the PCC, serving editors absent themselves from the process in relation to any decision on their newspaper, it is impossible to ignore the potential influence of a small number of extremely powerful individuals on the whole process.

9.8 In section 8 above I set out the exchange that I had with Mr Richards of Ofcom about the propriety of including serving editors at any decision making level in a regulatory regime. His view, that allowing members of the regulated population any part in regulatory decision making is entirely inappropriate, applies at least as much in relation to complaint adjudication as it does to standard setting. The CPVs urge that adjudicators must be independent of Government, Parliament and the press, and that serving editors should have no role in the adjudicating or investigating bodies.[235] Professor Greenslade said that retired editors would have 'baggage' and that they would not have up-to-date knowledge of the industry. He also

[232] pp25-26, para 40-41, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[233] pp9-10, para 2.06, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[234] p11, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[235] p1, para 7.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf

thought that the Press Council had tried co-opting retired editors and not found it to be productive.[236]

9.9 By contrast Mr Mosley proposes a statutory independent Tribunal to decide on all complaints, with each being decided by an individual adjudicator.[237] Mr Mosley does not indicate any requirement for the adjudicator to have any, let alone current, media experience. Similarly the MST proposes a statutory regulatory body with the power to adjudicate over disputes, although only in relation to those publishers who choose to join the regime.[238]

An ombudsman approach?

9.10 A significant number of the proposals put to the Inquiry suggest what is described as an 'ombudsman' to handle complaints. The British and Irish Ombudsman Association (BIOA) sets out a number of criteria for ombudsman schemes. These cover independence, fairness, effectiveness, openness and transparency, and accountability. It is clear that none of the proposals submitted to the Inquiry actually envisage a body with the independence that would be required for it to be recognised as an ombudsman by BIOA, as they generally draw their authority from a self-regulatory industry body without an obvious guarantee of independence. It should, perhaps, be noted here that, although many of the proposals draw on the Irish Press Ombudsman as an analogy, the BIOA does not recognise the Irish Press Ombudsman as fulfilling their definition of an ombudsman because there is not a clear separation between the ombudsman and the Press Council in terms of appointment, reporting and appeal; the BIOA consider that regime to be a complaint handling scheme only.[239] The main thing that distinguishes these proposals from that of Lord Black is that they envisage adjudications being made by a single person, not a committee, and do not rely on current media experience.

9.11 Lord Prescott advocates the establishment of an ombudsman. Complaints could only be taken to the ombudsman once the company's internal mechanisms had been exhausted; the ombudsman would then encourage a quick and mutually agreed solution but should be able to adjudicate on the complaint where necessary.[240] The ombudsman could be asked to look at matters which might otherwise be the subject of civil litigation. There would be no requirement on complainants to use the ombudsman, but courts might take a decision to side-step this option into account when considering a case. Similarly, the courts could consider the decision of the ombudsman if this channel was used.[241] The Carnegie Trust suggests the appointment of an ombudsman to investigate and adjudicate on complaints because of the perceived benefits of independence, public profile, trust and effectiveness.[242] Similarly, the MediaWise Trust recommends the creation of an ombudsman. As in other models, the complaint would first have had to be considered bilaterally with the publisher.

[236] p27, lines 7-23, Professor Roy Greenslade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[237] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[238] pp3-4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[239] p57, lines 1-15,David Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-12-July-2012.pdf
[240] p11, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[241] p12, para 11, *ibid*
[242] p7, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf

The ombudsman would seek to resolve the matter swiftly and to the satisfaction of all parties, and could arrange oral hearings or conciliation meetings if appropriate.[243]

9.12 The BIOA concluded that there is a role for a press ombudsman scheme as part of a proportionate system of checks and balances and provided its own set of proposals as to how a genuinely independent press ombudsman scheme might work. The BIOA notes that there is no current ombudsman scheme appropriate to take on the role, so a new scheme would be required. Specifically, and among other things, it recommends:[244]

> *"the name 'ombudsman' should not be used unless the body complies fully with the BIOA criteria for ombudsmen;*
>
> *any ombudsman scheme should be constituted as an independent body entirely separate from any regulatory body;*
>
> *any ombudsman scheme should have an independent board of directors, appointed on terms that secure their independent from those appointing them;*
>
> *Board members should not be appointed by a body which has more than minority representation from the industry, and not more than a minority of the board members should be from the industry;*
>
> *the independent board should appoint the ombudsmen, on terms that secure their independence from those appointing them;*
>
> *the scope and powers of any ombudsman scheme should be set independently, in the public interest, and not set by 'negotiation' with the industry;*
>
> *any ombudsman should be operationally independent, so that no regulator or industry body has any influence on its approach and decisions;*
>
> *the funding arrangements should ensure sufficient resources for the workload, and not provide any lever for the industry to try and exert any influence over the ombudsman's approach."*

Who can make a complaint?

9.13 The position with respect to who can make a complaint to the PCC is set out earlier in this Report.[245] Very few of the proposals submitted to the Inquiry deal explicitly with this issue. The Carnegie Trust recommends that the ombudsman should be able to take complaints from any concerned citizen, not merely from those directly affected by the article in question.[246] The CPVs argue that complaints should be able to be brought by the subject (or intended subject) of the publication or by third parties.[247] The NUJ urges that those impacted collectively should be able to complain and seek a right of redress.[248]

[243] p19, para 3.31-3.33, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[244] pp15-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-British-and-Irish-Ombudsman-Association.pdf
[245] Part D, Chapter 2
[246] p7, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[247] p1, para 7.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[248] pp3-7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf

9.14 Mr Dacre expresses concern at the idea, set out in the Inquiry's published draft criteria for an effective regulatory regime, that third party complaints might result in 'credible remedies'. He argued that this could:[249]

> *"open a Pandora's box of problems with every lobby and fringe pressure group in Britain (and abroad) deluging the regulator with complaints which may often be politically or ideologically motivated and aimed at forcing newspapers to report events in a way that furthers the group's objectives."*

His proposal is that the standards body should be able to take third party complaints, at their discretion, but only with a view to formulating a judgment that could result in changes to the code.[250]

9.15 The BIOA raise a concern that the wider complainant eligibility is drawn, the greater the burden on business and any ombudsman scheme, and the greater the chance that some cases might be brought for 'campaigning' rather than redress reasons. The solution proposed by the BOIA is that it might be open to representative groups to bring a complaint, but that should be subject to some requirement for 'permission'.[251] The same type of hurdle (whatever the scheme) might avoid the problems which concerned Mr Dacre.

Standards: investigatory powers

9.16 The purpose of a complaints handling mechanism is to deal with issues as they affect an individual: it could be considered as loosely analogous to the remedies available through the civil law, where the point at issue is the impact on the individual. A regulatory body, as opposed to a complaints handler, would also have an interest in the maintenance of standards for their own sake: this could be considered as loosely analogous to the criminal law, where the focus is on the maintenance of minimum standards and the determination of an appropriate sanction if that standard is not met.

9.17 So it is not enough that the regulatory body should have the power to deal with complaints; it also needs to have the power to consider compliance with standards and to take action where standards are systemically or significantly breached, irrespective of whether a complaint has been made in respect of the breach. The PCC has been widely described as a good complaints handler but not a regulator. The key to the ability of the regulator to take action in relation to systemic or significant breaches is the power to investigate potential incidents.

9.18 The failure of the PCC to use any investigatory powers that it might have had in relation to phone hacking has led a number of witnesses to emphasise the need for a new system to include investigatory powers. Lord Black's proposal on behalf of the industry sets out details for a standards and investigatory arm that would have the power to carry out investigations in respect of significant, systemic breaches. This proposal is described and analysed earlier in the Report[252] but is worth noting when considering the other proposals that have been made with regard to investigatory powers.

9.19 Where the issue is addressed explicitly by proposals, there is unanimous support for a regulatory body having investigatory powers. Lord Prescott advocates that the regulatory

[249] p8-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[250] p8-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[251] p12, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-British-and-Irish-Ombudsman-Association.pdf
[252] Part K, Chapter 3

body should have the power to appoint a suitably skilled investigator, at the regulated firms' expense, to address questions that the regulator may have.[253] Sir Louis Blom-Cooper QC argues for a statutory power for a regulatory body to hold public inquiries into 'any press activity that has aroused, or is likely to arouse, public concern'.[254] Mr Suter says that the self-regulatory bodies must have 'adequate powers' including at a minimum the power to investigate broader or systemic problems.[255] Professor Greenslade proposes giving a power to investigate to a media ombudsman who could investigate where there is evidence of systemic breaches of the code.[256] The Media Regulation Roundtable says: [257]

> *"In addition, the MSA would have the power to investigate apparent breaches of the MSA Code by participants without a specific complaint having been made by a member of the public."*

9.20 Ofcom supports the introduction of a power to investigate but warns:[258]

> *"Ensuring powers of investigation are only available post publication would be consistent with preserving the independence of the press and rights of free expression."*

9.21 It seems to me entirely right that any press standards body should have both a duty to maintain standards and the power to initiate its own investigations, in particular in respect of concerns relating to systemic or significant standards breaches. It is entirely conceivable, especially in privacy cases, that the subject of a story may not wish to draw more fire upon his head from an offending publication by making a formal complaint. This should not prevent a standards body from carrying out whatever investigation is necessary to identify whether there has been a breach of standards and, if so, applying the appropriate sanction. One approach might be to give the standards body the power (in appropriately serious cases) to bring a complaint in relation to a specific article, albeit allowing the complaint handling process to take account of the failure of the affected party to complain.

9.22 Further, in relation to complaints by groups, although I have recognised the concern expressed by Mr Dacre and would endorse a filter system to remove complaints that are ideologically motivated only to further the group's objectives, I do not otherwise accept the argument. As I have pointed out earlier[259] the current Editor's Code outlaws prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability, but does not provide similar protection in respect of groups. It is difficult to understand why there should not be some mechanism for representative groups to engage in challenges similarly based on the standards set out in the code.

9.23 In addition, I see no reason why representative organisations should not be entitled to raise a complaint in relation both to accuracy and prejudice where articles are discriminatory in respect of a group. Where such articles are found to have breached the relevant standards

[253] p12, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[254] p16, part III, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[255] pp3-4, para 17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[256] p12, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[257] p14, para 37, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[258] p8, para 4.3 e, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[259] part D, chapter 2

to the level that can trigger a standards investigation, it should be possible for the standards body to impose whatever sanctions or redress they would normally impose in respect of a breach of standards.

9.24 A number of proposals mention that individuals should be able to have complaints dealt with without incurring costs. This is an important point, and nobody has suggested otherwise. I entirely agree and applaud the fact that this has been one of the high points of the way in which the PCC has operated.

10. Remedies and redress

10.1 For this purpose I draw a distinction between 'remedies' or 'redress', the primary purpose of which is to make good, or compensate for, the harm done to another party and 'sanctions', the primary purpose of which I take to be punishment for breach and should impact primarily on the wrongdoer. For example, in a system with a regulator and an independent ombudsman, the ombudsman would be interested in redress and might require a company to pay compensation to an individual who has suffered at a level that reflects their loss, whilst the regulator might, in respect of the same breach, impose a fine, the level of which is designed to demonstrate the severity of the breach. The proposals considered in this section refer to redress and remedies that might be awarded by a regulatory complaints body for breach of a code of standards, not to any redress or remedies that might be awarded in respect of breach of civil rights. That is dealt with in the section below on dispute resolution.

10.2 The only remedy currently open to the PCC is to require a correction to be published, and the only redress is the publication of an apology, both with the placing and prominence to be agreed between the publisher and the PCC. Under the proposals submitted by Lord Black, this position on remedy and redress for those who have been harmed by press misconduct would remain unchanged. The Campaign for Broadcasting and Press Freedom takes a similar approach to redress but advocates a dedicated section on the editorial page to carry corrections, clarifications and apologies.[260]

10.3 A substantially wider range of remedies and redress have been put to the Inquiry in the proposals for the future. The CPVs argue that the press adjudicator should have the power to make compensatory awards, to require the publication of corrections, and to determine the prominence given to such corrections.[261] Most, but not all, of the CPVs also consider that an adjudicator should have the power to prevent publication similar to an injunction.[262] Mr Mosley specifically advocates all of those powers as well as proposing that the Tribunal should have the power to order newspapers and photographers to leave a complainant alone, ban the use of photographs, and order an item to be removed from the internet.[263]

10.4 Lord Prescott proposes that a press ombudsman should have the powers to:[264]

[260] pp5-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[261] p2, para 7.6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[262] p2, para 7.7, *ibid*
[263] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[264] p11, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf

> *"obtain[..] prompt equal-prominence corrections to quickly limit harm and/or redress the damage inflicted on the individual;*
>
> *award[…] damages, which are significantly material to genuinely recognise the distress and suffering caused to the complainant;"*

10.5 Similarly, the Carnegie Trust says that a press ombudsman should have the power to require news providers to issue prompt and prominent corrections and apologies for factual errors or misleading articles, and award compensation if appropriate.[265] The BIOA considers that any ombudsman should be able to award redress (up to a specified monetary limit) and/or require the business to take specified steps in relation to the business. The decisions of the ombudsman should be binding on the business.[266]

10.6 Ms Harman considers that the regulator should have the power to order the prominence and wording of an apology,[267] as does the NUJ,[268] while Mr Eustice says they should be able to dictate the size and prominence of corrections.[269] Ofcom suggests that a strengthened self-regulatory system might have strong rules in relation to equal prominence of apologies and corrections, with determination by the regulator rather than as part of a process of negotiation with editors.[270]

10.7 The MediaWise Trust says that:

> *"breaches of the new code should be dealt with like any other violation of professional standards or human rights – with appropriate sanctions, including compensation for the victims."* [271]

In addition they argue that the costs of successful complainants should be met, within a modest cap.[272] The Campaign for Media Reform also advocates the regulator having the power to award compensation,[273] as does the Media Reform Roundtable.[274]

10.8 Sir Louis Blom-Cooper acknowledges some concerns around giving a regulator the right to dictate the wording and/or placement and size of a correction or apology, on the grounds that this might constitute an infringement of the right to freedom of expression. By way of authority he refers to the Supreme Court of the United States in *Miami Herald v Tomillo,*[275] which held that a statutory right to reply to a newspaper article was an interference with editorial freedom and hence contrary to freedom of the press under the First Amendment to the US Constitution. By way of contrast, however, he also pointed to the decision of the European Human Rights Commission in *Ediciones Tiempo v Spain,*[276] which rejected a

[265] p8, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[266] p16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-British-and-Irish-Ombudsman-Association.pdf
[267] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[268] pp10-11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[269] p5, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[270] p8, para 4.3 f http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[271] p20, para 3.35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[272] pp20-21, para 3.40-3.41, *ibid*
[273] p13, Campaign for Media Reform submission p13 'Fines and compensation' http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[274] p13, para 34-35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[275] 418 US 2141 (1974)
[276] 62 D+R 247 (1989)

challenge to a right of reply provision in Spanish law on the grounds that the editor had plenty of opportunity to publish his own version of events so that the marketplace of ideas was enhanced, not contracted.[277]

10.9 It seems to me that there is no rationale for allowing the publisher to have some kind of veto over the wording, placement or prominence of a correction or apology made as a result of a code breach. These are matters which a regulatory body should have the power to dictate. Whether or not it is appropriate for the regulatory body to have powers to award compensation to complainants might depend on the relationship between the regulator and any dispute resolution system.[278]

11. Sanctions

11.1 Sanctions are a vital part of any effective standards regime. Sanctions must obviously be proportionate, but a regime will have limited impact if the sanction for breach is not sufficient to incentivise compliance. Ofcom refers to the important of effective powers of enforcement and sanction as:[279]

> *"a genuine deterrent both to the party being punished and as a warning to other regulated parties."*

Negative comment

11.2 The only sanction available to the PCC currently is to reach an adverse adjudication and require its publication.[280] The proposal by Lord Black on behalf of the industry would continue to restrict the complaints body to adverse adjudication, and the publication of a correction or apology, in respect of individual complaints. He also proposes that the standards body be given the power to investigate in a way that could result in the imposition of fines in relation to serious or systemic breaches.

11.3 Sir Louis Blom-Cooper proposes a system entirely based around the publication of report on specific topics and outcomes from public inquiries into media malpractices. This, he argues, would inform the public and wield influence, rather than power.[281]

Fines

11.4 Despite the apparent general acceptance by the industry of the need for a self-regulatory standards body to have the power to levy fines, this is not accepted without question by everybody. Sir Louis is worried that too high a fine might impact on the ability of a journalist, editor or publisher to continue to practice, and thus impinge on the right to freedom of expression.[282]

[277] p12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[278] This is discussed in Part J Chapter 4 para 5.10
[279] p6, para 2.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[280] and reporting to the publication's owner, but that is a lower sanction even than adverse adjudication
[281] P15, Part III, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[282] p11, part II, *ibid*

11.5 Lord Prescott argues that the regulatory body must have financial penalties as a tool at its disposal. He recognises that in a voluntary body it might be difficult to secure agreement on the power to levy fines, but nonetheless (as noted above) takes the view that the body should have the power to award damages.[283]

11.6 On the other side of the argument, the CPVs,[284] Ms Harman,[285] Mr Eustice,[286] the Carnegie Trust,[287] the MediaWise Trust,[288] the NUJ,[289] the Campaign for Media Reform,[290] Max Mosley,[291] Professor Greenslade,[292] Ofcom,[293] and the Media Regulation Roundtable[294] are clear that the regulator should have the power to levy fines. The MediaWise Trust is severe about the efficacy of the power of adverse adjudication, saying:[295]

> *"the new system will need genuine sanctions rather than the current fiction that peer pressure alone maintains standards. Breaches of the Code should be treated serious and persistent breaches should be dealt with severely. Editors whose newspapers have been found in breach of their own Code have in the past, remained in post or been 'promoted' or even remain on the PCC or the Editors' Code Committee. It is not surprising that such a system is viewed with contempt."*

11.7 I am inclined to agree. It is important that any new press standards regulatory body should have sufficiently strong sanctions to provide an incentive to press to comply with agreed standards. I do not find it credible that the power of negative adjudication on its own provides that and it seems sensible that the regulator should have the power to levy proportionate fines. Given Lord Black's proposals in this area I do not expect this to be a very controversial conclusion.

11.8 The Carnegie Trust notes that in a voluntary system the ultimate sanction is expulsion from the system, with whatever benefits might have accrued from being in the system.[296] This is, of course, only a sanction of any significance if membership of the system carries significant benefits and is inappropriate for a system whose strength is intended to be its inclusivity of all.

11.9 Mr Eustice proposes a higher level of sanction, arguing that Ofcom should be given the power to ensure that the internal governance systems of newspapers are such as to allow them to

[283] p11, para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[284] p2, para 7.6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[285] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[286] p5, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[287] p8, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[288] p20, para 3.35, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[289] pp10-11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[290] p13, Campaign for Media Reform submission p13 'Fines and Compensation' http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[291] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[292] p12, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[293] p8, para 4.3f, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[294] p14, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[295] pp19-20, para 3.34, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[296] p8, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf

comply with the code and the law.[297] Mr Eustice does not specifically say that Ofcom should be able to fine newspapers for failure to comply but, given the nature of Ofcom's current regulatory powers, that must be the logical inference; in truth, there is no other ultimate sanction.

12. Dispute resolution

12.1 The sections above dealt with breaches of a standards code. This section deals with breaches of civil rights by media organisations. It is a fact that many, but by no means all, complaints relating to a breach of a press standards code will be in respect of breaches that potentially give rise to an action in tort. The question must therefore arise as to whether such issues should be considered as code breaches, breaches of civil rights or both. The PCC has historically taken the view that it will not consider a complaint that is the subject of legal action, and that any complaint will be suspended pending the outcome of legal action should action be commenced after a complaint has been made. Complainants can, and sometimes do, take legal action following resolution of a case by the PCC. The PCC complaints system is free and can by relatively quick. Taking action through the courts, by contrast, is both extremely slow and can be extremely expensive.

12.2 Many of those proposing ways forward on standards to the Inquiry have, either as a part of their proposed solution or as the foundation of it, proposed the creation of an alternative to the courts to settle civil cases involving the media. The establishment of an alternative dispute resolution mechanism is straightforward enough. There is nothing now to stop that happening: indeed, the Inquiry heard evidence from Sir Charles Gray in relation to Early Resolution, which has done just that, although as noted earlier it has not proved popular so far with claimants.

12.3 The issue is not how to ensure that such systems exist, but how to make them sufficiently attractive to the press so as to encourage them to be part of a regime that provides access to them, and equally attractive to those who wish to commence proceedings against the press. The issues around civil litigation are examined in detail elsewhere in the Report[298] and I do not propose to revisit them here. In this section I will simply consider the proposals that have been put forward to deal with them.

12.4 Lord Black suggests the possibility of establishing an 'arbitral arm' as a part of the model he proposes on behalf of the industry. However, this proposition is not worked up in any detail. It is clear that the value to the industry from this proposal would come principally from the ability to require complainants to use it.

12.5 The Alternative Libel Project submitted a proposal based around a new press regulator offering a voluntary arbitration service. The key elements of their proposal are: [299]

(a) "increased use of mediation and arbitration;

(b) the introduction of Early Neutral Evalation;

[297] pp5-6, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-George-Eustice-MP.pdf
[298] Part J, Chapter 3
[299] p2, para 1.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Alternative-Libel-Project-English-PEN-and-Index-on-Censorship.pdf

(c) Costs penalties for failing to use these three forms of alternative dispute resolution

(d) the introduction of a hearing to determine the meaning of an alleged defamatory statement, with fixed limits on evidence, argument and costs;

(e) more robust case management;

(f) a change in costs rules to protect a party from having to pay the other side's costs in the event of losing, and the introduction of an overall costs cap."

12.6 Under this model the regulator could offer a mediation service, with any unsettled cases going on to court, an adjudication service, or an arbitration service where the findings would be final.[300] The Alternative Libel Project supports voluntary ADR as part of a self-regulatory scheme which should be incentivised by costs orders made by the courts.[301] They take this line because compelling people to use ADR would involve some form of statutory underpinning, which is opposed by Index on Censorship and English Pen as a form of statutory regulation.[302]

12.7 By contrast Sir Charles Gray and Early Resolution submitted to the Inquiry a proposal founded on a statutory adjudication scheme which both claimants and defendants are required to use. Early Resolution (ER) is a not-for-profit company set up in 2011 for the specific purpose of helping those engaged in expensive and complex libel or privacy litigation.[303] The Objective of ER is to bring about a fair, rapid and cost-effective resolution of disputes involving the media.[304] Where both parties agree to arbitration, ER can resolve issues including, in relation to defamation the meaning of the publication complained of, whether the words are statement of fact or comment and the quantum of any damages. In relation to libel, ER can determine whether the defendant had infringed the claimant's right to privacy, and, if so, to what extent, whether the defendant had a defence of public interest and any damages.[305] The benefits of this scheme are described as its speed, privacy and cost effectiveness.[306]

12.8 Sir Charles' proposal would be for a statutory regulator operating mediation for breaches of its code and statutory adjudication for disputes involving a claim for compensation.[307] Under this system both claimants and defendants would be compelled to participate in the adjudication process.[308]

12.9 Hugh Tomlinson QC's proposal on behalf of the Media Regulation Roundtable postulated a fully integrated regulatory and ADR regime. Under this scheme, like the ER proposal, all complaints against scheme members would go to the regulator in the first instance. A complaint in relation to a breach of the code would be the subject of mediation and could then go to a dispute resolution tribunal if the claimant was not satisfied. A complaint of a legal wrong would also start with mediation but, if that was unsuccessful, would then go to a compulsory adjudication process. Any attempt to bypass the adjudication system by going straight to court would result in the court action being stayed. The adjudicators would operate a stringent filter to prevent vexatious or hopeless cases being brought. The case would be ruled on within 28 days and could be dealt with on the papers or after an oral

[300] pp2-3, paras 1.3-1.4, *ibid*
[301] p3, para 1.7, *ibid*
[302] p3-4, para 1.9, *ibid*
[303] p1, para 1.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Early-Resolution.pdf
[304] p1, para 1.2, *ibid*
[305] p1, para 1.5, *ibid*
[306] p1, para 1.6, *ibid*
[307] p12, para 9.2, *ibid*
[308] p12, para 9.3, *ibid*

hearing. The adjudicator's ruling would not be final or binding and could be challenged in the courts.[309]

12.10 Mr Mosley's proposal would establish a Press Tribunal which would have jurisdiction in parallel with the High Court in respect of media cases. The Tribunal would operate by hearings in front of a single adjudicator, at very short notice if necessary. Lawyers would not be involved unless the complainant appointed one. The adjudicator would have no power to make orders for costs other than for wasted costs, but would have the power to award damages. Because the Tribunal would be operating as a regulator as well as an adjudicator it would also have regulatory sanctions and remedies available to it.[310]

12.11 There is much to be said for an effective alternative dispute resolution mechanism that must be used by both complainants and defendants. I am struck by Sir Charles' experience that complainants at present are not incentivised to use an ADR mechanism. That may well change with changes to the conditional fee agreements (CFAs). But making it more difficult for complainants to use CFAs will put the balance of power firmly back with the newspapers when it comes to court action, making an alternative route to justice of critical importance for ordinary individuals.

13. The role of the courts

13.1 Many of the proposals presented to the Inquiry envisage a role for the courts in some way. For the most part, this is related to the extent to which the courts could take into consideration any membership of a self-regulatory body when considering defamation and privacy cases, and the relationship between the courts and any ADR mechanism. I have considered both of these issues thoroughly in sections 5 and 12 respectively of this Chapter and I do not propose to revisit them here.

13.2 A few of the proposals envisage the courts having a role in enforcing the decisions of the regulatory body. Lord Black's proposal on behalf of the industry relies on contacts between the regulator and the regulated for enforcement of any regulatory decisions. The only mechanism for enforcement in that situation is to seek an order from the courts for specific performance. Similarly the Media Regulation Roundtable proposal suggests that the power to apply sanctions would sit in a contract between the regulator and those regulated,[311] and the regulator would therefore similarly have to rely on the courts to enforce a sanction if the other party refused to comply voluntarily. The Campaign for Broadcasting and Press freedom suggests that its proposed regulator should be able to apply to the courts for an order to enforce a ruling about publication of a correction or apology.[312] Similarly Ms Harman envisages the courts enforcing fines for failure of a newspaper to comply with a ruling by a new regulatory body.[313] In practice, there would be a potential enforcement role for the courts in relation to any statutory provision. In addition, the decisions and actions of any

[309] P23, para 81, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[310] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[311] pp3-4, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[312] pp5-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[313] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf

statutory body would be subject to judicial review unless some other appropriate appeal mechanism was specifically provided for in the statute.

14. Costs and funding

14.1 Any new regulatory regime will have costs and those costs will have to be met from somewhere. This gives rise to three separate questions. The first is simply affordability. How much will it cost, can adequate resources be found and, from where? The second is about adequacy. Any regulator can only be as effective as its resources allow it to be, so how can a new system ensure that the regulatory body has sufficient funding to act effectively, particularly recognising that all private and public sector budgets are under pressure in the current economic circumstances? Third, how can the regulator maintain genuine operational independence from its funding body or bodies? This encompasses the obvious point that a regulator should not be put under financial pressure in relation to any individual decision or decisions, but also that a funding body should not be able to influence the regulator's overall approach in terms of how it organises its activities, sets its priorities or approaches its duties. This section is concerned only with the costs of a regulatory function (including complaint handling) and does not include any consideration of litigation costs in relation to dispute resolution.

How much will it cost?

14.2 The only proposal presented to the Inquiry with any estimate of the cost was that of Lord Black. He estimated that the industry proposal would cost £2.25m per annum, together with (un-estimated) one-off transitional costs.[314] Lord Black made it clear in oral evidence that this was an estimate and that clarity over costs remained an important issue for the industry. However, he said:[315]

> *"As always with the industry, if there is a case that is made out that more funding is needed, then the industry has always met it in the past. I think that we would need to sit down with the new regulator when that's in place, when we have further costings, and look at these elements and how much they're going to cost, but I have no doubt that sufficient funding will be made available to the regulator to fulfil its function."*

14.3 The MST helpfully calculates that the cost of the PCC and Pressbof in 2011 (just over £2m) amounted to approximately 0.05% of copy sales revenue for nationals and 0.13% for regionals.[316] The MST also helpfully provides information on the costs of other self or co-regulators in the UK and other press councils around the world, but I fear that this information is limited in value unless there is a clear comparison between the models.

14.4 I have dealt above[317] with suggestions that the PCC was unable to be effective because it was not sufficiently funded. Without being able to give a view myself on what level of funding would be appropriate for any particular model put forward I certainly would make that point that any system must be adequately funded to carry out all of its functions.

[314] p45, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[315] p73, lines 2-9, Lord Black, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-9-July-2012.pdf
[316] p118, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[317] Part D, chapter 2, paragraph 8.4

Who should pay?

14.5 The first point to make is that none of the proposals presented to the Inquiry suggest that complainants should directly bear any part of the cost of a new regulatory regime. The NUJ expresses the point explicitly:[318]

> *"The body needs to be free for users at point of access so that there is no financial impediment to complaints about standards. The one small bit of praise for the PCC that is constantly and justly repeated is that it is fast and free. These are attributes that need to remain in a successor regulator……"*

The MediaWise Trust points out that, whilst there is no fee to access the PCC's services at present, it cannot be considered to be 'free' to do so because the costs of, for example, securing professional advice, or obtaining transcripts of inquests or court cases, can be significant.[319] Mr Mosley argues that it is essential that a tribunal should be available to both public and media free of charge.[320]

14.6 Lord Black makes it clear that his proposal would be fully funded by the industry. Indeed, he goes further and says that:[321]

> *"It would be inappropriate in a system of self regulation for the taxpayer to make any contribution through state funding, and the industry is – to the best of my understanding – wholly opposed to that."*

14.7 Others agree that the industry should be responsible for the full cost of a new regulatory system. Ms Harman considers a circulation based levy on publications.[322] Mr Mosley, who also proposes the establishment of a statutory tribunal, proposes that it should be funded by a combination of fines levied on companies and:[323]

> *"A levy of 'less than 1p (possibly as little as 0.1p) for every copy distributed of any publication with a circulation exceeding 30,000."*[324] *The Campaign for Press and Broadcasting Freedom argue for a levy on advertising revenues generated by the activities of the relevant groups. The levy would take into account the varying capacities of organisations to pay as well as overarching principles of fairness.*

14.8 Mr Mosley asserts that a 1p levy on newspaper distribution would raise about £47.5m annually. Professor Greenslade says that publishers who sign up to the system will provide funds proportionate to the size of their circulations.[325] The MST proposes a levy on all large news publishing organisations of 0.05% of revenues in order to fund its proposed Backstop

[318] pp3-7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[319] p20, para 3.36, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[320] p4 and p9, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[321] p20, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf
[322] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[323] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[324] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Max-Mosley.pdf
[325] p15, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf

Independent Auditor.[326] The self-regulatory bodies would be (transparently) funded by members' subscriptions.[327]

14.9 There is a significant body of opinion that state funding of some sort should be provided. This is particularly the case where the proposals envisage some form of statutory authority or powers for the new regulatory body. This ranges from those who would like to see a mix of public and industry funding to those who advocate a fully state funded solution.

14.10 The Carnegie Trust anticipates that the new regulatory regime is likely to be significantly more costly than the current regime and that the full cost should not be met by the industry:[328]

> *"Given the challenging economic and market conditions facing the newspaper industry at present this could have a detrimental effect on the sustainability of a number of news outlets – and this is not in the interests of citizens."*

The Trust therefore suggests that the industry should pay some of the increased cost of a new system but that there should also be additional public funding to support the activities of the new regulator.[329] Similarly, the MediaWise Trust advocates a mix of public funds and contributions from the print and broadcasting companies, saying:[330]

> *"Just because public money is involved doesn't mean that control transfers to politicians."*

14.11 The NUJ tends towards the view that state funding may be the easiest way to ensure true independence, but also canvasses the idea of charging the companies complained of a case fee, with surcharges where complaints are upheld,[331] although agreeing that one would have to be very careful about frivolous complaints. In giving oral evidence to the Inquiry Professor Frost said:[332]

> *"it's certainly a possibility that if the new body became concerned that newspapers were wilfully ignoring complaints that had come to them first, that they could charge a fee, but I have to say it's not my favoured option. I don't think we would want to push that. It would be much more sensible for the new body to be funded either from the industry or from state funds or a mix of the two."*

14.12 The CCMR, having recommended the establishment of a statutory tribunal, suggests that funding of the Tribunal should be through the courts and tribunals system.[333]

14.13 The Media Regulation Roundtable expects most funding to come from subscriptions from publishers joining their voluntary scheme. They also advocate the 'polluter pays' principle, suggesting that those who breached the code would be expected to make enhanced contributions. Finally, they note that it is likely that an element of state funding will also be required, in particular to cover start up and transition costs.[334] Sir Louis Blom-Cooper

[326] p75, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf
[327] p66, *ibid*
[328] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Carnegie-Trust.pdf
[329] p8, *ibid*
[330] p22, para 3.49, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-MediaWise1.pdf
[331] pp8-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[332] p95, lines 12-19, Professor Chris Frost, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[333] p13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[334] pp16-17, paras 53-55, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf

envisages that '*substantial public funding*'[335] would be required for his vision of a statutory independent Press Commission.

14.14 It seems to me that a pragmatic solution is probably called for. It is important that the funding for any new system of press standards regulation should be sufficient to enable the job to be done properly. The press currently makes a contribution of just over £2m a year to fund the PCC and I can certainly see no reason why they should be called up on to pay any less towards a new system. I do, however, recognise that some parts of the industry are facing significant economic and market challenges and it is important to keep the burden on companies to a realistic and appropriate minimum. I see no objection in principle to public funds being used to help establish or run any system of regulation that depends on statute, although equally there is no reason why the industry should not meet the costs of any statutory regulation in this sector as they do in many others. Ultimately this must be a matter of judgment for the Government, having regard both to what is fair and to the ability of the industry and the public finances to contribute.

Adequacy and independence

14.15 Ofcom argues that:[336]

> *"Ensuring reasonable operational independence and appropriate scope could be best achieved through the application of fixed term funding settlements."*

Elaborating on this point in oral evidence Mr Richards made the point that a regulatory body requires financial security in order to be truly independent of its funding body:[337]

> *"If you have established to public satisfaction, as it were, all of the things that Colette was talking about a few moments ago, in other words your governance and independence framework, that in reality is not going to go very far if actually someone is controlling the purse strings on a regular basis and in effect can infer or imply that resourcing or money may be withheld or changed in one form or another should decisions be made which are not the ones that may be preferred, and I think this is extremely important. I think a very important dimension of independence and effectiveness is financial security. You can't have an in perpetuity arrangement, and I think we suggest a multi-year period, I think we might mention somewhere three or four years, such that there is a moment when a proper exercise takes place which asks what is the necessary funding for the body? And that's about efficiency and value for money. But after that, there should not be interference with that budget, to ensure that the operational daily decision-making is not subject to any risk, any risk of threat or intimidation or anything of that kind."*

14.16 The difficulty of ensuring independence of the regulator from the body funding it was made by Professor Greenslade:[338]

> *"If you just take funding, for a start. Funding is not a sort of joke thing. If you pull that lever, you constrain that lever, you control. And so I would be really worried about the*

[335] p19, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/First-Submission-by-Sir-Louis-Blom-Cooper-QC.pdf
[336] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Covering-Letter-from-Ofcom.pdf
[337] pp86-87, lines 14-10, Ed Richards, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf
[338] pp41-42, lines 21-5, Professor Roy Greenslade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-12-July-2012.pdf

industry funding board aspect [of Lord Black's proposal]. It seems to me it's PressBoF reborn, and I think that's a problem. I thought his phrase about independently led self-regulation was beautifully put. It's actually in his submission too. But what we're really aiming for, are we not, is independently led independent regulation."

14.17 Mr Suter proposes a model in which regulation is carried out by approved self-regulatory organisations. In recognition of the importance of maintaining the independence of the regulator from its funding body, he suggests that one of the three essential criteria against which a self-regulatory body should be assessed should be that the operational and funding arrangements are sufficient to fulfil their role.[339]

14.18 I agree with Mr Richards and Professor Greenslade on this point. It is essential that any new regulatory body should have both security and independence of funding. I agree that this will mean that fixed term funding agreements should be reached to enable the regulatory body to manage its affairs as it sees fit without undue pressure or interference from the funding body, whether the funding comes from the industry or from Government, or both.

15. Protection and promotion of freedom of expression

15.1 A number of the submissions put to the Inquiry suggest that any new regulatory regime should include a positive role in relation to protection and promotion of freedom of expression or freedom of the press.

15.2 Ofcom starts from the position that there should be a clear statement of the public purposes of any regulatory system, and that the first of those purposes should be:[340]

"a requirement to protect the rights of the press in relation to freedom of expression."

The Campaign for Press and Broadcasting Freedom proposes that the aims of its proposed Media Standards and Freedom Council should include:[341]

"To promote both the free dissemination of news and information in the public interest, and professional and ethical standards."

The CCMR proposes that the Board of its News Publishing Commission would have a responsibility to monitor and champion press freedom.[342] The MST identifies six key objectives for its proposed Backstop Independent Auditor, one of which is to protect and promote reporting in the public interest.[343]

15.3 Mr Tomlinson QC, on behalf of the Media Regulation Roundtable, proposes a 'Media Freedom and Standards Act', which would include a provision, modelled on s3 of the Constitutional Reform Act 2005, which would place a duty on the relevant Secretary of State and other

[339] pp3-4, para 17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Tim-Suter-of-Perspective-Associates.pdf
[340] p4, para 1.11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom.pdf
[341] pp5-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-The-Campaign-for-Press-and-Broadcasting-Freedom.pdf
[342] p11, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[343] p89, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf

Ministers of the Crown to uphold the freedom of the press and its independence from the executive.[344] His suggestion is in these terms:

> "GUARANTEE OF MEDIA FREEDOM
>
> (1) The Secretary of State for Culture, Olympics, Media and Sport and other Ministers of the Crown and all with responsibility for matters relating to the media must uphold the freedom of the press and its independence from the executive.
>
> (2) The Secretary of State for Culture, Olympics, Media and Sport must have regard to:
>
> (a) the importance of the freedom and integrity of the media;
>
> (b) the right of the media and the public to receive and impart information without interference by public authorities;
>
> (c) the need to defend the independence of the media.
>
> (3) Interference with the activities of the media shall be lawful only insofar as it is for a legitimate purpose and is necessary in a democratic society, having full regard to the importance of media freedom in a democracy."

15.4 Mr Tomlinson explained the intension behind, and anticipated effect of, this proposal:[345]

> *"It's partly intended as a statement of, as it were, quasi-constitutional principle. Like the independence of the judiciary is a fundamental constitutional principle, so the independence of the media should be as well. What that means in practice is that if the Secretary of State of is making decisions which will impact on the way the media operates, the Secretary of State must be guided by this principle. And there are circumstances in which one could envisage situations where that would force the Secretary of State to go in one direction rather than another."*

15.5 Lord Prescott does not advocate an explicit role defending freedom of expression but he argues that any new framework should expressly require any regulator to have regard to case law under the ECHR and the HRA.[346]

15.6 Ms Harman states that the Labour Party believes that any Bill establishing a new system should also include constitutional safeguards for the freedom of the press.[347] She goes on to suggest that this might be done via the introduction of a statutory public interest defence. Ms Harman is not alone in arguing for a public interest defence, which is raised by the MST, Hacked Off, MediaWise, the Coordinating Committee for Media Reform, Max Mosley, Roy Greenslade and the Media Regulation Roundtable.

15.7 I have dealt earlier[348] with the problems associated with the creation of statutory public interest defences in criminal law and I will not revisit that here.

[344] p6, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf
[345] p11, lines 14-25, Hugh Tomlinson QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[346] p6, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-working-group-led-by-Lord-Prescott.pdf
[347] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[348] Part J, Chapter 2, section 6

16. Protection of journalists

Whistleblowing and a conscience clause

16.1 Lord Hunt suggested that a new regulatory structure should have a whistleblowing hotline[349] and the CCMR recommends that the new regulatory body should establish a whistleblower code.[350]

16.2 The NUJ makes a strong case that there should be some protection for journalists who are put under pressure to behave unethically. To this end, it recommends that all journalists' contracts should include a 'Conscience Clause' to prevent a journalist from being dismissed for a refusal to breach ethical standards:[351]

> *"A journalist has the right to refuse assignments or be identified as the creator of editorial which would break the letter of [sic] the spirit of the Code. No journalist should be disciplined or suffer detriment to their career for asserting his/her rights to act according to the Code."*

16.3 Specifically the NUJ recommends that a new standards code should include a provision requiring the inclusion of such a clause in journalists' contracts. The CCMR argued that a news standards code should itself include a conscience clause supporting journalists who refuse to work in ways that breach the code of practice.[352] Similarly Professor Greenslade argues for the inclusion of a conscience clause within the code and for the protection of journalists who act as whistleblowers or who invoke the conscience clause.[353]

16.4 When this was put to Rupert Murdoch as a suggestion he agreed that a conscience clause along those lines in employment contracts would be a good idea:[354]

> *"Q: Are you aware that the NUJ has for a long time been seeking the insertion in contracts of employment, not just at News International but other titles, of a conscience clause, that's to say a provision by which it is forbidden to discipline a journalist who refuses to do something which is unethical or against the code of practice?*
>
> *A. I have never heard of it.*
>
> *LORD JUSTICE LEVESON: Do you think it's a good idea?*
>
> *A. Yes. I think – I wouldn't do it through the NUJ, but I think for –*
>
> *LORD JUSTICE LEVESON: No, but the clause.*
>
> *A. For us to say as a condition of employment in a contract for a journalist they have the right to do that, I think that's a good idea."*

[349] p80, lines 20-24, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-9-July-2012.pdf
[350] p14, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[351] p13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Michelle-Stanistreet-on-behalf-of-the-National-Union-of-Journalists.pdf
[352] p14, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf
[353] p14, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf
[354] p100, para 6-20, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-26-April-2012.pdf

Moral rights

16.5 Professor Chris Frost raised the issue of the position of journalists in relation to moral rights. Essentially, the Berne Convention requires recognition of two inalienable rights of authors in literary and artistic works. The first is the right (even after transfer of copyright) to claim authorship of a work ('the paternity right') and the section is the right to object to any distortion, mutilation or other modification of a work which would be prejudicial to the author's honour or reputation (the 'integrity right').[355] Under the Copyright Designs and Patents Act 1998 (CDPA), these rights do not apply in relation to any work made for the purpose of reporting current events or in relation to a literary work made available for publication in a newspaper, magazine or similar periodical.[356] Professor Frost argued that these moral rights should be extended to cover journalistic work:[357]

> *"So I can prevent material being published under my byline if I disagree with it. In this instance, if I think it's unethical. Equally, I could argue about material that I had written being changed to make it unethical. That doesn't stop a newspaper publishing it without a byline or with what's known as a cod-byline, an invented byline of a fictional person, but it does mean that it wouldn't be there under my byline and that's quite important to a number of journalists who have become very upset – quite rightly so – when stories are changed or completely rewritten or a headline is put on the top of them which does not reflect what they wrote and what they know to be accurate and ethical."*

16.6 Given that this was a new issue that had not been raised before the Inquiry before, I invited press Core Participants to make submissions on the matter; two, the Telegraph Media Group (TMG) and News International (NI) did so. Both advanced similar arguments. The exemptions in the CDPA had been inserted into the Bill that subsequently became the CDPA. News International provided evidence that:[358]

> *"It was reported to the House of Lords in the course of the debates that the government had received many representations about the dire effect of moral rights on newspapers, particularly, it seems, from the editor of the Economist, who had given evidence to the committee. Lord Lloyd of Hampstead said that: "intolerable complications would be created if it were applied to newspapers, magazines and composite works". Lord McGregor, a Labour spokesman and former Chairman of the Royal Commission on the Press, concluded that "The exercise of moral rights in such circumstances would have posed a threat to an editor's right to edit and would have emasculated his responsibility for the form and content of his newspaper."*
>
> *Lord Hemingford stated: "allowing a reporter the right to insist on being identified or not to suffer alteration to what he has written or possibly dictated over the telephone from notes would be unrealistic and impractical in a newspaper context.""*

16.7 TMG argued that to require either the paternity right or the integrity right would delay the news and be wholly impractical for the newspapers to operate.[359] TMG felt that it was not clear whether Professor Frost was arguing for the repeal of the exemption provisions for

[355] TMG submission on moral rights para 5
[356] ss79 and 81, Copyright Designs and Patents Act 1998
[357] p13 lines 7-11 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-10-July-2012.txt
[358] p18, para 66, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-News-International.pdf
[359] Telegraph Media Group submission on moral rights, paras 10, 11 and 17

both rights or only in respect of integrity and I share that uncertainty. It is clear to me that the context in which he raised the issue was that of integrity but that a combination of both rights, namely a right to assert authorship and a right to prevent 'distortion, mutilation or other modification' of a work, would indeed be problematic in a newspaper environment. It is less clear to me that allowing the integrity right on its own would cause the problems complained of by TMG and NI. If a journalist retained his integrity right but not his paternity right then, in any case where a publisher needed to make changes to a text and did not have time to seek the permission of the author, they could simply remove the attribution. I am not, however, clear that this would be a desirable outcome for journalists, who might find themselves systematically denied attribution as a precautionary measure where articles have been edited after submission.

16.8 NI also drew my attention to the 2009 consultation by the UK Intellectual Property Office, resulting in a policy statement that the Government does not propose to alter the UK's moral rights regime. Whilst this consultation did indeed consider the position of moral rights in the UK, it did so only in the context of proposed changes in relation to orphan works and the possibility of introducing an exception in relation to parody.[360] I do not, therefore, consider that this constitutes a recent consideration by the Government of the issues raised by Professor Frost. NI further submitted that the Inquiry should not consider recommending the repeal of a statutory provision founded on a thorough debate without receiving full evidence on the implications of such a repeal. [361]

16.9 I recognise the real force of this point and I do not feel that I have heard enough evidence on the matter to reach a fixed conclusion. I do, however, think that this is an issue that is worth looking at further. I would, therefore, encourage the Government to find an early opportunity to consult on it, with a view to identifying whether removing the exemptions for reporting on current affairs and material provided for publication in a newspaper or journal in relation to either or both of paternity and integrity rights would improve protection of journalists and journalistic standards.

[360] http://www.ipo.gov.uk/consult-2011-copyright.pdf
[361] p18, para 66, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-News-International.pdf

CHAPTER 5
INTERNATIONAL COMPARATORS

1. The Press Council of Ireland and the Press Ombudsman

History and background

1.1 The Irish Press Council and Ombudsman system was set up in 2007 as a direct response to the threat of legislation from the Irish Government. The Chair of the Press Council, Daithí O'Ceallaigh, described the agreement eventually reached between the Government and the industry as:[1]

> *"a win-win solution….[where] at least some of the changes in defamation law sought by the industry would be incorporated in a new Act and, in return, the industry would sponsor an independent Press Council and Press Ombudsman along lines broadly acceptable to government."*

1.2 In the mid 1990s the Irish Government set up a Commission on the newspaper industry; in 1996, that body recommended the establishment of a Press Ombudsman, but no action was taken.[2] Then in 2002, the Minister for Justice, Michael McDowell, set up an expert advisory group which reported in 2003 with a recommendation for a statutory system of regulation for the press.[3] The industry set up a steering committee to consider its response; this committee included representatives of all the major newspaper groups in Ireland, including some of those based in the UK, namely News International and Trinity Mirror.[4] This group ultimately developed a model for the Press Council, which was to be independent of Government and, in its operations, independent of the industry; this was the model that was adopted for the new Council and Ombudsman in the summer of 2007.

1.3 Professor John Horgan, the Irish Press Ombudsman, explained to the Inquiry his understanding that the Press Council had been established with the *quid pro quo* that that Government would withdraw its proposals for the statutory regulation of the press.[5] At the same time, the Government agreed to use the legislative opportunity provided by the Defamation Bill in 2009 to offer some statutory underpinning for the new Council.[6]

1.4 Professor Horgan made it clear that the industry considered there to be a very real threat that the Government would legislate for press regulation in the absence of an adequate self-regulatory solution:[7]

> *"LORD JUSTICE LEVESON: But behind it all, do I gather from what you were saying somewhat earlier, was the threat of statutory regulation?*

[1] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/11/Press-Council-of-Ireland-Chairman-speech.pdf
[2] p51, lines 2-10, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[3] p51, lines 11-15, Professor John Horgan, *ibid*
[4] pp51-52, lines 24-4, Professor John Horgan, *ibid*
[5] p52, lines 17-24, Professor John Horgan, *ibid*
[6] p53, lines 9-22, Professor John Horgan, *ibid*
[7] pp55-56, lines 23-18, Professor John Horgan, *ibid*

A. Absolutely.

LORD JUSTICE LEVESON: So in other words, it behoved the press interests to come up with a solution that was less than the club that was being held over them?

A. That is absolutely the case. And in fact my membership, or our membership of the Alliance of Independent Press Councils of Europe indicates that in quite a few countries this threat has been the engine which has generated or promoted the successful establishment of press councils of the same kind in many European countries.

So even though before this threat was made, there had been moves towards the establishment of something like this, the 1996 report of the commission, which wasn't under such a threat, recommended the establishment of an ombudsman. As I said, it was the real and present danger of that that created the situation in which we found ourselves."

Legal recognition

1.5 In practice the Defamation Act 2009 set out some fairly detailed requirements for the structure, coverage and operation of a Press Council before it could be recognised under the legislation; this meant that, whilst the detail of both the code of practice and the complaints mechanism were left to the industry to set, the broad framework was dictated by the legislation if the industry wanted to take advantage of the protection offered by the Act. Professor Horgan told the Inquiry:

> *"without the benefit of knowledge of what went on behind closed doors in the four years leading up to the creation of the Press Council, it might be thought that this legislation represents a framework imposed by the state on the private sector. Whereas in fact – and Professor Thomas Mitchell has briefed me extensively on this – by and large the provisions relating to the Press Council that found their place in the Defamation Act were those proposed by the Press Council itself to the government."*

There is scope within the Act for the industry collectively to decide not to create a Press Council, and for any individual journal to decide not to participate. However, the Press Council of Ireland, as currently constituted, was established before the Act came into force and all significant publishers of newspapers in Ireland are members of the Council.[8]

Benefits

1.6 The Act provides a defence of 'fair and reasonable publication' to a defamation action.[9] In the case of a statement published in a periodical by a person who at the time of publication was a member of the Press Council, a court in considering whether publication was fair and reasonable may take into account the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of both the Press Ombudsman and the Press Council.[10] There was, as yet, no case law on this.[11] Professor Horgan clarified that this did not mean that the defence was only available to those who had signed up to the system. The defence was also available, in theory, to other publications if they could satisfy

[8] pp66-67, lines 13-4, Professor John Horgan, *ibid*
[9] Defamation Act 2009 s26, http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf
[10] *ibid*
[11] p3, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf

the court that they operated to standards and procedures in no way inferior to those of the Council. Similarly, this had not been tested in court and Professor Horgan said:[12]

> *"My honest view it that it would be quite difficult for publications that are not members of the Council to satisfy a court that they operate to such standards."*

1.7 In order to enact these benefits, the Act makes provision for the Minister, by order, to recognise a body as "the Press Council" for the purposes of the Act. The requirements for recognition are specific and detailed and it is worth setting them out here to show the extent to which the Defamation Act establishes the objectives and the structural independence of the Press Council, the approach to dealing with complaints and the overarching coverage of the code of standards.

1.8 Only one Press Council may be recognised at any one time. Before the Press Council can be recognised the Minister must satisfy himself that it meets the specifications set out in Schedule 2 to the Act. He can revoke the recognition at any time he considers that the Press Council fails to meet the specifications in the Schedule.[13] So far this power has been used once, in April 2010, to recognise the Press Council of Ireland as 'the Press Council'.

1.9 Schedule 2 of the Act requires that the Press Council should have the principle objectives of:[14]

> *"(a) ensuring the protection of freedom of expression of the press,*
>
> *(b) protecting the public interest by ensuring ethical, accurate and truthful reporting by the press,*
>
> *(c) maintaining certain minimum ethical and professional standards among the press,*
>
> *(d) ensuring that the privacy and dignity of the individual is protected."*

Interestingly, Professor Horgan told the Inquiry that the primary purpose of the Press Council was:[15]

> *"to maintain the rights of the press to freedom of expression, to maintain the independence of the press from the State and State control or regulation and to decide on appeals against decisions or the Press Ombudsman on complaints."*

with the primary role of the Press Ombudsman being:[16]

> *"to receive and adjudicate on complaints, to raise public awareness of the work of his Office and of the Council, and to encourage and promote the highest ethical standards of journalism in Ireland."*

Meanwhile, the website of the Press Council says that the objectives of the Press Council are:[17]

- *"To provide the public with an independent forum for resolving complaints about the press.*

[12] p54, lines 1-10, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[13] Defamation Act 2009 s44, http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf
[14] Defamation Act Schedule 2.2, http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf
[15] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf
[16] pp1-2, *ibid*
[17] http://www.presscouncil.ie/about-the-press-council.77.html

- *To resolve all complaints quickly, fairly and free of charge.*
- *To defend the freedom of the press and the freedom of the public to be informed."*

1.10 Specific provision is made in the Act about the structure of the Council, the number of members and how many of those members should independently represent the public interest, the interests of owners and publishers, and of journalists.[18] The Schedule makes requirements about the independence of the appointments procedures; it requires that the Minister should be satisfied by the independence of the appointments procedure but gives him no role in establishing or operating it.[19]

1.11 Professor Horgan told the Inquiry that it was clear to the industry when they were formulating their proposals for the Council that:[20]

> *"one critical aspect of what the industry proposed to establish, without which no possible measure of Government acceptance or approval would have been available, was independence."*

1.12 It is a requirement of the Act that the Press Council should be funded by subscribing journals and should receive no funding from other sources.[21]

1.13 The Act requires that the Press Council should appoint a body (the Press Ombudsman) to resolve complaints about the conduct of its members. The Press Ombudsman is to have the power to require publication of its own decisions, corrections, retractions and *"such other action as the Ombudsman may, in the circumstances, deem appropriate"*. Decisions of the Ombudsman are to be appealable to the Press Council itself, which is to have similar powers in respect of requiring publication of decisions.[22]

1.14 The Press Council must have adopted a code of practice with which all members are required to comply; this includes:[23]

> *"(a) ethical standards and practices,*
>
> *(b) rules and standards intended to ensure the accuracy of reporting where a person's reputation is likely to be affected, and*
>
> *(c) rules and standards intended to ensure that intimidation and harassment of persons does not occur and that the privacy, integrity and dignity of the person is respected."*

The Press Council

1.15 The Council was created by the Press Industry Steering Committee, comprising the publishing trade associations and the NUJ, in accordance with the provisions set out in the Act.

[18] Defamation Act Schedule 2.5, http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf
[19] Defamation Act Schedule 2.6, *ibid*
[20] pp56-57, lines 24-4, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[21] Defamation Act Schedule 2.7, http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf
[22] Defamation Act Schedule 2.8-2.9, *ibid*
[23] Defamation Act Schedule 2.10, *ibid*

Appointments

1.16 The Act requires the Press Council to comprise 13 members, of whom seven are independent members representing the public interest, five represent the interest of owners and publishers and one represents the interest of journalists.[24] The public interest members are appointed by an independent four-person Appointments Committee, on the basis of public advertisement and interview.[25] The Chair of the Council is appointed from within the public interest members, although in practice external applications have also been invited.[26] The industry and journalist members are nominated by the various organisations that took part in the steering committee and the Appointments Committee ratifies the nominations. Professor Horgan explained that there was not an automatic guarantee of appointment for those who were nominated, but he could not readily foresee a situation in which such nominations would not be ratified.[27]

1.17 The first Appointments Committee was appointed by the Press Industry Steering Committee. Subsequent appointments to the Committee are made by the Press Council. The appointments are for three years; that first Committee was subsequently re-appointed for a second three year term by the Council in July 2010.[28] As of August 2010, the Chair of the Council was also the Chair of the Appointments Committee.[29]

1.18 The five industry members of the Press Council are current senior editorial executives, although not usually editors. The only serving editor currently on the Council is the editor of a regional publication; he fills the slot effectively reserved for regional newspaper editors.[30] Professor Horgan suggested that the absence of serving editors has worked well for the Press Council, particularly because he thought that there was more change of personnel than might be expected if editors were to hold the seats. The appointments are for a three year term, and can be extended for a second term; however, some four and a half years into the Council's existence, only one of the original industry representatives is still a member of the Council.[31]

1.19 Professor Horgan told the Inquiry that the public interest majority on the Council was essential to the public acceptance of the independence of the model.[32] He also regarded the presence of a journalist member on the Council alongside the industry members as essential.[33]

Structures and Funding

1.20 In line with the requirements of the Defamation Act, the Press Council is wholly funded by the press industry. The finances of both the Press Council and the Press Ombudsman are provided by the Administrative Committee of the Press Council; the Committee is chaired by an independent member of the Council but otherwise consists of representatives of the different types of publications covered, together with the NUJ. Each title covered by the Council pays a levy based on circulation.[34]

[24] Defamation Act Schedule 2 s5(1), *ibid*
[25] p57, lines 19-22, Professor Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[26] p76, lines 13-22, Professor John Horgan, *ibid*
[27] p58, lines 7-19, Professor John Horgan, *ibid*
[28] http://www.presscouncil.ie/about-the-press-council/sub-sub-1.19.html
[29] *ibid*
[30] pp58-59, lines 24-7, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[31] p59, lines 8-24, Professor John Horgan, *ibid*
[32] pp74-75, lines 22-2, Professor John Horgan, *ibid*
[33] pp75-76, lines 25-7, Professor John Horgan, *ibid*
[34] http://www.presscouncil.ie/about-the-press-council/structures-and-funding-.2172.html

1.21 Making a complaint is free to the complainant.[35]

The Code

1.22 The code was originally drawn up in 2007 by the Steering Committee. There is now a Code Committee, which is chaired by an independent retired journalist and comprises nominees of the industry bodies. Serving editors have the right to be on the Committee but, for the most part, they are represented by deputies or senior executives. The Ombudsman sits on the committee in an ex-officio capacity.[36] Any changes to the Code are made in consultation with the Council. The Council can also suggest changes to the Code Committee. There have not, in fact, been any significant changes since the code was originally drafted.[37] It may be worth noting that the code would have been available to the Government to see when formulating the terms of the 2009 Defamation Act.

Coverage

1.23 All national newspapers, including all the UK papers that are published in Ireland, and over 90% of regional newspapers, are members of the Press Council. Around 60%, by number, of periodicals are members of the Council, but this would account for considerably more than 60% of circulation as the larger magazines are members.[38] Since the creation of the Council no members have left, or threatened to leave, the system.[39] Recently a news website has applied for membership and the Council is considering the appropriate criteria for membership of web media.[40]

Public awareness and satisfaction

1.24 Professor Horgan told the Inquiry that public awareness of the Press Council and Ombudsman was limited. A public awareness campaign had been launched in an attempt to make the services provided by the Ombudsman more widely known.[41]

Impact of statute on freedom of speech and the public interest

1.25 Professor Horgan did not think that the statutory recognition afforded to the Press Council by the Defamation Act constituted a limitation on the freedom of expression because the limitations in the Act were, by and large, those proposed and endorsed by the industry itself as a necessary balancing of the right to publish against the rights of individuals.[42] The belief of the Council in the importance of the freedom of the press is reasserted in the preamble to the Code.[43]

1.26 In this context it is worth noting that all UK titles that publish in Ireland are members of the Council; they do not appear to allow any principled objections to statutory underpinning of press self-regulation to get in the way of constructive and willing participation in this system.

[35] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf
[36] p92, lines 1-17, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[37] pp60-61, lines 20-4, *ibid*
[38] p66, lines 14-25, *ibid*
[39] p68, lines 3-5, *ibid*
[40] p67, lines 6-10, *ibid*
[41] pp67-68, lines 16-2, *ibid*
[42] p73, lines 14-25, *ibid*
[43] p74, lines 3-8, *ibid*

1.27 The public interest is not defined in the code, and it is left up to the Council and the Ombudsman to interpret it on a case by case basis. The code does set out a general principle:[44]

> *"that the public interest is invoked in relation to a matter capable of affecting the people at large so that they may legitimately be interested in receiving and the press legitimately interested in providing information about it."*

The Press Ombudsman

1.28 The Press Ombudsman primarily receives and adjudicates on complaints. The Ombudsman is appointed by the Press Council and reports to the Council on a monthly basis in respect of administrative matters.[45] The Ombudsman is independent of the Council in the execution of his functions of investigation and adjudication, but his decisions can be appealed to the Council by either the complainant or the newspaper if they are dissatisfied.[46] Professor Horgan stressed that his contract guarantees his independence from the Council and that the Council had recently agreed to amend its articles of association to give him greater independence. In particular the Ombudsman now has discretion to make decisions on whether someone is a person directly affected, and to rule out vexatious and frivolous complaints.[47]

Complaints

1.29 Complaints can only be made in respect of publications that are members of the Press Council of Ireland. A complaint can relate to any article that breaches the Code of Practice or to the behaviour of a journalist that breaches the Code.[48]

1.30 Complainants are expected to go in the first instance to the publisher concerned, and the Ombudsman will only consider complaints if the complainant has not received a satisfactory reply within two weeks.[49] Professor Horgan told the Inquiry that he had:

> *"got a very severe telling off, which I think in the circumstances was quite justified, from the editor of the newspaper concerned….."*

when he had, on one occasion taken a compliant directly at the request of the complainant who had been too fearful to confront the newspaper itself.[50]

1.31 Complainants are free to take their cases to court in advance of, alongside or after a case is considered by the Ombudsman. The Ombudsman will not consider a case while it is before a court, but will suspend consideration of the complaint until legal proceedings have concluded.[51] Professor Horgan could only recall one example of a complainant having taken legal action in respect of a matter which had already been adjudicated by him.[52]

[44] pp93-94, lines 22-4, *ibid*
[45] p79, lines 15-21, *ibid.* p80, lines 3-13, *ibid*
[46] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf; p80, lines 13-16, Professor Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[47] pp78-79, lines 24-12, *ibid*
[48] http://www.presscouncil.ie/office-of-the-press-ombudsman.167.html
[49] p63, lines 4-10, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[50] pp61-92, lines 22-9, *ibid*
[51] p64, lines 1-12, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[52] pp64, lines 7-20, *ibid*

Process

1.32 The Ombudsman will generally carry out conciliation and reach conclusions on the basis of documentation alone, although there is also provision for face-to-face mediation, which may be used more often in future.[53] All decisions, whether by the Press Ombudsman or, on appeal, by the Press Council, are published to the interested parties and on the Press Council/ Ombudsman website.[54] An annual report is published setting out the data and the approach taken to key issues.

Volume and results

1.33 In the four years of its operation the Irish Press Ombudsman has received on average between 340-350 complaints per year. This is roughly analogous, in proportion to population, to the number received by the PCC. There is, however, one striking difference between the outcomes from the Irish Ombudsman and those from the PCC. The Irish Press Ombudsman has reached a decision on nearly 12% of the complaints brought to it over its four year lifetime, which compares to substantially less then 1% of complaints to reach adjudication with the PCC.[55] In 2010 and 2011 around two thirds of the decisions of the Press Ombudsman have included a finding that the code was breached, with sufficient remedial action already having been taken by the publisher in up to half of those cases.[56] Comparatively few cases are conciliated, with only 19 (6% and 5.5% respectively) conciliated in each of 2010 and 2011.[57]

Appeals

1.34 Either party to a complaint can appeal the decision of the Press Ombudsman to the Press Council. Professor Horgan told the Inquiry that there were a substantial number of appeals in the early years but that only very few appeals were upheld by the Press Council.[58] The figures provided to the Inquiry show that 53% of the decisions taken by the Press Ombudsman have been appealed to the Council over the four years. There was a substantial dip in the level of appeals in 2009, but otherwise the proportion of decisions appealed has been over 50% in every year of the Press Ombudsman's operation. It is not obvious from the figures whether those appeals were by publishers or claimants and Professor Horgan told the Inquiry:[59]

> *"Initially quite a substantial number of my decisions would have been appealed, either by newspapers or by complainants, on the grounds that, well, it was free and, you know, why not have a second bite at the cherry?"*

Very few of these appeals are upheld, however, with only three appeals having been upheld in four years (although some 12 appeals are described as being still outstanding).[60]

[53] pp84-85, lines 22-10, *ibid*
[54] http://www.pressombudsman.ie/making-a-complaint.24.html
[55] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf
[56] *ibid*
[57] *ibid*
[58] p81, lines 2-9, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[59] pp80-81, lines 23-1, *ibid*
[60] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-Submission-by-Professor-John-Horgan-Irish-Press-Ombudsman.pdf

Standards

1.35 The Ombudsman deals with individual cases and has no remit to identify or respond to any systemic issues which might become apparent from cases that he considers. Professor Horgan told us this would be a matter for the Press Council, on the basis of its own assessment of the issues before the Ombudsman and the decisions being reached. However, the Press Council does not have the power to conduct own-initiative investigations, and has no specific remit to tackle serious or systemic problems. Some efforts have been made to address systemic issues by, for example, sponsoring seminars on relevant matters.[61]

Sanctions

1.36 The only sanction available to the Press Ombudsman is the requirement for the newspaper or magazine to publish a decision upholding a complaint.[62] Professor Horgan told the Inquiry that all the major newspapers have been the subject of critical adverse findings in one form or another.[63] Decisions of the Press Ombudsman also frequently include a correction of inaccurate facts.[64] Detailed guidelines have been adopted by the Council in relation to the publication of a decision by the Press Ombudsman. In relation to prominence of publication these guidelines say:[65]

> *"(3) Those sections of decisions of the Press Ombudsman upholding a complaint should be published: (a) in full; (b) promptly; (c) on the same page as the original article, or further forward, subject to the exception at (6) below; (d) on the same day of the week as the original publication, (e) with similar prominence; (f) unedited; and (g) without editorial commentary by way of a headline or otherwise. In addition, each should carry, above the headline, a strap-line indicating that it is a decision of the Press Ombudsman.*
>
> *[….]*
>
> *(6) Where a complaint has been upheld in relation to an article published on the front page of a publication, the decision should be published with due prominence on one of the first four editorial pages."*

UK titles as members

1.37 Professor Horgan told the Inquiry that UK titles accounted for 30% of membership of the Council, but were responsible for around 22% of the complaints. These figures have to be viewed with caution, however, as they make no allowance for circulation figures or other differences between titles.[66] In respect of the types of complaint that were received about UK titles and Irish titles, Professor Horgan said:[67]

> *"There's absolutely no discernable differentiation between the basis of the complaints against indigenous publications and those against UK-based publications."*

[61] p65, lines 2-24, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[62] p90, lines 4-6, *ibid*
[63] p68, lines 9-11, *ibid*
[64] pp90-91, lines 25-2, *ibid*
[65] Office of the Press Ombudsman, Publication Guidelines, http://www.pressombudsman.ie/cases-appeals/publication-guidelines-for-newspapers-and-periodicals.1161.html
[66] p71, lines 10-19, Professor John Horgan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-13-July-20121.pdf
[67] p72, lines 3-6, *ibid*

Professor Horgan went on to say that he had no complaints at all about the cooperation of any of the publications with the Ombudsman.[68]

2. Other models of press regulation: Europe and beyond

2.1 In this section I consider systems of press regulation operated in Europe and elsewhere; whether they are comparable to conditions in the UK and whether there are lessons that might be learnt and applied. It is important to start by noting that, while there may be similarities between systems of press regulation, no two systems are the same and there are important differences.

2.2 While all of those countries in consideration here operate systems of self-regulation, they differ from the PCC in many ways. In some cases, notably Denmark, Sweden, Finland and Germany, there is some form of involvement by government, either through statute or because of financial support; in the case of France, the impact of legislation is very different to the model in the UK and has real impacts upon the functioning of the press in that country.

2.3 Most of the comparative European countries operate a form of self-regulation through a Press Council, but also in some cases a Press Ombudsman (notably in Sweden). Unsurprisingly, the majority of the Press Councils operating in Europe and internationally, have been established solely with the printed press in mind. The development of new media, such as online publications and micro-blogging sites, have created opportunities for Press Councils to review existing frameworks, in order to consider options for incorporating new media platforms into their regulatory structure. This has included consideration of how to encourage membership, as well as how to meet the expectations for new media platforms and additional sources of funding for the system of regulation.[69] By way of example, Denmark operates a 'polluter pays' policy for online members who have joined the Press Council. However, this is regarded as a temporary measure, as no official funding mechanism has yet been developed.[70] Online and the self-regulatory settlement with online publishers is considered as and where appropriate in this section.

2.4 This section will also look at the composition of the Press Council Boards, as well as sources of funding for the industry; both are important variables. The German Press Council for example is co-funded by the German Government. This system has not led to statutory regulation; neither has it been suggested that the Government exerts a deleterious influence simply because of the public funding. In her extremely well informed evidence to the Inquiry, Lara Fielden, a Visiting Fellow at the Reuters Institute for the Study of Journalism, has suggested that, although many of the European Press Councils profess to focus on the embedding and maintenance of journalistic standards, in practice this role is limited and most Press Councils are reactive and complaints driven instead.[71]

2.5 I will first consider the Scandinavian countries and thereafter Germany, France and the Netherlands. I will then pass on briefly to review the situation in both the United States and China.

[68] p73, lines 7-12, *ibid*
[69] p79, lines 10-1, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[70] p80, lines 6-10, Lara Fielden, *ibid*
[71] pp72-73, lines 24-3, Lara Fielden, *ibid*

Denmark, Sweden and Finland

2.6 The press in the Scandinavian countries has been described as a collective press which has historically prided itself on the publication of information to high standards of accuracy, and within the boundaries set by a clear journalistic code. In each of the Scandinavian countries, the respective Press Council has powers to raise monetary contributions and, if an article is found to breach the code, to mandate the publication of the fact of a breach along with an apology. Furthermore, in Denmark, the Press Council additionally has the ability (rarely used) to fine or imprison an editor-in-chief who fails to comply with a publication of a Council adjudication.[72] As to the relevance of rights of individuals, the Swedish Code of Standards includes the clause that journalists should:[73]

> *"Refrain from publicity which could violate the privacy of individuals, unless the public interest obviously demands public scrutiny".*

Ms Fielden explained that the tabloid press in the Scandinavian countries had become increasingly comfortable with reporting on the private lives of politicians and others.[74]

2.7 Significantly, there are no press laws in place, nor specific legislation relating to the regulation of the printed press, in Denmark, Sweden or Finland. However, contrary to assertions made in evidence and in public over the course of this Inquiry, there are elements of governmental involvement that can be found in the systems of press self-regulation operated in these Scandinavian countries. For example, and most notably, the Danish Press Council is established in statute, pursuant to the Danish Media Liability Act 1998, albeit that other elements of the system are self-regulatory particularly in terms of handling adjudications, the composition of the Press Council Board and the exercise of Council responsibilities. Under the terms of the Act, all publications which are in printed circulation more than twice a year, as well as holders of broadcast licences, are subject to regulation by the Danish Press Council. The Council also deals with complaints across all media platforms, including online media, provided (in the case of online publishers) that these organisations are registered with the Council.

2.8 Ms Fielden has explained that registration in Scandinavia is the expectation and is not perceived as a form of licensing.[75] Indeed, it is compulsory for any publisher seeking to participate in the self-regulatory system in Denmark, Sweden and Finland. The procedure of registering an editor-in-chief responsible for the publication is representative of the Scandinavian approach to responsible and accurate journalism.

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[72] Lara Fielden notes that a prison sentence has never been passed, although in the 1990s, a number of fines were imposed

[73] p80, lines 1-3, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

[74] pp67-68, lines 24-3, Lara Fielden, *ibid.* This may be borne out by the reaction to the publication in France of the pictures of the Duchess of Cambridge (see Part F Chapter 7(7) and, in relation to the French publication, footnote 99 below. The Swedish magazine, Se och Hör (See and Hear), and the titles' sister Danish edition (similarly titled Se og Hør) both published the photographs within 24 hours of the injunction being granted. The editor-in-chief of Se och Hör defended the publication, saying that there had been nothing unusual about the publication of topless celebrities in their title. On Newsnight (19 September 2012), she did not deny they may have breached the privacy of the Duke and Duchess but said that the photographs presented a "*lovely couple in love*", which conformed with the focus of the magazine on celebrity relationships. As they had been obtained before the injunction, there was nothing withholding the title from publishing. The editor of Se och Hör in Denmark commented that the purpose of Se og Hør is to provide material to entertain

[75] p78, lines 2-9, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

Denmark

2.9 Any journalist, or individual who imparts news in some way, whether through printed media or online, is protected under the Danish Press Council's professional umbrella. The benefits of membership of the Council include access to privileges in law such as the protection of journalists' sources. This has been the incentive for many online publishers to join the Council on a voluntary basis.[76] They have the ability to differentiate themselves from other online media who are not regulated by the Council. Online publishers are expected to contribute to the industry funding of the Press Council if they are affiliates of existing members (such as the online presence of a broadcaster or a printed newspaper). However, purely online-only outlets are not expected to contribute. This is partly due to the non-existence of a funding mechanism and is compensated by the Danish Press Council operating the 'polluter pays' policy, which is applied if an online member breaches the Code.[77]

2.10 It is noteworthy that, in similar fashion to the PCC, the Danish Press Council does not accept third party complaints and deals with only those individuals who have been directly affected by press misreporting.

2.11 One of the primary roles of the Danish Press Council is the duty to enforce a right of reply (albeit limited to specific factual inaccuracy). This power is enacted in statute under the Danish Media Liability Act 1998, and is procedurally different to the remedy obtainable from the court,[78] and applies to both newspapers and broadcasters.[79] Save for this and for the penal consequences visited on the editor-in-chief for failure to publish adjudications by the Press Council, there are no other enforceable rights under the Act. Like the Press Councils in Sweden and Finland, the Danish Press Council does not have the power to award compensation or to impose financial penalties.

2.12 Although the Danish Press Council is set up in statute, it is still at a fundamental level self-regulatory and is regarded as such by its members. The eight members of the Council are appointed for their industry expertise. Historically, a member of the Danish Supreme Court has always been appointed as the Chair of the Council and a lawyer has held the position of Vice-Chair. The remainder of the Council consists of industry members, who are either journalists or editorial management, or independent public members; each is equally represented with two positions on the panel.

2.13 Although the system operated in Denmark has its benefits, it has come under parliamentary scrutiny, in particular for the placement of apologies and corrections.[80] According to Ms Fielden, publications are:[81]

> *"…still, even within this co-regulatory framework, burying publication of an adjudication on sort of page 54".*

In her evidence she highlighted the different approach of publications towards 'regulation' and noted the distinction between two media camps: those who are found in breach and are

[76] p81, lines 8-25, Lara Fielden, *ibid*
[77] p82, lines 2-11, Lara Fielden, *ibid*
[78] pp76-77, lines 21-17, Lara Fielden, *ibid*
[79] Previous attempts at passing a similar right of reply bill through UK Parliament been unsuccessful to date. See Peter Bradley Submission – http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Peter-Bradley.pdf
[80] The review by the Danish Parliamentary Select Committee, at the time of writing, was due to report in the Autumn of 2012
[81] p89, lines 11-13, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

ordered to comply with adjudications by the Danish Press Council; and those who voluntarily choose to comply with regulation in order to benefit from the protections that membership of the Press Council offers.

Sweden

2.14 In Sweden, the press and press freedom are specifically protected by two of Sweden's four constitutional laws. These function to protect the freedom of speech (Freedom of the Press Act 1991) and the freedom of the Swedish press (Freedom of the Press Act 1949). These freedoms apply to any individual who has registered for authorisation to publish and can include private individuals such as online bloggers. Both Acts guarantee a ban on censorship, the protection for anonymous sources and the right of public access to documents held by Swedish authorities.[82]

2.15 Press standards in Sweden are upheld through the Swedish Press Council. Membership is voluntary and not backed by legislation, unlike in Denmark. Newspapers and print publications are authorised to publish as members of either the Swedish Newspaper Publishers' Association, the Magazine Publishers' Association, the Swedish Union of Journalists, or the National Press Club. There are no restrictions on who can apply for a licence through the Swedish Press Council. These organisations collectively finance the system of self-regulation, and also set the Code of Ethics for the printed media (and broadcasting) in Sweden.

2.16 In Sweden, the editor-in-chief of a print publication is legally responsible for all content published by that title and is answerable to the Press Council Board. There are a total of 18 members of the Press Council Board. In similar fashion to Denmark, the Chair and three Vice-Chairs are members of the Swedish Supreme Court. The remaining members are representatives from the four associations responsible for funding the Press Council, as well as three representatives of the general public who are without affiliation to the press. This composition of the Board is seen as a way of underpinning the independence of the system of self-regulation in a country that has historically esteemed the freedom of the press and sought to protect it in law.[83]

2.17 Sweden also operates a Press Ombudsman whose role is to investigate complaints, provide information and advice to the public and contribute to the development of press standards. Both the Press Council and the Ombudsman deal with the online versions of printed newspapers and magazines. The Press Ombudsman is the first point of contact for any complainant who has a personal interest in press misreporting or who has been directly affected by it. As such, third party complaints are not accepted by the Swedish Ombudsman. The Press Ombudsman does not act as a mediator but rather makes decisions on whether a complaint can be accepted and passed to the Council for adjudication. If the Press Ombudsman decides a complaint does not warrant formal criticism of the title in question, the complainant can appeal directly to the Press Council. There are also no restrictions to prevent a complainant from taking the grievance to court after it has been considered by the Press Ombudsman and the Press Council.

2.18 The Press Ombudsman is appointed by a special committee which consists of the Chief Parliamentary Ombudsman, the Chair of the Swedish Bar Association and the Chair of the National Press Club. The length of time taken for an adjudication by the Press Council can be a further six or seven months after the Ombudsman has considered a submitted complaint

[82] Advisory note provided by the British Embassy in Sweden

[83] pp69-70, lines 15-5, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

(which can last itself three to four months). The remedy for such complaints is the right to reply or the publication of a correction.

2.19 In contrast to the UK and Denmark, however, the Swedish Press Council operates a system whereby titles are expected to contribute towards costs after a breach of the code. Whereas only online operators in Denmark are ordered to pay a levy towards the funding of the Council if they are in breach of the code, in Sweden, anyone who breaches the code is required to pay a 'penalty' towards the fund. It is estimated that this form of 'polluter pays' policy contributes approximately 20% of the Press Council's funding.[84]

Finland

2.20 Finland's printed press is regulated by The Council for Mass Media (CMM), established by publishers and journalists in 1968. It is the main body responsible for the self-regulation of Finland's printed press and broadcasters. It is also the only self-regulatory system in the Scandinavian countries that encompasses all media platforms, including online journalism. Under Finnish Law, the freedom of speech is protected through the Exercise of Freedom of Expression in Mass Media Act 2003.[85] Through this Act, publications are obliged to provide a public right of reply as well as the duty to correct factual inaccuracies. In similar requirements to Sweden, each publication must nominate an editor who holds the responsibility for all the published content of that publication.

2.21 The CMM is responsible for issuing Guidelines for Journalists, which establishes professional conduct guidelines across cross-media platforms. Membership to the CMM is voluntary, although it is perhaps noteworthy that journalists who have affiliated membership to the Council commit themselves to advancing and upholding the principles set out in the Guidelines for Journalists. Dr Riitta Ollila, a member of the CMM has argued that the Council:[86]

> *"…does not act as a mediator between editors and audience but as a master of the code making remarks on the press of their errors."*

Although the CMM has no legal jurisdiction over the regulation of the press, its position overseeing journalistic standards is generally accepted. The CMM receives state funding from the Finnish Government equivalent to 30% of the Council's budget.

2.22 In contrast to Denmark, Sweden and indeed effective practice in the UK, the CMM is open to third party complainants. Complaints can be received from any member of public who considers that there has been a breach of good practice or violation of the Guidelines for Journalists. Any title or broadcaster found in breach of good practice is compelled by the CMM to publish a notice issued by the Council within a certain timeframe. Similarly to the PCC, the CMM will not rule on an issue or consider a complaint where legal action is being taken concurrently. The Council can only rule on complaints brought to the Council's attention within three months of publication.

2.23 The CMM is comprised of eight representatives of the industry and (including the Chair) four public members. Up until 2007, only a current or serving media professional could be appointed to Chair of the CMM. Changes have since been made which now allow a former

[84] pp75-76, lines 13-3, Lara Fielden, *ibid*

[85] The 2003 Act includes particular measures which are not applied to the printed press but are in relation to the distribution of network messages either on the internet or broadcasted through radio waves or other electronic measures

[86] p6, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-the-Finnish-Press-Council.pdf

editor to assume the post of Chair of the CMM. These adjustments might have been to improve the operation of the Council, given the rate at which respective Chairs of the CMM have resigned.[87]

2.24 The membership of Press Councils in Scandinavia has historically been high; it appears that this is largely due to the reputational benefits of membership and the accountability that is perceived to be afforded by membership of the relevant Council. This is also shown through the increasingly high rate of membership by online media outlets, and the online platforms of traditional media. In addition, it appears to be the case that, in the Scandinavian countries, there is a culture of commitment to (and indeed pride in) high journalistic standards. Therefore the question of membership, irrespective of the cost of that membership to an individual publication, is not an issue for consideration by media bodies in Scandinavia. As has been noted, the only exception is Denmark, where any publication that meets the criteria defined by the Media Liability Act, is subjected to compulsory regulation by the Danish Press Council.

Germany

2.25 It has been argued by some commentators that the German Press Council operates the purest form of press self-regulation in Europe. In Germany, the press are regulated only by the press and are only subject to restrictions within the German Basic Law (*Grundgesetz*). The Press Council was established in 1956 and consists of members from industry organisations and the press trade unions. The Council has 28 industry members and the Chairmanship of the Council rotates between the representatives of the different industry organisations. Press behaviour and standards are set out in the German Press Code, first developed by the Press Council in 1973, which provides guidelines under which journalists should operate. In 2009, the Press Council expanded their remit to include online newspapers. The Press Council relies on Government funding for its operations (although there is a stipulation that the funding should not exceed 49% of the Press Council's total revenue).[88] Other than providing monetary support to the Council, the Government has no powers or influence over the day-to-day operations of the Council.

2.26 Any member of the general public may make a complaint directly to the Council. Complainants do not have to waive their rights to initiate legal proceedings if they submit a complaint to the Press Council. If the Press Council Board supports a public complaint, then the newspaper in question is expected to publish the Press Council's ruling. This public reprimand is a voluntary undertaking by the title in breach, rather than an order dictated by law or mandated as a condition of membership of the Council. Ms Fielden has noted that some 90% of German publishers have signed up to the voluntary undertaking, although one major publisher, the Bauer Media Group,[89] has not renewed its declaration.[90] Whilst the Press Council can request that these reprimands are published, as with the PCC, it cannot determine the prominence given to the publication of the decision.

2.27 The authority of the German Press Council has not gone unchallenged, particularly in response to the publication of public reprimands. The newspaper Bild, the best-selling German tabloid, has questioned decisions made by the Press Council. By way of example, a published Press Council ruling on 29 November 2007 was printed by the paper in question not as an

[87] There have been three resignations by previous chairs in the last four years

[88] p24, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-1-to-Submission-from-the-Netherlands-Press-Council.pdf

[89] Bauer Media Group own both publishing and media brands worldwide that include UK's Bella, Take a Break, that's life! and Q and Kerrang! magazines

[90] p42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Reuters-Institute-for-the-Study-of-Journalism-submission-April-2012.pdf

adjudication but, rather, as a criticism of that adjudication.[91] The problem of compliance is ongoing and has led to delays in the publication of apologies. This has led to the reputation of the German Press Council being discredited and has damaged the public perception of its general credibility as a self-regulating body.

2.28 The approach of the German press is perhaps more aggressive than that in Scandinavia, although it may appear tame in comparison to standards in the UK. Its behaviour has been described best as a *"balancing act"*.[92] Significantly, there is a culture in the German press (notably absent from the UK press) of titles publicly holding each other to account. In this respect, Bildblog is an example of an online media watchdog, which was originally established to examine the coverage by the Bild newspaper.[93] Bild has also been criticised by its readers, notably for its coverage in 2010 of a number of deaths at a music festival in Duisburg.[94] The title was accused of exaggerating reports of the deaths and came under intense scrutiny from the public and industry members alike. The German Press Council received a large number of complaints from readers, via traditional methods such as letters to the editor, as well as micro-blogging through channels such as Twitter. It has been argued that this event, and the resultant response, has led journalists to reflect on their standards of reporting for the future.

France

2.29 The system of press regulation in France is different to the countries so far outlined. In place of a Press Council, the press in France are regulated by the existing body of French law. Trade unions and professional associations, such as the Syndicat National des Journalistes and the Association des Journalistes Républicains Francais, are responsible for maintaining standards of journalism across the printed press. As a consequence, the development of a code of standards applicable to the industry has been problematic. Instead, both the Unions and professional associations have encouraged the appointment of ombudsmen at some newspaper titles. The first appeared in 1994 at Le Monde, although this has not been popular across the majority of the printed press.

2.30 The Direction du Département des Médias et des Industries Culturelles,[95] is responsible for the development of Government policy in relation to the media and plurality. It is also responsible for providing financial support to parts of the media, most of which is directed towards the printed press.

2.31 Efforts at creating a Press Council in France have been unsuccessful. The most recent attempt in 2006 led to the establishment of the Association de prefiguration d'un Conseil de press,[96] led by a group of French journalists, although it is unclear how far their efforts have led.[97] It is likely that this is a consequence of lack of industry support.

[91] Bild ran a headline under "Mad! Press Council reprimands Bild about this arsonist", http://www.bild.de/news/2007/news/el-masri-3095854.bild.html
[92] p68, lines 7-16; p90, lines 7-17, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[93] And now also includes other media, particularly since the German Press Council expanded their remit to include online newspapers
[94] Eberwein, T, '*Germany: Model without Value*?' in Eberwein et.al, *Mapping Media Accountability – in Europe and Beyond,* pp77-78
[95] Department for Cultural Industries and Media
[96] Association anticipating a Press Council
[97] Baisnee, O and Balland, L, '*France: Much Ado about (almost) Nothing?'* in, Eberwein et.al, *Mapping Media Accountability – in Europe and Beyond*, p71

2.32 The corollary to the informal systems of self-regulation in France is the application of civil and criminal law. Although the freedom of the press and the freedom of speech are both constitutional principles, uniquely in Europe, privacy laws, in particular Article 9 of the Civil Code,[98] are also applicable to the press. Intrusions into privacy, including the taking of photographs of individuals in a public place, are prohibited. Article 9 guarantees the protection of the citizen's private life, from which the right to one's image emanates. The Civil Code, however, is fluid in definition in relation to individuals who have a public profile and, in particular, those who hold public office. Under the constitutional guarantees of freedom of speech, French law allows for the publication of information on individuals in public office, as a consequence of their occupation or status. They are presumed to waive rights over the publication of their image, on condition that it is used to inform and not for commercial gain. In French civil law, an individual who feels that their image has been misused can request court action to prevent the attack (through detention, seizure of property, banning the publication, or public denunciation) or seek damages in compensation. In criminal law, invasion of one's privacy is punishable by a prison term of up to 12 months and a fine of up to €45,000.

2.33 Historically, the French press has been reluctant to publish stories on the private lives of individuals. Perhaps the most famous example of this phenomenon was the refusal of the French press to publish stories about the extramarital affairs of the former President, François Mitterrand. Suffice to say that nothing was printed about President Mitterrand's second family, and it was only shortly before his death that the press revealed the facts. There has been a historical willingness to interpret privacy law broadly (and some may argue too broadly) and it has been argued that French privacy law is used to suppress information. However, increasingly French newspapers and, particularly, celebrity gossip magazines are challenging this traditional reluctance to publish content that may be regarded as private and such stories are increasingly the norm in France. The recent publication of the photographs of the Duchess of Cambridge may be part of this trend.[99]

Netherlands

2.34 Freedom of speech is set out in Article 7 of the Constitution of the Netherlands. The Constitution also states that the Government has a duty to enable the media to freely exercise their profession without any form of undue influence or interference. This is realised through the Dutch Media Act 2008. Although the Act regulates only public broadcasters and cable operators in the Netherlands, it also ensures that newspapers and internet publications have rights to operate independently and free from Government interference.[100] [101]

2.35 The Netherlands has operated a system of self-regulation for the last 50 years. The Netherlands Union of Journalists founded the prototype of a Dutch Press Council in 1948; this functioned originally as a disciplinary body, before being reconstituted as the Raad van Tucht, the

[98] http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf

[99] The impact of the publication of the photographs of the Duke and Duchess of Cambridge (obtained by a freelance photographer) is described in Part F Chapter 5. The French publication, Closer (owned by the former Italian Prime Minister Silvio Berlusconi's media company, Mondadori) defends what appears, under French law, to constitute a clear breach of the privacy on the grounds of public interest. On 18 September 2012 an injunction was granted restraining the title from further disseminating or publishing the photographs; the court imposed a financial penalty of €10,000 for each day of failure to comply and ordered the publisher to pay €2,000 in legal costs

[100] The Media Act regulates the organisation, finance and responsibilities of public broadcasting in the Netherlands. The rules set in the Dutch Media Act 2008 are upheld by the Dutch Media Authority, known as the 'Commissariaat voor de Media', who are responsible for broadcasting but not the printed press.

[101] http://www.government.nl/issues/media-and-broadcasting/the-government-and-media/media-act-and-media-policy

Netherlands Press Council (NPC), in 1960.[102] This Council describes journalism in the country as a completely free profession, where any individual can be considered a journalist and is not required to be professionally registered as such.

2.36 The NPC does not accept third party complaints. Complaints are only accepted from those who have a direct interest and are affected by the issue and must also be related to a specific breach of the Code. It must concern the journalistic practice of either a professional journalist or someone who, on a regular basis and for remuneration, collaborates on the editorial content of a mass medium. The Council can only pass judgment and is unable to impose sanctions on titles in breach of appropriate journalistic practice. In the Netherlands, and much like the UK, a complainant's route to seeking compensation is through civil litigation.

2.37 The fundamental difference between the system of press self-regulation operated in the Netherlands through the NPC and the PCC lies in the prominence accorded to publication of adjudications against titles in breach of the Netherlands guidelines for journalism. The adjudication summaries published by the NPC name and shame journalists who have breached terms on accuracy, or have been found to have crossed the limits of what it is acceptable to publish. These adjudications are published in full on the Press Council's website, as well as in the Dutch union of journalists' newspaper, which is widely read by people working in the industry. The decisions are also widely circulated through national news agencies and to other media organisations. This very public naming of titles in breach of the code is seen as a deterrent for poor journalistic behaviour.

2.38 Although the NPC cannot force a title to publish a correction, the majority of the media will respect such a request from the Council and will comply. Some titles have decided not to publish the verdicts of complaints against them, such as De Telegraaf (the largest newspaper in the country) and NOVA, a current affairs programme on television, who announced that they would no longer cooperate with the NPC. Despite this, 80% of the NPC members have indicated that they would publish adjudications involving their titles.

2.39 The Chair of the Dutch Press Council has historically been appointed from the Dutch Judiciary. The Chair is assisted by three Vice-Chairs, who are also drawn from the law. The remaining members of the Council comprise 13 industry members (including journalists) and 13 lay members.[103] In recent years, steps have been taken to improve the effectiveness of the Council, including an internal review of systems and functions. Changes have included the appointment of five 'public members' drawn from the Dutch public at large.[104] In order to implement improvements, the NPC has applied for additional financial support from the Dutch Government and has pushed for the adoption of a similar funding mechanism to that used in Germany. The review of systems and functions conducted by the NPC also considered other self regulatory models, including the PCC.

2.40 Before concluding this summary of the approach of other European countries, it is worth adding that, in her evidence, Ms Fielden observed that Press Councils in Europe are now making concerted efforts to prove to readers that they are concerned with maintaining standards. She gave the example of a judgment by the Swedish Press Council, which ordered

[102] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-3-to-Submission-from-the-Netherlands-Press-Council.pdf
[103] These thirteen members hold a variety of positions in society
[104] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-from-the-Netherlands-Press-Council.pdf

the publication of a decision, which the newspaper title ran on the front page of its publication, as a way of setting the bar:[105]

> *"…a Swedish paper that had got something very wrong had been censured by the Press Council and ordered to publish the Press Council decision, off its own bat published it on the front page, and the reason it did that was to say, 'This is our compact with you, the reader. We are different. We aspire to very high standards. When we get it wrong, we will tell you that we've got it wrong, very visibly so.'"*

The United States

2.41 In some countries there are no systems of press regulation. The prime and only statutory structure of the United States print newspaper industry is the First Amendment to the American Constitution, adopted in 1791.[106] The First Amendment to the Constitution reads:[107]

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

The First Amendment protects both the freedom of speech and the freedom of the press, although there remain certain statutory limitations relating to defamation and privacy,[108] as well as certain forms of state censorship, which exempt some areas of free speech from the protections of the First Amendment.[109]

2.42 By way of example, there are restrictions in both Federal and State law in relation to obscene images (which may be defined to cover material which would not be considered to offend obscenity laws in the UK); there is no equivalent to Page 3. Many US states seek to build on the existing Federal law and place restrictions on the possession, dissemination and sale of obscene material in public places, in particular those where minors may be present such as schools and libraries.

2.43 The Federal Communications Commission (FCC) is responsible for the regulation of broadcasting across the fifty states and on an international scale.[110] The remit of the FCC does not, however, include the regulation of the print media.

China

2.44 Some witnesses have suggested that any introduction of statute in relation to press standards is tantamount to placing the press under state control. It may be of some benefit to turn very briefly to look at China and the regulation of print media in that country, if only to provide an example of the sort of statutory control of the press that gives rise to these concerns and identify the key features of that regulation to demonstrate how widely and dramatically it

[105] pp86-87, lines 19-3, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf
[106] The First Amendment comprises one of ten amendments in the Bill of Rights
[107] http://www.senate.gov/civics/constitution_item/constitution.htm#amendments
[108] This includes the Privacy Act of 1974, Privacy Protection Act of 1980, the Freedom of Information Act 1966, and the OPEN Government Act of 2007
[109] This includes speech that involves incitement, false statements of fact, obscenity, child pornography, threats and offensive speech, and the speech of others
[110] http://www.fcc.gov/what-we-do

differs from the type of underpinning statute that has been proposed by witnesses to the Inquiry.

2.45 Chinese publications are required under law to abide by a strict registration criteria as well as to undergo a process of continual government approval, exercised by the General Administration of Press and Publications (GAPP). Individual publications are held accountable to the government by official sponsors, defined as a 'managing institution', which must be an institution recognised by the Chinese Communist Party or the government.[111] The managing institution is responsible for the exercise of control over the publication and content published by it. Specifically, the managing institution should limit any negative coverage of the Chinese Government and the Chinese Communist Party. There are, by definition and in fact, no free or independent media outlets in China.

2.46 The regulation of the Chinese media by the government is not limited only to the domestic market. Indeed, the Chinese Government seeks to control the content of Chinese language newspapers published abroad. The Epoch Times is a Chinese newspaper founded in 2000 operated from the UK; it provides an interesting perspective on the reach of Chinese press regulation.[112] Their submission to the Inquiry suggests that the influence of the Chinese Communist Party extends to the Chinese language print media in the UK and that this influence is exercised through the Chinese Embassy. They have said that the Embassy seeks to influence media outlets targeted at the Chinese community and has sought to discourage its circulation. The Director of the English edition, Sek Halu, has suggested that a number of retailers and supermarkets have refused to stock the Epoch Times because of its critical view of the CCP.[113]

3. Reviews of press regulation: Australia and New Zealand

3.1 The development of new media and, in particular, the convergence of delivery platforms for content, has challenged existing models of press regulation, causing some regulators to review the extant regulatory frameworks to consider how best to respond to this changing environment and how new forms of content delivery might be incorporated into existing regulatory structures.

3.2 In Australia, the structures and functions of the existing Australian Press Council have recently been considered as part of a wider review of press standards, in the context of the Independent Media Inquiry, otherwise known as the Finkelstein Inquiry. The Finkelstein Inquiry has fed into the wider Convergence Review, being conducted by the Australian Government, of regulation across media platforms in Australia and broader media policy. In New Zealand, the Law Commission has looked specifically at the privileges and benefits accorded to traditional media and have considered how these might be applied to new media.

[111] This includes organisations such as the Chinese Federation of Labour, the China Youth League or the All-China Women's Federation

[112] An English edition was introduced in 2005

[113] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/11/Submission-from-the-Epoch-Times.pdf

Australian Independent Media Inquiry: the Finkelstein Report

3.3 The Independent Media Inquiry was established by the Australian Government on 14 September 2011. A former Justice of the Federal Court of Australia, Mr Ray Finkelstein QC, was appointed to conduct the Inquiry. The Independent Media Inquiry invited submissions from any person with an interest in the issue and held public hearings in Melbourne, Sydney and Perth during November and December 2011. In parallel to these hearings, the Chair of the Inquiry also invited selected individuals, organisations, trade associations and other interested parties to make formal submissions. Responses were received from a range of parties, including serving editors of Australia's major media outlets, former editors with experience of the news media industry, the current Chair of the Australian Press Council (as well as former Chairs), and academics specialising in media and regulation.

3.4 The timing of the Independent Media Inquiry has overlapped with the establishment of this Inquiry. Although the former was not set up in response to any allegations of wrongdoing at News Limited (the Australian subsidiary of News Corp), or to investigate any press misconduct, it was nevertheless indirectly provoked by the allegations of phone hacking and corrupt payments at News International that led to this Inquiry.[114]

3.5 The Terms of Reference for the Independent Media Inquiry focussed on the efficacy of existing codes of conduct governing media practice in Australia, particularly the likely impact on these of the growing convergence of print media and digital and online platforms. Mr Finkelstein was also required to investigate:[115]

> *"The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment; ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints; and any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest."*

3.6 The Independent Media Inquiry concluded its review and reported to the Australian Government on 28 February 2012. Mr Finkelstein recommended that the current Australian Press Council (APC) should be replaced by an independent body, the News Media Council (NMC).[116] The role of the NMC would be to ensure that Australian news media operated in a more accountable manner to those who were the subject of press reporting, as well as to the general public at large. To enable the NMC to exercise this function, Mr Finkelstein argued that the NMC should have strengthened remedial powers to deal with complaints about the press. These proposed powers would be significantly greater than those available to the existing APC. Mr Finkelstein also proposed that the NMC should have powers to enforce a right of reply, the withdrawal of an article from further circulation, and the publication of apologies and Council adjudications (including the ability to control the size and prominence of these publications). These remedial powers are, according to Mr Finkelstein, necessary to preserve the integrity of the press.

[114] Report of the Independent Inquiry into the Media and Media Regulation, pp15-16, paras 1.4-1.7 http://www.dbcde.gov.au/digital_economy/independent_media_inquiry

[115] Report of the Independent Inquiry into the Media and Media Regulation, paras b-d, http://www.dbcde.gov.au/digital_economy/independent_media_inquiry

[116] As well as the news and current affairs standards functions of the Australian Communications and Media Authority (ACMA)

3.7 The NMC would also be responsible for setting journalistic standards, in consultation with the industry, and to handle complaints across all media platforms (specifically print, online, radio and television). Mr Finkelstein proposed a greater level of funding from the Government for the body which would replace the current levy system. He argued that this would remove a current burden on the print industry but would also address the issue of the independence of the NMC from the industry.

3.8 Perhaps more significantly, and indeed a change of greater significance, Mr Finkelstein also proposed that a legal requirement should be established to grant powers to the NMC to take legal action against any media outlet that refused to comply with the requirements set by the NMC. By way of example, if a publication refused to publish an adjudication issued by the NMC, the Council or the complainant would have the right to apply for a court order compelling compliance from the publication. Any failure by the publication to comply with the court order would be subject to existing legal processes. It is this particular aspect of Mr Finkelstein's proposals that has been the subject of considerable and heated media criticism.

3.9 In his concluding remarks, Mr Finkelstein drew comparisons between his review and this Inquiry. He acknowledged that, although the Independent Media Inquiry was not established in response to phone hacking in Australia, they shared the historical experience of a Press Council that had limited powers as a self-regulatory body and was unable to fully bring the press to account in the public eye. Mr Finkelstein has also speculated, in relation to this Inquiry, that:[117]

> *"Looking at the matter from afar, it would not be surprising if statutory regulation were top of the list."*

Public and Industry Response to the Finkelstein Report

3.10 It would be an understatement to observe that Mr Finkelstein's recommendations have not gone unchallenged by the Australian press. Rather, the Report has led to a wide-ranging and, at times, heated debate as to the nature of press freedom in Australia.[118] News Limited's Chief Executive, Kim Williams, called the Independent Media Inquiry's report "*too draconian*" and argued that there was little value in replacing the existing Australian Press Council (APC) with the NMC as proposed by Mr Finkelstein.[119] Mr Williams went further and, speaking at the Pacific Area Newspaper Publishers' Association forum in Sydney, suggested that the Independent Media Inquiry was established by the minority Australian Labor Party Government primarily to attack News Limited, as a direct response to the coverage the Government was receiving in his company's newspapers.[120]

3.11 Bob Cronin, group editor-in-chief of West Australian Newspapers, also expressed his opposition to Mr Finkelstein's proposals. He heavily criticised the element of increased oversight of the new Council, as well as the powers of a Government-appointed regulator to control what the media was able to publish. He argued that the proposals were:[121]

[117] Report of the Independent Inquiry into the Media and Media Regulation, p211, paras 8.30-8.31 http://www.dbcde.gov.au/digital_economy/independent_media_inquiry
[118] The World Today Programme, broadcasted 09 March 2012, 'Experts debate pros and cons of the Finkelstein Review, http://www.abc.net.au/worldtoday/content/2012/s3449417.htm
[119] http://panpa.org.au/2012/09/10/regulation-not-needed-for-diversity-according-to-news-limited-ceo-kim-williams/
[120] http://www.news.com.au/business/breaking-news/news-boss-hits-back-at-media-reforms/story-e6frfkur-1226466220012
[121] The World Today Programme, broadcasted 09 March 2012, 'Experts debate pros and cons of the Finkelstein Review, http://www.abc.net.au/worldtoday/content/2012/s3449417.htm

"…the most outrageous assault on our democracy in the history of the media."

3.12 A different perspective was provided by the Chair of the current APC, Professor Julian Disney, who has continued to argue for the improvement of resources available to the APC to ensure that it was able to fulfil its complaints-handling responsibilities. He stated that:[122]

"…resources are hopelessly inadequate and they were even before our number of complaints doubled so it is really just to carry out the responsibilities that we are meant to have and that people expect us to do."

3.13 In this respect, Professor Disney agreed with many of the central recommendations of Mr Finkelstein's report which, he suggested, clearly identified the fundamental flaws in the current system of complaints handling through the APC. However, Professor Disney has strongly disagreed with the two particular elements of Mr Finkelstein's proposals.[123] He also drew attention to the absence of any coverage by local newspapers of the APC's opinions of Mr Finkelstein's report.[124] He stated that no Sydney or Melbourne paper had reported the views of the APC, despite the body being the main focus of the report, or their response to the proposals. He argued that this was a striking example of the lack of balanced coverage that existed in the Australian press.

3.14 Some commentators have chosen not to focus on the detail of the proposals but have instead considered how the recommendations might be applied in practice, particularly as that Mr Finkelstein concluded the NMC should not be established by statute. Echoing the views of a number of Australian commentators, the former financial journalist Jim Parker, who currently writes for the respected Australian media blog, The Failed Estate,125 argued that, without a statutory backdrop, the powers of the proposed NMC would be without effect.126

Australian Convergence Review

3.15 The Convergence Review was established in early 2011 by the Australian Government to examine the current system of media regulation in the light of the challenges posed by the conversion of services and the proliferation of media platforms. Specifically, the Convergence Review sought to establish whether a single model could be applied across the media.

3.16 This review was led by the Convergence Review Committee, chaired by Glen Boreham, former Managing Director of IBM Australia and New Zealand.[127] The Committee was also tasked with looking at how the recommendations of Mr Finkelstein's Independent Media Inquiry might be incorporated into media regulation.[128] The Committee reported to the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, on 30 March 2012.

3.17 The Convergence Review Committee recommended that any media title, regardless of the platform on which their content was delivered, should be subjected to certain restrictions by a

[122] *ibid*

[123] Specifically, the formal powers of the News Media Council to compel publications to act in accordance with the NMC requests; and the strengthening of the Council's resources through full government funding: http://www.presscouncil.org.au/uploads/52321/ufiles/APC_Media_Release_-_The_Media_Inquiry_Report.pdf

[124] The Australian Press Council's response to the report were published only in the national papers

[125] http://thefailedestate.blogspot.com.au/2012/03/freedom-from-press.html

[126] http://www.abc.net.au/news/2012-03-05/drum-wrap-media-inquiry/3869106

[127] http://www.dbcde.gov.au/digital_economy/convergence_review/committee_profiles

[128] the recommendations of the Australian Law Reform Commission's review into the National Classification Scheme were also considered by the Convergence Review

single regulator.[129] In this respect, the Committee proposed that the licensing of broadcasting services should cease, and the regulation of the media should be undertaken by a single statutory body which would replace the existing Australian Communications and Media Authority (ACMA). The new regulator would be responsible for any media enterprise, across all platforms, defined as 'content service enterprises'; this means organisations that:[130]

> *"…have control over the professional content they deliver; have a large number of Australian users of that content; and have a high level of revenue derived from supply that professional content to Australians."*

3.18 In this regard, the Convergence Review recommended that thresholds should be defined in relation to the annual revenue of a concern, as well as the number of readers (or 'hits') any media title attracts within the Australian market.[131] By setting these thresholds, Australia's 15 largest media companies would be subject to regulation by the new body. Ms Fielden noted in her evidence to the Inquiry that online operator, Google, would be exempt from this definition, despite the company's reach within the Australian media market. This was due to the stipulation that saw Google's revenue understood in terms of professionally produced material, rather than as a content service enterprise.[132]

3.19 The Committee's proposals did not, however, take forward the recommendation of the Independent Media Inquiry to establish the new News Media Council. Rather, it proposed an industry-led body for maintaining news standards across all media and communications, in the stead of the Government-appointed regulator proposed by Mr Finkelstein. This was in addition to the recommendation for a statutory regulator to replace the ACMA.

3.20 At the time of writing, the Australian Government was still considering the recommendations of both Committees. However, whatever the eventual Government response, it will no doubt alter the regulatory landscape of Australia in relation to the convergence of print, broadcast and online media.

Public and Industry Response to the Convergence Review

3.21 There has been a mixed response from the industry to the recommendations of the Convergence Review. Although these recommendations have not generated the same levels of controversy and debate as those put forward by Mr Finkelstein, a number of commentators saw the proposals as part of a continued, and in some cases deliberate, erosion of the freedom of the press.[133] In her evidence, Ms Fielden drew the attention of the Inquiry to the response of some parts of the Australian press, which have argued that the Convergence Review was purposefully established in order to regulate the fifteen companies which would fall under the definition of 'content service enterprises', and has been otherwise unconcerned with other areas of media regulation that ought to have been considered more fully by the review. Ms Fielden disputed the validity of this assessment of the Convergence Review.[134]

[129] Whether it is online, broadcast or in print

[130] Convergence Review, Final Report, published 30 March 2012, http://www.dbcde.gov.au/digital_economy/convergence_review

[131] This would exclude any small or emerging content provider

[132] pp78-79, lines 21-9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

[133] For example, submissions by: Newspaper Publishers Association, http://www.dbcde.gov.au/__data/assets/pdf_file/0020/146351/Newspaper_Publishers_Association.pdf; and News Limited, http://www.dbcde.gov.au/__data/assets/pdf_file/0006/146283/News_Limited.pdf

[134] pp78-79, lines 24-4, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

3.22 Ms Fielden also told the Inquiry of the recent changes implemented to improve the function and practice of the Australian Press Council (APC), introduced in response both to the Convergence Review and the allegations of wrongdoing, in particular the allegations of phone hacking that led to the establishment of this Inquiry. She said that the Council had actively responded to the calls for reform of press regulation, and had proactively sought to consult the Australian public in order to determine how best to hold the press to account. This had led the APC consciously to shift its focus of activity to the maintenance and improvement of press standards, ensuring the fair balance of the Journalists' Code and the mediation of complaints. The APC had appointed an advisory board tasked with monitoring the coverage by news media of issues which were likely to give rise to a substantial number of complaints.[135]

New Zealand Law Commission Review

3.23 The New Zealand Law Commission Review examined the legal and regulatory environment in which the media operated in New Zealand and, specifically, the privileges that existed for print media and whether these should be extended to their online equivalents. Such privileges included legal rights to the protection of sources and others relating to court proceedings. The Review tried to set a framework which defined who should benefit from these privileges and how. The Terms of Reference were to examine the following questions:[136]

> *"how to define 'news media' for the purposes of the law; whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end, and; whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available."*

3.24 The New Zealand Law Commission provided a list of preliminary proposals, published in December 2011, and has since invited submissions in relation to these proposals. The proposals included the suggestion for a statutory definition of 'news media' (to include new media), specifically for the purposes of defining which publications should be entitled to the rights of the legal privileges and exemptions. The Review also proposed the establishment of a new independent regulator, responsible for all news media, regardless of the format or delivery platform. In relation to the existing civil remedies for victims of mistreatment by the press or other media, the Review proposed the creation of a Communications Tribunal, which would handle complaints in the context of the changing publishing environment.

3.25 The Law Commission's preliminary Report was published to encourage wider public debate, as well as to generate feedback on the scale and scope of initial solutions. By way of example, the Law Commission produced two options, for consideration by the public and stakeholders, as to whether membership of the new body should be enforced by statute or remain voluntary. The consultation period ran from December 2011 to March 2012.[137] The paper and accompanying proposals are currently being considered by the New Zealand Government which, similarly to the Australian Convergence Review, is due to report in Autumn 2012.[138]

[135] pp73-74, lines 10-11, Lara Fielden, *ibid*
[136] The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age, published December 2011, http://ip27.publications.lawcom.govt.nz/uploads/files/downloads/LC-IP27-ALL.pdf
[137] http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media?quicktabs_23=issues_paper
[138] p94, lines 12-16, Lara Fielden, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-13-July-20121.pdf

Concluding remarks

3.26 The alternative models of press regulation, as well as the other recent international reviews, have provided helpful examples of the different possible solutions for this Inquiry to consider. It is possible, however, to argue that there has been no compelling evidence to demonstrate that any of these models, or combinations of them, would function better than any others.

3.27 It is clear, however, that all the structures considered in this Chapter are embedded in the social, cultural and historical functions of the media in each country, and are not necessarily ideal structures to apply to the UK. It is also worth noting how many countries are currently considering the impact of the evolution of digital platforms, as we have seen in Scandinavia and further afield in Australia and New Zealand. This development of online media content, as well as methods of delivery, has brought the regulation of print media into a whole new context. Although some of the practices revealed by the Inquiry may not be faced by other countries, the overarching questions being addressed are not unique; but neither is it possible to pretend that any other system, inquiry or review has successfully developed an ideal solution to the problems being faced.

CHAPTER 6
TECHNIQUES OF REGULATION

1. Introduction

1.1 Part K, Chapter 1 sets out the criteria that I consider need to be met by any 'new more effective regulatory regime'. Chapters 2-4 look at specific proposals that have been made for a new approach to regulation of press standards, and Chapter 5 looks at the way that other countries deal with press standards. This Chapter starts from a rather different position and looks at the theoretical framework for regulation. This does not purport to be a definitive text on the theory of regulation; rather it is a brief look at the different ways in which regulation can be achieved and the circumstances that are conducive to different approaches to regulation being effective.

2. Regulatory options

2.1 The Terms of Reference talk about making recommendations for a new and more effective policy and regulatory regime and that it precisely what this Report aims to do. There has been a lot of talk in the media and elsewhere about the regulation of the press versus self-regulation of the press as though that were a binary choice. That is not an interpretation that I accept. It seems to me that there is a wide spectrum of action that can be undertaken, and that, far from a binary option there is a continuum from no regulation at all, through to full statutory regulation: a solution can be accessed at any one of a number of points on that range. This chapter considers, from a theoretical perspective, the various policy and regulatory tools that are available for use and looks at the pros and cons of each, though I must reiterate that this is a partial review of the options, not a thorough analysis.

2.2 At the opening of the Inquiry a number of briefing sessions were held that dealt with the factual background against which the issues under consideration by the Inquiry should be seen. At one of those briefings Donald McCrae, an expert in regulatory theory, introduced a model for thinking about regulatory propositions.[1] Specifically, he categorised the potential approaches to changing behaviour under four headings: engage, enable, encourage and exemplify. At the same time the Inquiry heard from a number of regulators about different regulatory regimes and about the different regulatory regimes for the press and the media in other countries.

2.3 This Chapter starts by considering different ways of securing behavioural outcomes, drawing on examples where that is helpful. This is a technical consideration of potential models and how they might operate.

2.4 The Department for Business Innovation and Skills (BIS) sets out general principles of regulation, which requires that any regulation and enforcement framework should be capable of being implemented in a fashion which is demonstrably proportionate, accountable, consistent, transparent, and targeted.[2]

2.5 There are various ways of categorising regulatory models. One way of doing so is to look at the level of external intervention. This can be cut at almost any level of specificity but we

[1] Donald McCrae presentation, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Donald-Macrae1.ppt
[2] BIS, Principles of Regulation, http://www.bis.gov.uk/policies/bre/principles-of-regulation

have identified four levels which we go on to consider in more detail, namely no regulation, self-regulation, co-regulation and, finally, statutory regulation.

No regulation

2.6 This concept needs some clarification. For most people 'no regulation' would mean no specific regulation or laws relating to the press. However at present the media are bound by the law as it applies to the rest of us. This includes many laws that could impact on the sorts of behaviour in the press that have been complained of in evidence to the Inquiry, such as Regulation of Investigatory Powers Act 2000 (RIPA), under which the prosecutions for phone hacking have been made, the Bribery Act 2010, the Fraud Act 2006, the Protection from Harassment Act 1997 etc. Critically, the Human Rights Act 1998 provides rights both to a private life and to freedom of expression. There are additional laws relating to press reporting on criminal cases. The media are also subject to the Data Protection Act 1998, although there is a specific public interest protection under section 32 for processing data with a view to publication for journalistic purposes.

2.7 So the concept of 'no regulation' should not necessarily be considered to mean that journalists would be able to operate unfettered by legal constraints.

Pros and cons

2.8 The principles of better regulation dictate that regulation should be 'proportionate' – i.e. no more than is required to achieve the policy objective. Clearly if it is possible to deliver the desired outcome in the absence of any regulation then no regulation should be introduced. In practice this means that 'no regulation' is an appropriate response when the market is capable of delivering the required outcome without intervention. The very fact that this Inquiry had to be established, in the wake of discoveries of serious wrongdoing and criminality, in at least one national newspaper, is sufficient demonstration that the market alone will not provide public protection from criminal acts which Parliament and the public have regarded with abhorrence, and which even those responsible for committing them have not sought to justify in this Inquiry.

2.9 Furthermore, the law has to be accessible for if there is limited prospect of detecting criminal behaviour or being able to afford civil proceedings, to that extent, there is no sanction (or, in the absence of ethical standards) disincentive to comply with the law when to do otherwise has potential advantages. Thus, if there is a good prospect of being able, say, to intercept mobile phone communications without being caught (because of the care taken to avoid alerting the victim and, in the absence of a victim, law enforcement will not be engaged) and the advantages to be obtained from listening to intercepted messages are sufficiently beneficial, the fact that others in the market do not engage in that behaviour will not necessarily prevent it.

Self regulation

2.10 There are many different self-regulatory tools. This section considers self regulation in the purest sense, where activity is entirely voluntary, where there is no constraint or oversight from outside of those self-regulating as to the standards that are set or monitoring or enforcement of compliance with them. There are a number of tools that could potentially fall within the definition of self-regulation.

Internal governance

2.11 The first is referred to as '*internal governance*'; these are the methods that organisations use to establish their own cultures and control behaviour within their own organisations. What happens inside a company is a matter of culture, example, practice and control, and these internal governance practices and procedures are likely to have the most significant impact on the ethical standards applied by their employees and contractors.

2.12 The Inquiry has been provided with extensive evidence from newspapers about systems that they have in place to ensure compliance with ethical standards. Internal governance is likely to be very effective in circumstances where it is genuinely in the interest of the organisation to secure compliance with the standards. It is less likely to be effective if there are competing incentives (for example if the financial benefits of breaching the standards are significant). To be effective, internal governance systems must be consistent, must be seen to be enforced and must be seen to be exemplified throughout the organisation.

2.13 The Inquiry has also seen evidence[3] of many excellent systems of internal governance in place in both national and regional newspapers. It is noticeable that the formal governance arrangements in the News of the World, prior to its closure, were effectively the same as those for other titles in the News International Group, which are themselves similar to the best examples of internal governance arrangements that we have seen. I draw two lessons from this. First, internal governance can have an important role to play but, second, formal internal governance procedures are not in themselves sufficient. It should also be noted that, whereas the detail of day to day governance processes are very much a matter for companies individually, governance is not itself a purely self-regulatory matter as some elements of corporate governance are dictated by company law, or stock market listing requirements. The extent to which these rules impact on companies running newspapers is, of course, affected by the different ownership structures which they enjoy.

Industry standards

2.14 The second purely self-regulatory tool is *industry standards*. With a purely self-regulatory industry standards model there is no compulsion for anyone to be a member, no oversight from outside the membership of the standards set or enforcement procedures, and no fallback either where relevant bodies are not members or where the self regulatory standards are not enforced. This is the model currently in place with the Press Complaints Commission.

2.15 It is worth noting that many professional bodies often regarded as 'self-regulatory' (such as the General Medical Council, the Solicitors' Regulatory Authority etc) are not self-regulatory at all. Their powers spring from legislation that restricts the practice of the profession and gives the bodies the right to prevent those who fall sufficiently short of professional standards from practising the profession. Similarly, whilst the Royal Institute of British Architects (RIBA), which was suggested as a model of self-regulation[4] at one of the seminars held by the Inquiry, is a self regulatory body and architects do not have to belong to it, they do have to be registered with the Architects Registration Board (ARB) in order to use the term architect and the ARB issues a code of professional practice and can take action against those who fail to comply. For that reason, these models of professional regulation are not considered here.

2.16 There are many examples of industry groups who have come together to agree codes of practice that all are willing to adhere to. These codes are likely to require members to follow

[3] Part C, Chapter 2

[4] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Presentation-by-Eve-Salomon-PDF-23.4KB1.pdf

particular courses of action; in the context of this report this is most relevant where the action is aimed at consumer protection. Such bodies may produce a kitemark or similar badge which is intended to represent to the public that the members who are able to display the kitemark adhere to an appropriately high standard of behaviour in the course of their work, whatever that may be.

2.17 It is generally accepted that industry self-regulation is often more flexible and less costly for both business and consumers than direct government involvement. There are two principal reasons for this. Industry experts can be expected better to understand their own processes and capabilities and also have better insight into consumer needs and responses to their particular products or services than an outside or external regulator would. Self-regulation also allows industry to adapt and react to technological and market change, and consumer behaviour, at a speed that formal regulation can rarely match. If effective, this should result in better outcomes for both consumers and the industry.

2.18 However, for self-regulation to be effective there needs to be an appropriate alignment of incentives to make it so. In practice these incentives tend to be the existence of a market need, and the absence of legal rules or regulation to address that need, coupled with a fear that the imposition of such rules would have a damaging effect on industry players. Ofcom research has found that most self-regulatory schemes have been established, at least in part, in response to a perceived threat of state intervention.[5] The PCC, established in the wake of the Calcutt Report in 1990, as the now notorious 'last drink in the last chance saloon' is no exception.

2.19 For incentives to align, more is needed than simply the existence of a problem and a threat of state intervention. Self-regulation is more likely to be effective in those markets where: [6]

(a) *"companies recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also they operate in a environment where they have to act responsibly within the societies in which they operate; and;*

(b) *companies recognise and acknowledge the identified problems which may cause harm or market failure that impede citizens or consumers; and;*

(c) *companies, individually and collectively, acknowledge the need to reduce the identified harm or market failure, since this will improve the ability of those companies to determine the interests of citizens or consumers and, potentially, society as a whole."*

A fourth criterion could be added:

(d) *addressing the perceived harm is not in direct conflict with providing the desired service to the companies' consumers."*

2.20 It is worth exploring this concept a little further. Most self regulatory regimes are aimed at dealing with the impact that the relevant organisations have on those who use their services, or at least where the consumers of their services would be expected to disapprove of the impact concerned. Examples include Association of British Travel Agents (ABTA) or other kite mark institutions, whose aim is to provide a guarantee of quality to consumers. It is in the interests of all members of a kitemark group to ensure that the standards promised by the

[5] http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/summary/condoc.pdf
[6] para 2.24, http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/summary/condoc.pdf

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mark are upheld consistently because failure to do so will damage consumer trust in their own product.

2.21 A different example is the Internet Watch Foundation (IWF) where Internet Service Providers (ISPs) co-operate not only because the majority of their customers do not themselves want to be exposed to images of child abuse, but also because it is very much in their interests not to be seen to be providing access to such images to those who do want to see them.

2.22 The potential for successful self regulation is reduced where the harm complained of is to a third party and does not obviously damage the interests of the companies concerned or their consumers. Obvious examples of this would be the use of child labour, or casual dumping of waste leading to environmental damage. Such activities might lead to higher profits and cheaper products, so pleasing both producers and consumers. The fact that they have a wider social cost that is not generally considered acceptable may be sufficient to prevent this type of behaviour but, equally, it may not be if the relevant company believes that it can achieve its ends (albeit causing the harm) in secret and without being detected.

2.23 It might be argued that public concern over the wider social costs would be enough to lead to a successful self regulatory outcome, but the continued sale in the UK of products that are made by child labour, or the production of which leads to environmental degradation in its country of production, whilst strict laws in the UK prevent such things from happening here, is testament to the difficulty of achieving pure self-regulatory outcomes that might be in the wider public interest, when direct consumer interests do not align with the wider public interest.

2.24 A less extreme example might be online copyright infringement. The growth of the internet has led to widespread habits of sharing music and film (and increasingly books and magazines) online through informal, unlawful, channels rather than buying them from legitimate sites. This is breach of copyright and deprives the creators and the creative industries of the legitimate revenue that they need to reinvest in the production of new content. The Government looked for self-regulation among ISPs to find ways of preventing internet users from engaging in these unlawful activities. However, the harm does not affect ISPs, and providing a solution was likely to be unpopular with their consumers who are precisely the people engaging in, and (in their eyes) benefiting from, the unlawful behaviour. In the absence of a self regulatory solution, Parliament passed legislation requiring action from ISPs because they believed the wider public interest required a solution to be put in place even though neither the service providers nor their consumers had any incentive to co-operate.

2.25 The relevance of this final point to the situation with the press is obvious. The Inquiry has heard evidence that the PCC is good at some things, such as mediation, and not at all effective in relation to others.[7] Similarly we have heard evidence from editors[8] that the continued purchase of newspapers by the public is proof that the public is satisfied with the standards that obtain. We have also heard substantial evidence of the harm that newspaper behaviour has done to many individuals: these include some who have put themselves in the public eye deliberately, some who are there incidentally because of a famous friend or relative, some who find themselves well known because of terrible things that happen to them and yet others who become the subject of media interest purely by freakish chance. None of this is about harm done to readers, that is to say the people whose purchasing decisions apparently tell the editors that they are making the right call; it is all about harm to third parties who have no voice in that transaction.

[7] Part J, Chapter 4
[8] Part F, Chapter 6

2.26 The Inquiry has had representations from members of the public complaining more generally about the content of newspapers; the complaints include a diverse range of press activities such as the sexual objectification of women, the vilification of migrants and the abuse of the disabled.[9] These cases also raise questions of a wider public interest than purely what any given portion of the public might like to read about and therefore whether consumers are getting fair treatment. Harm of this sort is less susceptible to effective self-regulation than harm as part of the producer/consumer contract.

2.27 Ofcom also argues that self regulation is more likely to be effective where citizens or consumers and all other individuals share common views as to the merits of regulating the activities of companies to achieve a particular social objective. The vigorous debate that has raged over these issues as the Inquiry has gone about its business suggests that this criterion is not met in relation to press regulation, in particular as it applies to privacy.

2.28 Finally, self-regulation will be more able to succeed in a market environment with active participation by the industry. In those circumstances, cohesiveness is most likely to administer effective self-regulation as industry participants are more likely to commit financial resources, consult with stakeholders and monitor the effectiveness of self-regulation. This, at least in part, does appear to be the case in relation to the press, with the market having been able to sustain the existing funding mechanism for the PCC (through PressBoF) since its creation in 1990.

2.29 Self-regulatory industry bodies tend to have few sanctions other than expulsion from the body. Levels of monitoring of compliance and enforcement vary. There are various options as to how compliance could be monitored. One option is simply rely on members to comply with the relevant standards. A second would be to require self declaration of compliance and a third would be to have independent verification of compliance and/or enforcement mechanisms. The PCC runs a reactive approach, relying for the most part on members to police their own compliance, with a reactive, complaints-based, enforcement mechanism and an Independent Review which can consider appeals concerned with the PCC process (but not on the substance or merits of the complaint or the adjudication).

User regulation

2.30 A further form of self-regulation is regulation by the user community. Many online services are seen to be self-policing. An obvious example is Ebay, in which users rate the service they have had from members either as buyers or sellers in order to enable users to buy and sell with trust. Similarly the operators of other online sites invite users to self-police by reporting breaches of terms and conditions, with the service provider which then takes action when notified. This mechanism can work well where it is in the interests of users to provide feedback on inappropriate behaviour, and where there are quick and simple mechanisms to do so. It is thus a relatively good tool in some online environments but less likely to be effective in the physical world.

Co-regulation

2.31 Co-regulation means any form of self-regulation with some sort of external, independent, incentives, oversight or form of backstop. There are many different ways in which the backstop can be provided and they will have different impacts. These can include recognition

[9] Part F, Chapter 6, Section 8

of a self-regulatory body by Government, law or a statutory regulator; approval of codes by Government or a statutory regulator; and compulsory membership or funding arrangements. Variations on each of these models exist in different sectors in the UK and elsewhere and the model is almost infinitely variable. The basic variations are explored.

Recognition of self regulation/regulatory backstop

2.32 The circumstances in which incentives might align to make self regulation effective are described above. A further incentive for co-operation with self-regulation can be provided in the form of recognition by the courts or a regulator of the process of self-regulation.

2.33 The Advertising Standards Agency (ASA) is an example of co-regulation, where the agency act as the regulator in relation to both print and broadcasting advertising. In the case of print advertising, the Office of Fair Trading (OFT) has statutory powers to deal with misleading advertising and in the case of broadcast advertising, Ofcom has statutory powers through its licensing regime. However, both statutory regulators recognise the role of the ASA and only take action in relation to advertising issues when referred to them by the ASA. Specifically, the Control of Misleading Advertisements Regulations 1988 require the OFT, before considering a complaint about the misleading nature of an advertisement to satisfy itself that 'such established means as the Director may consider appropriate' have been used and have not dealt adequately with the complaint and that he should have regard to the desirability of encouraging the control, by self-regulatory bodies, of advertisements. The ASA does not, therefore, have statutory recognition itself, but the statute sets the framework within which the ASA can be given the space by the OFT to operate.

2.34 This sort of approach has many advantages. First, it brings all the advantages of self regulation (efficient regulation, speed of response, flexibility in the light of social and technological change). Second, it provides an incentive for industry to comply with the standards and rulings of the self-regulatory body since the alternative is to face a regulatory process with the regulator. Third, it provides an incentive for industry players to ensure that the self-regulatory body is credible, since the regulator can only accept the rulings of the self-regulatory body if that body deals satisfactorily with complaints. Finally, it provides a backstop in the case of those parts of the industry which might chose not to comply with the standards or rulings of the self-regulatory body but who are, none the less, subject to the law and to the jurisdiction of the regulator.

2.35 On the other hand, this approach does require the basic ground rules to be set in legislation. It requires the existence of a regulator capable of acting as a backstop and it leaves open the possibility of conflict between the regulator and any self-regulatory body over what standards should apply, within the legislative framework. A basic framework approach of this sort could allow for two or more self-regulatory bodies running different codes or standards as long as the regulator was content to recognise both, but it would also allow the regulator to favour one self-regulatory body over another.

2.36 In practice, it may be felt that it is easier to arrive at an ASA model where a strong industry self-regulatory body already exists, but requires some legislative underpinning in order to ensure appropriate standards are set and maintained without exception across the industry, than in the case where a new self-regulatory body would have to be called into being. In the absence of a credible self-regulatory body, the regulator might have to develop codes and standards itself, in order to provide appropriate predictability, consistency and transparency in the market. In the online copyright infringement example mentioned above, the legislation requires Ofcom to seek to approve an industry code, but provides that in the absence of an

appropriate industry code Ofcom should impose a code of its own that meets the requirements of the statute. In that model, a structure which appears, on the face of it, to provide a co-regulatory approach in practice (depending on the circumstances) can end up delivering a statutory regulatory outcome.

2.37 It is possible to imagine a lighter touch regime than the ASA version. For example, the courts could be required or encouraged to consider compliance with the standards of a self regulatory body as a sufficient defence against a relevant complaint. For example, if a regulatory body established a process for considering the existence of a public interest before engaging in activity that might otherwise constitute a breach of privacy then the courts might consider that compliance with that process demonstrated (at least prima facie) sufficient grounds to give rise to reasonable view that the public interest was engaged and the intrusion was legitimate.

2.38 On the one hand, a co-regulatory model can encompass anything that could be done under self-regulation whilst adding an element of compulsion to make effective enforcement possible. On the other hand, it can encompass anything that could be done by a statutory regulator but put relevant decision making in the hands of those closest to the industry, and rigorously separate from Government, to seek to gain the benefits of self-regulation without losing the benefits of statutory backing. This is a model that is much in use in the UK. Most professional regulation is co-regulation by this definition where the practice of the profession (law, medicine, architecture etc) is protected by law and the professional bodies that, police it do so with the statutory backing that allows them to rescind or refuse a license to practise. Advertising is a well known example of successful co-regulation. Others include ATVOD, PhonePayPlus and the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Statutory regulation

2.39 In this Report a reference to statutory regulation means a system where the scope and coverage of the regulation is set by statute. Again, there is a broad spectrum. At one end is the situation where the full detail of the regulation (in fact, law) is set by statute with enforcement by the police or otherwise through the courts. At the next level, is the regime where most of the detail of the regulation is set by statute, but with a regulator acting primarily as an enforcement body: many consumer protection regulations, with OFT regulating, fall into this category. Then there is the case where the regulator is established by statute and given objectives to meet, along with the tools with which to do so, leaving the regulator to set the detail of the regulations, to make regulatory decisions and then to enforce them: most sectoral regulators such as Ofcom, Ofgem, and Ofwat fall into this category. In some models the regulations set by the regulator might themselves need to be approved by Parliament. In others the regulator is free to manage the regulatory regime without external oversight but subject to appeal though an appropriate judicial body.

2.40 Statutory regulation, with the legitimacy of Parliamentary debate and approval, represents the will of the people to impose certain standards of behaviour. Statutory regulation is primarily used to address circumstances where horizontal law is insufficiently precise to deliver the outcomes required and, where the nature of the problem to be resolved is such that the operation of the market is not likely to deliver the solution. This is the case, for example, where there is a high degree of concentration within an industry, leading to the possibility of anti-competitive behaviour with negative impacts for consumers. It is also unlikely that the market alone will provide appropriate consumer protection where companies take a short-

term view of the factors influencing their viability and are focused predominantly on the interest of their current customers and shareholders.

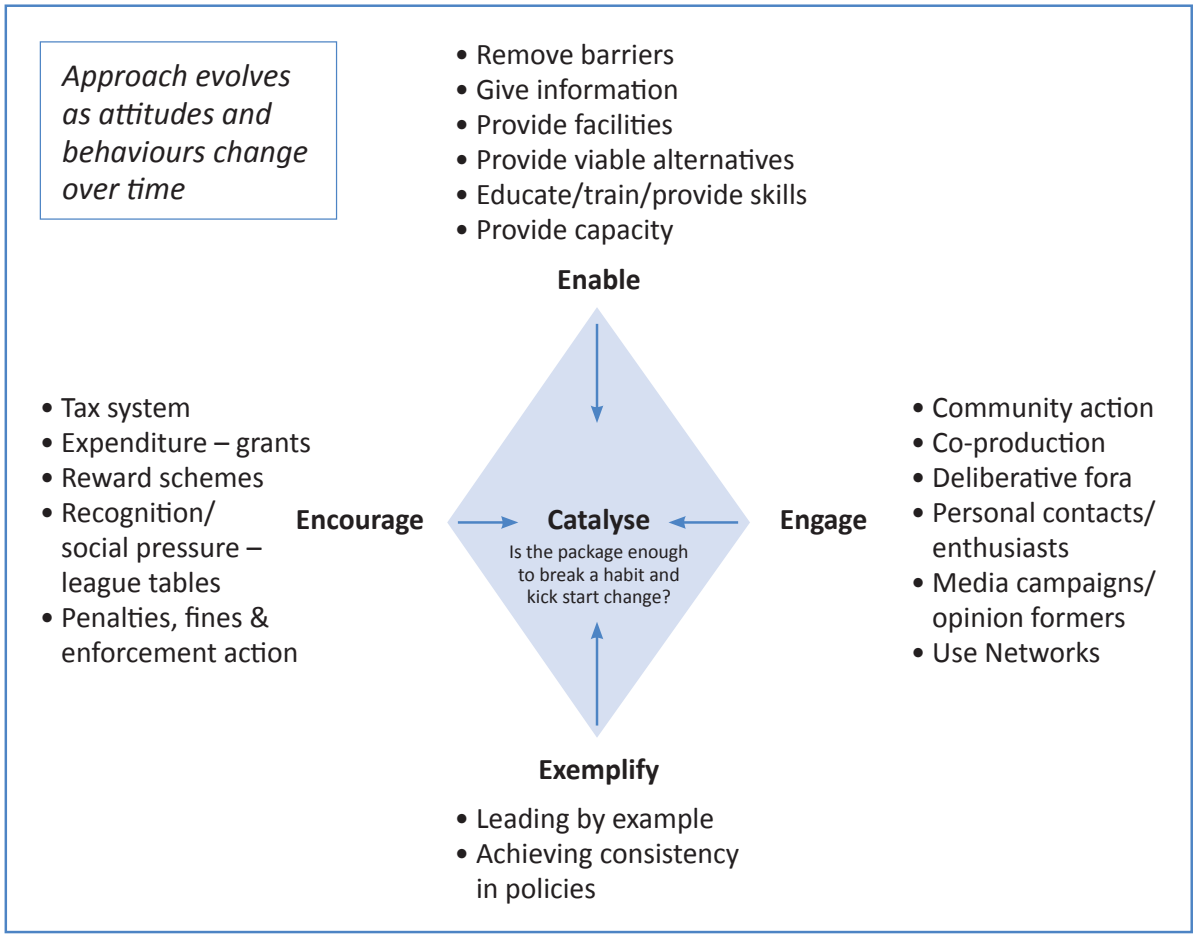
2.41 Statutory regulation is an effective way of dealing with issues relating to the impact on third parties of activities outside the commercial relationship involved. Legislation can be used to require parties to take into account broader social or public interest issues that would not otherwise form a part of their commercial consideration of their interest. To express that in more economic language, this is where external costs arising from the activities of the companies are borne predominantly by sections of the society other than by the customers of those companies and the companies themselves.

3. Regulatory tools

3.1 The previous section considers different ways in which regulation can be delivered. This section aims to consider the types of tools that can be used. Most of these tools could form part of any regulatory tool kit whether it was self-regulatory, co-regulatory or statutory regulation.

3.2 The purpose of regulation is to deliver an outcome that society wants. However, regulation is not the only way to influence or change behaviour. I thus turn to the categorisation identified by Mr McCrae of the different ways in which changes to behaviour can be encouraged and influenced, namely: enabling, engaging, exemplifying and encouraging.

Figure K6.1



Source: Donald McCrae, slide 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Donald-Macrae1.ppt

Enable

3.3 This includes removing barriers (of whatever sort) to the desired behaviour, giving information and providing viable alternatives, including through capacity building, skills, training and facilities. Two different aspects of press culture have been raised with the Inquiry: on the one hand, there is behaviour that breaks the law or is, in some other way, in breach of recognised, accepted standards (which, in shorthand, I refer to as unethical), and on the other hand, there is concern that the press is not sufficiently engaged in genuine investigative work. The Inquiry has not heard any evidence to suggest that there are barriers preventing lawful or ethical behaviour, as opposed to pressures encouraging unethical behaviour. The Inquiry has, however, heard arguments[10] that there are barriers in place that make it difficult for the press to pursue legitimate investigatory journalism, in particular current libel laws, the new Bribery Act and uncertainty over the interpretation of the public interest.

3.4 There is no doubt that newspapers are largely operating in an increasingly challenging economic environment, with the need to compete with 24 hour news and the internet. Newspapers are now required not only to fill their printed pages on a daily (or weekly) basis but also to provide constantly updated content on websites and they do this with reduced numbers of journalists. In this context, issues around resourcing and training of journalists are clearly highly relevant.

Engage

3.5 Another route to changing behaviour is to leverage the enthusiasm and commitment of interested parties. This involves community action, media, opinion formers and using networks. There is clearly substantial interest from MPs, the public, academics and pressure groups in the issues of press culture and ethics.

3.6 The Inquiry has seen no evidence of a lack of engagement on the part of those outside of the media. On the other hand the partial approach to reporting in the press either the extent (or even the existence) of problems with press ethics has been exemplified by reporting of the phone-hacking scandal from the very beginning. It is widely, and rightly, recognised that there would not have been the public concentration on these issues of press culture and ethics had not an investigative journalist, (Nick Davies), with a support of national newspaper (The Guardian), not pursued phone-hacking determinedly. On the other side of the scale, the rest of the press, together with the PCC, were keen to paint the Mulcaire case as that of one rogue reporter.[11]

3.7 The nature of the problems identified by the Inquiry suggest that the tools of engagement, whilst potentially complementary, are unlikely to be sufficient by themselves to change behaviour.

[10] p21, lines 14-21, Nick Davies, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-29-November-2011.pdf
p2, Alan Rusbridger, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Alan-Rushbridger.pdf

[11] It is also possible to point to the way in which the Inquiry has been reported, in particular relating to the different arguments for alternatives to improved self regulation along the lines proposed by PressBoF. The press is, of course, entitled to be partisan but the extent to which there has been any balanced discussion or analysis of the arguments is, at least, open to debate

Exemplify

3.8 Exemplification includes leading by example and achieving consistency in policies. The Inquiry has heard many references to examples of excellent journalism and adherence to excellent ethical standards within the British press. The Inquiry has, however, heard fewer instances of use of such examples of excellence within the industry to promote ethical behaviour. The PCC receives complaints and, unless mediated, produces adjudications on them which lead to reminders to papers and journalists of the nature of the code and the production of additional guidance on good behaviour.

3.9 The Inquiry has been told of many examples of excellent investigative journalism, ethically conducted, being lauded within the industry: examples include Thalidomide, phone hacking and MPs expenses. However, on the other hand there appears to be no particular censure for unethical behaviour: for example, even after the decision of Eady J awarding damages for breach of privacy to Max Mosley, in which the activities of the chief reporter were heavily criticised, the News of the World (NoTW) put that story forward for the title of scoop of the year.[12] The NoTW did not win (the Times won the title that year) but the story suggests that NoTW did not expect accuracy or ethical standards to be a material factor in deciding the winner. Again, the nature of the problems the Inquiry has heard suggest that, whilst best practice will certainly have a role to play, it is unlikely to be sufficient to address all concerns.

Encourage

3.10 In the context of this list of mechanisms to change behaviour, 'encourage' includes all regulatory measures, including through the tax system, transparency requirements, penalties and enforcement measures and positive approaches such as reward schemes and targeted grants.

3.11 Some of these tools are rewards for good behaviour, others sanctions for bad. Some might be seen to work both ways. Public money can be provided either to fully fund activity seen as desirable (e.g. the BBC) or in other ways. Examples from the broadcasting sector include Channel 4, which is publicly owned, and has historically been funded both by its own commercial income and by subsidies levied from other public service broadcasters and other terrestrial broadcasters who have access to spectrum to broadcast and in return have to meet public service broadcasting requirements.

3.12 There is less tradition of the state funding the press, though many local authorities publish newsletters which are distributed to the local population and which contain council news, sometimes other local news and advertising. All books and newspapers are exempt from VAT, whilst online publications are not. In addition Royal Mail operates a specific tariff (presstream) for distribution of newspapers and magazines.

3.13 Governments can provide public money for grants to encourage all sorts of behaviour, from grants for film production to the car scrappage payments, from the solar power feed-in tariff to help with starting up small businesses. Grants and other payments can be used to encourage behaviour change by citizens, consumers or businesses of any size.

[12] pp55-56, lines 15-1, Colin Myler, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-14-December-2011.pdf

3.14 Newspapers and magazines are substantial recipients of public subsidies in some countries. In France, for example, the press received €20m in subsidies in 2008,[13] with all forms of aid to the press estimated at €1.2bn.[14] These subsidies take the form of direct payments for technological improvements, subsidised travel for reporters, reduced mailing rates for newspapers, tax advantages etc. Some subsidies are direct grants, others are repayable loans. In addition a new scheme was started in 2010 to provide free newspapers to young people (one free copy a week; distribution is also paid for by the Government); this is an attempt to persuade the new generation to develop the habit of reading newspapers.

3.15 Sweden also provides direct subsidies to the press (around €61m in 2009),[15] as do Denmark (around €44m in 2008)[16] and Norway (around €35-40m in 2005)[17] both directly and in the form of tax exemptions.

3.16 The tax system is one way of incentivising desired behaviour. In general, in recent decades UK Governments have taken the view that the corporate tax system should by used in this way only to address horizontal market failures, e.g. in relation to R&D. There are exceptions (the tax relief for film is one example) but these are not widespread and there is little appetite to increase them. The Inquiry has heard suggestions that the VAT exemption could be used as a mechanism to encourage compliance with a self-regulatory approach to standards, but there are overwhelming legal problems with that idea.[18]

3.17 Also under the 'encourage' heading is the wide range of more direct regulatory steps that could be taken. These are addressed below.

Transparency

3.18 Transparency is valuable in a situation where consumers or others need information to take relevant decisions. This could work in two ways. It can take the form of transparency of action (e.g. requiring all stories to run under the byline of a real person; requiring transparency on the sources of quotes, requiring transparency on the method by which any story has been obtained). It can also take the form of transparency of compliance (e.g. requiring visible corrections, publishing accuracy league tables, publishing data on compliance with regulatory standards).

3.19 The advantage of transparency as a tool is that it enhances the effectiveness of the market by reducing information asymmetry and putting consumers in the position of being able to take a judgment on issues that they might otherwise not be aware of. Transparency should not in itself add significantly to regulatory cost, nor does it necessarily require any particular change to the standards set, the point is simply to ensure that compliance, or the lack of it, is visible.

3.20 However, the difficulty of relying on self-regulation, where the harm or costs to be avoided fall to third parties who are not a part of the commercial transaction to be regulated, was identified earlier. Transparency has some advantages in this respect by bringing those external costs to the attention of consumers, but it does not actually address the situation where the consumers have no direct interest in the external costs or harm.

[13] http://www.lemonde.fr/actualite-medias/article/2009/12/30/les-editeurs-de-presse-en-ligne-se-repartissent-20-millions-d-euros-d-aides_1285932_3236.html
[14] various press reports, http://www.mondaynote.com/2009/11/15/young-readers-already-hooked-on-subsidies/
[15] EU commission, http://www.regeringen.se/sb/d/14476
[16] http://www.newspaperinnovation.com/index.php/category/legislation/page/3/
[17] http://www.ejc.net/media_landscape/article/norway/
[18] as described in Part K, Chapter 4

Complaint Resolution

3.21 Complaint Resolution allows for those, whether consumers or third parties, who consider themselves to have been harmed by an action to seek some form of restitution or redress. There are various models of complaint resolution. Most start with the complainant putting their case to the company concerned. If the company fails to resolve the complaint to the satisfaction of the complainant then the matter is classed as a dispute and there could be an independent body that would seek to resolve the dispute.

3.22 Currently the PCC acts as a quasi independent dispute resolution body in respect of complaints about press conduct and content, but only where the publisher is a funding member of PressBoF. There is no independent dispute resolution mechanism for those publications which chose not to be a part of the PCC.

3.23 One widely used model for complaint resolution is the Ombudsman model. Ombudsmen can exist under statute or under voluntary agreement, and they will vary in how they operate and their powers. The Financial Services Ombudsman is a statutory body which has powers to resolve disputes between financial services companies and their customers in respect of a wide variety of products. The role of the ombudsman falls into two parts: first mediation to seek an agreed outcome and second, mediation having failed, determination of the dispute and imposition of a remedy. In the case of the FS Ombudsman the resolution is binding if the consumer accepts it but they can choose to go to court if they wish to.

3.24 More generally Ombudsmen provide remedies which are fair and reasonable in all the circumstances, and are not necessarily bound by a strict interpretation of the law or precedent. In the public sector and in some private schemes their recommendations are not binding but met with nearly total compliance. This is secured by a variety of means whether by law, by contract, by publicity, by a regulator or by the moral force and the standing of the Ombudsman. There is no appeal against Ombudsman decisions, other than Judicial Review (where applicable) or where schemes (like the Pensions Ombudsman) have an appeal procedure in place.

Incentives

3.25 Many types of incentives are available. The possibility of tax incentives has been considered earlier but tax is a very blunt instrument for changing behaviour. Generally rewards can come in terms of specific benefits or preferential treatment although it is difficult to consider this in the abstract. A number of specific suggestions have been made to the Inquiry in respect of the sorts of incentives that could be used, including: coverage in the ABC circulation figures; advertisers boycotting publications outside the regulatory regime; enhanced weight being given to public interest arguments in relation to unlawful behaviour; alternative dispute mechanisms to deal cheaply and quickly with libel and defamation cases (as well as other standards breaches) without going to court; and access to pre-publication, public interest advice that could be relied upon in retrospect.

3.26 Some of these would be purely self-regulatory and would rely on the goodwill of parties outside the press (e.g. the advertising industry), some might require legislative change to deliver and others might require the involvement of the courts (which means changes to the law). All of the incentives that have been proposed to the Inquiry are considered fully in Part K, Chapter 4.

Penalties

3.27 Penalties for failure to comply can include dissuasive penalties to attempt to prevent non-compliant behaviour occurring (or recurring) and remedial penalties to provide redress and make good the wrong, once the contravention has occurred. Generically, dissuasive penalties can include fines, removal of privileges/rights either as a punishment in its own right or to make it impossible for the perpetrator to repeat the offence (e.g. imprisonment, removal of a licence), additional checks and constraints on behaviour and public disclosure. Remedial penalties can include payment of compensation, and other acts of restitution such as an apology.

3.28 In the press context the Inquiry has heard suggestions for a range of potential penalties in both the dissuasive and remedial categories: these include fines, a regime for requiring journalists to hold a press card, temporary prevention of publication, and publication of corrections with equal prominence to the offending article.

CHAPTER 7
CONCLUSIONS AND RECOMMENDATIONS FOR FUTURE REGULATION OF THE PRESS

1. Introduction

1.1 Earlier parts of this Report have set out in considerable detail the systems currently in place which seek to address press standards in an attempt to support high quality journalism while at the same time protecting the rights and interests of individuals. This has included examining the formal systems in place within individual titles, the informal culture and practices within titles (and across the press) and the industry agreed standards as embodied in the Editors' Code of Practice which form the standard for the Press Complaints Commission (PCC) when giving advice or handling complaints. Throughout, I have drawn conclusions on the adequacy and effectiveness of those systems.

1.2 It is important to make the point, yet again, that I recognise that most of the press, most of the time, do meet the high standards that the UK public is entitled to expect. I have explored good practice in the Report,[1] looking both at the generic importance of a free press and at examples of good practice across the industry. However, when looking at whether the standards regime in place is adequate, it is important that the analysis takes account not only of what happens most of the time but also, and critically, what the regime allows to happen some of the time. And there can be no doubt that, on occasion, there has been a significant failure of standards within and across parts of the national press. To some extent, these significant failures have been conceded by everyone: I have concluded, however, that they are more widespread than has been universally acknowledged.

1.3 That these failures have included breach of civil rights on a substantial scale is made evident by the civil claims that have already been settled by the News of the World (NoTW) in respect of phone hacking. The reports of the Information Commissioner in 2006 provided prima facie evidence of criminal breach of data protection legislation on behalf of journalists across a number of areas of the national press. And, of course, the police are still investigating a substantial number of suspected criminal offences, not just at the NoTW, but elsewhere in News International (NI) and in some other titles.[2] Arrests have been made covering unlawful interception of communications and payments to public officials. Some suspects have been charged, in particular in relation to conspiracy to intercept communications without lawful authority. I can obviously make no comment on these cases and do not pre judge any of them. It is, however, appropriate to observe that the fact that such a significant police investigation has resulted in so many arrests and charges so far, at least gives rise to a legitimate cause for concern.

1.4 The criticisms that can be levied against the press on the basis of the evidence that this Inquiry has heard are set out elsewhere in this Report.[3] My conclusions on the effectiveness of the PCC as an industry self-regulator have been dealt with earlier.[4] It is abundantly clear from this that current systems of both internal governance in some parts of the press, and industry self-regulation of the press, have not worked and are not working.

[1] Part F, Chapter 2
[2] journalists from News International, Trinity Mirror and Express Group: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-Witness-Statement-of-DAC-Sue-Akers.pdf
[3] Part F, Chapter 6
[4] Part J, Chapter 4

Can the PCC continue to act as regulator?

1.5 In Chapter 1 above, I set out the criteria that I consider need to be met for a regulatory regime to be considered effective. The system operated by the PCC falls short of these criteria on a number of key points. First, it has lost credibility with the public, with politicians and with the press itself. This is not just a view that I have reached, but is shared by Lord Black in his own submission to this Inquiry[5] on what the future regulatory regime should look like. On top of that, the departure of Northern and Shell from the system has shown that it is not able to deliver complete coverage, even of the major national newspaper groups.

1.6 The PCC lacks the independence that is critical to building public confidence in a regulator. It has been dominated by the industry, both through the influence of the Press Board of Finance (PressBoF), particularly in relation to appointing the Chair and the press members of the Commission, and through the presence of serving editors in both the Code Committee and on the Commission itself.

1.7 The Editors' Code, whilst widely considered both within and outside the industry as being a good code, provides a set of general requirements. These often contain a measure of uncertainty over how and when they might apply. The development of the Code over the years has achieved a great deal. It can, however, be improved to provide a constructive ethical and legal framework within which journalists should work. In any event, compliance with, and enforcement of, the Code has been inadequate and intermittent.

1.8 The structures and practices of the PCC have constrained it to acting as a mediator in respect of complaints, rather than having any enforcement role that is consistent and effective. The failure to identify any code breaches where a mediated settlement could be reached, or to provide meaningful statistics in relation to complaints brought and how they were resolved, means that there is no authoritative picture of just how often breaches have occurred and where they have occurred. The manifest failures of the PCC to take any steps to address the reports from the Information Commissioner and the discredited investigations and conclusions by the PCC into phone hacking (since abandoned), demonstrate that the PCC, despite calling itself a regulator and referring to self-regulation of the industry, has not acted as regulator of standards as opposed to a reactive case-handler.

1.9 The remedies available to the PCC have proved an inadequate deterrent to breach. Whilst the industry have shouldered the full cost of operation of the PCC, the PCC has not been provided with the funding that it would have needed to act as a credible regulator.

1.10 It is clear, therefore, that continuation of the status quo is not a credible option, and no one has suggested that it is.

[5] p13, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

2. Options put forward

The industry proposal

2.1 The inability of the PCC to fulfil the required role has been recognised and accepted by the industry, which has put forward its own proposal for the future in the form of a submission from Lord Black, as the Chairman of PressBoF. That proposal is described[6] and analysed[7] earlier. As I have already said, that proposal does represent a significant improvement on the PCC as currently constituted and I recognise, and am grateful for, the efforts that have gone into constructing what is intended to be a new, more independent and more effective model. However, unfortunately, although it would represent an improvement on the status quo, and aspects of the framework could be built on, I conclude that the extent of industry control within the proposed system is a fundamental flaw.

2.2 First, the proposal does not have the clear support of any larger proportion of the industry than the current system. If the PCC is inadequate, at least in part, because a major national newspaper group sits outside it, then Lord Black's proposal must also be inadequate. Northern and Shell has not said explicitly that it would not join the organisation if it was to be established, but its evidence to the Inquiry is sufficiently negative to give a strong steer that that is the case. Certainly, there must be a substantial doubt as to the ability of this proposal to command full industry support and cooperation, and there is no sufficient mechanism for the critical goal of full participation by all.

2.3 Second, the system as proposed provides no long term stability. This has two features. The first is that a five year contract would bind members into the club for that period, but there is no guarantee that the system would continue to operate beyond the first five year term. The second feature is that it provides no assurance that the level at which standards or safeguards would be set would meet the level rightly expected by the public. Or that, once set, they would remain at that level. Thus, the proposal does not provide sufficient long term stability, durability or guarantee. That is not to say that contracts between the regulator and the regulated entity have no role to play in a future model; it is simply the case that they do not, on their own, provide sufficient assurance of long term effectiveness.

2.4 Third, and of critical significance, the model presented by Lord Black fails to offer genuine independence from the industry. The industry, primarily through the Industry Funding Body (IFB), would have substantial influence over the appointment of the Chair of the Trust, as well as having 'responsibility' for the Code and having to approve any changes in the regulations. The continuation of the Code Committee with a majority of serving editors, acting in more than an advisory role, does not allow for independent setting of standards.

2.5 A new system must have an independent and effective enforcement and compliance mechanism. As I have already said, I endorse the approach to internal company governance proposed by Lord Black. In particular, I support the proposal that complaints should be dealt with in the first instance by publishers and the requirements for an annual return on compliance to the regulator, and a named senior individual within each title with responsibility for compliance and standards. These are real innovations and are welcome. However, the proposal still has serving editors on the body making decisions on complaints, and this does not provide the required degree of independence of enforcement. The proposal for a standards and compliance arm, with both its ongoing monitoring role and its ability to carry out investigations, is welcome, although in practice, as currently set out by Lord Black, it could be so drawn out and so hedged about with appeals that I doubt it could ever be used effectively.

[6] Part K, Chapter 2
[7] Part K, Chapter 3

2.6 A new system must have the ability to offer meaningful remedies to those who have been harmed. This proposal does not offer any significant improvement on the current PCC approach in this regard. It must also be able to apply effective sanctions to those who continue to breach standards: although real movement has been made in that direction, through the proposals on investigations and the power to fine, there are serious concerns about it resulting from procedural complexity that is greater and more extensive (thereby causing significant delay) than is necessary even when having full regard to the vital requirements of fairness. The improved transparency is to be welcomed, but it is not sufficient.

2.7 Finally, an effective regulatory system must be adequately financed and have sufficient independence from its funding body to operate independently. It is impossible for me to take a view on what constitutes adequate funding given the early stage of development of the proposal. What is clear, however, is that the IFB has sole discretion to decide on the funding and this cannot give the regulator sufficient independence to carry out its role properly.

Other proposals

2.8 Many proposals, with various degrees of detail, were put forward by interested parties and I would like to express my gratitude to all of them for the efforts that they made. These proposals are examined in detail elsewhere.[8] It is fair to say that, whilst there are many excellent and helpful ideas contained within those proposals (a number of which I am happy to adopt), there are none that, on their own, sufficiently meet all the criteria that I set down.

2.9 If I am not to adopt a proposal that has been put in front of the Inquiry I must instead construct one myself. In section 4 below, I look at what a satisfactory system must contain, but first I address the question of coverage.

3. A new system must include everyone

3.1 A new system must be effective, and one of the key criteria of effectiveness is that it should include all major publishers of news (if not all publishers of newspapers and magazines). This has been an almost universal view from the witnesses who have given evidence to the Inquiry in relation to future regulation; they have been clear that any new system should cover all news publishers, and that compliance with it should not be a matter of choice. There has been a striking level of agreement between commentators, the industry and politicians as to the desirability of all newspapers being covered by a regulatory regime, although not everyone has explained how they would deliver such comprehensive coverage. The Prime Minister, the Rt Hon David Cameron MP, said:[9]

> *"What we actually have to deliver is that it is compulsory and has all those things that I said [i.e. independence, penalties, compulsion, toughness, public confidence and all the rest of it]".*

3.2 The Deputy Prime Minister, the Rt Hon Nick Clegg MP, stopped short of explicitly calling for compulsion, but was clear that the system should include everybody:[10]

[8] Part K, Chapter 4
[9] p60, lines 1-25 and p60 lines 1-2, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[10] p81, lines 21-25, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf

"…it's hopeless if we end up, as has been the case recently in parts of Canada, for instance, where just great swathes of the media have just opted out of the regulatory system altogether. You have to have buy-in from everybody."

3.3 The Rt Hon Ed Miliband MP set out a number of criteria for a new body, including complete coverage of the newspapers:[11]

"A new body should have: a) clear independence from those it regulates and freedom from political interference; b) proper investigative powers; c) an ability to enforce corrections; d) a system that is focused on the needs of the public which is accessible for all and not available only to the rich; e) a system that applies to all newspapers." (emphasis added)

3.4 The Joint Committee on Privacy and Injunctions considered the role that should be played by regulation and said:[12]

"It is essential that membership of the reformed media regulator extends to all major newspaper publishers. It should no longer be possible for a title unilaterally to opt out of regulation with no sanction forthcoming."

3.5 The Core Participant Victims argued that all newspapers and magazines should fall within the jurisdiction of the regulatory regime and comply with the requirements of adverse adjudications or investigations.[13]

3.6 The current PCC Chair, Lord Hunt, said that a new system would not be perceived to be effective, and indeed that the credibility of the new system would have been fatally undermined, if a 'big fish' were not a part of it; he recognised that Northern and Shell qualified as a 'big fish' for these purposes.[14, 15]

3.7 A previous PCC Chair, Sir Christopher Meyer told the Inquiry:[16]

"No system of self-regulation can survive the wilful refusal of a major player to take part. There may be a case for back-stop law or regulation making membership of the PCC compulsory."

3.8 A number of commentators have pointed out that the Lord Chief Justice, in his speech last year, argued for a self-regulatory system. He did, as do I, but he also insisted that any new self-regulatory system should cover the whole industry:[17]

"The new PCC – that is the new body currently in my contemplation in any new system of self-regulation – must be all inclusive. You might perhaps be willing to discount a news sheet circulated to about 25 people, but any national or regional paper would

[11] p4, para 1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf
[12] para 179, report of Joint Committee on Privacy and Injunctions http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf
[13] p1, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf
[14] pp 1-2, lines 14-14, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[15] p3, lines 11-15, Lord Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-10-July-2012.pdf
[16] p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Sir-Christopher-Meyer.pdf
[17] p9, Speech by Lord Judge, Lord Chief Justice of England and Wales 19/10/2011 http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-annual-justice-lecture-2011.pdf

have to be included. In short any new PCC would require to have whatever authority is given to it over the entire newspaper industry, not on a self-selecting number of newspapers."

3.9 From within the industry there has similarly been general agreement that any system should be comprehensive in its coverage. Thus, Paul Dacre, Editor-in-Chief of Associated Newspapers, and editor of the Daily Mail, in his presentation to a seminar at the very beginning of the Inquiry, said:[18]

"…there's one area where Parliament can help the press. Some way must be found to compel all newspaper owners to fund and participate in self-regulation. God knows the industry fought hard enough to prevent it, but the Express group's decision to leave the PCC was a body blow to the commission. How can you have self-regulation when a major newspaper group unilaterally withdraws from it?"

Whilst he has subsequently resiled from advocating statutory intervention to achieve the goal of comprehensive coverage, his view that all newspapers and magazines should be covered by the new regulatory system was repeated in a submission to the Inquiry in July:[19]

"I also believe absolutely that one of the main responsibilities of the new regulatory system should be to ensure that the Editors' Code is followed both in spirit and the letter by all newspapers, magazines and, importantly, their Online versions."

3.10 This is consistent with the approach taken by Viscount Rothermere, the current owner of the Daily Maily & General Trust, who told the Inquiry:[20]

"I would certainly agree that in order for self-regulation to work, I think that you would have to have all members of the industry support it, yes. Or the defined industry support it, whatever that definition was."

3.11 Joint owner of Independent Print Limited, Evgeny Lebedev, told the Inquiry, "*I think everybody in the industry has to be part of this new future body in order for it to work*."[21] Similarly, Aidan Barclay, Chairman of the Telegraph Media Group said, "*I think it does need to include everybody*."[22] James Murdoch, former Chief Executive of NI, from a slightly different perspective, said, "*I also think it's difficult to allow an industry in and of itself to control itself on a voluntary basis, given the concerns that we obviously all have.*"[23]

3.12 It is worth noting two other, albeit contrasting, political opinions. The Rt Hon Kenneth Clarke QC MP said:[24]

"I believe we do need a new regulator- one with substantially more power and independence than the PCC, which failed in its previous incarnation, and no longer commands the confidence of the public."

[18] Paul Dacre, The future for self regulation? Seminar 12 October 2011, p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/RPC_DOCS1-12374597-v1-PAUL_DACRE_S_SEMINAR_SPEECH.pdf
[19] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf
[20] p42, lines 4-8, Viscount Rothermere, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-10-May-2012.pdf
[21] p44, lines 19-21, Evgeny Lebedev, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[22] p106, line 18, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[23] p70, lines 1-3, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[24] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Kenneth-Clarke-MP.pdf

He went on to say that he agreed with Lord Hunt that participation of all the big players is highly desirable if the new system is to have meaning and said that a very difficult question that goes to the heart of the effectiveness of a new body is how you ensure membership of all powerful media voices.[25]

3.13 By contrast, the Rt Hon Michael Gove MP was very cautious about any system of regulation, expressing the concern that regulation does not always deliver the outcomes desired, but might nonetheless result in a curtailing of freedoms. He said that he was not necessarily advocating a free-for-all, but he was clearly entirely untroubled by the thought of some, or all, of the press existing outside of a system of standards regulation.[26]

3.14 So, with the exception of Mr Gove (although, if present press reports are correct, there are others), the very strong view expressed to the Inquiry by politicians in Government and Opposition, from the victims of press abuse, from press regulators and from those at the head of the industry itself, was that any new system of regulation should cover all significant news publishers, and I entirely agree.

I therefore recommend that a new system of regulation should not be considered sufficiently effective if it does not cover all significant news publishers. The challenge, then, is to find a way of achieving that result.

3.15 The first task is to look at the suggestions made by all those quoted above as to how they would achieve full coverage of a new system. Mr Cameron was reluctant to reach for statute to compel regulation of press standards, but did not rule it out:[27]

> *"I think as we go at this, we have to understand the real concern there is about statutory regulation. That doesn't mean you rule it out, but it means try and make everything that can be independent work before you reach for that lever. But, of course, if you had to undertake it, the more undertakings, the more safeguards would obviously be better. That would be my view."*

3.16 Mr Clegg identified a possible role for legislation in "*creating incentives or cajoling all parts of the media to be part of a new regulatory environment.*"[28] He did not define 'cajoling', but was clear that participation in the regulatory system should not be a matter of choice. He also suggested that there could be a role for a statutory backstop co-regulator,[29] but did not develop the idea in detail.

3.17 Mr Miliband did not explain how his vision for a new form of press regulation should be delivered, but the Rt Hon Harriet Harman MP, on behalf of the Labour Party, proposed 'statutory support' for a new regulatory body both in providing for its independence and to give it "*the power to enforce its decisions across all newspapers*."[30]

[25] p2, *ibid*
[26] pp51-73, Michael Gove, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf
[27] p63, lines 13-20, David Cameron http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[28] p81, lines 19-21, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[29] p82, lines 12-22, Nick Clegg, *ibid*
[30] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf

3.18 The Joint Committee on Privacy and Injunctions recommended that the industry should adopt the proposals then being promoted by Lord Hunt (which subsequently formed the basis of Lord Black's proposals to the Inquiry) and that a standing commission comprised of both Houses of Parliament should be established to scrutinise the process of reform.[31] However, the Committee was clear that this might not be sufficient and concluded: [32]

> *"However, should the industry fail to establish an independent regulator which commands public confidence, the Government should seriously consider establishing some form of statutory oversight. This could involve giving Ofcom or another body overall statutory responsibility for press regulation, the day-to-day running of which it could then devolve to a self-regulatory body, in a similar manner to the arrangements for regulating broadcast advertising."*

The Committee also recommended that 'significant penalties' should be imposed on news publishers who are not members of the reformed media regulator, although the only example they offered was that advertisers should refuse to advertise in non-member publications.[33]

3.19 The Core Participant Victims considered that:[34]

> *"a statutory mechanism could be established to ensure that [their recommended requirements] are met by the new regime whilst guaranteeing that the regulator could not be misused by politicians to interfere with media's legitimate right to freedom of expression."*

3.20 The Lord Chief Justice stopped short of saying from where the 'new PCC' should derive its authority or how his requirement that it "must be all inclusive" could or should be met. The outcome could be delivered by agreement (as I would also wish) but his language clearly points to a scheme which permits no exceptions; such an arrangement would have to be mandated or required in some way.

3.21 Lord Hunt was very clear that he did not regard it as appropriate to use legislation to secure full participation in a regulatory regime. However, he did not offer any means of doing so, other than a general reference to the incentives suggested as part of Lord Black's proposal. Sir Christopher accepted that there might be a case for backstop law or regulation making membership of the PCC compulsory.[35]

3.22 As mentioned above, Mr Dacre has pulled back from advocating statutory intervention to achieve the goal of comprehensive coverage, but he has not offered any alternative mechanism for achieving it other than the incentives already referred to in Lord Black's proposal. Viscount Rothermere did not address the question of how one would obtain the support of all members of the industry, or what should be done in the absence of such support.

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[31] para 187, report of Joint Committee on Privacy and Injunctions http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf. This may fall foul of what might be described as an entirely legitimate requirement of the press that any regulation must be independent of politicians (and the Government) whom the press are required to hold to account

[32] para 188, report of Joint Committee on Privacy and Injunctions http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf

[33] para 180, *ibid*

[34] p2, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Joint-Submission-by-Core-Participant-Victims1.pdf

[35] p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Sir-Christopher-Meyer.pdf

3.23 Mr Lebedev said that self-regulation was preferable to statutory regulation, but that he was:[36]

> *"not averse to statutory backstop, because I think there needs to be a way of making sure that everyone in the industry is part of this regulation, regulatory body, signed up to it, and that includes online as well."*

3.24 Mr Barclay urged caution in relation to statutory provision but said:[37]

> *"I certainly support the notion that everybody should be included and should be somehow obliged to be included."*

But he went on to say *"I don't understand how we solve the problem."*[38]

3.25 James Murdoch said that providing a solution was *"above his pay-grade"*, but suggested that:[39]

> *"it may be a question of a stronger enshrining of speech rights on the one hand, coupled with a stronger set of consequences and either a self-regulating body or a statutory body that includes the press but also individuals that are not part of the working press today."*

3.26 Mr Clarke did not offer a particular prescription but said:[40]

> *"I am not convinced, though, that a statutory underpinning of some kind would amount to state control of the press. You have pointed out the statutory duty of the Lord Chancellor to uphold the independence of the judiciary. I would note as well that press organisations have a legal obligation to register with Companies House and HM Revenue and Customs as businesses; this doesn't appear to me to amount to political interference in their work. This is not my endorsement necessarily for a statutory backing, but simply an observation that it would not be the freedom of expression Armageddon some commentators would have you believe. I am attracted to the idea of contracts, with the possibility (hopefully never used) of civil litigation if the contracts are broken."*

3.27 So, in summary, whilst there is limited enthusiasm for statutory provision to ensure comprehensive coverage of a regulatory regime, there is widespread recognition that statute may be the only way of delivering this goal. Those who shy away from statute have found nothing of substance to offer as an alternative means of ensuring that their own objective of all industry buy-in can be achieved. A number of incentives to membership of a regulatory system have been put forward. These have been analysed elsewhere[41] and I have concluded that only a few of them are capable of having some effect, and those are included in my recommendations below. I hope, and believe, that these incentives will send a powerful message to publishers that it is in their own interests to be a part of a system such as the one that I am recommending, but it cannot be guaranteed that they will all agree.

[36] p40, lines 5-9, Evgeny Lebedev, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[37] p107, lines 4-9, Aidan Barclay, *ibid*
[38] p107, lines 9-10, Aidan Barclay, *ibid*
[39] p69, lines 15-21, James Murdoch http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[40] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Kenneth-Clarke-MP.pdf
[41] Part K, Chapter 4

3.28 I am firmly of the view that the goal here is voluntary independent self-regulation, and I set out below my own prescription for what that must look like in order for it to deliver what the public wants, and is entitled to want, in respect of independence and respect for individual rights and interests. I believe that the model that I set out has real and significant benefits for the public and for the press.

3.29 However, I must also recognise the risk that some publishers would choose to stay outside such a system, or even that the industry might not be able to secure agreement to establish such a system. Much as I hope this is not the case, as described earlier,[42] the history of concerns about press behaviour, and the press and Government response to those concerns, has demonstrated that the industry has only ever offered what could be described as small incremental improvements to its system of self-regulation, even though its model (as modified) has been shown, time after time, not to be sufficient to address public concerns. Indeed, it is highly relevant that the most significant argument advanced for allowing self-regulation a further 'last chance' is that, in truth, the PCC never was a regulator (even though that is precisely what it was intended and purported to be). Whatever might now be said, it was intended to be sufficiently robust to address the problems identified by Sir David Calcutt QC.

3.30 There is evidence, therefore, that, left to itself, the press response to public concern this time would, in reality, be little different: although there are some new ideas, a full analysis of Lord Black's proposal may, indeed, support that conclusion. As I have said, I very much hope that this time the industry and the Government will rise to the challenge and create a genuinely effective system of independent self-regulation, but I would be failing in my duty to the public if I did not address the consequences if that were not to happen.

3.31 It is likely that, were the industry to fail to deliver what is needed, the Government would face entirely appropriate pressure from the public, who would be entitled to demand that some action be taken to ensure that the press is accountable and that there was an acceptable answer to the question "Who guards the guardians?" Indeed, it is clear that there have been two opinion polls published recently that suggest quite a strong public demand for effective action in this area.[43]

3.32 There are a number of options which I set out in the next Chapter. I readily accept that there may be many different views on which would be the most appropriate, and I do not intend to make a firm recommendation on this matter as an answer is not needed unless or until the industry fail to deliver effective independent self-regulation. Furthermore, if I make a recommendation in this area, press attention will move from the detailed proposal that I make to the industry and focus on this recommendation alone.

3.33 Having said that, it would equally be wrong if I did not make it clear that, if some or all of the industry are not willing to participate in effective independent regulation, my own concluded view is to reject the notion that they should escape regulation altogether. I cannot, and will not, recommend another last chance saloon for the press.

[42] Part D, Chapter 1

[43] Carnegie Trust Voicing the Public Interest: Listening to the public on press regulation http://www.carnegieuktrust.org.uk/getattachment/8f98195f-4b95-4f0f-aa52-dd79cd3b5177/Voicing-the-Public-Interest.aspx?type=Finjan-Download&slot=000000F1&id=000008F0&location=0A64020E
YouGov poll for Hacked Off: http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/zbsbfp8gnb/Hacked%20Off%20results%20121005.pdf

3.34 With some measure of regret, therefore, I am driven to conclude that the Government should be ready to consider the need for a statutory backstop regulator being established, to ensure, at the least, that the press are subject to regulation that would require the fullest compliance with the criminal and civil law, if not also to ensure consequences equivalent to those that would flow from an independent self-regulatory system.[44]

3.35 I repeat, again, that I do not, at the moment, recommend any statutory backstop and to assert that I do will be to distort this Report and the clear recommendations that I do make. I hope that the industry will be able to see the value of what I have proposed and come together to participate in it. If they do, nothing further would be necessary. Further, I do not suggest that a backstop regulator should be the starting point for any discussion of the way forward and, in particular, for the legislation that I do propose. But, having said that, I have equally no doubt that there needs to be clarity and that it should not be possible for the industry (and, in particular, those who have a powerful voice in the industry), either in whole or in part, to choose not to engage with independent regulation.

4. Voluntary independent self-regulation

4.1 I now turn to what is required in order to build a genuinely effective independent self-regulatory system. Lord Black talked of his model as 'independently-led self regulation'.[45] Professor Baroness O'Neill, Professor of Philosophy at the University of Cambridge, commented that:[46]

> *"I've noticed a lot of misuse of the phrase "independent regulation" for what is actually self-interested regulation. So what we need first to do is to get away from that…"*

This identifies the problem rather well. What is required is independent self-regulation. By far the best solution to press standards would be a body, **established and organised by the industry**, which would provide genuinely independent and effective regulation of its members and would be durable. If such a body were to be established, and were to command the support of all key players in the market, there would be no need for further intervention, although I believe that there would remain a need for some further support in relation to ensuring that independence and providing incentives for membership.

[44] I have been particularly interested in the informal advice of the relevant expert Assessors in framing and drafting the detail of the recommendations set out in this Chapter. All the relevant Assessors have clearly advised that the system I am recommending, organised by the industry to objective standards, delivers the independent regulation which is essential; it safeguards press freedoms, will not chill investigative journalism that is in the public interest, and can command public confidence. It is their unanimous advice that it is in the interests of both the industry and the Government to accept and implement the recommendations to that end. For completeness, I have recorded one point of detail, relating to how an industry body is recognised, on which Shami Chakrabarti gave me different advice: see para 6.23 and footnote 56. As for the matters addressed in the next Chapter, two of the Assessors (Elinor Goodman and George Jones) advised that it was not necessary for me to make a recommendation about what to do in the event of the press not accepting the preferred option as they believe that independent self-regulation is the best solution and that, if the industry considers it carefully, it too will agree. I also record that Shami Chakrabarti advised against the contemplation of any element of compulsory backstop standards regulation of the press in the event of the inability or unwillingness of the press to implement the recommendations in this Chapter; she would prefer in that event to see a strengthening of the financial assistance available to those who feel their rights have been abused by the press in order to help them defend those rights in court.

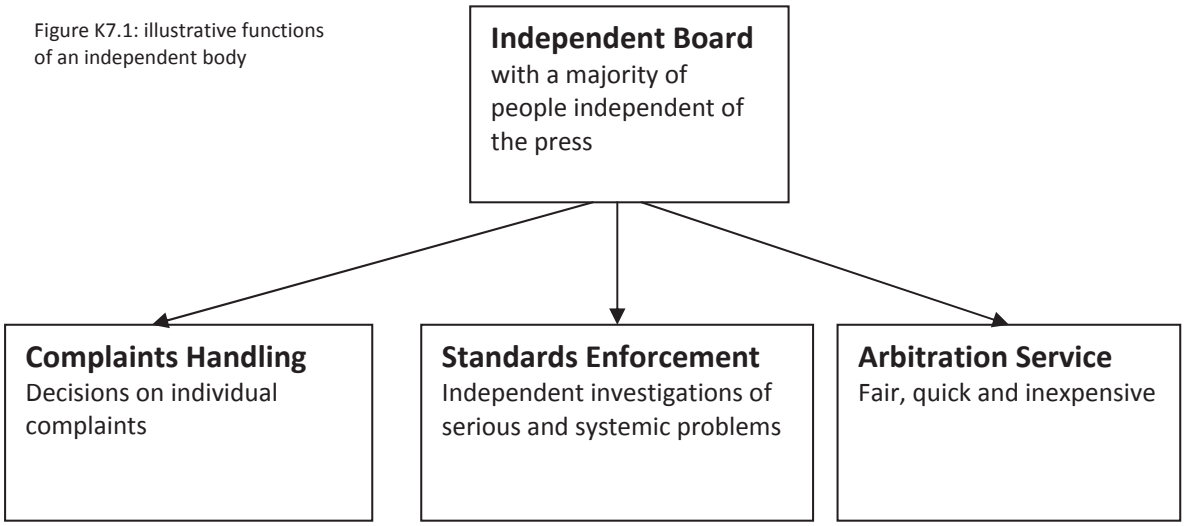
[45] p21, para 28, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Lord-Black-of-Brentwood1.pdf

[46] p89, lines 10-14, Professor Baroness O'Neil, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-16-July-2012.pdf

4.2 It is important to be clear about what I mean by 'genuinely independent and effective regulation'. My criteria for an effective regulatory regime set the broad framework. What I will do now is set out at a level of detail the minimum criteria that I believe it would be necessary to have in place in order to deliver against that broad framework.

4.3 In summary, I envisage that the industry should come together to create, and adequately fund, an independent regulatory body, headed by an independent Board, that would: set standards, both by way of a code and covering governance and compliance; hear individual complaints against its members about breach of its standards and order appropriate redress; take an active role in promoting high standards, including having the power to investigate serious or systemic breaches and impose appropriate sanctions; and provide a fair, quick and inexpensive arbitration service to deal with any civil complaints about its members' publications. Figure K7.1 below provides an illustrative structure, but this is not intended to be prescriptive in terms of organisation.

Figure K7.1: illustrative functions of an independent body



4.4 It is important both to note and to underline that these functions are not dissimilar to the basic structural framework proposed by Lord Black on behalf of the industry.

Independent governance

4.5 Independence of the regulatory body is absolutely critical.

I recommend that an independent self-regulatory body should be governed by an independent Board. In order to ensure the independence of the body it is essential to ensure that the Chair and members of the Board are appointed in a genuinely open, transparent and independent way, without any influence from industry or Government.

4.6 Further, in order to ensure the independence of the body, the Chair of the Board should be clearly and demonstrably independent of the press. By that I mean that he or she should have no current, or recent, affiliation with any particular press organisation. He or she should certainly be committed to freedom of expression and freedom of speech, but that must be matched by a commitment to uphold the rights of others and to the need to provide an appropriate balance in a democratic society in precisely the way that Articles 8 and 10 of the European Convention on Human Rights (ECHR) identify that balance. The Chair of the Board should also be independent of any political party.

4.7 The independence of the appointment process is important and by no means trivial. There are a number of specific criteria which I believe should be met in relation to the Chair of the Board.

> **I recommend that, first, the appointment should be made by an appointment panel. The selection of that panel must itself be conducted in an appropriately independent way and must, itself, be independent of the industry and of Government.**

Without being prescriptive, it could include distinguished public servants with experience of senior independent appointments such as the Commissioner for Public Appointments and the Chair of the Judicial Appointments Commission.

4.8 The body (and the Chair that leads it) will have the task of setting and enforcing standards in the press, specifically balancing the interests of freedom of speech and the interests of individuals; there are not many more important balances to be struck. In order to ensure that the full complexity of the task is taken into account by the appointment panel, it is essential that the appointment panel should be capable of balancing the public interest in freedom of speech and the protection of privacy and should be free of political influence.

> **I recommend that the appointment panel:**
>
> **(a) should be appointed in an independent, fair and open way;**
>
> **(b) should contain a substantial majority of members who are demonstrably independent of the press;**
>
> **(c) should include at least one person with a current understanding and experience of the press;**
>
> **(d) should include no more than one current editor of a publication that could be a member of the body.**

4.9 I do not intend to say more about the appointing panel. It is critically important that the industry, in a fair and open way, get together to identify independently minded people in whom the public can have confidence to make up the appointing panel. It will then be the task of that body to find and appoint a Chair who demonstrably meets the criteria of fair minded and balanced independence to which I have referred. In doing so, the industry will be committing itself to organising independent regulation.

4.10 Of equal importance is the fact that the Board itself must be independent of the press, but sufficiently expert to ensure that regulatory decisions are appropriate, proportionate and practical.

> **I recommend that the appointment of the Board should also be an independent process, and the composition of the Board should include people with relevant expertise. The requirement for independence means that there should be no serving editors on the Board.**

As with the appointment panel, it is essential that the Board should be capable of balancing the public interest in freedom of speech and the protection of privacy and should be free of political influence.

I recommend that the members of the Board should be appointed by the same appointment panel that appoints the Chair, together with the Chair (once appointed), and should:

(a) be appointed by a fair and open process;

(b) comprise a majority of people who are independent of the press;

(c) include a sufficient number of people with experience of the industry who may include former editors and senior or academic journalists;

(d) not include any serving editor; and

(e) not include any serving member of the House of Commons or any member of the Government.

Membership

4.11 Ideally the body would attract membership from all news and periodical publishers, including news publishers online. It is important for the credibility of the system, as well as for the promotion of high standards of journalism and the protection of individual rights, that the body should have the widest possible membership among news providers. Clearly this will be unlikely to include broadcasters who are already covered by the Broadcasting Code. It has been accepted that, although I am very anxious that it remain voluntary, it must involve all the major players in the industry, that is to say, all national newspaper publishers and their online activities, and as many regional and local newspaper publishers, and magazine publishers, as possible. This is not meant to be prescriptive at the very small end of the market: I would not necessarily expect very small publishers to join the body, though it should be open to them to do so on appropriate terms. Having said that, however, I have no doubt that there would be advantages in doing so. Ideally it would also include those who provide news and comment online to UK audiences.[47]

4.12 I recognise that most blogs have very different processes, audiences and business models to most newspapers, and that consequently it may be difficult to establish one set of requirements, for example in respect of internal governance, annual reporting or membership fees, that is appropriate for all different types of publisher. It is important, however, that all types of publishers should be able to join such a body, and to do so on terms that are not manifestly inappropriate for their business model.

4.13 **I therefore recommend that membership of the body should be open to all publishers on fair, reasonable and non discriminatory terms, including making membership potentially available on different terms for different types of publisher.**

Funding

4.14 The industry, through Lord Black, has made a principled point that the industry should fund self-regulation without requiring input from the public purse. Certainly, I agree that any industry established independent regulatory body must be funded by its members. There are, however, some important points to be made about funding. The body will only be able to do what it is funded to do. If it is to be genuinely independent in operational and strategic terms, it must have both some certainty and some influence over the level of its funding across a reasonable period. Practice in the industry has been for an industry body (PressBoF) to set, and levy, the membership fees for self-regulation. In my opinion there is no need for

[47] This is equally apparent from an analysis of the evidence quoted at 3.1-3.13 above

such a body to exist at all: it would be perfectly possible for the regulator to set its own fees and collect them directly from its members, taking account of the financial position of the industry. Equally, however, there is not necessarily any problem of principle with an industry body acting as a coordinator.

4.15 However the fees are set and collected, the Board should establish the budget that it requires in order to carry out its functions effectively, and fees should be levied accordingly. As I have identified earlier, two issues arise in relation to independence of funding. One is the absolute level of funding, and the other is security of funding over a reasonable planning period. Both are important if the regulator is not to be at risk of being effectively held to ransom by its funding members.

4.16 I recognise that it is not appropriate that the regulator should have a blank cheque, anymore than that the industry should have a strangle-hold on the regulator's budget. In practice, if the regulator is too expensive, publishers will not join.

I recommend that funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry (which are not as great for a number of the larger publishers as they are for the smaller, regional press). There should be an indicative budget that the Board certifies is adequate for the purpose. Funding settlements should cover a four or five year period and should be negotiated well in advance.

4.17 I recognise that the start-up costs of such a body may be significant and those putting together such a proposal may need to look for sources of funding to help to cover some of those costs. In this context I do not believe it to be unreasonable for some public funding to be made available to facilitate the establishment of a satisfactory, genuinely independent, press regulatory body.

Standards code

4.18 The new regulatory regime must have a standards code. The current Editors' Code has been widely praised by those in the industry. It has been developed by the industry over the last two decades and has adapted to take account of new concerns and issues that have arisen. I have made no attempt during the course of this Inquiry to conduct a full scale evaluation of the Code of Practice. My role is to make recommendations for an effective and independent structure for setting and enforcing standards, not to set those standards. That is properly a role for the independent regulatory body, in consultation with the industry and with the wider public. Where comments on, or criticisms of, the Code have been made in evidence I have reflected them in this report, but that should not be read as an analysis of the Code.

4.19 However, there are a few general points I would like to make about the contents of the Code. First, if the Code is to provide an ethical framework for editors and journalists to work within, then it is important that it should set the ethical and legal context within which it applies, and seek to provide some positive depiction of ethical journalism. Second, it is important that the Code should be clear and practical. Clauses that are either impossible to comply with (as the Inquiry has been told is the case with clause 1(iii) relating to the separation of opinion and fact) or that are not entirely clear as to their intention and effect, will serve only to bring the Code itself into disrepute and disuse.

4.20 Both of these points (along with some of the academic comment that was offered to the Inquiry) suggest that the current Code would benefit from a thorough review, with the aim of developing a clearer statement of the standards expected of editors and journalists. Thus, if, for example, the present formulation relating to the separation of opinion and fact does not work, a reconsideration of the wrong being targeted might lead to that concern being addressed in a different way. In structural terms, whilst it is of course essential that editors should take pride in their Code, and that it should be thoroughly grounded in real world current experience of the industry, it cannot be right that the standards to which the industry are to be held are set without independent oversight.

4.21 In order for the new regulatory regime to have the independence required to secure public trust and confidence, it is essential that it should be the regulator who approves a code of standards to which members must adhere. The Board could well be advised by a Code Committee including serving editors and journalists, but with independent members as well: indeed, I can see no reason why the Code Committee in the amended form as proposed by Lord Black should not be constituted as a formal advisory body to the Board.

I recommend that the standards code must ultimately be the responsibility of, and adopted by, the Board advised by a Code Committee which may comprise both independent members of the Board and serving editors.

4.22 As a further step to secure public confidence, it appears to me that it would be valuable if the Board was to satisfy itself that the proposed Code had been subjected to public consultation, albeit on the basis that the Code Committee would then analyse the result of any consultation and provide the Board with the benefit of its experience on issues that might have arisen. Thus the Code would command the confidence of both the public and the industry.

4.23 As I have said above, I have no particular desire to comment on the actual content of the Code. It is both important and appropriate, however, that I make some recommendations about the scope and coverage of the Code. The Code will be the document that articulates the nature of the boundaries between journalism, its subjects and its readers. As such it is essential that it fully reflects the interests of all three.

I therefore recommend that the Code must take into account the importance of freedom of speech, the interests of the public (including the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled) and the rights of individuals. Specifically, it must cover standards providing for:

(a) conduct, especially in relation to the treatment of other people in the process of obtaining material;

(b) appropriate respect for privacy where there is no sufficient public interest justification for breach; and

(c) accuracy, and the need to avoid misrepresentation.

4.24 The Code must set out a clear picture of how good journalism serves the public interest and the implications that has for journalistic behaviour. The Inquiry has heard that different editors have different views on what constitutes the public interest, and that may well be the case. The Code will have to take a sufficiently broad approach to encompass the different views and different perspectives of different types of journalism. However, the regulator, when applying the Code, will have to adopt a consistent interpretation of the public interest.

If an editor can create his own definition of the public interest without any constraint then the standards will be meaningless. The regulator, alongside the Code, must provide guidance on the interpretation of the public interest that justifies what otherwise would constitute a breach of the Code and must do so in the context of the different provisions of the Code so that the greater the public interest, the easier it will be to justify what might otherwise be considered as contrary to standards of propriety. That guidance should be available for editors and journalists to use when making day-to-day decisions, and should also be the basis of decisions taken on complaints about breach of the Code.

Organisational requirements

4.25 The concerns about press standards that the Inquiry has heard about give rise to equivalent concerns about governance, across some parts of the press, in relation to internal procedures for dealing with complaints and ensuring legal and standards compliance. An effective new regulatory regime should address these internal governance issues. It is important that the companies should take responsibility for their own compliance with the standards that they sign up to. I do not expect the regulator necessarily to define the governance processes that member companies should adopt, though it may choose to set principles. However:

I do recommend that the Board should require of those who subscribe, appropriate internal governance processes, transparency on what governance processes they have in place, and notice, of any failures in compliance, together with details of steps taken to deal with failures in compliance.

4.26 Publishers should have adequate (and timely) processes in place for dealing with complaints from readers and members of the public about breach of standards. It is absurd that complainants should be encouraged to take their complaints to a regulatory body instead of the company concerned seeking, in the first instance, to deal with the complaint themselves. Taking a complaint to the regulator should be the last step, not the first.

I recommend that the Board should require all those who subscribe to have an adequate and speedy complaint handling mechanism; it should encourage those who wish to complain to do so through that mechanism and should not receive complaints directly unless or until the internal complaints system has been engaged without the complaint being resolved in an appropriate time.

4.27 It is already generally accepted that the editor of a newspaper is ultimately responsible for all that happens within it. That must be true, and it must be accepted and acted on at a practical level. Editors must, as a matter of course, accept personal responsibility, not only for every word printed in their paper but also for the methods by which information is gathered, the judgments made about intrusion into private matters and the culture that operates in their newsrooms.

4.28 I note that the proposals put forward by Lord Black cover very similar ground in relation to internal governance and accountability. The proposals he makes in respect of the requirement for an effective in-house complaint system, an annual compliance return to the regulator and having a nominated senior individual with responsibility for compliance, are entirely consistent with my recommendations here. As for the complications of compliance for small newspapers, there is no reason why this responsibility should not either be officially delegated to someone with other duties (provided that, in this context, they are required demonstrably to act independently of management) or, alternatively, a group of papers could combine to make a single appointment: I am not seeking to be dogmatic as to how the aim is achieved.

Powers

Complaints

4.29 In order to be effective the regulatory body must have appropriate powers. There are two different aspects to the powers that the body should have: first, it needs to have the right powers to deal appropriately with individual complaints about breach of the code; and second, it needs to have the right powers to deal with serious or systemic standards failure.

4.30 Looking first at dealing with complaints:

I recommend that the Board should have the power to hear and decide on complaints about breach of the standards code by those who subscribe. The Board should have the power (but not necessarily in all cases, depending on the circumstances, the duty) to hear complaints whoever they come from, whether personally and directly affected by the alleged breach, or a representative group affected by the alleged breach, or a third party seeking to ensure accuracy of published information. In the case of third party complaints the views of the party most closely involved should be taken into account.

The Board will need to have the discretion not to look into complaints if they feel that the complaint is without justification, is an attempt to argue a point of opinion rather than a code breach or is simply an attempt to lobby, but they should, as a matter of principle, have the power to take up any complaint that is brought to them.

4.31 **I recommend that decisions on complaints should be the ultimate responsibility of the Board, advised by complaints handling officials to whom appropriate delegations may be made.**

It is not for me to make specific organisational recommendations about how the body should be structured or the mechanism whereby disputes might be capable of resolution. There is, however, no reason why the Board should not establish a small complaints committee to deal with complaints in the first instance.

4.32 Having said that, it is necessary to add that it is absolutely clear to me that it is unacceptable to have serving editors playing any role in determining the outcome of individual complaints.

I recommend that serving editors should not be members of any Committee advising the Board on complaints and any such Committee should have a composition broadly reflecting that of the main Board, with a majority of people who are independent of the press.

Whatever arrangements are put in place for the practical handling of complaints, ultimately decisions must be a matter for the Board.

4.33 **I recommend that it should continue to be the case that complainants are able to bring complaints free of charge.**

This is one of the best features of the existing PCC system, which is carried over to Lord Black's proposal for the future.

Standards

4.34 Turning now to serious and systemic concerns, it is essential that the body should have the power to act as a regulator.

> **Consequently, I recommend that the Board, being an independent self-regulatory body should have authority to examine issues on its own initiative and have sufficient powers to carry out investigations both into suspected serious or systemic breaches of the code and failures to comply with directions of the Board. Those who subscribe must be required to cooperate with any such investigation.**

Again, it is unnecessary for me to make detailed recommendations on structures, but those carrying out investigations must have sufficient relevant experience and expertise and be demonstrably independent of the press. Lord Black's proposal meets many of the requirements set down here, but I have already made clear my concerns that this aspect of Lord Black's proposal is so weighed down with process that it is difficult to see how the investigative powers could ever be used successfully. The new regulatory body must be able to undertake investigations when and where it thinks appropriate, and to rely on the cooperation of members. The investigation process must be simple and credible and, while I recognise the need for a level of reconsideration (whether by appeal or otherwise), this should be only at significant stages in order to ensure that the process can be operated effectively: ultimately, any decision is ultimately amenable to judicial review.

4.35 The new regulatory body should, as the PCC currently does, act on behalf of individuals to ask the press to stay away when requested to do so, and may choose to provide an advisory service to editors in relation to consideration of the public interest in taking particular actions.

Remedies and sanctions

4.36 In the same way as with powers, this section breaks down in to two parts: the first relates to the remedies that the regulator can award to individuals in relation to breaches of standards that have affected them, and the second relates to the sanctions that the regulator should be able to impose in relation to breaches of standards.

> **I recommend that the Board should have both the power and a duty to ensure that all breaches of the standards code that it considers are recorded as such and that proper data is kept that records the extent to which complaints have been made and their outcome; this information should be made available to the public in a way that allows understanding of the compliance record of each title.**

4.37 In the first case of complaints:

> **I recommend that the Board should have the power to direct appropriate remedial action for breach of standards and the publication of corrections and apologies. Although remedies are essentially about correcting the record for individuals, the power to require a correction and an apology must apply equally in relation to individual standards breaches (which the Board has accepted) and to groups of people (or matters of fact) where there is no single identifiable individual who has been affected.**

It should, of course, be the subject of discussion between the complainant and the title but, in the end:

I recommend that the power to direct the nature, extent and placement of apologies should lie with the Board.

4.38 Turning to the second case:

I recommend that the Board should have the power to impose appropriate and proportionate sanctions (including financial sanctions up to 1% of turnover, with a maximum of £1million),[48] on any subscriber found to be responsible for serious or systemic breaches of the standards code or governance requirements of the body. The sanctions that should be available should include power to require publication of corrections, if the breaches relate to accuracy, or apologies if the breaches relate to other provisions of the code. Financial sanctions should be appropriate and proportionate.

4.39 It is important that the existence and use of financial sanctions should be transparent, in order to encourage effective compliance with the system. It is equally important to consider what would happen to any financial penalties levied. In a statutory regulatory system such penalties would be paid into the consolidated fund. This is obviously inappropriate in the case of a self-regulatory body. However, if the body were to be able to draw on fines to meet its ongoing costs there would be an inappropriate incentive on the body to levy fines. The solution proposed by Lord Black is that a ring-fenced enforcement fund should be established, with fines being used only to finance investigations into systemic or significant breaches. This approach seems to me to be an acceptable way of dealing with the issue.

4.40 For the avoidance of doubt:

I recommend that the Board should not have the power to prevent publication of any material, by anyone, at any time although (in its discretion) should be able to offer a service of advice to editors of subscribing publications relating to code compliance which editors, in their discretion, can deploy in civil proceedings arising out of publication.

In that way, there is potentially the opportunity for the regulatory body, should the need arise, to give reasoned opinions on issues brought to them by editors, or by individuals concerned about potential publication of a matter, that might provide explanation and context and thereby assist the court in any subsequent consideration of the matter.

4.41 Any material that generates a greater practical understanding of the approach to decisions made by editors and the constraints under which they are made is likely to help and I have little doubt that, if that context is provided by an independent regulator, it will carry real weight. In that way, it could help to shape the way that the courts apply the law in these cases. Given the often voiced concerns about the willingness of courts to grant injunctive relief, supportive context in this area might help both claimants and publishers better to understand context and be better able to reach a fair and balanced solution to the issue of injunctive relief then being argued. Independent focus on the balance between Articles 8 and 10 can only assist the thinking of all.

[48] These are the amounts suggested by Lord Black in his proposal, p12, paras 2.1-2,2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Lord-Black-of-Brentwood-Annex-C1.pdf. There is some disagreement in the industry about whether these limits are equitable and reasonable: in setting up the regulator, that would be an issue that would have to be addressed

4.42 It is essential for the public confidence in the system that the Board should regularly publish information on the performance of the regulatory body and on the compliance records of its subscribers.

I therefore recommend that the Board should publish an Annual Report identifying:

(a) the body's subscribers, identifying any significant changes in subscriber numbers;

(b) the number of complaints it has handled and the outcomes reached, both in aggregate for the all subscribers and individually in relation to each subscriber;

(c) a summary of any investigations carried out an the result of them;

(d) a report on the adequacy and effectiveness of compliance processes and procedures adopted by subscribers; and

(e) information about the extent to which the arbitration service had been used.

Arbitration service

4.43 The high cost and real complexity of civil law and procedure, as it relates to media issues, has been a theme running through this Inquiry. Both complainants and publishers have complained of how slow and expensive it is to take an issue to court. However, there are a substantial number of disputes every year between individuals and publishers that are about the civil rights of the complainants. Under the current system some of these the subject of legal action, though very few see their way through to a judgment of the court. Some manifest as complaints to the PCC but the complainants are often too unsure of their rights or do not commence proceedings because they are unable to afford (or are too concerned about the potential consequences of) litigation.

4.44 The balance of power between the publishers and complainants in these cases has shifted over time. At one time publishers could rest secure in the knowledge that only the very rich and very determined would be able to make a challenge in relation to defamation or privacy. Then the introduction of Conditional Fee Agreements (CFAs) and after the event insurance changed the balance and ordinary people were able to make claims. Some high profile claims were made, not least with regard to phone hacking, and many complainants were successful in their actions. But the balance is now moving back, with the new changes to the CFA regime, meaning that individuals will no longer be able to take action without fear of potentially impossibly damaging costs: this problem has been examined in detail and is an area that is very likely to come under further scrutiny.[49]

4.45 It is self evident that this situation is far from ideal. What is needed is a quick, fair and inexpensive system for resolving these disputes. Of course, no one can be forced to give up their right to go to court in pursuit, or for the protection, of their rights. However, that does not argue against the need for some arbitral system to be available.

4.46 **I recommend that the Board should provide an arbitral process in relation to civil legal claims against subscribers, drawing on independent legal experts of high reputation and ability on a cost-only basis to the subscribing member: it should not be difficult to provide such expertise, not only from those who have retired from the Bench but also from the most senior ranks of the legal profession. The process should be fair, quick and inexpensive, inquisitorial and free for complainants to use (save for a power to make an adverse order for the costs of the arbitrator if proceedings are frivolous or**

[49] Part J Chapter 3

vexatious). The arbitrator must have the power to hold hearings where necessary but, equally, to dispense with them where it is not necessary. The process must have a system to allow frivolous or vexatious claims to be struck out at an early stage.

4.47 As acknowledged above, neither publishers nor complainants can be forced to use such a system. However, the regulator should offer publishers the right to use the system and, equally, all complainants should be encouraged to use it as well. I consider below how use of the provision of an arbitration service could be incentivised by way of costs advantages both for potential claimants and for publishers along with the wider benefits that it could bring. Mechanisms for appeal to the courts (by way of review rather than rehearing) would have to be acknowledged.

4.48 It is worth repeating that the ideal outcome is a satisfactory independent regulatory body, established by the industry, that is able to secure the voluntary support and membership of the entire industry and thus able to command the support of the public. I have set out here the minimum requirements for a 'satisfactory independent regulatory body'. I recognise that, whilst this has much in common with the model proposed by the industry, there are substantive differences between what I am recommending and the model put forward by Lord Black. The main differences are in the extent of the independence of the body from the industry, first in the appointments process, second in the role of serving editors and third in the allocation of funding. In terms of organisational structure and the contractual framework, there is no reason why Lord Black's model should not be capable of adaptation to meet the requirements set down here if the industry were able to support such a move, and if the other, more substantive, changes around independence and effectiveness were made.

5. Encouraging membership

5.1 If parts of the industry were to come together to set up a body meeting the requirements set out above, the question must remain as to whether a sufficient proportion of the industry would join the body to make it an effective industry regulator. A great number of possible incentives for membership of an industry regulatory body have been put forward to the Inquiry. They have been looked at earlier.[50] Naturally I hope that the desire to be able to use a kitemark signifying compliance with high standards would be an important incentive to membership, but realistically I recognise that those most eager to use a standards kitemark are likely to be those already meeting high standards. The power of a kitemark to draw in those less concerned by standards is unclear. I have already made clear my view of some of the other potential incentives to membership.[51] In practice, it seems to me that there are three areas where it might be possible to craft a relatively significant benefit for publishers who choose to sign up to a satisfactory independent regulatory body.

5.2 The first relates to data protection. I have already set out a number of recommendations for changes that I think should be made to the data protection regime to enhance the ability of the Information Commissioner's Office (ICO) to perform its functions in relation to the press.[52] These include making it simpler for the ICO to use its existing powers to investigate cases of possible breaches of the legal requirements of the data protection regime, as well as taking a more focused approach to the promotion of standards of good practice in relation to handling of personal data within press organisations.

[50] Part K, Chapter 4
[51] Part K, Chapter 4
[52] Part H, Chapter 6

I recommend that in any reconsideration of the powers of the Information Commissioner (or replacement body), power is given to that body to determine that membership of a satisfactory regulatory body, which required appropriate governance and transparency standards from its members in relation to compliance with data protection legislation and good practice, should be taken into account when considering whether it is necessary or proportionate to take any steps in relation to a subscriber to that body.

5.3 This is not to suggest that a different level of data protection regulation would apply to a publisher who was a member of a regulatory body as opposed to one who was not. On the contrary, the law would, naturally, apply in exactly the same way to both. The difference would be in the approach that it would be appropriate for the Information Commissioner to take to audit when, on the one hand, he sees an operation that has signed up to high standards of privacy and data protection and which operates effective and transparent governance, whereas on the other hand he has no information about that company's approach to data protection other than what he can find out by asking.

5.4 Second, the area where a substantive benefit might be derived from membership of a regulatory body is costs in relation to the resolution of disputes. I have said already that I consider that it is essential that a regulatory body should offer and fair, quick and inexpensive arbitral system to deal with media disputes. Such a system should be of benefit to all who use it, cutting out a large amount of time, effort and expenditure currently engaged in litigation. It is not, of course, possible to deprive anyone, claimant or defendant, of their right to have their case heard by a court. But it is possible for the court to take account of whether either party has taken all possible steps to resolve the issue in a less expensive way.

5.5 **I recommend that it should be open to any subscriber to a recognised regulatory body to rely on the fact of their membership and on the opportunity it provides for the claimant to use a fair, fast and inexpensive arbitration service. It could request the court to encourage the use of that system of arbitration and, equally, to have regard to the availability of the arbitration system when considering claims for costs incurred by a claimant who could have used the arbitration service. On the issue of costs, it should equally be open to a claimant to rely on failure by a newspaper to subscribe to the regulator thereby depriving him or her of access to a fair, fast and inexpensive arbitration service. Where that is the case, in the exercise of its discretion, the court could take the view that, even where the defendant is successful, absent unreasonable or vexatious conduct on the part of the claimant, it would be inappropriate for the claimant to be expected to pay the costs incurred in defending the action.**

5.6 At one extreme, when the court concluded that it was entirely reasonable for a claimant (although unsuccessful) to bring the claim, it might be possible for the court to go further and order that the claimant's costs should be met by the defendant: the justification would be that although the claimant has not been successful, by not being a member of an industry regulator, the defendant had forced the claimant to use the expensive court system whereas an effective arbitral mechanism could have resolved the issue without the expenditure on costs at all.[53]

5.7 This does not need to work only one way and should not. Where a publisher is a member of an industry body, and therefore does offer access to an arbitration system, the claimant can obviously nonetheless choose to take the publisher to court instead: Article 6 demands

[53] This approach to costs is discussed further in connection with the civil law: see Part J Chapter 3

nothing less. In this case, however, it would be open to the court to take the view that the claimant had deliberately chosen to take the high cost route of litigation and could refuse to award costs if the claimant were successful. Whether it could go further and permit the judge to exercise a discretion to require a claimant to meet the costs of the defendant is, perhaps, another matter: I do not express a view about it.

5.8 This approach could have the effect of providing a strong incentive to publishers to join an independent regulatory body. I acknowledge that this may be largely an economic calculation, and that that calculation will be different for each title, depending on the extent to which it expects to face litigation and the costs it might incur in the course of that litigation. There are no publicly available figures that would enable me to say with confidence what the potential benefit to the industry is here, not least because that benefit would also depend on the cost of the regulator, the cost of the arbitral regime and any impact the existence of that regime might have on the number of cases being brought. I do, however, expect this to provide a genuine economic benefit to membership of a body.

5.9 Finally, I believe that it would be appropriate for it to be open to a court to award aggravated or exemplary damages against an unsuccessful defendant who has not only failed to demonstrate a proactive commitment to high journalistic standards but also deprived a complainant of access to fast, fair and inexpensive arbitral mechanism by refusing to join an independent regulatory body: this would require a change to the law which I have addressed earlier.[54]

6. Giving effect to the incentives

6.1 I will say again, because it cannot be said too often, that the ideal outcome from my perspective is a satisfactory self organised but independent regulatory body, established by the industry, that is able to secure the voluntary support and membership of the entire industry and thus able to command the support of the public. In order to achieve that, it is necessary both to have a satisfactory independent regulatory body established by the industry, and that it should secure support from the entire industry. The incentives described in Section 4 above aim to build that support. However, as described above they suffer from a significant flaw. That flaw is the word 'satisfactory' which I have used so far to describe an independent regulatory system that meets the requirements set out above.

6.2 The incentives described above rely on action being taken by the courts, and by the ICO, on the basis of a company's membership of a body. This can only be possible if the courts and the ICO have a way of determining whether they should consider that a body that the company is a member of is 'satisfactory' – in other words, how can the courts tell the difference between a properly constituted independent regulatory body meeting all the requirements set down in Section 4 and a body that fails to meet some or all of those requirements but nonetheless holds itself out as doing so?

6.3 The only solution to this is a recognition process of some kind for the independent regulatory body. This brings me to 'statutory underpinning'. There has been a lot of discussion, both within and outside the Inquiry, of statutory underpinning, its merits and its dangers. Close to home, there is an example of statutory underpinning in the Irish Press Council, which has been accepted without demur by several UK newspaper publishers, notably including Northern and Shell. In that case, there is a statute which sets out the requirements that must be met for a Press Council to be recognised by the Parliament, with members of the recognised Press

[54] Part I Chapter 3

Council then being able to use that membership as a demonstration that they achieve certain standards when defending themselves in defamation litigation. Something similar (although not at all identical) is required in this country.

6.4 Suffice to say, in order to meet the public concern that the organisation by the press of its regulation is by a body which is independent of the press, independent of Parliament and independent of the Government, that fulfils the legitimate requirements of such a body and can provide, by way of benefit to its subscribers, recognition of involvement in the maintenance of high standards of journalism:

I recommend that the law must identify those legitimate requirements and provide a mechanism to recognise and certify that a new body meets them.

6.5 **I recommend that the responsibility for recognition and certification of a regulator shall rest with a recognition body. In its capacity as the recognition body, it will not be involved in regulation of any subscriber.**

Once recognised, the regulatory body would have no further interaction with the state, or with the body that recognised it, other than to ensure that it continues to meet the requirements for recognition.

In practice, I recommend that the requirements for recognition should be those set out in Section 4 above.

If that were the case then bodies (like the ICO) would be able to be sure that any member of a recognised regulatory body would be required to meet basic governance requirements and would be following a Code that covered respect for privacy. The courts would be able to be sure that any member of a recognised regulatory body had ascribed to standards that met specified and acceptable criteria and was a member of a quick, fair and inexpensive arbitral scheme that anyone could use when seeking redress from them.

6.6 The majority, though not all, of the national press has made it very clear that they regard statutory underpinning as unnecessary and dangerous. Some have gone further and indicated that they would find it unacceptable. In some cases, these same companies are quite happy to participate in a statutorily recognised system in Ireland. The Inquiry has heard evidence from all three major political parties that statutory underpinning is an option.

6.7 The main argument that has been made against statutory underpinning or recognition is that any legislation touching on press standards provides the thin end of the wedge for political interference in the press. There is a countervailing argument that any such legislation could also be used to provide, for the first time, statutory protection for the freedom of the press from Government interference. I explore this idea further below.

Recognition process

6.8 Recognition requires a recognition process, and body to carry out that process. The legislation setting out the requirements for recognition would also have to set out both the process and who would be responsible for carrying it out. I will start with the recognition body.

The recognition body

6.9 The role of the recognition body is essentially an objective one. Its task would be simply to check that the statutory requirements have been met by the body applying for recognition. Having said that, it is also one that requires a degree of expertise in order to assess that the criteria have been met. The role would consist of:

(a) approving the independence of appointment processes (if the approach above is adopted);

(b) checking whether bodies applying for recognition meet the statutory criteria on application;

(c) periodically reviewing that recognised bodies continue to meet the statutory criteria; and

(d) in specifically defined circumstances, carrying out any ad hoc reviews that a recognised body continues to meet the statutory criteria should the need arise.

6.10 As regards (c) and (d) above:

I recommend that the operation of any certified body should be reviewed by the recognition body after two years and thereafter at three yearly intervals.

The purpose of review is solely to ensure that the requirements for recognition continue to be satisfied. The circumstances in which an ad hoc review might be necessary could perfectly properly be defined restrictively.

6.11 As for who should fulfil this function, two fundamental options exist for the role of recognition body. One is to create a new body to undertake the role, and the second is to give the role to an existing body.

6.12 A new body would have this one role and this one role only. This gives rise to an immediate difficulty. The recognition body has a significant on going role and it is not one that could be done easily by an ad hoc body. Equally it is an intermittent role, at best, and a standing body would have little or nothing to do most of the time. Its decisions will be potentially controversial and open to challenge by judicial review. If, for example, PressBoF was to come forward with its current proposal and seek recognition, the recognition body would have to refuse, because the current proposal as drafted does not meet the requirements set out above, and the implications of refusing an application by a body with the support of the vast majority of the publishing industry are significant. The recognition body would need to be able to demonstrate that its processes were sound, that its approach was objective and that its decision was grounded in evidence and was taken correctly. All this means that in order to do the job properly the body must be capable of running a demonstrably competent, expert and objective process.

6.13 A new body with a single role would by definition be inexperienced, and might be in a weak position, vulnerable to press influence. The intermittent but ongoing nature of the role make it poorly suited to a standalone, specially appointed individual or body. The body carrying out this work must have the power to reach the correct decisions without being overly pressured by the press. This also argues against a sole purpose individual or body which would be very vulnerable to the sorts of antagonistic campaigns that the press are capable of mounting when they perceive themselves to be under threat. One way of dealing with that would be to support an independent individual, or panel, appointed to carry out the recognition task within an established body.

6.14 This leaves the option of giving the role to an existing body or using an existing body to support a new, independent, post. Options that I considered are: Parliament, the courts and Ofcom. Parliament is, in many ways, an obvious option. The Irish Defamation Act adopts this model, with Parliament approving an order for recognition that is made by the Minister. However, one of the fundamental requirements for the regulatory body is independence from the Government. Any Parliamentary process would be likely to be perceived by the industry, and possibly by the public, as Government interference in the independence of the press. Certainly it is not obvious to me that the Government, or Parliament, have any particular qualification for this role that would outweigh the negative connotations of an independent regulatory body having to seek the approval of the Government. Indeed, it is worse than that because there may need to be some measure of negotiation as the industry seeks to resolve the challenges that are involved in creating a body that satisfies the criteria that I have described. The idea of the industry negotiating either with Parliament or the Government does raise what I readily perceive to be significant issues of independence.

6.15 The courts have the requisite strength to undertake the role. However, I repeat the point that I have just made: the nature of the recognition process, which has nothing to do with issues relating to editorial content, is such that what is required is an inquisitorial consideration of whether the criteria have been met, possibly involving discussion with the body about any changes which might be required in order to meet the criteria: there is no satisfactory mechanism by which the courts could fulfil that role.

6.16 Ofcom has the requisite standing and expertise. However, Ofcom's role in content regulation in relation to broadcasting is likely to be seen by some as a very significant objection to them carrying out this recognition role. This is primarily a presentational issue rather than a substantive one. The recognition role requires a judgment to be made only that the proposal satisfies the statutory requirements. For the most part, these will only touch on governance issues. The only exception is that the recognition body would be required to determine whether the standards code met the statutory requirements, but as set out in Section 4 above, these requirements specify only that particular subjects should be covered but do not lay down any particular requirements on how they should be covered.

6.17 I recognise that there is a risk that this process could involve a degree of subjective interpretation of concepts such as taking account of the rights of individuals. However, in reality, I have no doubt that Ofcom would consult and issue guidance on how such concepts should be interpreted. The decision making process would have to be transparent and, as I have indicated, it would be subject to judicial oversight by way of appeal or review.

6.18 Ofcom is a statutory regulator and its Chair is appointed by the Government. However, it is also an independent regulator and its independence is accepted by the broadcasting, telecommunications and postal services industries that it regulates. In both telecommunications and postal services, there is a European requirement for independent regulation, which Ofcom meets. It is worth noting that, although its role in broadcasting content regulation has been much talked of, Ofcom carries out a wide range of regulatory functions, including competition regulation in communications markets. It has experience of the sort of role proposed here in the many co-regulatory systems where Ofcom must approve or recognise the industry established regulator. It is also worth noting that Ofcom has two general duties:

- to further the interests of citizens in communications matters; and
- to further the interests of consumers in communications markets.[55]

[55] s3 Communications Act 2003 http://www.legislation.gov.uk/ukpga/2003/21/section/3

6.19 Furthermore, in carrying out those general duties Ofcom must seek to reduce regulatory burdens, including having regard to whether the objectives of regulation are being met by effective self-regulation. In other words, although Ofcom is a statutory regulator, it has a statutory bias in favour of self-regulation and a statutory focus on the interests of citizens and consumers. A more specific duty to secure and promote freedom of speech and the freedom of the press in relation to the role of recognising an independent press regulatory body could be added should that be considered desirable.

6.20 The final option is that of some independent person or panel, a Recognition Commissioner or Commission, sitting within an existing body with the expertise and size to provide both the technical and legal support that would be needed. Obviously such a person or panel would need to be appointed in a way sufficiently independent from the industry and from political influence. Three questions arise: what are the necessary characteristics for a Recognition Commissioner; who should appoint them; and what body would provide the administration and expertise to support them.

6.21 I am going to approach the last of these questions first, because the answer has significant implications for the first. In the light of the assessment above, I am inclined to the view that the only body capable of providing an independent Recognition Commissioner with the necessary expertise in this matter is Ofcom. This would mean that Ofcom would provide the Commissioner with the necessary technical, legal and administrative expertise to undertake the necessary process of recognition, but that the decision taken would be that of the Commissioner himself (or the Commission), without any influence or input from the Ofcom Board.

6.22 Thus the Commissioner would need to be an independent person, with experience of being responsible for weighing evidence and taking significant decisions, but need not have specific experience of the press or of regulation. He or she would have to be appointed by another process independent of the press, independent of the Government and independent of the legislature. Again, it could involve those who hold equivalent responsibilities in other areas such as the Commissioner for Public Appointments and the Chairman of the Judicial Appointments Commission.

6.23 There is no single obvious best option for a recognition body. Ofcom is by far the best qualified body for the role, and I do think it is important that the expertise that Ofcom holds is brought to bear on the recognition process. In all the circumstances:

I recommend that the role of recognition body, that is to say, to recognise and certify that any particular body satisfies (and, on review, continues to satisfy) the requirements set out in law should fall on Ofcom. A less attractive alternative (on the basis that any individual will not have the requisite authority or experience and will only be occasionally be required to fulfil these functions) is for the appointment of an independent Recognition Commissioner supported by officials at Ofcom.[56]

In either case, the decisions could be subject to appeal and would undeniably be liable to judicial review, so that ultimately responsibility would sit with the courts.

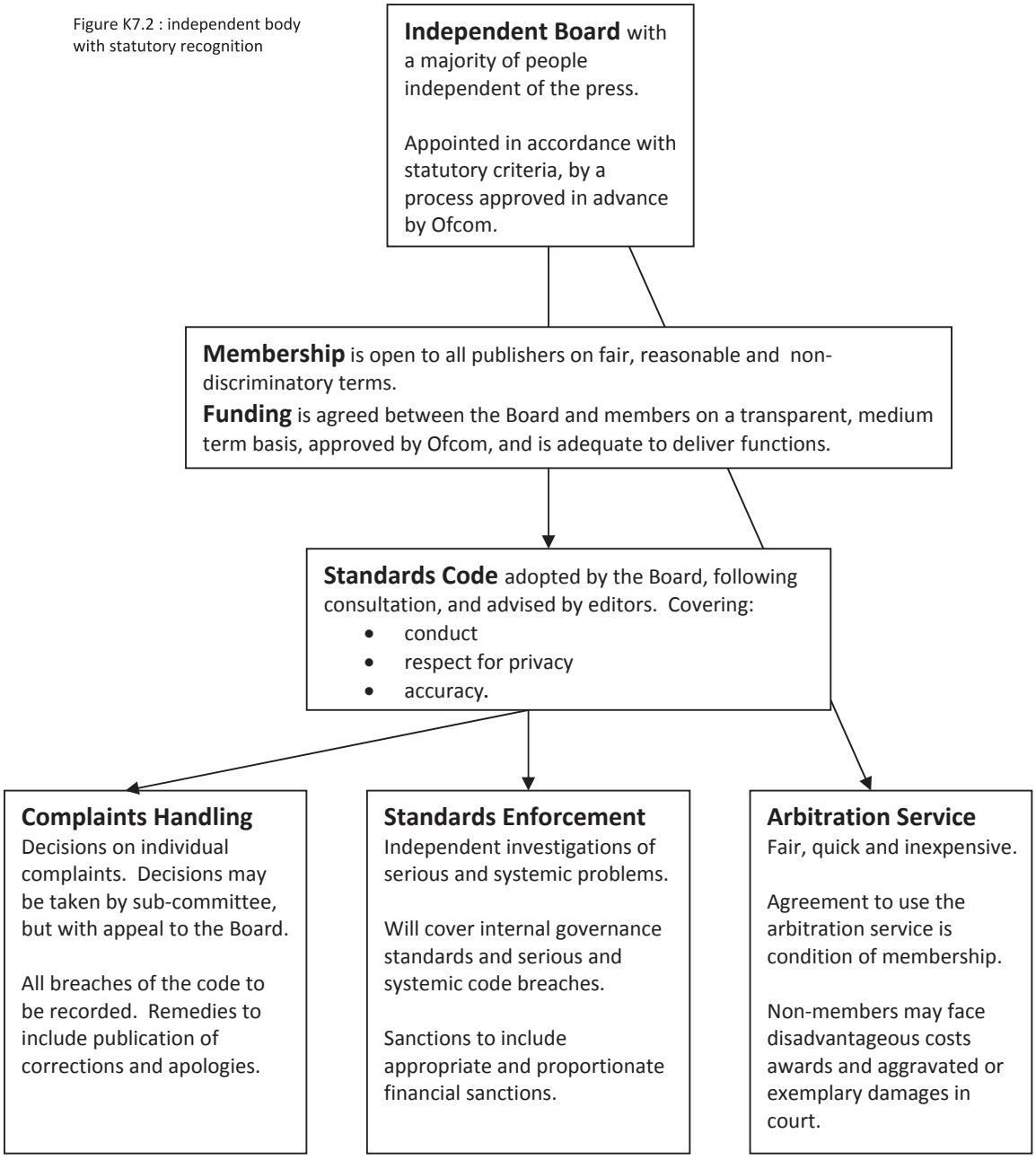
[56] Shami Chakrabarti has advised that she prefers this role to be fulfilled by the court but I do not see how the court, of its own motion, could adopt an adjudicative role in relation to certification or subsequent review. Somebody would have to be prepared to challenge either the extent to which the new body fulfilled the requirements of the legislation or the proposition that it should continue to do so. If that was Ofcom, and Ofcom raised no objection, there would be nothing upon which the court could adjudicate. Thus, the decision would become whether Ofcom was satisfied. A very similar role would be available to the court if there was an appeal from an adverse decision of Ofcom (which could allow a merits challenge rather than be limited to the more restrictive justification for intervention that is provided by judicial review

The recognition process

6.24 The intention is that the press and periodical industry should come together, as they have done under Lord Black, and bring forward a proposed body that would meet the requirements for recognition. There are, no doubt, details about the process that would need to be worked out. What I envisage is that the various industry representatives would decide to set up a body capable of recognition. They might want to discuss how they are approaching the task with Ofcom and thus ensure that there is a mutual understanding about an acceptable way forward. Such a discussion could include the proposed appointments process before the key appointments are made, in order to ensure that the requirements are met at the right time. Indeed, I would encourage a continuing dialogue between those establishing a body and Ofcom throughout the process, to ensure that the statutory requirements were fully understood, all the while recognising the very limited role that Ofcom would have.

6.25 Once a body was fully established it would seek recognition from Ofcom, providing evidence of its funding agreement, governance structures and code. Ofcom would test each against the statutory requirements and either approve the body or raise any reasons as to why the requirements are not met. The body would then have the option of amending the proposal in a way which would satisfy the statutory requirements, withdrawing its application, or challenging the decision of Ofcom decision not to recognise it. Figure K7.2 shows how the recognition process applies to the illustrative functions of the independent body shown in figure K7.1. Speaking for myself, assuming that the exercise is undertaken in a way that seeks to fulfil that which I have described, I see no difficulty in recognition being comparatively straightforward.

Figure K7.2 : independent body with statutory recognition



6.26 It is necessary to address the question of how many bodies Ofcom could recognise. My starting point is that only one regulatory body should be recognised at any one time. There are good reasons for this. A single regulatory body would mean a common set of standards across the industry, ensuring that individuals knew what was expected of the press, where to go to if they had a problem and would not need to deal with multiple regulatory bodies if they had a problem that crossed many titles. A single regulatory body would have oversight of the whole industry (or at least as much of it as had joined the body) and would be able to take a view on standards across the industry, including pan title investigations into systemic issues. There is no risk of inconsistent decisions by different regulators effectively considering the same material. In Ireland, the Minister is only permitted to recognise one Press Council and the Inquiry has not been made aware of that causing any problems, either at the point at which the Press Council was recognised or subsequently.

6.27 However, there are potential difficulties with this approach. The UK press is not particularly homogenous: the evidence given to the Inquiry as to why some publishers currently sit outside the PCC suggests that the whole industry may find it difficult to work together. The evidence provided by editors in relation to the proposals from Lord Black show some differences in approach to regulation: the Guardian, The Independent and the Financial Times have reservations about the approach to regulation taken by PressBoF, the regional press are anxious not to find themselves paying for the sins of the nationals and online providers see themselves having little or nothing in common with the majority of the printed press. In Ireland, the single industry body had been formed before the Government shaped the legislation, and the legislation was shaped to fit the body. There is no equivalent industry body in existence in the UK now, and, assuming that this solution found favour with the Government, there is no guarantee that one would emerge in the few months between publication of the Report and the introduction of legislation.

6.28 It is, therefore, conceivable that Ofcom might face multiple bids for the role of regulator. The legislation would have to have some way of dealing with that eventuality, even if it were considered to be relatively remote. The alternatives are to provide Ofcom with some means of selecting a single regulatory body to recognise, or giving it the power to recognise more than one regulatory body. The obvious, and fair, approach to choosing between competing bids would be for the recognition body to set a date by which bids should be received and hold some form of 'beauty contest' to see which of the bids was preferable. An alternative solution would be to add a new requirement that the regulatory body had to have membership of over 50% of the relevant industry. Another approach would simply be for the recognition body to recognise the first compliant body put before it.

6.29 All of these options have significant disadvantages. A 'beauty parade' would lead to Ofcom having to identify criteria on which it would select and apply subjective judgments over and above the application of the statutory requirements approved by Parliament. This would move the role of recognition along the line from a mostly technical one to a wholly subjective one. This would be likely to give rise to significant concerns about the nature of the recognition process and the degree of interference from Ofcom as it made its choice between potential regulatory bodies.

6.30 An approach which required a minimum level of industry membership would be objective. However, too high a level might be too difficult for any industry grouping to achieve. Any proportion over 50% would make it possible for a few of the major publishers between them to ensure that the only proposal going forward was one led by them, irrespective of whether they actually had the support of the majority of the rest of the industry. It is questionable as to whether it would be helpful to put this much power in the hands of any of the large players.

6.31 Requiring the recognition body to recognise the first compliant bid would be an objective test. However, it is undoubtedly true that an individual organisation could run a spoiler bid, designed solely according to their own lights, more quickly than the majority of the industry would be able to reach agreement on a genuine agreed independent regulatory body. Such an event may be unlikely, but it is a contingency that must be guarded against.

6.32 There are also advantages to allowing more than one regulatory body. Different parts of the industry might want to apply different standards. As long as the standards offered meet the requirements set out above, there is no obvious reason to require the whole of the industry to coalesce around the standards acceptable to those who wish to do the least. If parts of the industry wanted to aspire to higher standards it is difficult to see why they should not be encouraged to do that.

6.33 The problems associated with multiple bodies are fragmentation of standards and the response. This is not necessarily a substantive concern. Anyone complaining to multiple titles will be complaining about different articles, and consequently the complaints will themselves be different and even a single regulatory body would have to deal with them differently. If the standards are voluntary it is difficult to see any principled reason why, as long as they meet the statutory criteria, it should be a matter of concern if they are different. There is no obvious reason why someone should not be entitled, for example, to pursue an apology from the Guardian when it purports to meet higher standards, which it would not expect to receive from a local newspaper or blog in relation to the same story.

6.34 The other concern identified is about the difficulty of conducting systemic investigations across the industry if there is more than one regulator. This undoubtedly could be an issue and it is possible to imagine issues that would warrant a pan industry investigation. One possible solution to this problem would be to make it a criterion for recognition that the body would agree procedures and cooperate with any other recognised regulatory body in relation to complaints or systemic investigations that cover titles across regulator boundaries: they might even agree a common appeals mechanism to ensure consistency of approach.

6.35 A concern raised about having a single regulator is that some organisations might find that that single recognised regulator simply was not set up to accommodate their particular business: the standards might be onerous but irrelevant, the fees might be too high, the governance requirements might be too burdensome and bureaucratic for a small publisher. This would be important if meaningful incentives were in place to encourage membership, as the organisations for which the single regulatory body was not appropriate would be forced to choose between forgoing the benefits of membership or submitting themselves to inappropriate regulation. Neither can be desirable. If multiple bodies were permitted there would be at least the theoretical possibility that they could collectively set up their own compliant body more geared towards their business model. Alternatively, or as well, the criteria for recognition could be strengthened to explicitly require the body to offer variable membership categories, with appropriate governance requirements and fee structures.

6.36 On the other side of the coin is the cost: I am not in a position to challenge Lord Black's view as to the cost of the proposals by PressBoF but I am sure that multiple regulators would duplicate cost and thus increase it for an industry that, at least in some of its manifestations, is suffering financial hardship. In the circumstances, I have no doubt that it would be ideal if the press came together to form an independent regulatory body, that would meet all of the requirements that I have set down here, and that would garner the support of all key publishers.

6.37 In the circumstances, I would strongly urge that it is in the best interests of the industry and the public that a single regulatory body should establish a single set of standards on which the public can rely. Failure to do so would be a sad indictment of the inability of the press to put commercial interest to one side, in order to come together in the public interest to create a system of independent regulation that would protect both freedom of expression and the rights of individuals. However, I do recognise that, should that ideal scenario not arise, it would be difficult to find an appropriate basis on which Ofcom could decide which of any competing proposals should be recognised. For this reason:

I recommend that it should be possible for the recognition body to recognise more than one regulatory body, should more than one seek recognition and meet the criteria, but I must emphasise that this is not an outcome I would advocate, and I would regard it as a failure on the part of the industry should it be necessary for that step to be taken.

Protection of freedom of the press

6.38 It has been argued that any legislation touching on press regulation would be the beginning of the slippery slope; that any Government would find it easier to amend an existing Act than to bring forward new legislation to shackle the press; that Parliament is itching to control the press and that this would be an opportunity to do so. I do not accept any of these arguments. If the history of the last 50 years on press regulation tells us anything, it tells us that Parliament wants nothing less than to pass legislation to regulate the press. There may have been the occasional siren voice expressing a contrary view but, in truth, Parliament has managed to avoid many opportunities to do so, despite real (and repeated) public concern about press behaviour and the consequences of failing to deal with it.

6.39 There is no foundation in the suggestion that it is easier to amend an existing Act than to bring in a new one. Any statute only gives Government, or anyone else, the powers that are stated on the face of the legislation. If a statute simply provides for a recognition process for a press regulatory body then it can only be used for that purpose. Any attempt to introduce further legislation of the press would require a new Act of Parliament which could make new provisions or amend an existing Act, but it would need to be a new Act, and go through exactly the same processes that an Act establishing a recognition process would need to do today.

6.40 Having said that, I recognise the concern expressed by many and, in order to address the slippery slope argument, it would be possible to use a statute setting up a recognition process for a regulatory body to also place an explicit duty on the Government to protect the freedom of the press. I have already referred earlier to an example of just this, drawing heavily from s3 of the Constitutional Reform Act 2005, which would look like this:[57]

> *"GUARANTEE OF MEDIA FREEDOM*
>
> *(1) The Secretary of State for Culture, Media and Sport and other Ministers of the Crown and all with responsibility for matters relating to the media must uphold the freedom of the press and its independence from the executive.*
>
> *(2) The Secretary of State for Culture, Media and Sport must have regard to:*
>
> *(a) the importance of the freedom and integrity of the media;*
>
> *(b) the right of the media and the public to receive and impart information without interference by public authorities;*
>
> *(c) the need to defend the independence of the media.*
>
> *(3) Interference with the activities of the media shall be lawful only insofar as it is for a legitimate purpose and is necessary in a democratic society, having full regard to the importance of media freedom in a democracy;"*

6.41 Without necessarily suggesting that the clause should be worded in exactly this way, as I am sure there would be benefit from further consideration around the precision with which the intention is expressed, this seems to me to be an admirable proposal, which should provide some comfort to those who have any concerns about the risk of Government decisions impacting adversely on the freedom of the media. In the circumstances:

[57] This language is not prescriptive and neither do I intend to be prescriptive about the identity of the Secretary of State given primacy in this area. The draft is taken from a submission to the Inquiry by the Media Regulation Round Table: see http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Regulation-Round-Table.pdf

I recommend that, in passing legislation to identify the legitimate requirements to be met by an independent regulator organised by the press, and to provide for a process of recognition and review of whether those requirements are and continue to be met, the law should also place an explicit duty on the Government to uphold and protect the freedom of the press.

7. Summary of recommendations

7.1 From the outset, I have encouraged the industry to come together to create an independent regulatory regime that satisfies the need to provide public confidence. In my judgment, the proposals so far put forward by the industry do not do that. I have been very specific about where I consider those proposals would need revision in order meet expectations, but essentially they fail in respect of independence and inclusiveness. I regard both of these points as absolutely essential in any new effective regulatory regime.

7.2 I have therefore set out a vision of a voluntary independent self-organised regulatory system that would provide an appropriate degree of independence from the industry, coupled with satisfactory powers to handle complaints, promote and enforce standards, and deal with dispute resolution.[58]

7.3 In order to provide incentives to publishers to join such a voluntary independent regulatory system, I have recommended a series of incentives that will provide benefits to those who sign up to the system.[59] Significantly, these include consequences in relation to the costs of litigation in privacy, defamation and other media cases (even if successful), if, by non-membership of the regulatory system, it has deprived a claimant of a quick, fair, low cost arbitral route. On the basis that the court could also conclude that a publisher that did not subscribe and was found to have infringed the civil law rights of a claimant, it might also be possible to conclude that the breach is evidence of wilful disregard of standards and thereby potentially lead to a claim for exemplary damages. I believe that these proposals should provide a powerful incentive for all publishers to want to be a part of such a self-regulatory system.

7.4 In order to give effect to those incentives I have recommended legislation that underpins the independent self-organised regulatory system and facilitates its recognition in legal processes. This legislative proposal does no more than ensure an appropriate degree of independence and effectiveness on the part of the self-regulatory body if the incentives described are to be made use of. This is not, and cannot be characterised as, regulation of the press.

7.5 A number of newspaper groups are fiercely supportive of the proposal put forward by Lord Black. But others have indicated that they still have problems of principle with what is proposed by Lord Black, as do I. Let me be clear: even if all the national newspaper publishers were to sign up to the contracts proposed by Lord Black, I would still recommend that significant changes would need to be made to that system in order to meet the requirements, particularly in relation to independence, that I set out above.

7.6 Let me further be clear that if an adequately independent regulatory body were to be established by industry and signed up to by all major news publishers, I still recommend the underpinning statute to provide for recognition of that body, a mechanism to ensure

[58] See Part K, Chapter 7
[59] See Part K, Chapter 7

that it maintained the standards expected of it and support for an arbitration system. Such recognition would be important evidence that the system met legitimate public demands for independence, it could provide relevant evidence of systems and standards that would doubtless assist the courts and could also impact both on damages and in relation to costs. It would also be the only way to ensure that participants in the system could access the benefits that I have set out in relation to costs.

7.7 I repeat the refrain that what I want is for the industry to come together to organise their own independent regulatory system. If they cannot agree on a single regulatory system, I have left the door open, however undesirable it might be, to there being more than one such independent regulatory system. I cannot see any legitimate reason why the press should not accept this approach and provide the public with the independent regulation that it deserves.

7.8 As for the challenge that this goes too far, I simply do not accept that these provisions will have a chilling effect on free speech or press freedom. Neither do I accept that politicians will be more willing and able to amend the provisions which I have suggested (as opposed to legislating afresh which is always open to them). I reject the suggestion that it will cause a degeneration of the rights of the press or a descent into state control.

7.9 I have made it clear that I firmly believe it is in the best interest of the public and the industry that an independent self organised regulatory body is set up, and recognised in statute so that its members can benefit from the legal privileges that would go with membership. Given the public appetite for some accountability of the press, I do not think that either the victims or the public would understand if the industry did not grasp this opportunity. Neither would they understand if I were not to consider the consequences of the industry failing to deliver the independent regulation that is required.

7.10 Unfortunately there may be some in the industry who it presently appears would not consider going beyond the present PCC proposals. If that is the case, I have set out in the next Chapter the options that I believe would be open to (and necessary for) the Government to pursue. Suffice to say, bearing in mind my duty to consider the interests of the public, my view is that there would then be no alternative but to provide in legislation for a backstop regulator to apply and enforce a Code.

7.11 It would be a great pity, however, if the intransigence of a few resulted in the imposition of a system which everyone in the industry has said they do not want and which, in all probability, very few others would actually want to see in place. This is not an explicit recommendation that I am making: whether it becomes necessary to take the proposition further, in the public interest, depends on the press.

7.12 Rather, I would much prefer that the focus of all concerned should be on attempting to deliver the effective self regulation that I have set out. In my judgment, this provides the least intrusive method of ensuring some form of adequate independent regulatory oversight of press standards for the future. Possibly for the first time in our history, it provides real incentives for the press to organise and thus deliver genuine effective independent regulation in the public interest.

CHAPTER 8
THE ALTERNATIVES

1. The issue

1.1 I have indicated above that a new regulatory regime needs to cover all main news publishers if it is to be effective,[1] and I have recommended a model for an effective independent self-regulatory system which I very much hope will be taken forward by the industry and Government and which I hope will secure the support of the whole industry.

1.2 However, should that not be the case, and only in those circumstances, there would be a need for some mechanism to ensure that the advantages that the press enjoy in the public interest are matched by responsibilities that are owed to the public. In other words, there should be some way that the press can be held to account on behalf of the public for the way it goes about its business. I have been clear that it is my hope and expectation that this situation will not arise. It can only do so if the press fails to deliver the independent regulation that is required and that the public have a right to demand. If, however, the industry were unwilling, or unable, to come forward with a credible proposal for independent regulation then it would have demonstrated sufficient disregard for the public interest to have established that self-organised regulation simply is not an effective option. This Chapter looks at the issues that would have to be addressed in order to provide such a mechanism and identifies the possible solutions.

1.3 I ought to make it clear that I do not believe that an approach involving direct independent regulation necessarily constitutes a "*freedom of expression Armageddon*" (to use the Rt Hon Kenneth Clarke MP's expression). I repeat that the issue arises only if the press deliberately refuse to set up a regulatory process that is undeniably independent of Government and Parliament but is, equally, independent of the press itself; or, if such a system is set up but does not have the support of the whole industry.

1.4 I set out here a very brief analysis of the issues which I think logically arise in that eventuality. I do so for reasons of completeness, and so that no reader of this Report is unaware of the inescapable context which forms the background to the recommendations that I have made in the previous Chapter. There are no recommendations in this Chapter; it is simply a short overview of the logical alternatives, as I see them, to the implementation of the model I have put forward.

2. The questions

1.5 It is extremely easy to say that everyone must participate in a new regulatory system, and relatively easy to fall back on the idea that, if they refuse, some type of statutory provision may be necessary to ensure that outcome. It is more difficult to determine the shape and substance of that statutory provision. I note that very few of the witnesses to the Inquiry have addressed themselves to this question at all, even where they accept that legislation might well be needed. The first point to make is that any form of compulsion would require legislation. Undeniably, it is statutory regulation in stark form.

[1] Part K, Chapter 7

2.1 There are essentially four questions that need to be addressed in considering what statutory provision might be required:

(a) what standards should be complied with?

(b) what should be the consequences of failure to comply?

(c) how should these consequences be applied? and;

(d) who should these provisions apply to?

3. What standards should be complied with?

3.1 I have already made it clear that I have no intention of trying to define the standards of press conduct and ethics that should be applied. That is rightly a matter for an independent regulatory body, acting with the advice of the industry and following consultation with the public and others with relevant interests. I have also made it clear that I expect the standards set by an independent regulatory body to cover governance and compliance procedures as well as conduct and ethical issues. The recommendations set out above establish the specific requirements that I consider should be met by an independent regulatory system in this regard.

3.2 The issue considered here is the standard to be expected of those who choose to stay outside of a self-organised independent system that meets those criteria, or in the event that no such system emerged. There are a number of possible approaches.

Enforcing legal requirements

3.3 It has been argued that what is needed is not regulation of standards, but enforcement of the law. I have explained why simple enforcement of the law, either through the application of the criminal law or by civil proceedings through the courts, will not be a realistic solution to most of the problems identified by the Inquiry.[2] Having said that, those who argue for law enforcement alone are correct that, for the most part, the contents of any likely 'standards code' are already, at a basic level, covered by the law.

3.4 However, the virtue of an effective regulatory system is that, even if it does not seek to set standards at a level beyond the basic requirements of the law, it would be possible to enforce those rights in a way that is more flexible and may not otherwise be possible. Where a publisher declines to be part of an effective regulatory system, there is currently no mechanism for effective enforcement even of standards equivalent to the law beyond reporting the matter to the police (if there is a basis for contending that the complaint is one of crime) or commencing civil proceedings.

3.5 Under this analysis, the harm that arises as a result of publications choosing to sit outside a regulatory system, or the lack of existence of a regulatory system, is that victims are obliged to fall back on the civil law process which is not designed to provide the type of speedy redress or rectification that is available to a regulator, but can be both slow and unsatisfactory; furthermore, it is unlikely to be a possible route for any other than the very rich and there is no external monitoring of compliance with civil and criminal legal requirements.

3.6 It might reasonably be suggested that no publisher should be above the law, and that the simplest way of enforcing that principle would be for a standards code that simply looks

[2] Part J, Chapters 2 and 3

to reflect the existing law in terms of standards to apply and then rigorously enforces those standards. Essentially, if that was to be the case, what is suggested is that a statutory regulator should be empowered to undertake regulatory enforcement of relevant civil rights and criminal wrongs with a zero-tolerance approach. By 'regulatory enforcement' I mean that the statutory body would: establish a standards code that requires no more or less than compliance with legal obligations; determine whether standards have been breached; and apply appropriate sanctions. This rigorous regulatory enforcement would sit alongside the existing mechanisms of law enforcement but would be applied by the regulator, not the courts. All decisions taken by the regulator could be subject to appeal to the courts and would, in any case, be subject to challenge by judicial review.

3.7 In order to be able to exercise such a role effectively the regulator responsible would need new statutory powers to set and enforce regulatory standards that do not exceed the limits of the law. In addition, it would need powers to obtain information about compliance. These powers could take the form of the ability to conduct an audit to examine and make recommendations about the compliance systems that a company has in place. The regulator would also need to be given investigatory powers in order to follow up complaints or reasoned suspicion of breach of law. These powers might include the power to call for documents and to hold hearings. In relation to enforcement powers, the regulator could be given the power to require publication of corrections and apologies in relation to defamatory material, and the power to impose regulatory fines (or civil penalties) in respect of defamation and other breaches of law.

3.8 Some of these powers would be entirely new regulatory enforcement powers for existing law. Others, for example in relation to data privacy breaches, exist already, or would do so if the recommendations that I have made in relation to the reform of the Information Commissioner and the Data Protection Act are accepted. A good deal more work would be required to identify the specific areas of law that such powers should cover and precisely what powers such a regulator should have.

3.9 A regulatory system would offer access to victims to pursue their rights, albeit without necessarily pursuing a claim for the compensation that the law might allow; it could provide a mechanism for standards oversight that criminal law enforcement cannot provide.

Enforcing independently set standards

3.10 Many of the examples of unacceptable press behaviour that the Inquiry has seen concern inaccuracy that is harmful to individuals or the public at large, and breaches of privacy of one sort or another. Most clauses of the current Editors' Code fall under one of those headings or the other. Those that do not (those relating, for example to reporting of crime and payment to witnesses and criminals) are in areas covered by criminal law. It might, therefore, be argued, that an ethical standards code is unlikely to offer the public any more protection than the civil and criminal law, taken together, already do. This is not strictly true.

3.11 In the first place, the law only covers accuracy of published material to the extent that want of accuracy is defamatory (the threshold for which is presently under consideration in the Defamation Bill) or a contravention of the data protection regime. It is quite clear that the public interest in accuracy goes much wider than the case of personal information, and I would expect an independent standards code to set that expectation. There is, however, no legal mechanism to correct an inaccuracy other then when it is defamatory or a breach of the Data Protection Act. The current Editors' Code also makes provision for handling cases involving grief and shock in a sensitive way where there is no underlying legal requirement

(unless a claim could be pursued for breach of privacy). In other areas, such as harassment, the current Code provisions cover ground where there are legal standards but the Code does not necessarily track those legal standards exactly, nor would it necessarily be desirable that it should do so. There are therefore gaps in the protection of the public interest, and in reasonable expectations of press standards, which the substantive law does not cover.

3.12 Where a recognised independent regulatory system did exist, there would be one or more recognised independently-set standards codes in existence. These would have been subject to public consultation. It would be perfectly possible to apply the most appropriate of these directly to a publisher outside the system. This is broadly analogous to the model adopted by Ofcom in relation to the Advertising Standards Authority, where Ofcom will, if necessary, take enforcement action against broadcasters who are in breach of the ASA broadcasting code. If there were no such body at all, the regulator would have to issue its own code, doubtless having given the industry the opportunity to provide input from the start and, ultimately, following open and transparent consultation both with the industry and the public.

4. What consequences should apply for breach?

4.1 This is the main question that defines the impact of any compulsory regulation. What should apply, and to whom it should apply are, to some extent, matters of technical detail. What happens in respect of breach defines the nature of the statutory intervention. For some regulators, there is a power to disqualify or ban: it goes without saying that, if a publisher could be banned from publication as a result of breach, that would amount to a licensing regime for the press which would be entirely unacceptable.

4.2 The options that I consider below are only those that I believe would be acceptable in a democratic society and all respect the right of any publisher to publish any material. There is nothing here that would apply any form of prior restraint, or require any permission, in relation to publication. None of the options includes any form of state intervention in the content published (save to the extent that a requirement to publish a correction impacts on content), or even in setting any standards that might apply to any content published.[3] These options relate solely to consequences after the event where standards (howsoever defined) have been breached.

4.3 Other than the first, which is the absence of consequences and included simply for the sake of completeness, each of these approaches would rely on the existence of statutory backstop regulator of some kind. They are set out so that they can be considered by all concerned with this issue.

Rely solely on benefits from membership of a recognised body

4.4 If there is no backstop regulator, the only effect of non-membership of a recognised body would be the inability to access the benefits of that membership. Effectively, this would be a 'do nothing' option. I have set out above[4] the statutory benefits that I consider should apply to membership of a recognised body. These include the recognition by the courts of a commitment to high standards of behaviour and practice in connection with the issues that arise in relation to aggravated and exemplary damages and also of a willingness to participate in a fair, low cost, scheme to arbitrate disputes which is relevant to issues of costs.

[3] If a backstop regulator has the power to require the publication of corrections and apologies this is a form of control of content, but only to rectify something that was previously incorrect

[4] Part K, Chapter 7

4.5 Conversely, those who are not members of such a regulatory body would face the risk of failing to demonstrate a commitment to high standards of behaviour (which could provide material that justifies the award of aggravated or exemplary damages) and adverse costs consequences of failing to participate in a system which permitted claimants to pursue their rights in a fair, low cost system of alternative dispute resolution (ADR). Thus, if my earlier recommendations are accepted, non-members might find that the court exercises its discretion against making an order for costs even in the event that they had succeeded in a privacy or defamation defence.

4.6 These are, of course, consequences of not joining a regulatory system; they are not consequences attached to specific breaches of standards. The only mechanism for an individual to challenge a publisher outside the regulatory system would be by legal challenges relating to defamation, privacy or data protection. In the context of the changes to conditional fees, this is unlikely to be a route open to most people, which is why I have recommended that if no such scheme is set up, the Government should revisit the proposals made by Lord Justice Jackson for one way qualified costs shifting.

Name and shame

4.7 The first and least intrusive approach for a backstop regulator would be no more than an obligation and ability to monitor the performance of non-member publishers against the relevant standards and governance requirements, and to make its findings public. In order to be able to make meaningful reports, such a body would need to have the power to hear complaints from individuals and reach conclusions on whether standards had been breached. In order to provide any broader standards oversight, the body would need to have the power to investigate serious or systemic breaches of standards and to require information from publishers to facilitate that.

4.8 On this basis, the regulatory backstop would be unable to make any requirement of a publisher or impose any remedy for an individual: the only recourse for that individual would remain litigation. However, the body would itself be able to publish its conclusions on complaints and make public any concerns it had about standards in relevant publishers. A report of this sort could formally be made to Parliament.

Complainants champion

4.9 There is also the potential for an entirely different approach. In the absence of some sort of regulatory intervention, the only option open to an individual would be litigation, if that were appropriate. It is theoretically possible for a backstop regulator (who could assume the naming and shaming role identified above) to take on the role of supporting complainants in taking legal action. A more extreme approach would be for the backstop regulator to take legal action on behalf of complainants.

4.10 There are, however, two rather obvious problems with this proposal. The first is the cost. Even with the cost proposals set out in Section 4, it is likely that this would be an expensive option. It is inevitable that sometimes claims would fail; indeed, it would be a poor service if the only claims the regulator pursued were those guaranteed to succeed. The regulator would need some means of determining which cases to pursue as it would be both impractical and improper to take forward any complaint, however unlikely to succeed.

4.11 The second substantive problem here is that the state, however constituted, does not generally seek to enforce the civil rights of citizens and it is difficult to see why it should do so

in this area, as opposed to many others. There are serious concerns about access to justice in a wide variety of contexts; the legal aid budget is already overstretched, with the areas of law in which legal assistance is provided under constant review. It is extremely difficult to see why the state should be prepared to enforce these (as opposed to many other) private law rights.

Apply standards with enforcement powers

4.12 The final level would simply be to apply standards to all news publishers in the same way. This could be achieved in one of two ways. The first would be to require all relevant publishers to be bound by a recognised independent regulatory body such as the type I have recommended. However, this approach is not itself without difficulty for a number of reasons.

4.13 First, it is important to emphasise that if the press come together to organise an independent regulatory body (albeit in such a way that satisfied certain statutory requirements) the result is not itself a statutory body of any sort. It will be recognised by statute but it will not have any statutory powers. The Report does not propose statutory regulation of the press but, rather, self-organised independent regulation of the press, both elements of which (self organised and independent) are significant. It means that it would be wrong to give the body statutory jurisdiction of any sort. Equally, it would be wrong to require any individual publisher to become a member of a 'self-organised' body organised by others.

4.14 The alternative, second way is that some other regulatory body (a 'backstop regulator') should apply a standards code directly to press publishers who choose not to become part of a recognised system. Under this approach the backstop regulator would need, by statute, to be given enforcement powers to carry out investigations, to require publication and placement of corrections and apologies, and to levy fines in respect of serious or systemic breaches and in default of compliance with its orders. The backstop regulator would then be in a position to apply an appropriate level of regulation to those who do not voluntarily sign up to a recognised independent system. As described above, the standards applied could be a code that simply reflects the requirements of the law, or it could go further and apply the most appropriate code or, in default, a code that it had prepared after suitable consultation.

4.15 It is important to repeat that no backstop regulator should be given any powers over published content, except in relation to apologies and corrections. At no point should the regulator be able to prevent publication of content. The regulator would have no right to see content ahead of publication and no right to require the publication of any content other than in respect of apologies and corrections. This would not be statutory regulation of what the press could publish; rather, it would represent an after the fact review of press behaviour.

5. How should any consequences be applied?

5.1 I identified earlier that all options (except for 'do nothing') would require a backstop regulatory body to undertake the proposed regulatory role. The role requires a strong, expert organisation, capable both of understanding the balance between Article 8 and Article 10 rights of the European Convention on Human Rights (ECHR) and of withstanding the pressure that the press would be bound to place on anyone in this position.

5.2 An obvious answer would be that Ofcom should be given the responsibility of the role, not least because it is an established regulator, well able to understand the issues and address them. I am aware of the attitude of the press towards Ofcom but there is absolutely nothing

in the way in which I have seen that it exercises its regulatory functions to suggest that it does not do so entirely appropriately and fully in accordance with its legislative mandate.

5.3 Ofcom has an internationally high reputation[5] as a telecommunications regulator, and has been described by the Rt Hon Ed Vaizey MP, Minister for Culture, Communications and Creative Industries, as 'doing an outstanding job'.[6] The broadcasters who have given evidence to the Inquiry have not suggested that Ofcom (which directly regulates the independent broadcasters, occupying a slightly different position in relation to the BBC) has ever exercised the slightest chilling effect in relation to the many examples of splendid investigative journalism that have been carried out over many years. For the avoidance of doubt, I am equally clear that Ofcom would have no difficulty approaching its task with an eye to the very different requirements of press regulation as contrasted with broadcast regulation, not least in relation to the difference of position as to political neutrality.

5.4 Ofcom would have to take on additional expertise from print journalism to assist in the task but, given that many broadcast journalists have also worked in the press, I do not believe that Ofcom would be starting from a blank sheet. Much expertise is available to it and I have no doubt that it could perform the oversight task with a light touch but be ready to deal with egregious examples of conduct as and when it is necessary to do so. Both in the seminar and in evidence, the Chair, Dr Colette Bowe and Ed Richards, the chief executive of Ofcom, demonstrated a clear understanding of the line and I reject the suggestion that regulation by Ofcom would mean the end of the free press or descent into state control of content.

5.5 Having identified Ofcom as the obvious answer, I must recognise that I have already recommended that Ofcom should act as that body responsible for recognition and audit of independent regulatory press standards bodies. It might be suggested, therefore, that it was undesirable for one body to be responsible both for advising on the adequacy of the model for independent regulation that has been set up (against the statutory requirements) and, ultimately, if all else fails, for delivering the regulation itself.

5.6 The issue could be argued both ways. First, it might be said that Ofcom could reject an independent regulator in order to take on the role of direct regulation. Second, and in quite the opposite direction, it is just as plausible to argue that Ofcom might actually be inclined to approve any independent regulator that comes forward in order to avoid taking on highly controversial role of regulating the press directly.

5.7 For my part, I do not believe that this dual role necessarily creates any real difficulty. I do not see why it should not be possible to require Ofcom at all times to aim for independent self-organised regulation, whilst nonetheless having to be able to demonstrate how any recognised regulator meets the statutory criteria. As a statutory regulator, Ofcom is required to operate with full transparency and could be obliged to publish not only its decisions on recognition, but also the reasoning for its decisions, thus ensuring that there is no opportunity for competing incentives in relation to a backstop regulatory role to influence a decision on recognition of an independent regulator.

5.8 For the sake of completeness I should mention what could be the alternatives. First, it would be possible to extend the remit of the Information Commissioner. There are some advantages

[5] The European Competitive Telecommunications Association rated Ofcom in the top 2 Telecoms regulators in the EU in the last three regulatory scorecards published http://www.ectaportal.com/en/REPORTS/Regulatory-Scorecards/Regulatory-Scorecard-Overview/

[6] Speech to the Oxford Media Convention, 25 January 2012, http://www.culture.gov.uk/news/ministers_speeches/8811.aspx

to this idea. The Information Commissioner's Office (ICO) has many of the relevant powers already, as well as the expertise in balancing the considerations raised by Articles 8 and 10 of the ECHR. However, for the reasons I have set out in Part H, I do not see this as an obvious solution. Any attempt to give this role to the ICO would require restructuring and substantial strengthening of the office, together with giving the Information Commissioner new duties and responsibilities to ensure that sufficient priority was given to the role.

5.9 The final option would be to create a new regulator to undertake the role. To my mind, this is the least satisfactory. Creating a new, self-standing, authority would take time. It would be likely to be the most expensive option; it would have no established authority or reputation. Without appropriate support, it would also be vulnerable to pressure.

6. To whom should any provision apply?

6.1 I have referred throughout this section to 'news publishers'. In practice if there were to be any requirement for certain organisations to meet prescribed standards in carrying out their activities, then it would be necessary to define quite precisely who those organisations are. There are two elements to this question. The first, and most basic, is how it is possible to distinguish the types of organisation that it is considered should be included within a new regulatory system. The second, once a definition has been decided, is whether everyone within that definition should be covered, or whether there is an argument for some sort of size threshold. I will deal with these two issues separately.

Definitions

6.2 The Inquiry has had limited help on this matter from witnesses. Some have argued that the difficulty of defining who should be covered by any legislation is a sufficient argument in itself for not imposing a legislative solution.

6.3 Current definitions are an obvious starting point. Membership of the PCC is purely voluntary and the PCC says[7] that it deals with editorially controlled material in UK newspapers and magazines and their websites. The PCC does not cover any newspapers or magazines that do not subscribe to the Press Board of Finance (PressBoF), and hence has not had to grapple with the issue of definitions in relation to whether a particular publication should be a member if it does not wish to do so. National newspapers pay the levy through the National Periodical Association, whilst regional newspapers and magazines are invoiced individually.[8] No evidence is available on how PressBoF identifies publications to invoice, though it seems likely that this is done via the relevant industry bodies, or what they do when publications do not choose to pay. There is no publicly available list of those publications that are covered by the PCC, nor any list of publications which are not.

6.4 One, albeit partial, source would be a definition of 'newspaper' or 'the press'. Dictionary definitions of 'a newspaper' tend to include reference to the fact that it is printed,[9] that it is published at regular intervals, and that content includes articles on the news, editorials, features, reviews and advertisements. Definitions of the 'press' tend simply to refer to publications and periodicals. Definitions of the media go much more widely and bring in

[7] http://www.pcc.org.uk/complaints/makingacomplaint.html
[8] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Appendix-D.pdf
[9] There are definitions of 'newspaper in the 'Newspaper Registration and Libel Act 1881, and in guidance issues by HMRC in respect of VAT; both rely on print publication

broadcasting and, sometimes, the internet. An approach based on defining terms of this sort does not, therefore, appear promising.

6.5 An alternative approach, in seeking to identify the scope and coverage of a new regulatory system, would be to identify what activity it is that gives rise to the need for regulation. The harm that the Inquiry has heard described relates primarily to the process of gathering information about individuals, the use of private information and the publication of inaccurate information. It is these areas (conduct in the gathering of information, respect for privacy, and accuracy) that I have recommended should by covered by a standards code in the new regulatory system. It follows that the coverage of a new regulatory system should encompass those who undertake activities likely to involve those three processes. It may therefore be appropriate to attempt to build a definition based around: the gathering of information about people and current affairs, for the purpose of, or in relation to, publication of news and information; and the publication of information about people and current affairs.

6.6 One way of looking at this would be to develop a concept of 'press like services' along the model already used in relation to audiovisual media services, where regulation applies to 'TV-like services'. Whether or not a service fell within the definition would be determined by any backstop regulator, but subject to appeal or review.[10]

6.7 A definition of this sort would be targeted on the behaviour that gives rise to concern and would certainly include newspapers and relevant magazines. Such a definition should also apply to those to whom information gathering is subcontracted, such as picture agencies and private investigators (although only when working for clients who would themselves be included by virtue of their publication activities).

6.8 As set out above, however, the definition would also include broadcasters and internet sites which cover news or celebrity issues. Whilst it is important to ensure that the coverage of a new regulatory system is sufficiently wide to prevent it being evaded purely by restructuring or redefining what an organisation does, it is also important to avoid any conflict or unnecessary and unhelpful overlap between regulatory systems. In this context, it would be sensible to say that any activities that are regulated by Ofcom under the Broadcasting Code, or by the Authority for Television on Demand (ATVOD), under the Audio Visual Media Services (AVMS) Directive, should not fall to be regulated under the new system. It would clearly be very important, however, for the boundaries between those systems and the new system to be looked at very carefully, and for the relevant regulators to work together to avoid conflict or gaps in coverage.

A size threshold

6.9 Arguments have been made from two perspectives about the extent to which any regulatory system should apply to companies of all sizes engaged in 'press like services'. First, and at a level of regulatory policy, a number of regulators have made the case that regulation should be proportionate and that some form of *de minimis* exemption would be appropriate to exempt those companies that are so small that the regulatory requirements would not be a proportionate response to the potential harm caused by unregulated behaviour.

6.10 Second, it has been argued that it makes sense to concentrate any required remedies on large companies: [11]

[10] Part K, Chapter 7

[11] p74, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Media-Standards-Trust.pdf

> *"Large news publishers have voices far louder, with significantly greater impact than any individual. They have the power to frame and influence public opinion and public understanding. They also have exceptional power to seriously harm private citizens through their influence."*

It is further argued that making some form of standards regulation compulsory only for large companies, as well as concentrating the remedy on the source of the harm, would distinguish between freedom of expression, which would remain entirely unconstrained, and 'corporate speech' which 'due to its power and influence ought to be accountable'.[12]

6.11 The arguments for some form of *de minimis* exemption are strong. There will be few who think that a parish magazine or small newsletter should be compulsorily subject to a regulatory system. Such publications will simply never have the resources to join a regulatory body, or to provide the sort of internal governance systems and compliance returns that are appropriate for much larger organisations. Equally, they are unlikely to give rise to the level of harm that a substantially larger publisher might. On the one hand, it is possible for a very small organisation to make some defamatory remark or breach privacy and they are, and should remain, subject to the law should they do so. However, the worst harm is done to an individual, or society, once those inaccuracies or defamations are published and read more widely. The most significant damage is done by the use of the megaphone and the power of large brands to influence public understanding and opinion.

6.12 Thus the principle of setting a size related limit above which regulation should apply is simple enough. The difficult question, inevitably, is where that limit should be set.

6.13 This could be looked at in two ways. First, a simple economic measure could be considered. This could take into account revenues, market share and circulation. The Media Standards Trust suggests that companies meeting the definition of a small company or group for the purposes of the Companies Act 2006 should remain outside regulation. Another suggestion was that any company not large enough to be required to register for VAT should be exempt from regulation.

6.14 The alternative approach would be to consider a measure based more on the impact and influence of a publication. I have argued that a free press is important because of the influence that it can have over the nation's understanding of issues and events.[13] That importance has attracted privileges that the press can rely on in terms of privileged access to Parliament and the courts, privileged protection for sources, privileged exemptions from the data protection regime and privileged defences in relation to defamation. It must also be the case that the influence and privileges of the press bring some form of accountability.

6.15 The Inquiry has heard from editors that they are accountable to their readers, and, to no small extent, on a commercial basis to their shareholders or proprietors. But accountability to the paper's own readership cannot be confused with accountability to the public more generally in relation to activities that go wider than their influence on readers: that is because the activities that are the subject of complaint relate to the treatment of third parties or the publication of inaccurate or defamatory material.

6.16 Effective independent regulation would provide a level of accountability in relation to standards that would not in any way interfere with the freedom of an editor to publish any material that he or she wanted to publish, but would encourage governance systems, to

[12] *ibid*
[13] Part B

avoid legal and standards breaches, and generate potential consequences should standards be breached.

6.17 Using this rationale for independent standards regulation, it follows that, when considering who should not be able to opt out of standards regulation, the measure to be used should be a materiality threshold based on influence. The Report sets out elsewhere the issues involved in measuring the relevant parts of the media market to understand whether there is sufficient plurality in the market.[14]

6.18 In that Chapter, I refer to the various metrics that Ofcom proposes using to measure plurality, including availability, consumption and impact. It is entirely possible that some similar combination of measures of influence, in particular consumption and impact, would be appropriate in considering whether it would be proportionate for a news publisher to be expected not to be able to opt out of compliance with independently set standards.

6.19 This is a complex and technical question and my only purpose is to identify the options. Either of these approaches might serve as a starting point, but, if the Government were to find it necessary to put a system of backstop regulation in place, I would recommend that they should conduct a detailed consultation on the matter of precisely where and how the line should be drawn: that is precisely the type of line that Ofcom would be able to draw.

6.20 It is my clear view that, wherever the line is to be drawn, all the national daily and Sunday titles should fall within the regulatory system. Equally, regional and local titles with a significant readership should be included within the system. It is more difficult to be clear about what types of online service clearly should be inside or outside of a regulatory system. However, it would clearly be appropriate that websites providing news coverage aimed substantially at a UK audience, with a substantial stable audience should be covered by any new regulatory system.

6.21 Any definitions would need to apply at the group level, to ensure that where there are many small publications under the control of one organisation they are potentially included within the regulatory system. This could place differential costs of regulatory compliance on independent local or regional titles and those of their competitors that are part of a larger group. Although I recognise the need for consultation, on the face of it, it is not unreasonable to expect a publishing group of any size to be able to institute appropriate governance mechanisms that might not be necessary or proportionate in the case of much smaller and simpler operations. The aim of putting a size threshold on the regulatory system would be to ensure that regulation was not disproportionate and did not act as a barrier to freedom of expression, not to provide a route to evasion for those who should be within the system.

7. My views

7.1 A backstop regulator would only be required if either the whole of the press industry had failed to accept the principle of independent regulation and thus failed to organise an independent body meeting the proposed statutory requirements or a significant proportion of the press (and, in particular, any of the national press) had refused to engage with an independent regulator. This would be a serious indictment of the ability and willingness of the industry to engage with standards regulation by any means short of direct compulsion and, as I have said, would undeniably reinforce the need for some statutory system of standards to be put in place.

[14] Part I, Chapter 9

7.2 I repeat, as I have made very clear that, by a very long way, my preferred solution, and hence my recommendation, is that the industry should come together to construct a system of independent regulation that could be recognised. If it does so, there will be no need for a backstop regulator.

7.3 However, if some or all of the industry were not prepared to adopt that position, I do not accept that they should expect the public to settle for less, much less escape standards regulation altogether. More significantly, if the possibility exists that a significant provider of press like services could avoid independent regulation without consequence, then there would simply be no incentive for an unwilling industry collectively to deliver it. My personal view, therefore, is that there may be a need for the realistic prospect of a backstop regulator being established.

7.4 I think it is reasonable and proportionate to expect all publishers to comply with the standards of conduct required by the law. I also think it reasonable and proportionate to require the press, which enjoys many benefits in the public interest, to accept the obligations of the sort of public interest standards, over and above the minimum requirements of the law, which they have already described to some extent in their past codes, and which they purport to take seriously and live up to. These standards must reinforce the rights of free speech and of the press to pursue whatever stories that they consider appropriate in whatever way they see fit; they must also respect the legitimate rights and interests of the public, individually and collectively.

7.5 Second, in relation to the consequences of failure to comply, I am sure that they would have to exist and must be real. I therefore do not consider that it would be appropriate to adopt the 'do nothing' option, relying only on generic incentives to encourage membership of an independent regulatory body. Neither do I consider that simple publication by a regulator of an adverse judgment would be sufficient. The provision of a 'complainants champion' service might be useful in relation to those who suffer breach of their civil rights by the media, but this would be an expensive and partial solution to the problems posed by standards breach. In my opinion it would be better that some statutory backstop regulator be given the powers to enforce standards, including powers to require publication of apologies and corrections, the power to investigate concerns of serious standards breach and the power to impose fines (proportionate to the gravity of any breach and the means to pay) in respect of serious or systemic breaches of standards (or failure to publish a required apology or correction).

7.6 Third, in respect of who should apply these consequences, my clear expectation is that Ofcom would be given this role: it is by far and away the best placed to do so.

7.7 Finally, in respect of these to whom provisions should apply, I would consider that the basic concept of 'press like services' as described above should be considered. In addition, I do think it makes sense to apply backstop regulation, if required, only to those organisations of a sufficient size, and with sufficient impact, to make accountability to society an important issue. I would suggest that Ofcom would have to be tasked with developing appropriate metrics along the lines I have set out above.

CHAPTER 9
RECOMMENDATIONS FOR A SELF-REGULATORY BODY

1. Introduction

1.1 Earlier in this Part of the Report,[1] I set out my recommendations for independent self-regulation. In that Chapter, I make it clear that I do not consider that it is my role to set the standards that should be applied by an independent regulatory body, but that setting those standards should be the role of that body, in consultation with the industry and with the wider public.

1.2 However, within the evidence given during the course of this Inquiry, I have inevitably heard much which bears on what those standards are or should be and how they might be made more relevant and effective. In this Chapter, I have collected together some of the explicit recommendations that I have made and, in addition, some other ideas which I express in the form of a recommendation that the industry and any putative independent regulatory body should be prepared to consider. The use of this different language is very deliberate: by making a recommendation that consideration should be given to an issue, I am doing no more than seeking to assist by identifying to the industry features that it should be prepared to consider. In this regard, it is not my intention to direct.

1.3 On some of these additional issues, I have strong personal views, and on others less so. On all of them, I accept entirely that they are matters that should be properly considered by the industry in its own attempt to demonstrate to the public that it has taken both seriously and to heart the public concerns that have been expressed over the recent past and by the new regulatory body as part of a standards setting process.

1.4 This Chapter does not introduce any new ideas. All that appears has been derived from the evidence presented to the Inquiry and analysed in the Report. I do not therefore reproduce that evidence or any analysis here; references go back to the relevant Chapters of the Report and are mostly to be found in the earlier Chapters of Part F.

2. Recommendations to a new regulatory body

Internal governance

2.1 The point has been made that the current practice has the effect of encouraging publishers to rely on the PCC to deal with complaints rather than putting in place processes to deal with them effectively in-house. I have already recommended that a new regulatory system should require from each subscribing member of the body:

(a) an adequate in-house complaint process which should be exhausted before a complaint can be taken to the regulator; and

(b) an annual return to be made to the regulator in relation to compliance so as to make transparent the extent to which complaints have been made and the way in which they have been handled.

[1] Part K, Chapter 7

I also recommend that a new regulatory body should consider requiring:

(a) that newspapers should publish their annual compliance reports in their own pages to ensure that their readers have easy access to the information;[2] and

(b) as proposed by Lord Black, that a named senior individual within each title should have responsibility for compliance and standards.[3]

Incentives to membership

2.2 I have recommended earlier in Part K some incentives to membership that would benefit those who joined a new regulaory body. A number of other incentives were suggested by other witnesses to the Inquiry. Of these:

I recommend that a new regulatory body should consider establishing a kitemark for use by members to establish a recognised brand of trusted journalism.[4]

The Code

2.3 There has been a lot of support for the current Editors' Code. However, issues have also been identified with it. I have made the points that in order to provide an ethical framework for editors and journalists to work within, it needs to set the ethical and legal context in which it applies, and that it must do so in a clear and practical way. I would not want to lose any of the positive elements of the existing Code, but given those two broader points and the broad swathe of evidence that I heard:

I recommend that a regulatory body should consider engaging in an early thorough review of the Code with the aim of developing a clearer statement of the standards expected of editors and journalists.[5] It is important that the public should be engaged in that review.

Powers and sanctions

2.4 The PCC does not consider complaints while any relevant legal action is pending. I remain to be convinced that there is any particularly unique problem associated with defamation that makes it impossible for court and regulatory action to be taken simultaneously. It seems, of course, reasonable that either the regulator or a court should be able to stay the regulatory action if proceeding in parallel would create a risk of injustice, but that is no reason for a blanket ban on the regulator considering regulatory issues without waiting for any legal action first to be completed: such an approach would be in line with the approach adopted in other cases of parallel civil and regulatory action. Lord Black agreed that a new regulator should, at least, be willing to allow a complaint to be heard prior to legal action.

I recommend that a regulator should take the view that a complainant can bring a complaint prior to taking legal action if that is the desired course of action. Challenges to that approach can be decided on the merits.[6]

[2] Part K, Chapter 3, para 4.26
[3] Part K, Chapter 7, para 4.28
[4] Part K, Chapter 4, para 5.41
[5] Part K, Chapter 7, para 4.20; it would be particularly worthwhile to give consideration to the evidence that was provided to the Inquiry both in witness statements and orally, but specifically deployed on 16 July 2012
[6] Part K, Chapter 3, para 5.14

2.5 The Inquiry heard a substantial amount of evidence relating to the allegedly discriminatory treatment of women and minorities in the press. I have already recommended that a new regulatory body must have the power to take complaints from third parties and representative groups. This may equip a regulator sufficiently to deal with this issue to the extent that they deem necessary. However:

I recommend that consideration should also be given to Code amendments which, while fully protecting freedom of speech and the freedom of the press, would equip that body with the power to intervene in cases of allegedly discriminatory reporting, and in so doing reflect the spirit of equalities legislation.[7]

2.6 I have reflected the arguments around whether the independent body should have the power to award compensation and conclude that there are real risks that doing so would make the system unwieldy and ineffective. In addition, the arbitral system that I have recommended would provide swift financial redress in relation to breaches of the civil law. I therefore recommend that a regulatory body should not seek the power to award compensation.[8]

2.7 I have already recommended that a regulatory body should have the power to levy fines in relation to serious or systemic breaches of standards. This raises the question of what should happen to any such payments. It would be inappropriate for the income from fines to be used to fund the day to day operation of the regulator because of the incentives that would create. The solution proposed by Lord Black is that any fines should be paid into a ringfenced enforcement fund that would finance subsequent investigations. I agree that this appears to be an acceptable way of dealing with the issue and:

I recommend that a new regulatory body should establish a ringfenced enforcement fund, into which receipts from fines could be paid, for the purpose of funding investigations.[9]

Protecting the public

2.8 The PCC attracted plaudits for its services in relation to providing 'desist' notices in cases where individuals have made it known that they do not welcome press intrusion. This service is seen by many as valuable and can be particularly helpful to vulnerable people at a difficult time.

I recommend that a new regulatory body should continue to provide a service to warn the press, and other relevant parties such as broadcasters and press photographers, when an individual has made it clear that they do not welcome press intrusion.[10]

2.9 There have been concerns expressed about the behaviour of press photographers and the publication of photographs taken at a time, or in a way, that breaches the Editors' Code. There is obviously a limit to the extent to which a press self-regulatory body can impact on the behaviour of photographers from agencies or of freelance photographers. However, the press must remain responsible for the content it publishes regardless of its source. It is important therefore that publishers should ensure that they only use information or photographs provided by third parties that were obtained ethically.

[7] Part F, Chapter 6, para 8.22
[8] Part K, Chapter 3, para 5.10
[9] Part K, Chapter 7, para 4.39
[10] Part K, Chapter 7, para 4.35

I recommend that a new regulatory body should make it clear that newspapers will be held strictly accountable, under their standards code, for any material that they publish, including photographs (however sourced).[11]

The public interest

2.10 The way in which a regulatory body understands and applies the concept of the public interest will be of great importance both to the newspapers themselves, and to the public and those who are the subjects of journalism. There would be benefit from a greater measure of clarity over that interpretation.

I therefore recommend that a regulatory body should provide guidance on the interpretation of the public interest that justifies what would otherwise constitute a breach of the Code. This must be framed in the context of the different provisions of the Code relating to the public interest, so as to make it easier to justify what might otherwise be considered as contrary to standards of propriety.[12]

2.11 The question also arises as to how judgments on the public interest are taken within editorial teams and how the proper thought process can be demonstrated to the regulator should the need arise. The obvious and simple solution to this is that the publisher should make a contemporaneous note of the issues raised and the consideration given to them. This is an issue that has already been to some extent addressed by the Code Committee, and the Editors' Code now says:

> *"Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time."*

2.12 I recommend that:

a new regulatory body should consider being explicit that where a public interest justification is to be relied upon they would expect to see a record of the factors weighing against and in favour of publication, along with a record of the reasons for the conclusion reached.[13]

2.13 It has been suggested that some editors might find it helpful, in particularly difficult cases, to be able to seek advice prior to publication on issues surrounding the approach to a relevant public interest question. I recognise that any requirement to seek pre-publication advice would be a constraint on freedom of speech and is simply not appropriate but, on the basis that the decision is always one for the editor, it seems to me that what is no more than the opportunity to seek such advice offends neither those rights nor editorial independence.

I therefore recommend that a new regulatory body should consider whether it might provide an advisory service to editors in relation to consideration of the public interest in taking particular actions.[14]

[11] Part F, Chapter 6, paras 4.6 and 5.19
[12] Part K, Chapter 7, para 4.24
[13] Part F, Chapter 6, para 2.74
[14] Part K, Chapter 7, para 4.35

Access to information

2.14 The Inquiry heard evidence of how the interpretation of some stories based on reports by third parties can be confusing. Medical and scientific stories were a particular concern. To further public understanding, I recommend that a new regulatory body should consider encouraging the press to be as transparent as possible in relation to the sources used for stories, including providing any information that would help readers to assess the reliability of information from a source and providing easy access, such as web links, to publicly available sources of information such as scientific studies or poll results. This should include putting the names of photographers alongside images. This is not in any way intended to undermine the existing provisions on protecting journalists' sources, only to encourage transparency where it is both possible and appropriate to do so.[15]

Protecting journalists

2.15 Lord Hunt the current Chair of the PCC, suggested that there should be a whistleblowing hotline into a new regulatory structure for those who feel that they are being asked to do things which are contrary to the Code. It is a shame that this has not been taken on board by the industry proposal and

I recommend that a regulatory body should put such a mechanism in place.[16]

2.16 The National Union of Journalists (NUJ) and many others argued that journalists who comply with the code deserve some protection for doing so. I was struck that Rupert Murdoch, when the idea of employment contracts including a conscience clause was put to him, did not disagree.

I recommend that the industry generally, and a regulatory body in particular, should consider requiring its members to include in their contracts with journalist staff a clause to prevent any disciplinary action being taken against a journalist as a result of his or her refusing to do something which is contrary to the code of practice.[17]

[15] Part F, Chapter 6, para 9.75
[16] Part K, Chapter 3, para 4.28
[17] Part K, Chapter 4, para 16.4

PART L

SUMMARY OF RECOMMENDATIONS

SUMMARY OF RECOMMENDATIONS

Regulatory Models for the Future

Establishing an independent self-regulatory regime

Independence: appointments

1. An independent self regulatory body should be governed by an independent Board. In order to ensure the independence of the body, the Chair and members of the Board must be appointed in a genuinely open, transparent and independent way, without any influence from industry or Government.[1]

2. The appointment of the Chair of the Board should be made by an appointment panel. The selection of that panel must itself be conducted in an appropriately independent way and must, itself, be independent of the industry and of Government.[2]

3. The appointment panel:

(a) should be appointed in an independent, fair and open way;

(b) should contain a substantial majority of members who are demonstrably independent of the press;

(c) should include at least one person with a current understanding and experience of the press;

(d) should include no more than one current editor of a publication that could be a member of the body.[3]

4. The appointment of the Board should also be an independent process, and the composition of the Board should include people with relevant expertise. The requirement for independence means that there should be no serving editors on the Board.[4]

5. The members of the Board should be appointed by the same appointment panel that appoints the Chair, together with the Chair (once appointed), and should:

(a) be appointed by a fair and open process;

(b) comprise a majority of people who are independent of the press;

(c) include a sufficient number of people with experience of the industry who may include former editors and senior or academic journalists;

(d) not include any serving editor; and

(e) not include any serving member of the House of Commons or any member of the Government.[5]

[1] Part K, Chapter 7, para 4.5
[2] Part K, Chapter 7, para 4.7
[3] Part K, Chapter 7, para 4.8
[4] Part K, Chapter 7, para 4.10
[5] Part K, Chapter 7, para 4.10

Independence: funding

6. Funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry. There should be an indicative budget which the Board certifies is adequate for the purpose. Funding settlements should cover a four or five year period and should be negotiated well in advance.[6]

Functions

Standards Code and Governance Requirements

7. The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which may comprise both independent members of the Board and serving editors.[7]

8. The code must take into account the importance of freedom of speech, the interests of the public (including the public interest in detecting or exposing crime or serous impropriety, protecting public health and safety and preventing the public from being seriously misled) and the rights of individuals. Specifically, it must cover standards of:

(a) conduct, especially in relation to the treatment of other people in the process of obtaining material;

(b) appropriate respect for privacy where there is no sufficient public interest justification for breach and

(c) accuracy, and the need to avoid misrepresentation.[8]

9. The Board should require, of those who subscribe, appropriate internal governance processes, transparency on what governance processes they have in place, and notice of any failures in compliance, together with details of steps taken to deal with failures in compliance.[9]

Complaints

10. The Board should require all those who subscribe to have an adequate and speedy complaint handling mechanism; it should encourage those who wish to complain to do so through that mechanism and should not receive complaints directly unless or until the internal complaints system has been engaged without the complaint being resolved in an appropriate time.[10]

11. The Board should have the power to hear and decide on complaints about breach of the standards code by those who subscribe. The Board should have the power (but not necessarily in all cases depending on the circumstances the duty) to hear complaints whoever they come from, whether personally and directly affected by the alleged breach, or a representative group affected by the alleged breach, or a third party seeking to ensure accuracy of published information. In the case of third party complaints the views of the party most closely involved should be taken into account.[11]

[6] Part K, Chapter 7, para 4.16
[7] Part K, Chapter 7, para 4.21
[8] Part K, Chapter 7, para 4.23
[9] Part K, Chapter 7, para 4.25
[10] Part K, Chapter 7, para 4.26
[11] Part K, Chapter 7, para 4.30

12. Decisions on complaints should be the ultimate responsibility of the Board, advised by complaints handling officials to whom appropriate delegations may be made.[12]

13. Serving editors should not be members of any Committee advising the Board on complaints and any such Committee should have a composition broadly reflecting that of the main Board, with a majority of people who are independent of the press.[13]

14. It should continue to be the case that complainants are able to bring complaints free of charge.[14]

Powers, Remedies and Sanctions

15. In relation to complaints, the Board should have the power to direct appropriate remedial action for breach of standards and the publication of corrections and apologies. Although remedies are essentially about correcting the record for individuals, the power to require a correction and an apology must apply equally in relation to individual standards breaches (which the Board has accepted) and to groups of people (or matters of fact) where there is no single identifiable individual who has been affected.[15]

16. The power to direct the nature, extent and placement of apologies should lie with the Board.[16]

17. The Board should **not** have the power to prevent publication of any material, by anyone, at any time although (in its discretion) it should be able to offer a service of advice to editors of subscribing publications relating to code compliance which editors, in their discretion, can deploy in civil proceedings arising out of publication.[17]

18. The Board, being an independent self-regulatory body, should have authority to examine issues on its own initiative and have sufficient powers to carry out investigations both into suspected serious or systemic breaches of the code and failures to comply with directions of the Board. Those who subscribe must be required to cooperate with any such investigation.[18]

19. The Board should have the power to impose appropriate and proportionate sanctions, (including financial sanctions up to 1% of turnover with a maximum of £1m), on any subscriber found to be responsible for serious or systemic breaches of the standards code or governance requirements of the body. The sanctions that should be available should include power to require publication of corrections, if the breaches relate to accuracy, or apologies if the breaches relate to other provisions of the code.[19]

20. The Board should have both the power and a duty to ensure that all breaches of the standards code that it considers are recorded as such and that proper data is kept that records the extent to which complaints have been made and their outcome; this information should be made available to the public in a way that allows understanding of the compliance record of each title.[20]

[12] Part K, Chapter 7, para 4.31
[13] Part K, Chapter 7, para 4.32
[14] Part K, Chapter 7, para 4.33
[15] Part K, Chapter 7, para 4.37
[16] Part K, Chapter 7, para 4.37
[17] Part K, Chapter 7, para 4.40
[18] Part K, Chapter 7, para 4.36
[19] Part K, Chapter 7, para 4.38
[20] Part K, Chapter 7, para 4.36

Reporting

21. The Board should publish an Annual Report identifying:

(a) the body's subscribers, identifying any significant changes in subscriber numbers;

(b) the number of complaints it has handled and the outcomes reached, both in aggregate for the all subscribers and individually in relation to each subscriber;

(c) a summary of any investigations carried out and the result of them;

(d) a report on the adequacy and effectiveness of compliance processes and procedures adopted by subscribers; and

(e) information about the extent to which the arbitration service had been used.[21]

Arbitration Service

22. The Board should provide an arbitral process in relation to civil legal claims against subscribers, drawing on independent legal experts of high reputation and ability on a cost-only basis to the subscribing member. The process should be fair, quick and inexpensive, inquisitorial and free for complainants to use (save for a power to make an adverse order for the costs of the arbitrator if proceedings are frivolous or vexatious). The arbitrator must have the power to hold hearings where necessary but, equally, to dispense with them where it is not necessary. The process must have a system to allow frivolous or vexatious claims to be struck out at an early stage.[22]

Encouraging membership

23. A new system of regulation should not be considered sufficiently effective if it does not cover all significant news publishers.[23]

24. The membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different types of publisher.[24]

25. In any reconsideration of the powers of the Information Commissioner (or replacement body), power should be given to that body to determine that membership of a satisfactory regulatory body, which required appropriate governance and transparency standards from its members in relation to compliance with data protection legislation and good practice, should be taken into account when considering whether it is necessary or proportionate to take any steps in relation to a subscriber to that body.[25]

26. It should be open any subscriber to a recognised regulatory body to rely on the fact of such membership and on the opportunity it provides for the claimant to use a fair, fast and inexpensive arbitration service. It could request the court to encourage the use of that system of arbitration and, equally, to have regard to the availability of the arbitration system when considering claims for costs incurred by a claimant who could have used the arbitration service. On the issue of costs, it should equally be open to a claimant to rely on failure by a newspaper to subscribe to the regulator thereby depriving him or her of access to a fair, fast

[21] Part K, Chapter 7, para 4.42
[22] Part K, Chapter 7, para 4.46
[23] Part K, Chapter 7, para 3.14
[24] Part K, Chapter 7, para 4.13
[25] Part K, Chapter 7, para 5.2

and inexpensive arbitration service. Where that is the case, in the exercise of its discretion, the court could take the view that, even where the defendant is successful, absent unreasonable or vexatious conduct on the part of the claimant, it would be inappropriate for the claimant to be expected to pay the costs incurred in defending the action.[26]

Recognition

27. In order to meet the public concern that the organisation by the press of its regulation is by a body which is independent of the press, independent of Parliament and independent of the Government, that fulfils the legitimate requirements of such a body and can provide, by way of benefit to its subscribers, recognition of involvement in the maintenance of high standards of journalism, the law must identify those legitimate requirements and provide a mechanism to recognise and certify that a new body meets them.[27]

28. The responsibility for recognition and certification of a regulator shall rest with a recognition body. In its capacity as the recognition body, it will not be involved in regulation of any subscriber.[28]

29. The requirements for recognition should be those set out the recommendations set out above numbered 1 to 24 inclusive and more fully described in Part K, Chapter 7, Section 4 of the Report.[29]

30. The operation of any certified body should be reviewed by the recognition body after two years and thereafter at three yearly intervals.[30]

31. The role of recognition body, that is to say, to recognise and certify that any particular body satisfies (and, on review, continues to satisfy) the requirements set out in law should fall on Ofcom. A less attractive alternative (on the basis that any individual will not have the requisite authority or experience and will only be occasionally be required to fulfil these functions) is for the appointment of an independent Recognition Commissioner supported by officials at Ofcom.[31]

32. It should be possible for the recognition body to recognise more than one regulatory body, should more than one seek recognition and meet the criteria, although this is not an outcome to be advocated and, should it be necessary for that step to be taken, would represent a failure on the part of the industry.[32]

33. In passing legislation to identify the legitimate requirements to be met by an independent regulator organised by the press, and to provide for a process of recognition and review of whether those requirements are and continue to be met, the law should also place an explicit duty on the Government to uphold and protect the freedom of the press.[33]

[26] Part K, Chapter 7, para 5.5
[27] Part K, Chapter 7, para 6.4
[28] Part K, Chapter 7, para 6.5
[29] Part K, Chapter 7, para 6.5
[30] Part K, Chapter 7, para 6.10
[31] Part K, Chapter 7, para 6.23
[32] Part K, Chapter 7, para 6.37
[33] Part K, Chapter 7, para 6.41

Recommendations for a self-regulatory body

Internal Governance

34. In addition to Recommendation 10 above, a new regulatory body should consider requiring:

(a) that newspapers publish compliance reports in their own pages to ensure that their readers have easy access to the information;[34] and

(b) as proposed by Lord Black, that a named senior individual within each title should have responsibility for compliance and standards.[35]

Incentives to membership

35. A new regulatory body should consider establishing a kite mark for use by members to establish a recognised brand of trusted journalism.[36]

The Code

36. A regulatory body should consider engaging in an early thorough review of the Code (on which the public should be engaged and consulted) with the aim of developing a clearer statement of the standards expected of editors and journalists.[37]

Powers and sanctions

37. A regulatory body should be prepared to allow a complaint to be brought prior to commencing legal proceedings if so advised. Challenges to that approach (and applications to stay) can be decided on the merits.[38]

38. In conjunction with Recommendation 11 above, consideration should also be given to Code amendments which, while fully protecting freedom of speech and the freedom of the press, would equip that body with the power to intervene in cases of allegedly discriminatory reporting, and in so doing reflect the spirit of equalities legislation.[39]

39. A new regulatory body should establish a ring-fenced enforcement fund, into which receipts from fines could be paid, for the purpose of funding investigations.[40]

Protecting the public

40. A new regulatory body should continue to provide advice to the public in relation to issues concerning the press and the Code along with a service to warn the press, and other relevant parties such as broadcasters and press photographers, when an individual has made it clear that they do not welcome press intrusion.[41]

[34] Part K, Chapter 3, para 4.26
[35] Part K, Chapter 7, para 4.28
[36] Part K, Chapter 4, para 5.41
[37] Part K, Chapter 7, para 4.20
[38] Part K, Chapter 3, Para 5.14
[39] Part F, Chapter 6, Para 8.22
[40] Part K, Chapter 7, para 4.39
[41] Part K, Chapter 7, Para 4.35

41. A new regulatory body should make it clear that newspapers will be held strictly accountable, under their standards code, for any material that they publish, including photographs (however sourced).[42]

The public interest

42. A regulatory body should provide guidance on the interpretation of the public interest that justifies what would otherwise constitute a breach of the Code. This must be framed in the context of the different provisions of the Code relating to the public interest, so as to make it easier to justify what might otherwise be considered as contrary to standards of propriety.[43]

43. A new regulatory body should consider being explicit that where a public interest justification is to be relied upon, a record should be available of the factors weighing against and in favour of publication, along with a record of the reasons for the conclusion reached.[44]

44. A new regulatory body should consider whether it might provide an advisory service to editors in relation to consideration of the public interest in taking particular actions.[45]

Access to information

45. A new regulatory body should consider encouraging the press to be as transparent as possible in relation to the sources used for stories, including providing any information that would help readers to assess the reliability of information from a source and providing easy access, such as web links, to publicly available sources of information such as scientific studies or poll results. This should include putting the names of photographers alongside images. This is not in any way intended to undermine the existing provisions on protecting journalists' sources, only to encourage transparency where it is both possible and appropriate to do so.[46]

Protecting journalists

46. A regulatory body should establish a whistleblowing hotline for those who feel that they are being asked to do things which are contrary to the code.[47]

47. The industry generally and a regulatory body in particular should consider requiring its members to include in the employment or service contracts with journalists a clause to the effect that no disciplinary action would be taken against a journalist as a result of a refusal to act in a manner which is contrary to the code of practice.[48]

[42] Part F, Chapter 6, paragraphs 4.6 and 5.19
[43] Part K, Chapter 7, Para 4.24
[44] Part F, Chapter 6, para 2.74
[45] Part K, Chapter 7, para 4.35
[46] Part F, Chapter 6, para 9.75
[47] Part K, Chapter 3, para 4.28
[48] Part K, Chapter 4, para 16.4

The Press and Data Protection

Recommendations to the Ministry of Justice

48. The exemption in section 32 of the Data Protection Act 1998 should be amended so as to make it available only where:[49]

(a) the processing of data is necessary for publication, rather than simply being in fact undertaken with a view to publication;

(b) the data controller reasonably believes that the relevant publication would be or is in the public interest, with no special weighting of the balance between the public interest in freedom of expression and in privacy; and

(c) objectively, that the likely interference with privacy resulting from the processing of the data is outweighed by the public interest in publication.

49. The exemption in section 32 of the Data Protection Act 1998 should be narrowed in scope, so that it no longer allows, by itself, for exemption from:[50]

(a) the requirement of the first data protection principle to process personal data fairly (except in relation to the provision of information to the data subject under paragraph 2(1)(a) of Part II Schedule 1 to the 1998 Act) and in accordance with statute law;

(b) the second data protection principle (personal data to be obtained only for specific purposes and not processed incompatibly with those purposes);

(c) the fourth data protection principle (personal data to be accurate and kept up to date);

(d) the sixth data protection principle (personal data to be processed in accordance with the rights of individuals under the Act);

(e) the eighth data protection principle (restrictions on exporting personal data); and

(f) the right of subject access.

The recommendation on the removal of the right of subject access from the scope of section 32 is subject to any necessary clarification that the law relating to the protection of journalists' sources is not affected by the Act.

50. It should be made clear that the right to compensation for distress conferred by section 13 of the Data Protection Act 1998 is not restricted to cases of pecuniary loss, but should include compensation for pure distress.[51]

51. The procedural provisions of the Data Protection Act 1998 with special application to journalism in:

(a) section 32(4) and (5)

(b) sections 44 to 46 inclusive

should be repealed.[52]

[49] Part H, Chapter 5, para 2.59
[50] Part H, Chapter 5, para 2.59
[51] Part H, Chapter 5, para 2.61
[52] Part H, Chapter 5, para 2.45

52. In conjunction with the repeal of those procedural provisions, consideration should be given to the desirability of including in the Data Protection Act 1998 a provision to the effect that, in considering the exercise of any powers in relation to the media or other publishers, the Information Commissioner's Office should have special regard to the obligation in law to balance the public interest in freedom of expression alongside the public interest in upholding the data protection regime.[53]

53. Specific provision should be made to the effect that, in considering the exercise of any of its powers in relation to the media or other publishers, the Information Commissioner's Office must have regard to the application to a data controller of any relevant system of regulation or standards enforcement which is contained in or recognised by statute.[54]

54. The necessary steps should be taken to bring into force the amendments made to section 55 of the Data Protection Act 1998 by section 77 of the Criminal Justice and Immigration Act 2008 (increase of sentence maxima) to the extent of the maximum specified period; and by section 78 of the 2008 Act (enhanced defence for public interest journalism).[55]

55. The prosecution powers of the Information Commissioner should be extended to include any offence which also constitutes a breach of the data protection principles.[56]

56. A new duty should be introduced (whether formal or informal) for the Information Commissioner's Office to consult with the Crown Prosecution Service in relation to the exercise of its powers to undertake criminal proceedings.[57]

57. The opportunity should be taken to consider amending the Data Protection Act 1998 formally to reconstitute the Information Commissioner's Office as an Information Commission, led by a Board of Commissioners with suitable expertise drawn from the worlds of regulation, public administration, law and business, and active consideration should be given in that context to the desirability of including on the Board a Commissioner from the media sector.[58]

Recommendations to the Information Commissioner

58. The Information Commissioner's Office should take immediate steps to prepare, adopt and publish a policy on the exercise of its formal regulatory functions in order to ensure that the press complies with the legal requirements of the data protection regime.[59]

59. In discharge of its functions and duties to promote good practice in areas of public concern, the Information Commissioner's Office should take immediate steps, in consultation with the industry, to prepare and issue comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data. This should be prepared and implemented within six months from the date of this Report.[60]

[53] Part H, Chapter 5, para 2.56
[54] Part H, Chapter 5, para 2.63
[55] Part H, Chapter 5, paras 2.93-2.94
[56] Part H, Chapter 5, para 2.106
[57] Part H, Chapter 5, para 1.106
[58] Part H, Chapter 6, para 4.9
[59] Part H, Chapter 5, para 2.63
[60] Part H, Chapter 5, para 2.71

60. The Information Commissioner's Office should take steps to prepare and issue guidance to the public on their individual rights in relation to the obtaining and use by the press of their personal data, and how to exercise those rights.[61]

61. In particular, the Information Commissioner's Office should take immediate steps to publish advice aimed at individuals (data subjects) concerned that their data have or may have been processed by the press unlawfully or otherwise than in accordance with good practice.[62]

62. The Information Commissioner's Office, in the Annual Report to Parliament which it is required to make by virtue of section 52(1) of the Act, should include regular updates on the effectiveness of the foregoing measures, and on the culture, practices and ethics of the press in relation to the processing of personal data.[63]

63. The Information Commissioner's Office should immediately adopt the Guidelines for Prosecutors on assessing the public interest in cases affecting the media, issued by the Director of Public Prosecutions in September 2012.[64]

64. The Information Commissioner's Office should take immediate steps to engage with the Metropolitan Police on the preparation of a long-term strategy in relation to alleged media crime with a view to ensuring that the Office is well placed to fulfil any necessary role in this respect in the future, and in particular in the aftermath of Operations Weeting, Tuleta and Elveden.[65]

65. The Information Commissioner's Office should take the opportunity to review the availability to it of specialist legal and practical knowledge of the application of the data protection regime to the press, and to any extent necessary address it.[66]

66. The Information Commissioner's Office should take the opportunity to review its organisation and decision-making processes to ensure that large-scale issues, with both strategic and operational dimensions (including the relationship between the culture, practices and ethics of the press in relation to personal information on the one hand, and the application of the data protection regime to the press on the other) can be satisfactorily considered and addressed in the round.[67]

Regulation by Law

The Criminal Law

67. On the basis that the provisions of s77-78 of the Criminal Justice and Immigration Act 2008 are brought into effect, so that increased sentencing powers are available for breaches of s55 of the Data Protection Act 1998,[68] the Secretary of State for Justice should use the power vested in him by s124(1)(a)(i) of the Coroners and Justice Act 2009 to invite the Sentencing Council of England and Wales to prepare guidelines in relation to data protection offences (including computer misuse).[69]

[61] Part H, Chapter 5, para 2.72
[62] Part H, Chapter 5, para 2.64
[63] Part H, Chapter 5, para 2.72
[64] Part H, Chapter 5, para 2.106
[65] Part H, Chapter 5, para 2.107
[66] Part H, Chapter 6, para 4.3
[67] Part H, Chapter 6, para 4.4
[68] Part H, Chapter 5, paras 2.94-2.95
[69] Part J, Chapter 2, para 9.1

68. The Home Office should consider and, if necessary, consult upon:[70]

(a) whether paragraph 2(b) of Schedule 1 to the Police and Criminal Evidence Act 1984 (PACE) should be repealed;

(b) whether PACE should be amended to provide a definition of the phrase "for the purposes of journalism" in s13(2); and

(c) whether s11(3) of PACE should be amended by providing that journalistic material is only held in confidence for the PACE provisions if it is held or has continuously been held since it was first acquired or created subject to an enforceable or lawful undertaking, restriction or obligation.

The Civil Law

Damages

69. There should be a review of damages generally available for breach of data protection, privacy, breach of confidence or any other media-related torts, to ensure proportionate compensation including for non-pecuniary loss (all referable to the duration, extent and gravity of the contravention).[71]

70. The Civil Justice Council should consider the level of damages in privacy, breach of confidence and data protection cases, being prepared to take evidence (from the Information Commissioner, the media and others) and thereafter to make recommendations on the appropriate level of damages for distress in such cases. How the matter is then taken forward will ultimately be for the courts to consider.[72]

71. The Report of the Law Commission on Aggravated, Exemplary and Restitutionary Damages should be adopted in relation to its recommendations that legislation should provide that:

(a) aggravated damages should only be awarded to compensate for mental distress and should have no punitive element;

(b) exemplary damages should be retained (although re-titled as punitive damages).[73]

72. Exemplary damages (whether so described or renamed as punitive damages) should be available for actions for breach of privacy, breach of confidence and similar media torts, as well as for libel and slander. The application to a defendant of any relevant system of regulation of standards enforcement which is contained in or recognised by statute and good internal governance in relation to the sourcing of stories should be relevant to the decisions reached in relation to such damages.[74]

Costs

73. The Civil Procedure Rules should be amended to require the court, when considering the appropriate order for costs at the conclusion of proceedings, to take into account the availability of an arbitral system set up by an independent regulator itself recognised by law. The purpose of this recommendation is to provide an important incentive for every publisher

[70] Part J, Chapter 2, para 9.11
[71] Part J, chapter 3, para 5.6
[72] Part J, Chapter 3, para 5.7
[73] Part J, Chapter 3, para 5.8
[74] Part J, Chapter 3, para 5.10

to join the new system and encourage those who complain that their rights have been infringed to use it as a speedy, effective and comparatively inexpensive method of resolving disputes.[75]

74. In the absence of the provision of an approved mechanism for dispute resolution, available through an independent regulator without cost to the complainant, together with an adjustment to the Civil Procedure Rules to require or permit the court take account of the availability of cost free arbitration as an alternative to court proceedings, qualified one way costs shifting should be introduced for defamation, privacy, breach of confidence and similar media related litigation as proposed by Lord Justice Jackson.[76]

The Press and the Police

Off-the-record briefings

75. The term 'off-the-record briefing' should be discontinued. The term 'non-reportable briefing' should be used to cover a background briefing which is not to be reported, and the term 'embargoed briefing' should be used to cover a situation where the content of the briefing may be reported but not until a specified event or time. These terms more neutrally describe what are legitimate police and media interactions.[77]

76. It should be mandatory for ACPO rank officers to record all of their contact with the media, and for that record to be available publicly for transparency and audit purposes. This record need be no more than a very brief note to the effect that a conversation has taken place and the subject matter of that conversation. Where the discussion involves a more significant operational or organisational matter, then it may be sensible for a more detailed note to be retained. Finally, in circumstances where policy or organisation matters may be on the agenda for discussion, it is good practice for a press officer also to be present.[78]

77. The simple rule included within the 'Interim ACPO Guidance for Relationships with the Media' should be adopted as good practice.[79] This is:

> *"Police officers and staff should ask: 'am I the person responsible for communicating about this issue and is there a policing purpose for doing so?' If the answer to both parts of this question is 'yes', they should go ahead."*

Leaks of information

78. The Police Service should re-examine the rigour of the auditing process and the frequency of the conduct of audits in relation to access to the Police National Computer (PNC). Additional consideration should also be given to the number of people given access to the PNC and the associated rules which govern its usage.[80]

[75] Part J, Chapter 3, para 6.9
[76] Part J, Chapter 3, para 6.11
[77] Part G, Chapter 4, para 4.5
[78] Part G, Chapter 4, para 4.8
[79] Part G, Chapter 4, para 4.10
[80] Part G, Chapter 4, para 5.6

Gifts, hospitality and entertainment

79. The recent ACPO Guidance should more specifically spell out the dangers of consuming alcohol in a setting of casual hospitality (without necessarily specifying a blanket ban).[81]

Media employment

80. Consideration should be given to the terms upon which ACPO rank officers are appointed and, in particular, whether these terms should include some limitation upon the nature of any employment within or by the media that can be undertaken without the approval of the relevant authority for a period of 12 months following the cessation of the appointment.[82]

Corruption, whistleblowing and related matters

81. An enhanced system for protection of whistleblowers and for providing assistance for the Police Service on general ethical issues should at least comprise the following:[83]

(a) greater prominence should be given to the Public Interest Disclosure Act (PIDA) telephone line operated by the Independent Police Complaints Commission (IPCC);

(b) there should be an 'ethics line' to the IPCC, available for all serving Police Officers, providing general ethical guidance;

(c) to avail those at rank of Chief Constable (Assistant Commissioner level within the Metropolitan Police Service), Her Majesty's Inspectorate of Constabulary should identify one of its members, a former Chief Constable, as the designated point of contact for confidential ethics guidance. The Chief Officer seeking and obtaining that advice would be able to refer to it should any issue subsequently arise on a complaint to a Professional Standards Department, a Police and Crime Commissioner, or indeed the IPCC itself. The advice would not be determinative of the complaint, but the fact that it was sought and received, as well as its content, would be a matter to be taken into account;

(d) within the IPCC itself, there is a need for an enhanced 'filter system' whereby the nature of complaints are appropriately addressed at an early stage so that (a) they can be investigated at the right level, and (b) sufficient structures are put in place to maintain confidentiality of the complaint, and differentiate as soon as is appropriate between genuine whistleblowers and those who are merely ventilating a personal grievance;

(e) the former Chief Constable referred to under sub-paragraph (c) above should also be the recipient of complaints about Chief Constables made to the IPCC. In the event that he or she may already have given informal advice in relation to the subject-matter of the complaint, as per sub-paragraph (c) above, a substitute HMI would be deputed to act; and

(f) Chief Officers should also be the subject of regular independent scrutiny by HMIC, including through unannounced inspections.

[81] Part G, Chapter 4, para 6.4
[82] Part G, Chapter 4, para 7.6
[83] Part G, Chapter 4, para 8.14

The Press and Politicians

82. As a first step, political leaders should reflect constructively on the merits of publishing on behalf of their party a statement setting out, for the public, an explanation of the approach they propose to take as a matter of party policy in conducting relationships with the press.[84]

83. Party Leaders, Ministers and Front Bench Opposition spokesmen should consider publishing:[85]

(a) the simple fact of long term relationships with media proprietors, newspaper editors or senior executives which might be thought to be relevant to their responsibilities and,

(b) on a quarterly basis:

i. details of all meetings with media proprietors, newspaper editors or senior executives, whether in person or through agents on either side, and the fact and general nature of any discussion of media policy issues at those meetings; and

ii. a fair and reasonably complete picture, by way of general estimate only, of the frequency or density of other interaction (including correspondence, phone, text and email) but not necessarily including content.

84. The suggestions that I have made in the direction of greater transparency about meetings and contacts should be considered not just as a future project but as an immediate need, not least in relation to interactions relevant to any consideration of this Report.[86]

Plurality and Media Ownership

85. The particular public policy goals of ensuring that citizens are informed and preventing too much influence in any one pair of hands over the political process are most directly served by concentrating on plurality in news and current affairs. This focus should be kept under review.[87]

86. Online publication should be included in any market assessment for consideration of plurality.[88]

87. Ofcom and the Government should work, with the industry, on the measurement framework, in order to achieve as great a measure of consensus as is possible on the theory of how media plurality should be measured before the measuring system is deployed, with all the likely commercial tensions that will emerge.[89]

88. The levels of influence that would give rise to concerns in relation to plurality must be lower, and probably considerably lower, than the levels of concentration that would give rise to competition concerns.[90]

89. Ofcom has presented the Inquiry and the Government with a full menu of potential remedies, and it has not been argued or suggested that any of them are inappropriate in principle. Each of them might be appropriate in a given set of circumstances and the relevant regulatory authority should have all of them in its armoury.[91]

[84] Part I, Chapter 8, para 5.9
[85] Part I, Chapter 8, para 5.31
[86] Part I, Chapter 9, para 5,37
[87] Part I, Chapter 9, para 2.8
[88] Part I, Chapter 9, para 2.11
[89] Part I, Chapter 9, para 3.9
[90] Part I, Chapter 9, para 4.19
[91] Part I, Chapter 9, para 4.20

90. The Government should consider whether periodic plurality reviews or an extension to the public interest test within the markets regime in competition law is most likely to provide a timely warning of, and response to, plurality concerns that develop as the result of organic growth, recognising that the proposal for a regular plurality review is more closely focussed on plurality issues.[92]

91. Before making a decision to refer a media merger to the competition authorities on public interest grounds, the Secretary of State should consult relevant parties as to the arguments for and against a referral, and should be required to make public his reasons for reaching a decision one way or the other.[93]

92. The Secretary of State should remain responsible for public interest decisions in relation to media mergers. The Secretary of State should be required either to accept the advice provided by the independent regulators, or to explain why that advice has been rejected. At the same time, whichever way the Secretary of State decides the matter, the nature and extent of any submissions or lobbying to which the Secretary of State and his officials and advisors had been subject should be recorded and published.[94]

[92] Part I, Chapter 9, para 5.14
[93] Part I, Chapter 9, para 6.10
[94] Part I, Chapter 9, para 6.11

APPENDICES

APPENDIX 1

Counsel to the Inquiry

Robert Jay QC
David Barr
Carine Patry Hoskins
Lucinda Boon

The following members of the team are qualified barristers who provided legal assistance to Counsel to the Inquiry:

Heather Emmerson
Toby Fisher
William Irwin
Josephine Norris

Inquiry Team[1]

Kate Arrowsmith
Abi Brooks
Kim Brudenell
Rachel Clark
Rowena Collins Rice
James Court
Khaleel Desai
Nicola Enston
Sharron Hiles
Amanda Jeffery
Philip Lawley
Nicola Massally
Simon Miller
Carole-Ann Montgomery
Joanne Osei-Asiamah
John Toker
Karen Wood
Ruby Yau

In preparing the Report, the Inquiry was assisted by:

Catherine Dobson
Hannah McCarthy
Emily Wilsdon

[1] not all members of the Inquiry Team were employed for the full duration of the Inquiry

APPENDIX 2
SUBMISSIONS AND CORRESPONDENCE STATISTICS

1. Introduction

Over the course of the Inquiry, submissions and emails have been received from members of the public, industry stakeholders, campaign and interest groups as well as academics, through the general enquiries mailbox. The Inquiry has been committed to publishing these statistics on the Inquiry's website on a monthly basis.[1]

2. Submissions

The following submissions have been received by the Inquiry since the start of formal public hearings, between 14 November 2011 and 31 October 2012:

Journalist (current)	24
Journalist (former)	43
Editor (current)	6
Editor (former)	7
Academic	53
Broadcaster	4
Members of the public	590
MP/Peer	27
Victim of press treatment	163
Campaign organisation	83
Press photographer	10
Police (current)	8
Police (former)	11
PI or investigatory body	2
Regulator	13
Trade association	4
Legal	18
Other	17

The Inquiry has received a total of 1,083 submissions between 14 November 2011 and 31 October 2012. Table 1 below shows the monthly breakdown of the number of submissions received each month, by author type.

[1] http://www.levesoninquiry.org.uk/about/submissions-and-emails-received/

Total Submissions Received through the General Enquiries Mailbo													
Author Type	14-Nov to 13-Dec	14-Dec to 31-Jan	Feb 2012	Mar 2012	Apr 2012	May 2012	Jun 2012	Jul 2012	Aug 2012	Sep 2012	Oct 2012		
Journalist (Current)	9	5	0	1	3	1	3	1	0	0	0		
Journalist (Former)	18	5	3	3	3	4	2	1	1	1	0		
Editor (Current)	2	1	0	0	0	0	1	1	1	0	0		
Editor (Former)	5	1	0	0	0	0	0	0	0	0	0		
Academic	21	12	2	2	1	3	12	1	0	0	0		
Broadcaster	n/a	n/a	1	0	0	0	2	0	0	0	1		
Members of the Public	215	73	40	19	34	60	93	31	6	5	2		
MP / Peer	10	6	2	2	0	2	2	3	0	0	0		
Victim of press treatment	93	24	16	9	2	3	5	3	3	3	0		
Campaign organisation	23	20	7	7	2	1	7	10	3	0	0		
Press photographer	4	3	1	0	1	0	0	0	0	1	0		
Police (current)	1	0	2	2	2	1	0	0	0	0	0		
Police (former)	1	4	5	1	0	0	0	0	0	0	0		
PI or investigatory body	n/a	n/a	2	0	0	0	0	0	0	0	0		
Regulator	7	2	0	1	0	1	2	0	0	0	0		
Trade Association	n/a	n/a	1	0	1	0	1	1	0	0	0		
Legal	2	7	3	1	0	1	2	1	0	0	0		
Other	0	6	2	1	0	0	3	5	1	0	0		
Total:	411	169[2]	87[3]	49	49	77	135	58	15	10	3		
Percentage change by Month[4] (%):	n/a	-59	-49	-44	0	+36	+75	-57	-74	-33	-70		

[2] this figure excludes 2 submissions which were processed outside of the General Enquiries Mailbox (and recorded at a later date); or were supplementary submissions which were not counted as new submissions for the January total
[3] this figure excludes 18 submissions which were processed outside of the General Enquiries Mailbox (and recorded at a later date); or were supplementary submissions which were not counted as new submissions for the February total
[4] figures rounded to the nearest whole number

3. General enquiries correspondence

In addition to the 1,083 submissions received through the general enquiries mailbox, the Inquiry has also received 2,502 general pieces of correspondence since the start of formal public hearings on 14 November 2011. These have been categorised accordingly:

- 2,452 enquiries;
- 22 FOI queries; and
- 28 pieces of other correspondence.

4. Website views

Between 14 November 2011 and 31 October 2012, the Leveson Inquiry website has received 1,805,939 hits from 652,675 unique visitors from over 200 countries.

5. Press reporting during the Inquiry

Since it was established, the Inquiry has had the benefit of daily summaries of relevant press stories, provided by an independent organisation, from all of the UK national newspapers and some international titles.

APPENDIX 3
WITNESSES TO THE INQUIRY

1. The following witnesses gave oral evidence to the Inquiry:

Witness	Date called
Stephen Abell	30 January 2012
Lawrence Abramson	13 December 2011
Colin Adwent	26 March 2012
DAC Sue Akers	06 February 2012 27 February 2012 23 July 2012
Francis Aldhouse	05 December 2011
Richard Allan	26 January 2012
Chief Constable Simon Ash	26 March 2012
Paul Ashford	12 January 2012
Chris Atkins	06 December 2011
Chief Constable Matt Baggott	28 March 2012
Sly Bailey	16 January 2012
Roger Baker	05 March 2012
Lionel Barber	10 January 2012
Aidan Barclay	23 April 2012
Derek Barnett	03 April 2012
Professor Steven Barnett	08 December 2011 18 July 2012
John Battle	23 January 2012
Helen Belcher	08 February 2012
Matthew Bell	20 December 2011
Joanne Bird	28 March 2012
Lord Black of Brentwood	01 February 2012 09 July 2012
Chris Blackhurst	10 January 2012
Lord Blair of Boughton	07 March 2012
Tony Blair	28 May 2012
James Blendis	02 February 2012
Adam Boulton	15 May 2012

Witness	Date called
Colette Bowe	01 February 2012 12 July 2012
Jillian Brady	26 June 2012
Alastair Brett	15 March 2012
Barbara Brewis	27 March 2012
Professor George Brock	08 December 2011
Lord Brooke of Sutton Mandeville	24 May 2012
Rebekah Brooks	11 May 2012
Gordon Brown MP	11 June 2012
Inayat Bunglawala	24 January 2012
Peter Burden	05 December 2011
Mark Burns-Williamson	02 April 2012
Baroness Buscombe	07 February 2012
Bill Butler	02 February 2012
Carla Buzasi	08 February 2012
Lisa Byrne	18 January 2012
Dr Vince Cable MP	30 May 2012
David Cameron MP	14 June 2012
Alastair Campbell	30 November 2011 14 May 2012
Anne Campbell	26 March 2012
Professor Brian Cathcart	08 December 2011
Oliver Cattermole	28 March 2012
Lucie Cave	18 January 2012
Jonathan Chapman	14 December 2011
Peter Charlton	18 January 2012
Sara Cheesley	13 March 2012
Charlotte Church	28 November 2011
Kenneth Clarke QC MP	30 May 2012
Martin Clarke	09 May 2012
Peter Clarke	01 March 2012
Nick Clegg MP	13 June 2012
Max Clifford	09 February 2012
Tim Colborne	26 June 2012
David-John Collins	26 January 2012

Witness	Date called
Lord Condon of Langton Green	06 March 2012
Steve Coogan	22 November 2011
Philip Coppel QC	17 July 2012
Andy Coulson	10 May 2012
Catherine Crawford	29 March 2012
Tom Crone	13 December 2011 14 December 2011
Bob Crow	25 January 2012
Colin Crowell	07 February 2012
Giles Crown	26 June 2012
Dr Rowan Cruft	16 July 2012
Chief Constable Mike Cunningham	29 March 2012
Professor James Curran	13 July 2012
Paul Dacre	06 February 2012 09 February 2012
Nick Davies	29 November 2011 28 February 2012
Richard Desmond	12 January 2012
Anne Diamond	28 November 2011
AC Cressida Dick	12 March 2012
Noel Doran	18 January 2012
Stephen Dorrell MP	23 May 2012
Bob Dowler	21 November 2011
Sally Dowler	21 November 2011
DCI Clive Driscoll	15 March 2012
Matthew Driscoll	19 December 2011
Ian Edmondson	09 February 2012
Jeff Edwards	14 March 2012
John Edwards	09 January 2012
Chris Elliott	17 January 2012
Lloyd Embley	16 January 2012
Claire Enders	17 July 2012
Sir Harold Evans	17 May 2012
Adrian Faber	20 March 2012
Nick Fagge	21 December 2011

Witness	Date called
Dick Fedorcio	13 March 2012
Spencer Feeney	18 January 2012
Ian Fegan	29 March 2012
Mary-Ellen Field	22 November 2011
Lara Fielden	13 July 2012
Elizabeth Filkin	05 March 2012
Padraic Flanagan	21 December 2011
Garry Flitcroft	22 November 2011
Robin Foster	17 July 2012
Fiona Fox	24 January 2012
Professor Chris Frost	10 July 2012
Jane Furniss	28 March 2012
Tony Gallagher	10 January 2012
Sheryl Gascoigne	23 November 2011
DCI Brendan Gilmour	09 May 2012
Mike Gilson	18 January 2012
Tim Godwin	07 March 2012
Tim Gordon	20 March 2012
Adrian Gorham	02 February 2012
Michael Gove MP	29 May 2012
Lord Grade of Yarmouth	31 January 2012
Christopher Graham	26 January 2012
Hugh Grant	21 November 2011
Jim Gray	23 January 2012
David Allen Green	25 January 2012
Professor Roy Greenslade	12 July 2012
Sir Charles Gray	12 July 2012
Andrew Grice	25 June 2012
Nick Griffiths	26 March 2012
Jonathan Grun	25 January 2012
Stewart Gull	02 April 2012
Jacqui Hames	28 February 2012
James Hanning	19 December 2011
James Harding	17 January 2012 07 February 2012

Witness	Date called
Professor Ian Hargreaves	08 December 2011
Harriet Harman QC MP	12 June 2012
Charlotte Harris	06 December 2011
David Harrison	19 March 2012
Liz Hartley	11 January 2012
Heather Harvey	24 January 2012
Andy Hayman	01 March 2012
Jonathan Heawood	24 January 2012
Peter Hill	12 January 2012
James Hipwell	21 December 2011
Amanda Hirst	27 March 2012
Ian Hislop	17 January 2012
HJK	24 November 2011
Stuart Hoare	19 December 2011
Commissioner Bernard Hogan-Howe	20 March 2012
Baroness Hollins	02 February 2012
Professor John Horgan	13 July 2012
Professor Jennifer Hornsby	16 July 2012
Chief Constable Stephen House	21 March 2012
Mark Hughes	02 February 2012
Simon Hughes MP	27 February 2012
Lord Hunt of Wirral	31 January 2012 09 July 2012 10 July 2012
Jacqui Hunt	24 January 2012
Jeremy Hunt MP	31 May 2012
Terry Hunt	26 March 2012
Ian Hurst	28 November 2011
Tony Imossi	02 February 2012
Christopher Jefferies	28 November 2011 28 February 2012
Alan Johnson MP	22 May 2012
Christopher Johnson	20 December 2011
DCI Philip Jones	27 March 2012
Tessa Jowell MP	21 May 2012

Witness	Date called
John Kampfner	24 January 2012
Daphne Keller	26 January 2012
ACC Jerry Kirkby	27 March 2012
Norman Lamb MP	26 June 2012
Maria Larasi	24 January 2012
Duncan Larcombe	09 January 2012
Sandra Laville	14 March 2012
Jeremy Lawton	19 March 2012
Evgeny Lebedev	23 April 2012
David Leigh	06 December 2011
Mark Lewis	23 November 2011 30 November 2011
Will Lewis	10 January 2012
Catherine Llewellyn	21 March 2012
John Lloyd	26 June 2012
Darryn Lyons	09 February 2012
DI Mark Maberly	29 February 2012
Lord MacDonald QC of River Glaven	04 April 2012
Stuart McIntosh	17 July 2012
Dr Daithi Mac Sithigh	08 December 2011
Kelvin MacKenzie	09 January 2012
DC Craig Mackey	26 March 2012
Murdoch MacLennan	10 January 2012
Mazher Mahmood	12 December 2011 25 January 2012
Sir John Major	12 June 2012
Manish Malhotra	10 January 2012
Kit Malthouse	29 March 2012
Lord Mandelson of Foy and Hartlepool	21 May 2012
Dr Neil Manson	16 July 2012
Andrew Marr	23 May 2012
Sharon Marshall	20 December 2011
Dr Rob Mawby	03 April 2012
Theresa May MP	29 May 2012
Dr Gerry McCann	23 November 2011

Witness	Date called
Dr Kate McCann	23 November 2011
Maria McGeoghan	18 January 2012
Paul McKeever	02 April 2012
John McLellan	18 January 2012
Paul McMullan	29 November 2011
Professor Chris Megone	16 July 2012
David Mellor	26 June 2012
Professor Sue Mendus	16 July 2012
Sir Christopher Meyer	31 January 2012
Frederic Michel	24 May 2012
T/ACC Russell Middleton	09 May 2012
Ed Miliband MP	12 June 2012
Sienna Miller	24 November 2011
Heather Mills	09 February 2012
Thomas Mockridge	17 January 2012
Dominic Mohan	09 January 2012 07 February 2012
Dr Martin Moore	08 February 2012 10 July 2012
Gary Morgan	07 February 2012
Piers Morgan	20 December 2011
Max Mosley	24 November 2011 18 July 2012
Will Moy	08 February 2012
John Mullin	10 May 2012
Andrew Mullins	10 January 2012
James Murdoch	24 April 2012
Rupert Murdoch	25 April 2012 26 April 2012
James Murray	19 March 2012
Colin Myler	14 December 2011 15 December 2011
Dawn Neesom	12 January 2012
Rosie Nixon	18 January 2012
Julie Norgrove	29 March 2012
Steven Nott	06 December 2011

Witness	Date called
Peter Oborne	17 May 2012
Sir Dennis O'Connor	12 March 2012
Lord O'Donnell of Clapham	14 May 2012
Nathan Oley	02 April 2012
Professor Baroness O'Neill	16 July 2012
Sean O'Neill	21 March 2012
Sir Hugh Orde	28 March 2012
George Osborne MP	11 June 2012
Gary O'Shea	24 January 2012
Alex Owens	30 November 2011 5 December 2011
CC Lynne Owens	06 March 2012
Nick Owens	06 February 2012
Brian Paddick	27 February 2012
David Palmer	02 February 2012
Lucy Panton	03 April 2012
Susan Panuccio	17 January 2012
Guy Parker	01 February 2012
Ryan Parry	24 January 2012
Lord Patten of Barnes	23 January 2012
Nicole Patterson	12 January 2012
Jeremy Paxman	23 May 2012
Paul Peachey	14 March 2012
Andrew Penman	16 January 2012
Rupert Pennant-Rea	17 January 2012
Justin Penrose	20 March 2012
Richard Peppiatt	29 November 2011
David Perry QC	04 April 2012
Professor Julian Petley	08 December 2011
Tom Pettifor	20 March 2012
Angela Phillips	08 December 2011 13 July 2012
Anne Pickles	26 March 2012
Nigel Pickover	18 January 2012

Witness	Date called
Julian Pike	13 December 2011 20 December 2011
David Pilditch	21 December 2011
Chief Constable Colin Port	27 March 2012
Lord Prescott of Kingston upon Hull	27 February 2012
Ben Priestly	29 March 2012
Bob Quick	07 March 2012
Lord Reid of Cardowan	23 May 2012
Ed Richards	01 February 2012 12 July 2012
Peter Riddell	25 June 2012
Finbarr Ronayne	10 January 2012
Viscount Rothermere	10 May 2012
Tom Rowland	23 November 2011
JK Rowling	24 November 2011
Alan Rusbridger	17 January 2012
Jonathan Russell	18 January 2012 21 March 2012
John Ryley	23 April 2012
Alex Salmond MSP	13 June 2012
Daniel Sanderson	15 December 2011
CI Sally Seeley	20 March 2012
Graham Shear	21 November 2011
Gillian Shearer	26 March 2012
Rob Shorthouse	21 March 2012
Paul Silva	11 January 2012
Chief Constable Chris Sims	20 March 2012
Gordon Smart	09 January 2012
Adam Smith	24 May 2012 25 May 2012
Lord Smith of Finsbury	22 May 2012
Joan Smith	21 November 2011
Tony Smith	02 February 2012
Jon Snow	25 June 2012
Matt Sprake	18 July 2012

Witness	Date called
Paul Staines	08 February 2012
Michelle Stanistreet	09 February 2012 10 July 2012
Keir Starmer QC	08 February 2012 04 April 2012
Ed Stearns	03 April 2012
Jonathan Stephens	25 May 2012
Sir Paul Stephenson	05 March 2012
Lord Stevens of Kirkwhelpington	06 March 2012
CC Jonathan Stoddart	27 March 2012
Jack Straw MP	16 May 2012
Michael Sullivan	15 March 2012
Pam Surphlis	08 February 2012
DCS Keith Surtees	29 February 2012
Tim Suter	12 July 2012
Dr Damian Tambini	18 July 2012
Professor John Tasioulas	16 July 2012
David Thomas	12 July 2012
Richard Thomas	09 December 2011
Mark Thompson	23 January 2012
Mark Thomson	24 November 2011
Neville Thurlbeck	12 December 2011
Hugh Tomlinson QC	13 July 2012
Tim Toulmin	30 January 2012
Chief Constable Andrew Trotter	28 March 2012
Neil Turner	07 February 2012
Steve Turner	20 December 2011
John Twomey	19 March 2012
Steve Unger	17 July 2012
Jonathan Ungoed-Thomas	14 March 2012
Anna Van Heeswijk	24 January 2012
Chief Constable Peter Vaughan	21 March 2012
Lord Wakeham of Maldon	15 May 2012
Justin Walford	09 January 2012
Richard Wallace	16 January 2012

Witness	Date called
Neil Wallis	12 December 2011 2 April 2012
Simon Walters	25 June 2012
Stephen Waring	24 January 2012
James Watson	22 November 2011
Margaret Watson	22 November 2011
Tom Watson MP	22 May 2012
Tina Weaver	16 January 2012
Derek Webb	15 December 2011
Philip Webster	25 June 2012
Hugh Whittow	12 January 2012
DS Philip Williams	29 February 2012
Jane Winter	28 November 2011
John Witherow	17 January 2012
Dan Wootton	06 February 2012
Camilla Wright	26 January 2012
Peter Wright	11 January 2012
Stephen Wright	15 March 2012
John Yates	01 March 2012
Liz Young	28 March 2012
Ronald Zink	07 February 2012

2. Written evidence and submissions were received from the following people and groups:

A

Dr John Abraham
Bryan Adams
Advertising Standards Agency
Dr Nafeez Ahmed
Abigail Alford
Tasmin Allen
Alternative Libel Project
Paul Ashford
Margaret Aspinall
Julian Assange
Associated News Ltd
Association of Medical Research Charities

B

Graham Banks
Jonathan Baume (FDA)
Beat
Ailsa Beaton
Kevin Beatty
Sean Bellew
Big Brother Watch
Bishop Hill
Cherie Blair
Tim Blott
Phil Boardman
Baroness Bottomley
Jim Boumelha
Magnus Boyd
The British Press Photographers Association (BPPA)
Tom Bradby
Claire Bradley
Peter Bradley
Ben Bradshaw MP
Tim Bratton
British and Irish Ombudsman Association (BIOA)
British Psychological Society
Benedict Brogan
David Brookes
David Brown
Kim Brudenell
Chris Bryant MP
Bureau of Investigative Journalism
Dr Aidan Byrne

C

Campaign for Press and Broadcasting Freedom
Cancer Research UK
Adam Cannon
Carbon Brief
Cardiff University Brain Research Imaging Centre
Carnegie Trust UK
Maggie Carver
Richard Caseby
The Centre for Investigative Journalism
The Chartered Institute of Journalists
Citizen Journalism Educational Trust
Simon Citron
City University London
Wesley Clarkson
Graham Cluley
Liz Cocks
College of Social Work
David Colquhoun
Paul Connolly
Coordinating Committee for Media Reform (CCMR)
Dominic Crossley
Lyn-Marie Cunliffe

D

Dart Centre Europe
Gareth Davies (on behalf of Barclays)
Professor Aeron Davis
Department of Culture, Media and Sport
Irene Dennehy
The Democratic Society
Disaster Action
Seamus Dooley
Ian Down
Dr Sallyanne Duncan
Greg Dyke

E

Early Resolution
East London Mosque and London Muslim Centre
EAVES Housing
Audrey Edwards
Paul Edwards
Nicholas Eldred
Martin Ellice
Harriet Ellis
End Violence Against Women (EVAW)
ENGAGE
Epoch Times
Equality Now
European Policy Forum
John Evans (HMRC)
Terry Evans

F

Federation of Poles in Great Britain
John Ferriter
Finnish Press Council
Bob Firth
Sue Firth
Francis Fitzgibbon QC
Dame Elizabeth Forgan
Alison Fortescue
Paddy French
Professor Chris Frost

G

Professor Ivor Gaber
Gary Gibbon
Professor Thomas Gibbons
Dr Rodney D Gilbert
Glasgow University
Deborah Glass
Peter Gold
Professor David Golding
Goldsmiths College
Timothy Gordon
DCS Iain Goulding
Philip Graf
Mike Granatt
Damian Green MP
Rob Greener
Dr Chris Greer
Geordie Greg
George Greig
Deborah Grobbelaar

H

Hacked Off
Phil Hall
Josh Halliday
Sean Hamilton
Hansard Society
Tony Harcup
John Hardie
Harmless Sky
Dave Hartnett
Stefano Hatfield
Louise Hayman
Scott Henderson
Patrick Hennessy
Scott Hesketh
Matthew Hibbert

Stuart Higgins
Peter Hill
Peter Hitchens
Lord Hollick
Howard League for Penal Reform
Mark Hughes (BT)
Mark Hughes (The Telegraph)
John Humphries

I

Inclusion London
Index on Censorship
INQUEST
Irish Press Council
The Irish Traveller Movement
Robert Sinclair Irvine

J

Sarah Jellema
Joint Enterprise: Not Guilty by Association (JENGbA)
Sir Paul Jenkins
Simon Jenkins
Joint Council for the Welfare of Immigrants
Carwyn Jones AM

K

Jemima Khan
Peter Kirkham
Laura Kuenssberg

L

Billy Labrum
Professor Rae Langton
Quentin Letts
Dr David Levy
Michael Lidbury
Magnus Linklater
Liverpool John Moores University
Tim Lord
Louise Lovely
Professor Tim Luckhurst
John Lyon

M

DCI John Macdonald
Ian MacGregor
Professor Kenneth MacKinnon
Lisa MacLeod
Make Justice Work
David Mannion
Ian Marratt
Peter McCall
Professor Eugene McLaughlin
Michael McManus
Media Regulation Round Table
MediaWise Trust
Kip Meek
Professor Marie Messenger-Davies
Migrant and Refugee Communities Forum
Andrew Miller
Mind and Rethink Mental Illness
Charles Moore
Gareth Morgan
Neil Morrissey
Vincent Moss
Mark Moylan
John Mulholland
Chris Mullin

N

Suleman Nagdi
National Aids Trust (NAT)
National Association of Press Agencies
National Council for Training of Journalists (NCTS)
Andrew Neil
Netherlands Press Council
Neuroimmune Alliance
New Zealand Law Commission
Newspaper Society
Jackie Newton

O

OBJECT
Ofcom
Craig Oliver
Ombudsman Services
Organisation of News Ombudsman (ONO)
Kevin O'Sullivan
Patricia Owen

P

George Parker
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APPENDIX 4
LEGAL MATERIALS

1. Overview

1.1 This Annex sets out an overview of the law of particular relevance to the Inquiry's terms of reference. The purpose of the Annex is to summarise the current law to the extent that this is necessary to understand the evidence heard by the Inquiry, to put that evidence in a legal context and to assist in understanding the legal framework within which the recommendations set out in the Report are framed. The Annex is not intended to be a complete or definitive recitation of the law relating to the press, nor does the commentary in the Annex seek to determine any points of law or carry any weight in any future legal proceedings. For those unfamiliar with the law, in the interests of clarity, authorities which support different propositions are repeated and explained in different parts of the text.

1.2 The broad structure of the Annex is as follows:

- Freedom of Speech and Article 10 – The importance of freedom of speech, Article 10 of the European Convention, section 12 of the Human Rights Act and the protection of journalists' sources;
- Civil Law – Breach of confidence, misuse of private information, protection from Harassment Act 1997 and defamation;
- Regulatory Law – Legal framework relating to the Information Commissioner;
- Criminal Law – Substantive law restraining the conduct of journalists and the content of publications;
- Criminal Procedure – Police powers of investigation in relation to journalists.

2. Freedom of speech and Article 10

Recognition of the right to freedom of expression

2.1 The concept of freedom of speech has a long history, although the establishment of a legally enforceable right to free speech in the United Kingdom is a relatively recent development in the law.

2.2 Freedom of speech in a specific context was recognised in the Bill of Rights 1689 which referred to "*freedom of speech in Parliament*". Freedom of speech in broader terms was recognised in a number of international instruments in the twentieth century. At the first meeting of the General Assembly of the United Nations in London in 1946, freedom of expression was proclaimed as the touchstone of all human rights.[1] Article 19 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948 states that:

[1] UN General Assembly Resolution 59(1) of 14 December 1946

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

2.3 The right to freedom of expression is also recognised in the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976.[2] Article 19 of the ICCPR states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. It is also observed that the exercise of the right to freedom to seek, receive and impart information carries with it special duties and responsibilities and may be subject to restrictions where these are provided by law and are necessary to respect the rights and reputation of others or the protection of national security, public order or public health or morals.

2.4 The European Convention for the Protection of Human Rights and Fundamental Freedoms (Cm. 8969), frequently referred to as the European Convention of Human Rights (The Convention) was signed on 4 November 1950. Freedom of expression was enshrined in Article 10. Prior to the Convention being incorporated into domestic law through the Human Rights Act 1998, the domestic courts had regard to the jurisprudence of the European Court of Human Rights (ECtHR) on freedom of expression and common law had recognised that freedom of expression had achieved the status as a constitutional right.[3] Today, Article 10 of the Convention is incorporated into domestic law through the mechanism set out in the Human Rights Act 1998.

2.5 Freedom of expression has been recognised as one of the general rights protected under EU law.[4] The right to free expression also forms part of the Charter of Fundamental Rights of the European Union in Article 11.[5]

2.6 The importance of freedom of expression is well established by both the ECtHR and the domestic courts.[6] In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, Lord Bingham observed:[7]

> *"Freedom of thought and expression is an essential condition of an intellectually healthy society. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government. These are the values which article 10 exists to protect, and their importance gives it a central role in the Convention regime, protecting free speech in general and free political speech in particular."*

[2] Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

[3] In *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 1 AC 277, Lord Steyn noted that even before the coming into force of the HRA 1988, "*the principle of freedom of expression [had] attained the status of a constitutional right with high attendant normative force*", with reference made to *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 207G-H

[4] Article 11 of the EU Charter of Fundamental Rights of the European Union. See also C-353/89 *EC Commission v Netherlands* [1991] ECR I-40689 at para 30

[5] Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000

[6] See for example: Application 22954/93, *Ahmed v United Kingdom* (1998) 29 EHRR1 at para 70, and Application 11800/85, *Ezelin v France* (1991) 14 EHRR 362 at paras 37 and 51

[7] [2008] UKHL 15 at para 27

2.7 The link between *individual* freedom of expression and a free media may also be discerned in citations from authority at the highest level. For example, per Sir John Donaldson MR in *A-G v Guardian Newspapers Ltd (No.2)*:[8]

> *"… the existence of a free press … is an essential element in maintaining parliamentary democracy and the British way of life as we know it. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalist. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public."*

2.8 Additionally, Lord Bingham observed in the case of *R (Laporte) v Chief Constable of Gloucestershire*, that:[9]

> *"… the proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than necessary to promote the legitimate object of the restriction."*

2.9 Further, the rationale for protecting the freedom of the press in contributing to debate in a democratic society has also been recognised. Lord Steyn observed in *R v Secretary of State for the Home Department*, Ex p Simms:[10]

> *"Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market': Abrams v United States (1919) 250 US 616, 630, per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."*

Article 10 of the Convention

2.10 Article 10 of the Convention provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of*

[8] [1990] 1 AC 109 at 183
[9] [2006] UKHL 55
[10] [2000] 2 AC 115 at 126

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2.11 Article 10(1) encompasses a number of freedoms, including freedom of expression, the right to hold and impart opinions and ideas and the right to receive information and ideas. The freedom to receive and the freedom to impart information are two independent rights and not merely corollaries of each other.[11] These rights belong to everyone in society and are not simply rights of the press, although freedom of the press and other news media has consistently been recognised in case law as protected by Article 10. Freedom of expression is not limited to written or spoken word but extends to print, radio, television broadcasting, film and artistic works. The European Court of Human Rights has recently confirmed that it is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest, emphasising that not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.[12]

2.12 Article 10 protects not only the substance of ideas and information, but also the form in which they are conveyed.[13] Unlike the press, the broadcast media are subject, by the express terms of Article 10(1), to licensing provisions. The ECtHR has recognised in the context of audiovisual media the importance of pluralism as an aspect of Article 10, noting that "*there can be no democracy without pluralism. Democracy thrives on freedom of expression.*"[14]

2.13 The State has not only a negative obligation to ensure that these rights are not infringed unless an infringement is necessary in a democratic society, but in some circumstances may have a positive obligation to ensure that the rights contained in Article 10 are safeguarded.[15] In deciding whether a positive obligation to safeguard Article 10 exists, regard must be had to the kind of expression rights at stake; their capability to contribute to public debate; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.[16]

2.14 The language of Article 10 recognises that freedom of expression carries with it duties and responsibilities. Some forms of speech have been denied protection under the Convention; for example racist literature and expressions of political support for terrorism.[17] The ECtHR in *Otto Preminger Institut* emphasised the duty on those who exercise freedom of expression to avoid expression which does not contribute to public debate and is gratuitously offensive to others.[18]

[11] See Application 6538/74, *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at paras 65-66
[12] See for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Lingens*, cited above, §§ 41-42) and recently *Centro Europa 7 SRL and Di Stefano v Italy (*Application no. 38433/09)
[13] *News Verlag GmbH & co KG v Austria* (2000) 31 EHRR 246 at paragraph 39
[14] *Centro Europa 7 SRL and Di Stefano v Italy* (Application no. 38433/09)
[15] See *Khurshid Mustafa v Sweden* (16 December 2008) (Application no. 23883/06) at para 50; *Ozgur Gunden v Turkey* (2000) 32 EHRR 49 at para 43
[16] For example the ECtHR has arguably conceded that a positive obligation arises for the State to protect the right to freedom of expression by ensuring a reasonable opportunity to exercise a right of reply and an opportunity to contest a newspaper's refusal suing for a right to reply in courts (see *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX). The Court has stressed that States are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear (*Dink v. Turkey*, para 137)
[17] See Applications 8384/78, 8406/78, *Glimmerveen and Hagenbeck v Netherlands* 18 DR 187 (1979), EcomHR (racist literature); Application 9325/81, *X v Federal Republic of Germany* 29 DR 194 (1982), EcomHR (Nazi leaflets);
[18] (1994) 19 EHRR 34, ECtHR

2.15 Article 10 expressly acknowledges that freedom of expression may be overridden where necessary to protect legitimate interests. Any restriction on free speech must pass three distinct tests: (a) the restriction must be prescribed by law, (b) the restriction must further a legitimate aim, and (c) the interference must be shown to be necessary and proportionate in a democratic society.[19] Lord Steyn explained this approach in *Reynolds v Times Newspapers*:[20]

> *"The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and the regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation."*

2.16 Legitimate grounds for interfering with freedom of expression are set out in Article 10(2). The court will require evidence to justify any interference with freedom of expression and not simply mere assertion.[21] The ECtHR has emphasised that there is little scope under Article 10(2) of the Convention for restrictions on the press in relation to political speech or in relation to debate on matters of public interest and the court will require the strongest reasons to justify impediments to the exercise of such speech.[22] However, in the context of other restrictions imposed by Article 10(2), for example the protection of health or morals, cases have recognised that states enjoy a wide margin of appreciation as to appropriate restrictions on freedom of expression.

2.17 The legitimate aim of "*protection of the reputation and rights of others*" set out in Article 10(2) permits a wide range of interests to be invoked as a justification for imposing restrictions on freedom of expression. The interests most commonly invoked are the right to reputation and the protection of privacy (which is often referred to as the tort of misuse of private information in domestic law).[23] However, the rights and interests of others which may justify restrictions on the freedom of speech are broader than reputation. For example, courts have recognised the need to protect the religious rights of others by restricting offensive material, to protect intellectual property rights, to protect a defendant's right to a fair trial, and to protect confidential information held subject to a duty of confidence.[24]

[19] See comments of Lord Bingham in *R v Shayler* [2002] UKHL 11 at para 23, referring to *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 62. See also *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 48

[20] [2001] 2 AC 127

[21] See remarks of Munby J in *Kelly v BBC* [2001] Fam 59 at 70, summarising that proper evidence, rather than assertion or assumption will be required

[22] See Application 28496/95, *EK v Turkey* (2002) 25 EHRR 1345. The ECtHR has observed on a number of occasions that in a democratic society, the actions and omissions of Government must be subject to close scrutiny and of public opinion and government must display restraint in resorting to criminal proceeding in this context. In particular, see a number of cases arising out of criminal proceedings taken against the owner of a newspaper for publishing press articles, readers' letters and reports concerning the conflict between Turkish Government and Kurdish organisations where the ECtHR emphasised that there is little scope under Art 10(2) of the Convention for restrictions on the press in relation to political speech and debate*:* Application 23556/94, *Ceylan v Turkey* (2000) 30 EHRR 73, Application 23144/93, *Ozgur Gundem v Turkey* (2001) 31 EHRR 49

[23] Discussed in detail in Section 3 of this Annex

[24] Application 13470/87, *Otto Preminger Institut v Austria* (1994) 19 EHRR 34; *Ashdown v Telegraph Group* [2001] EWCA Civ 142; Application 31457/96, *News Verlags GmbH v Austria* (2000) 9 BHRC 625 at para 45; Application 69698/01, *Stoll v Switzerland* (2008) 47 EHRR 59

2.18 Cases have drawn a distinction between reporting facts capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life.[25] In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a "*public watchdog*" are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life.[26] Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation.[27]

Relevance of responsible journalism and ethical journalism in the context of Article 10

2.19 The ECtHR has repeatedly held that it is not for the courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.[28] However, the ECtHR has on number of occasions recognised that responsible journalism and compliance with the ethics of journalists will be a factor, and in some cases, a highly significant factor, in determining whether an interference with the right to freedom of expression is justified and proportionate.

2.20 The ECtHR held in *Flux (No 6) v Moldova* that:[29]

> *"… under the terms of paragraph 2 of Article 10, the exercise of freedom of expression carries with it "duties and responsibilities" which also apply to the press… the Court will examine whether the journalist who wrote the impugned article acted in good faith and in accordance with the ethics of the profession of journalist".*

2.21 The ECtHR has also held that:[30]

> *"… the safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism."*

2.22 The conduct of a journalist cuts two ways. If a journalist has acted responsibly, in good faith, and in accordance with the ethics of journalism, these factors are likely to support an argument that freedom of expression should prevail over competing interests. There are a number of cases in which the ECtHR has referred to the fact a journalist has acted in conformity with professional ethics as part of the consideration whether there is a legitimate and proportionate interference with Article 10.[31] On the other hand, in cases where journalists have not acted

[25] see *Armonienė*, cited above, para 39
[26] *Von Hannover*, cited above, para 65; *Hachette Filipacchi Associés* (*ICI PARIS)*, cited above, para 40; and *MGN Limited*, cited above, para 143
[27] *Von Hannover*, cited above, para 66
[28] Application 15890/89, *Jersild v Denmark* (1995) 19 EHRR 1
[29] Application 22824/04, [2008] ECHR 746 at para 26
[30] Application 29183/95, *Fressoz & Roire v France* (2001) 31 EHRR 2; Application 69698/01, *Stoll v Switzerland* (2008) 47 EHRR 59 at para 103
[31] See for example, Application 19983/92, *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1 at paragraph 39; Application 29183/95, *Fressoz & Roire v France* (2001) 31 EHRR 2 at paras 54-55; Application 21980/93, Bladet Tromsø and Stensaas v Norway (2000) 29 EHRR 125 at para 65

with responsibility or have disregarded the ethics of the profession, this will support an argument that the interference with the freedom of expression is justified. For example, the case of *Prager and Oberschlick v Austria* concerned a journalist who had accused a judge of being biased and of having an arrogant and bullying attitude in the performance of his duties. The Court addressed the behaviour of the journalist and took the view that he could not invoke either good faith or compliance with the ethics of journalism, on the basis that the research that he had undertaken did not appear adequate to substantiate such serious allegations, the court noting that:[32]

> *"… [he] had not attended a single trial before Judge J.. he had not given the judge any opportunity to comment on the accusations levelled against him".*

2.23 The conclusion as to the journalist's conduct was of pivotal importance in the Court's overall determination. This case also illustrates that the adjudication by the Court of the proper standards to be expected of journalists may lead to different views, which can be seen in the dissenting opinions which took the view that the conduct of the journalist in this case could not *per se* be held to fall short of the standard of proper journalistic care.

2.24 In the case of *Stoll v Switzerland* the Court explained that the ethics of journalism required a distinction to be drawn between the manner in which the applicant obtained the information and the form of the impugned articles.[33] The Court undertook a detailed analysis of the manner in which the journalist had obtained a report and considered the extent to which he was responsible for leaking the document or whether he had acted illegally. The Court also undertook a comprehensive analysis of the articles themselves, noting that the question whether the form of the articles published were in accordance with journalistic ethics carries weight, and concluded that there were a number of shortcoming in the articles in respect of the content, vocabulary, and editing of the article, including sensationalist style of headings, inaccuracies in the articles and prominence of the articles within the newspaper. The Court therefore agreed with the opinion of the Swiss Press Council that the articles were in breach of the declaration on the rights and responsibilities of journalists adopted by the Swiss Press Council. The Court concluded that the content of the articles and the fact they were likely to mislead detracted from their contribution to the public debate that is protected by Article 10.

2.25 In *Flux (No 6) v Moldova* it was held that the Court will examine whether the journalist who wrote the impugned article acted in good faith and in accordance with the ethics of the profession of journalism.[34] In the Court's view, this depended in particular on the manner in which the article was written and the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question. The latter issue must be determined in light of the situation as it presented itself to the journalist at the material time, rather than with the benefit of hindsight.[35] The Court considered that disregard of journalistic ethics may undermine the rights of others guaranteed by the Convention, holding that "*the applicant newspaper acted in flagrant disregard of the duties of responsible journalism and thus undermined the Convention rights of others*"[36]. An assessment of the ethics of journalism appeared to be clearly embedded in the Court's analysis, concluding that:[37]

[32] Application 15974/90, [1995] ECHR 12 at para 37 in particular
[33] Application 69698/01, *Stoll v Switzerland* (2008) 47 EHRR 59
[34] Application 22824/04, [2008] ECHR 746
[35] *Loc. cit.* Referring to the decision of the ECtHR in *Application 21980/93, Bladet Tromsø and Stensaas v Norway (2000) 29 EHRR 125* at para 66
[36] Paragraph 34
[37] *Loc. cit.,* at para 104

> *"… in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance".*

2.26 Dissenting judgments in the case expressed the view that the decision of the majority had undermined freedom of expression and that the chilling effect of sanctions against press freedom had materialised through the decision of the Court.[38]

2.27 In short, the current case law underlines the importance of considering the conduct of journalists and their compliance with the ethics of journalism in assessing whether any interference with freedom of expression is justified.

Section 12 of the Human Rights Act 1998

2.28 Section 12 of the Human Rights Act 1998 (HRA) is predominantly a procedural provision dealing with the circumstances where the High Court is considering whether to grant any relief, typically an injunction restraining publication, which might bear on the right of freedom of expression in Article 10.

2.29 Section 12, as enacted, was introduced into the Bill by the Government during the committee stage in the House of Commons as a result of support for such a clause being expressed by Lord Wakeham, Chairman of the Press Complaints Commission, and a number of newspaper groups, due to concern that the proposed legislation might otherwise impede freedom of expression by protecting privacy and imposing prior restraint on newspapers. During the second reading debate in the House of Commons, the Home Secretary, Jack Straw MP, announced that an amendment would be introduced into the Bill to protect press freedom in a manner which was consistent with the Convention.[39]

2.30 The purpose of section 12 was analysed by Lord Nicholls in *Cream Holdings Limited v Banerjee* in the following terms:[40]

> *"When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional* American Cyanamid *approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the American Cyanamid guideline of a "serious question to be tried" or a "real prospect" of success at the trial."*

2.31 Section 12 applies where the court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.[41] This section provides that no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.[42]

[38] *Loc. cit.*, at para 17 of dissenting opinion of Judge Bonello, joined by Judges David Thor Bjorgvinsson and Sikuta
[39] 306 HC Official Report (6th series) cols 775-777 (16 February 1998). See also pp28-41, [lines 23-16], Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[40] [2004] UKHL 44, at para 15
[41] Relief includes any remedy or order, other than in criminal proceedings, see s12(5); s12(1)
[42] S12(3)

2.32 The meaning of "*likely*" was analysed by *Cream Holdings Limited v Banerjee* (supra) by Lord Nicholls who concluded that the effect of s12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case.[43] As to what degree of likelihood makes the prospects of success sufficiently favourable, Lord Nicholls explained that:[44]

> *"the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial … but there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal".*

2.33 The significance of s12(3) is that this sets a higher bar than the general law in relation to granting an interim injunction. The courts have clarified that there is no conflict between s12(3) and the Convention because s12(3) does not seek to give a priority to one Convention right over another. It is simply dealing with the interlocutory stage of proceedings and with how the court is to approach matters at that stage in advance of any ultimate balance being struck between rights which may be in conflict.[45]

2.34 Section 12(4) provides that the court must have particular regard to the importance of the Convention right to freedom of expression and, in particular where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material the court must have regard to the extent to which the material has, or is about to become available to the public, or it is, or would be, in the public interest for the material to be published and any relevant privacy code.

2.35 The courts have rejected the argument that s12(4) has the effect that extra weight should be given to freedom of expression. In *Ashdown v Telegraph Group Ltd*, Lord Phillips MR rejected the argument that "*must have particular regard to*" means that the Court should place extra weight on the matters specified, noting that s12 does no more than underline the need to have regard to contexts in which the ECtHR has given particular weight to freedom of expression, while at the same time drawing attention to considerations which may none the less justify restricting that right.[46] Section 12(4) does not require the court to treat freedom of speech as paramount.[47]

2.36 Section 12(4)(b) requires that the Court pay particular regard to any relevant privacy code when considering proceedings which relate to journalistic material. Therefore, if a newspaper has breached one of the provisions of the PCC Code, this is a factor which the Court can take

[43] At para 22
[44] At paras 22-23
[45] *Douglas v Hello! Ltd* [2001] QB 967 at para 150, per Keene LJ in the CA, approved in *A v B (a company)* [2002] EWCA Civ 337 at para 11(iii), per Lord Woolf LCJ
[46] [2001] EWCA Civ 1142 at para 27
[47] *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385 at paras 18–19, per Sir Andrew Morritt V-C. See also *Re S (a child) (identification: restriction on publication)* [2003] EWCA Civ 963 at para 52, Hale LJ confirmed that where a court has to consider both Art 8 and Art 10, "*section 12(4) does not give one pre-eminence over the other*". Hale LJ's comment was approved by Lord Hope in the House of Lords in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para 111

into account in determining whether to grant relief. The concept of responsible journalism therefore represents an important part of the factual matrix within which the Court exercises its discretion.

2.37 In summary, the object of media proprietors in lobbying for the inclusion of s12 in the HRA 1998 was to prevent the development of privacy law and to prevent prior restraint. It is doubtful that s12 achieves either of these aims. The case law has repeatedly emphasised that s12(4) does not require the court to treat freedom of speech as paramount. The role of s12 is predominantly to establish a test for granting interim relief that differs from the conventional balance of convenience that is considered in civil proceedings, but otherwise adds little to the substantive law of Article 10. The view has been expressed by some human rights commentators that s12 serves no sensible purpose and there is some force in this point.[48]

Protection of journalistic sources

Introduction

2.38 The Editors' Code of Practice frames the relationship between a journalist and his source as giving rise to a "*moral obligation*" on the part of the journalist to protect confidential sources of information.[49] The current legal position is that, under both international and domestic law, a journalist enjoys a "qualified right" to protect the confidentiality of a source. This right is guaranteed by Article 10 of the Convention and section 10 of the Contempt of Court Act 1981, but is susceptible to being overridden by specifically defined competing considerations.

2.39 The European and domestic jurisprudence on the protection of journalistic sources has repeatedly emphasised the importance of the protection of sources as inherent in the freedom of the press and necessary to preserve the ability of the press to perform its role as a public watchdog. The classic statement of this position is the decision of the European Court in *Goodwin v United Kingdom*:[50]

> *"Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".*

2.40 In domestic law, the rationale for the protection of sources has long been established. In 1981, Lord Denning gave the crux of the justification in these words:[51]

> *"If [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known."*

[48] Lester, Pannick, Herberg, *Human Rights Law and Practice (2009)*, Chapter B, Section 12, Section 2.12, footnote 1
[49] Clause 14 of the Editors' Code of Practice. The Code is enforced by the PCC and is published on the PCC website www.pcc.org.uk/cop/practice.html
[50] Application 17488/90, *Goodwin v The United Kingdom* (1996) 22 EHRR 123
[51] In the Court of Appeal in *British Steel Corporation v Granada Television Ltd* [1981] 1 All ER 417

Legal right to protection of sources: domestic law

2.41 Prior to the enactment of s10 of the Contempt of Court Act 1981, the House of Lords in *British Steel Corporation v Granada Television Ltd* noted that the relationship of confidence between a journalist and a source was such that it was in no different category to a doctor and a patient, or banker and customer and that in those cases the court has to decide in the particular circumstances whether the interest in preserving the confidence is outweighed by other interests to which the law attaches importance.[52] The House of Lords reviewed the previous case law and confirmed that journalists had no absolute privilege so as to entitle them to refuse to disclose their sources of information. The Court adopted a test of necessity for overriding the confidence of a source and held that there is no immunity from disclosure of sources where disclosure is necessary in the interests of justice. Following this judgment, Parliament passed s10 of the Contempt of Court Act 1981, providing a qualified right for journalists to protect their sources.

2.42 Section 10 of the Contempt of Court Act 1981 provides that:

> *"No Court may require a person to disclose, nor is any person guilty of contempt of Court for refusing to disclose, the source of the information contained in that publication for which he is responsible, unless it be established to the satisfaction of the Court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."*

2.43 As was noted by the House of Lords in *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* the protection afforded by s10 was clearly intended primarily for the benefit of journalists. The Court held that:[53]

> *"the legislature in enacting section 10, manifestly intended that in court proceedings (1) journalists should ordinarily be entitled to refuse to disclose the source of any information contained in any publication (2) if they are to be deprived of that privilege the party seeking disclosure will have to satisfy the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."*

2.44 The House of Lords held in *Secretary of State for Defence v Guardian Newspapers Ltd* that s10 eliminated the old practice where judges exercised their discretion in determining whether sources should be disclosed and replaced judicial discretion with a rule of law which specifically defines the circumstances in which the confidentiality of journalists' sources could be revealed.[54] Lord Diplock, discussing s10 generally, noted that the exceptions include no reference to the "*public interest*" generally.

2.45 The Court of Appeal in *Financial Times v Interbrew CA* noted that:[55]

> *"It will be observed that this provision creates no power or right of disclosure: what it does is assume the existence of such a power or right and place a strong inhibition on its exercise. It governs material received with a view to publication, whether published or not: see X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1, 40, per Lord Bridge."*

[52] [1981] AC 1096 at pp1168-1169
[53] [1988] AC 660 at 703
[54] [1985] AC 339
[55] [2002] EWCA Civ 274 at para 5

2.46 The Court of Appeal also clarified that s10 applies to material received with a view to publication, whether published or not.[56]

2.47 Section 10 operates by giving a journalist a prima facie right to refuse to disclose a source, and no order can be made to this effect unless it can be established that disclosure of the source is necessary in the interests of justice or national security or for the prevention of disorder or crime.[57] Even if it is shown that one of the exceptions is made out, for example that disclosure is necessary for the protection of national security, the court retains its discretion to decline to order the source. However, it is likely to be rare that the Court would decline to order disclosure in circumstances where the exception was made out, and would probably be limited to a situation where a journalist would be put at risk.[58]

2.48 In *X Ltd v Morgan-Grampian (Publishers) Ltd* Lord Bridge gave guidance on the general approach to be adopted to s10, noted that:[59]

> *"the judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of a particular case on the one hand against the importance of protecting the sources on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."*

Interpretation of the exceptions set out in section 10

2.49 In relation to the phrase "*necessary for the prevention of crime*" it has been held that "*necessary*", although stronger than "*useful or expedient*", is less strong than "*indispensable*".[60] "*Prevention of crime*" is not restricted to a specific future crime, but means the deterrence and control of crime generally so that crimes allegedly already committed might come within the exception.[61]

2.50 "*Necessary in the interests of justice*" was initially given a restricted meaning in *Secretary of State for Defence v Guardian Newspapers* where Lord Diplock limited the phrase to the technical interests of the administration of justice.[62] Lord Bridge adopted a broader approach in *X v Morgan Grampian*, finding that the phrase is wide enough to include the exercise of legal rights and self-protection from legal wrongs, whether or not by court action.[63] He held that the "*interests of justice*" were not confined to technical sense of the administration of justice in the course of legal proceedings in a court of law. The sense in which it is used in section 10 is such that persons should be entitled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not they result in legal proceedings. The House of Lords in *Ashworth Hospital Authority v MGN Ltd* confirmed that the definition of "*interests of justice*" in s10 was wide enough to include cases where the injured party sought some form of lawful redress other than litigation, thus preferring the approach of Lord Bridge of Harwich in *X Ltd v Morgan- Grampian (Publishers) Ltd* (see above) to Lord Diplock in *Secretary of State for Defence v Guardian Newspapers Ltd*, [1985] AC 339.[64]

[56] *Loc. cit*
[57] *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 702
[58] *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 703
[59] [1991] 1 AC 1
[60] *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704-705
[61] *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704–705
[62] [1985] AC 339 at page 350
[63] [1991] 1 AC 1
[64] [2002] UKHL 29

2.51 The prevention of crime and national security are not the only good reasons for limiting the public interest in the confidentiality of sources: the interests of justice exception allows for a more detailed evaluation including the importance of the case for the claimant, the public interest in the information from the source, and the method by which the source obtained the material. "*Necessary*" has been interpreted to mean "*really needed*".[65]

2.52 In *Ashworth Hospital Authority v MGN Ltd* the House of Lords identified the following matters as relevant to the question of necessity: i) as a matter of principle the necessity for disclosure must be convincingly established, ii) limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court, iii) the disclosure must be in order to meet a pressing social need, iv) the disclosure should be proportionate to the legitimate aim which is being pursued.[66]

2.53 An example of the approach of the Court to an order requiring disclosure of a source in the context of enquiries made by a regulatory body is the judgment of the House of Lords in *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985.*[67] In this case the House of Lords considered whether a journalist was entitled to immunity from disclosing his source of information contained in a publication in the context of an inquiry by inspectors under section 177 of the Financial Services Act 1986 into the leak of price-sensitive information. The journalist refused to answer questions in the course of the inquiry which might lead to the identification of his source and argued he had a reasonable excuse for refusing to answer questions on the basis that he was conferred with immunity by s10 of the Contempt of Court Act.

2.54 The House of Lords held that the effect of s10 is to recognise and establish that in the interests of a free and effective press it is in the public interest that a journalist should be entitled to protect their sources unless some other overriding public interest requires them to reveal it.[68] It was in the public interest that a journalist should be entitled to protect their source of information unless one of the other matters of public interest referred to required it to be revealed. It was for the party seeking disclosure, in this case the inspectors, to satisfy the court that identification of sources was necessary for the prevention of crime. The House of Lords held that "*necessary*" could not be precisely defined, but the nearest paraphrase was "*really needed*" and that "*prevention of crime*" was not restricted to the prevention of particular crimes but was used in the broadest general sense of deterrence and containment.[69] On the facts the inspectors had satisfied the Court that it was of real importance for the purposes of their inquiry that they should know what the journalist's sources of information had been.

2.55 The facts of *Ashworth Hospital Authority* are instructive. The House of Lords considered an appeal by MGN Ltd against an order made by the High Court requiring it to identify who had provided it with the medical records of Ian Brady, a notorious convicted murderer detained in a secure hospital, parts of which had appeared in an article in their newspaper. The Court noted that both s10 and Article 10 have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources.[70] It concluded that the approach set out by the ECtHR can be applied equally to s10 given that Article 10 is part of domestic law and that the application of s10 should follow the judgment on Article 10 in the decision of

[65] *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 53
[66] [2002] UKHL 29
[67] [1988] AC 660
[68] *Ibid*, at 702
[69] *Ibid*, at 704
[70] [2002] UKHL 29 at para 38

the ECtHR in *Sunday Times v United Kingdom.*[71] That case established that the court has to be satisfied that the interference was necessary, having regard to the facts and circumstances prevailing in the specific case before it.[72] Lord Woolf explained by reference to the speech of Lord Bridge in *X Ltd v Morgan-Grampian (Publishers) Ltd*, that the approach to be adopted in relation to s10 of the 1981 Act involved very much the same balancing exercise as is involved in applying Article 10 of the Convention.[73]

2.56 Following the judgment of the House of Lords the newspaper revealed only the name of the journalist who provided the story, and not the source at the hospital who had provided the medical records. The hospital sought disclosure of the source from the named journalist who, following a trial, succeeded in persuading the Court that the source should not be disclosed.[74] The hospital appealed to the Court of Appeal.[75] The Court of Appeal held that the approach of the English courts to both s10 of the 1981 Act and Article 10 of the Convention should be the same.[76] The question in a case to which s10 of the 1981 Act or Article 10 of the Convention applies is whether the claimant has shown that it is both necessary, in the sense of there being an overriding interest amounting to a pressing social need, and proportionate for the court to order the journalist to disclose the name of his source. The requirements of necessity and proportionality are separate but cover substantially the same area.[77] Although the Court of Appeal was concerned that the Article 10 point should only have to be considered once (rather than, as transpired in this case, both at the behest of the newspaper and then the journalist), it upheld the decision of the trial judge.

Legal right to protection of sources: international instruments

2.57 Protection of journalistic sources is a right which is well recognised in countries around the world by virtue of international agreements, declarations and case law. The instruments generally adopt as the starting point that the identity of sources is not to be disclosed, although this may be outweighed by competing considerations.

2.58 The principle of protecting sources has been recognised by the United Nations since the 1950s. In 1952 the Sub-Commission on Freedom of Information and of the Press drafted a code of ethics which set out that:[78]

> *"… discretion should be observed concerning sources of information. Professional secrecy should be observed in matters revealed in confidence; and this privilege may always be invoked to the furthest limits of law".*

2.59 The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his report in 1997 noted that:[79]

[71] Application 6538/74 , (1979) 2 EHRR 245
[72] *Ibid*, at para 48
[73] [2002] UKHL 29 at para 39
[74] The trial followed a successful appeal to the Court of Appeal by Mr Ackroyd against summary judgment which was given in favour of the hospital on 18 October 2002 on the basis that the application had been resolved in its favour by the decision in the *MGN* case: see [2003] EWCA Civ 663. The Court held that different issues could arise in this second round of the litigation which justified a substantive hearing
[75] *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101
[76] *Ibid*, at para 12
[77] *Ibid,* at para 17
[78] Draft International Code of Ethics, Adopted by the Sub-Commission on Freedom of Information and of the Press, March 14 1952, Document E/CN.4/Sub.1/165, International Organisations Vol 6, No 2, May 1952, pp343-344
[79] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Abid Hussain, submitted pursuant to Commission Resolution 1997/27

"the protection of sources assumes primary importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake".

2.60 The UN Commission on Human Rights set out in its Annual Resolution in 2005 that it was "*stressing the need to ensure greater protection for all media professionals and for journalistic sources*" and called for States to respect the right of protection of journalistic sources.[80]

2.61 The Council of Europe and the European Parliament have issued in the region of fifty declarations and other instruments relating to freedom of expression and the media since 1949. These include the Resolution on the Confidentiality of Journalists' Sources by the European Parliament and amongst these the most significant is the recommendation made on 8 March 2000 relating to the protection of journalistic sources.[81]

2.62 The purpose of the recommendation was to reinforce and supplement the principles that had been established by the judgment of the European Court in *Goodwin v United Kingdom* and to provide a basis for common European minimum standards concerning the right of journalists not to disclose their sources of information.[82]

2.63 The Committee recommended that the governments of member states implement the practice and principles appended to the recommendation into domestic law. The principles set out in the recommendation are as follows:

"Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

Principle 3 (Limits to the right of non-disclosure)

(a) The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law

[80] The right to freedom of opinion and express on Human Rights Resolution 2005/38, 19 April 2005
[81] 18 January 1994, Official Journal of the European Communities No C 44/34
[82] At paragraph 4 of the Explanatory Memorandum to the Recommendation

of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

(b) The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- *an overriding requirement of the need for disclosure is proved,*
- *the circumstances are of a sufficiently vital and serious nature,*
- *the necessity of the disclosure is identified as responding to a pressing social need, and*
- *member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.*

(c) The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5 (Conditions concerning disclosures)

(a) The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

(b) Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

(c) Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

(d) Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

(e) Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the

public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

(a) The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

(b) Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source."

2.64 The Recommendation takes its cue from Article 10 of the Convention, namely that the right of journalists to protect their sources is not an absolute right, but may be overridden if circumstances of a sufficiently serious nature are identified.[83] The Recommendation follows the conventional balancing exercise under the Convention in respect of qualified rights: that interference with a right must pursue a legitimate aim and the infringement of the right must be proportionate.

2.65 The Parliamentary Assembly Recommendation 1950 (2011) entitled "*The protection of journalistic sources*" reaffirmed that the protection of journalists' sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern.[84] The Parliamentary Assembly noted with concern the large number of cases in which public authorities in Europe have forced or attempted to force journalists to disclose their sources, despite the clear standards set by the European Court and the Committee of Ministers.[85]

[83] At para 6 of the Explanatory Memorandum to the Recommendation

[84] Assembly debate on 25 January 2011 (4th Sitting). Text adopted by the Assembly on 25 January 2011 (4th Sitting)

[85] At paras 2-3. Para 5 restated that *"Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved".* Further, "*the disclosure of information identifying a source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established."*

2.66 The 2011 Recommendation provides that the confidentiality of journalists' sources must not be compromised by the increasing possibilities provided by technological developments, for example the power of public authorities to control the use by journalists of mobile telecommunication and internet media and the interception of correspondence and surveillance of journalists. In addition, the right of journalists not to disclose their sources of information is a professional privilege intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality.

2.67 The seminal case of the European Court of Human Rights on journalistic sources is the case of *Goodwin v United Kingdom.*[86] An order had been made by the domestic court under s10 of the Contempt of Court Act 1981 which required a journalist to disclose the identity of a source that had provided details of a company's confidential corporate plan. The purpose of the order was to permit the company to bring proceedings against the source. The ECtHR considered whether this amounted to an unlawful interference with Article 10.

2.68 The ECtHR held that freedom of expression constitutes one of the essential foundations of democratic society. In particular, if journalists are forced to disclose their sources then the role of the press in acting as a public watchdog could be seriously undermined, because of the chilling effect that such disclosure would have upon the free flow of information. Accordingly, an order to disclose sources cannot be compatible with Article 10 unless there is an overriding requirement in the public interest.[87] As a matter of general principle, the necessity for any restriction on freedom of expression must be convincingly established and the restriction must be proportionate to the legitimate aim pursued.[88] The Court stated that there must be a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim.[89]

2.69 On the facts the ECtHR held that the order to disclose the source had to be viewed in light of the fact that publication had been restrained already and whilst the company had a further legitimate interest in ascertaining the identity of the source to prevent further dissemination of confidential material and terminating the employment of the source, the interests of a democratic society in a free press outweighed these interests. Therefore the order for disclosure of a source was disproportionate in the circumstances.[90]

2.70 It is clear that the protection of journalists' sources in Article 10 extends not only to an order made by the court that a source be disclosed, but also to searches and the seizure of documents held by journalists at their offices and homes. For example, in *Ernst and others v Belgium* the ECtHR considered whether searches and seizures by the judicial authorities at their newspaper's offices and their homes constituted a breach of their freedom of expression under Article 10 and a violation of their right to privacy under Article 8 of the European Convention.[91] The ECtHR concluded that the searches and seizures violated the protection of journalistic sources guaranteed by the right to freedom of expression and the right to privacy. The Court considered that the searches and seizures, which were intended to gather information that could lead to the identification of persons who were leaking confidential information, came within the sphere of the protection of journalistic sources, an issue which called for the most careful scrutiny by the Court.

[86] Application 17488/90 , (1996) 22 EHRR 123
[87] *Ibid,* at para 39
[88] *Ibid,* at para 40
[89] *Ibid,* at para 45
[90] *Ibid,* at paras 45-46
[91] Application 33400/96, [2003] ECHR 359

2.71 More recently, consideration of the principles relevant to the extent of the right to protect confidentiality of sources was set out by the ECtHR in *Financial Times Ltd and Others v United Kingdom.*[92] The Financial Times and other UK newspapers complained that their Article 10 rights has been infringed by an order requiring them to disclose documents to a Belgian company which could lead to identification of journalistic sources at the origin of a leak to the press in relation to a takeover bid. The European Court upheld the newspapers' complaint, holding there was a violation of Article 10 and in that case, the balance was tipped in favour of the public interest in protecting journalistic sources. The Court held that although a disclosure order could serve the purpose of enabling the bringing of proceedings against a source, in order for it to be "*necessary*" under Article 10 to order disclosure it was not sufficient that the party seeking the order had merely shown that it would otherwise be unable to bring a claim or show a threatened legal wrong.[93] Where leaked information subsequently published was alleged to be inaccurate, the duty of journalists to contribute to public debate by accurate reporting and the steps that had been taken by the journalist to verify the accuracy of the information was relevant to deciding whether the order for disclosure was justified, however the principle of protection of sources meant that that such matters could not be decisive.[94] Where an unauthorised leak had occurred and the source had not been identified a general risk of future leaks would always be present, therefore the aim of preventing further leaks could only exceptionally justify an order requiring disclosure of a source.[95] On the facts, the Court held that the company's interest in identifying and bringing proceedings against the journalist was insufficient to outweigh the public interest in the protection of journalistic sources and that there had therefore been a violation of Article 10.

2.72 Whilst each case will turn on its own facts, the following principles can be derived the case law of the ECtHR:

(1) The right to freedom of expression in Article 10 encompasses safeguards and guarantees to the press, and protection of journalistic sources is one of the basic conditions for press freedom. An order for disclosure of a source cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.

(2) In accordance with the usual balancing exercising under the Convention, any restriction of Article 10 rights must pursue a legitimate aim, the necessity of any restriction on freedom of expression must be convincingly established and any restriction on the right must be proportionate to the legitimate aim pursued.

2.73 The following factors will be relevant to undertaking this exercise:

(1) Whether alternative means of discovering the identity of a leak of information had been pursued. For example in *Roemen and Schmit v Luxembourg* the Court considered that the fact that the authorities had searched the premises of journalists to discover the identity of the leak without searching the premises or interviewing individuals responsible for investigating the matter was a fact in concluding that balance between the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other, had not been maintained. It accordingly found a violation of the right to freedom of expression.[96] In *Ernst and others v Belgium* the European Court concluded that the searches and seizures of documents from journalists' homes and offices violated the protection of journalistic sources guaranteed by the right to freedom of expression. In reaching this conclusion the Court

[92] Application 821/03, (2010) 50 EHRR 46
[93] *Ibid,* at paras 64-66
[94] *Ibid,* at para 67
[95] *Ibid,* at paras 68-69
[96] Application 51772/99, [2003] ECHR 102

questioned whether other means could not have been employed to identify those responsible for the breaches of confidence and, in particular, took into consideration the fact that the police officers involved in the operation of the searches had very wide investigative powers.[97]

(2) The interest of an employer in identifying the source of a leak of confidential material in order to terminate an employee's employment is unlikely in itself to be sufficient to justify the disclosure of a source. It has been held that it is not enough to show that without disclosure the party seeking disclosure would be unable to bring a claim or assert a threatened legal wrong.[98] Further, the aim of preventing future leaks would only exceptionally justify an order for disclosure.[99]

(3) Disclosure may be proportionate where a journalist holds information which may assist the prevention of a serious crime. For example in *Nordisk Film & TV A/S v Denmark* the European Court held that a court order requiring disclosure of research material which had been compiled whilst making a documentary on paedophilia was a proportionate interference with the journalist's freedom of expression, namely the prevention of crime in the case of serious child abuse.[100]

(4) It would be relevant whether a journalist had acted in good faith and in accordance with the ethics of journalism to provide accurate and reliable information.[101] The steps taken to verify the accuracy of information would also be relevant but not decisive.

(5) The conduct of the source would also be relevant but not a decisive factor.[102]

Conclusion

2.74 A journalist's right to protect the confidentiality of his or her sources is well recognised in both domestic and European law. Successive decisions of the courts as well as international declarations and recommendations have emphasised the importance of the protection of sources in promoting a free press and exercise of the freedom of expression. However, such rights carry responsibilities and the case law has also made clear that the conduct of both the source and the journalist will be relevant to the balancing exercise undertaken in weighing up the purpose served by disclosure with the underlying right to confidentiality. The assessment of these competing aims is highly fact sensitive and the weight given to different factors will vary depending on the circumstances of each individual case.

3. Civil Law

Introduction to privacy law

3.1 The concept of privacy is one which divides opinion, both in relation to the scope of its protection and the manner in which it should be protected. This debate invariably requires reflection upon the fundamental right of freedom of expression and the extent to which the media are entitled to exercise this freedom without unjustifiably impinging upon the rights of private individuals.

[97] Application 33400/96, [2003] ECHR 359
[98] Application 821/03, *Financial Times v United Kingdom* (2010) 50 EHRR 46 at paras 64-66
[99] *Ibid*, at paras 68-69
[100] Application 40485/02, [2005] ECHR 951
[101] Application 821/03, *Financial Times v United Kingdom* (2010) 50 EHRR 46 at paras 59-62
[102] *Ibid,* at para 67

3.2 The common law has historically taken a conservative approach to the protection of privacy and the courts have demonstrated reluctance to develop a general cause of action for the protection of privacy rights. The courts have previously adopted the stance that a specific right to privacy could only be recognised by Parliament and therefore individuals seeking to protect private information or restrain publication turned to the creative application of existing causes of action.[103] For example, the law of confidentiality was invoked to restrain the publication of material with a personal or private dimension.[104] Some concern was expressed at the implementation of Article 8 through the less than satisfactory means of requiring the Court to "*shoehorn*" within the cause of action of breach of confidence claims for misuse of private information, and it is right to observe that the tort of breach of confidence is not necessarily a good fit for complaints which focus on the intrusive nature of the publication, as opposed to the exposure of 'secret' information through publication.[105]

3.3 However, in the period 1997-1998 Parliament enacted three statutes which shape the law providing protection against interference with privacy. First, the Protection from Harassment Act 1997 (PHA) provides a remedy for invasion of privacy which involves a course of conduct which the defendant knows or ought to know amounts to harassment, including conduct causing alarm or distress.[106] The PHA protects against both publication of information and the conduct of the press in obtaining information; for example door-stepping and intrusive investigations. Secondly, the Data Protection Act 1998 (DPA) sets out a comprehensive regime for the processing of personal data and provides a remedy where privacy is invaded, both through publication or other methods of processing data.[107] Thirdly, Parliament enacted the Human Rights Act 1998 (HRA). From 2 October 2000, when the HRA came into force, Articles 8 and 10 were incorporated in the law of England and Wales as substantive and enforceable rights.

3.4 The enactment of the HRA did not result in automatic recognition of a general tort of invasion of privacy, as the House of Lords clarified in *Wainwright v Home Office*.[108] However the HRA represented an important stepping-stone in the path to the development of the law to protect unjustified invasion of privacy, provoking lively discussion of the impact that the Act would have on the development of a law protecting privacy.[109]

3.5 Despite these three Acts of Parliament signalling recognition of the need to bolster privacy rights, the Government made clear that it anticipated that the Courts would bear the responsibility of developing the law of privacy appropriately, having regard to the Convention.[110] This task was taken up by the House of Lords in the seminal case of *Campbell*

[103] See for example the remarks of Leggatt LJ in *Kaye v Robertson* [1991] FSR 62, CA

[104] In the Spycatcher case*, AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 Lord Goff explained that the tort of breach of confidence encompassed the following principles: i) the principle of confidentiality only applies to information to the extent that it is confidential, ii) the duty of confidence applies neither to useless information, nor to trivia, iii) although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved public interest may be outweighed by some other countervailing public interest which favours disclosure. This approach was applied to try to protect information being imparted in circumstances of confidence and to seek to restrain publication of information to the world at large. See for example *Prince Albert v Strange* (1849) 2 De G & Sm 652; 1 Mac & G 25, matrimonial secrets, *Argyll v Argyll* [1967] Ch 302, and information about sexual relationships, *Stephens v Avery* [1988] 1 Ch 449

[105] See *Douglas v Hello! Ltd (No 3)* [2006] QB 125**,** Lord Phillips MR at para 53

[106] Considered at paragraph 3.137 of the Annex

[107] Considered at Part D, Chapter 4 of the Report

[108] [2004] 2 AC 4 at para 35

[109] See the judgment of Lords Phillips MR in *Douglas v Hello! (No 6)* [2006] QB 125

[110] See comments of Lord Irvine of Lairg LC in the course of the debate on the Human Rights Bill HL Hansard 24 November 1997, col 771 and the submissions of the UK Government in the case of *Spencer v United Kingdom* (1998) 25 EHRR CD 105

v MGN Ltd in which the House recognised a new cause of action, namely misuse of private information, as distinct from breach of confidence.[111]

3.6 This cause of action is now the closest thing to a free-standing right to protection from invasion of privacy in English law. The core element of privacy in this context is whether the person in question had a reasonable expectation of privacy in respect of the information and whether interference with that expectation is justified. The law after *Campbell* therefore recognised two distinct causes of action, protecting two different interests: privacy (misuse of private information) and secrecy (breach of confidence).[112]

3.7 The cause of action recognised in *Campbell* is the product of three features of the law. Firstly, the rights enshrined in Articles 8 and 10 of the Convention are incorporated into domestic law and individuals have a right to bring a claim for infringements of these rights. Secondly, the State is obliged to protect an individual from unjustified invasion of their private life by another individual.[113] Thirdly, the Courts are subject to a duty to avoid acting incompatibly with Convention Rights, and so must, in determining claims, give effect to Convention rights.[114] It is unsurprising, given these features, that the law relating to misuse of private information requires a rights-based analysis and that the jurisprudence of the ECtHR has shaped domestic law in this area.[115]

3.8 Since the landmark decision in *Campbell*, the law relating to misuse of private information has evolved on a case by case basis, both through the decisions of the ECtHR in this area which are absorbed into domestic law, and through the body of domestic case law that has built up over the years as the Courts deal with interim applications seeking to restrain publication of material and the smaller number of final hearings, or trials of alleged misuse of private information. The Court of Appeal has recently described the law in this field as "*well travelled (if fast moving)*" and the principles applicable are considered in detail below.[116]

3.9 A significant proportion of claims brought to restrain publication on the basis that the proposed publication unjustifiably interferes with an individual's privacy involve a claim for misuse of private information. However, the legal framework which has the potential to protect privacy interests is broader and it is through a combination of the common law of misuse of private information and breach of confidence, and actions based on the PHA and DPA, that the law has established a comprehensive framework for the protection of privacy rights. The framework is overlapping in some respects, and it is not unusual for cases to pursued based on more than one cause of action.[117]

Human Rights Act 1998

3.10 The HRA has had a significant impact on the development of the law to protect privacy in two material respects. Firstly, s6 of the HRA requires the courts (as a public authority) to act compatibly with Convention rights. In this context the key Convention rights are Article

[111] [2004] 2 AC 457
[112] *Douglas v Hello! Ltd* [2007] UKHL 21
[113] See ECtHR judgment in Application 59320/00, *Von Hannover v Germany* (2004) 40 EHRR 1
[114] Tugendhat and Christie, *The Law of Privacy and the Media*, 2nd Edition, at para 5.03
[115] As per Buxton LJ in *McKennitt v Ash* [2008] QB 73 at para 11, that Articles 8 and 10 are the very content of the domestic tort that the English court has to enforce
[116] *Hutcheson (formerly known as "KGM") v News Group Newspapers Ltd and others* [2011] EWCA Civ 808
[117] For example, *Campbell v MGN Ltd* [2004] 2 AC 457 is an example of successful claims both for misuse of private information and for breach of the DPA. In *CC v AB* [2007] EMLR 11 claims were made for misuse of private information and under the Protection from Harassment Act 1997. In *Carina Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB) claims were brought pursuant to the PHA 1997 and misuse of private information

8 (respect for private life) and Article 10 (freedom of expression and the right of the general public to receive information). Secondly, by s2(1) a court is also required to take into account judgments of the European Court of Human Rights, and by virtue of this provision the ECtHR's case law has informed the development of domestic law. For this reason it is necessary to dwell briefly on the scope of Articles 8 and 10 in this context.

3.11 Article 8 provides as follows:

> *"Article 8: Right to Respect for Private and Family Life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

3.12 The scope of Article 8 and the meaning of "*private and family life*" has been analysed extensively in case law. The ECtHR has stated that private life is a broad term not susceptible to exhaustive definition, but includes elements such as gender identification, name and sexual orientation, sexual life, mental health, the right to identity and personal development and to establish and develop relationships: *Bensaid v United Kingdom*.[118]

3.13 The House of Lords in *R (Countryside Alliance) v A-G* addressed the scope of private life within the meaning of Article 8. Baroness Hale observed that Article 8 protects a "*private space*" and the "*personal and psychological space within which each individual develops his or her own sense of self and relationship with other people*".[119]

3.14 However, it is now well established that protection of reputation is a right which is covered by the right to respect for private life under Article 8.[120]

3.15 Article 8 does not confer an absolute right to privacy: Article 8(1) provides for a right to "*respect*" for privacy and therefore is inherently qualified. The right is further qualified by Article 8(2). The purposes of the qualifications are to ensure that the core of Article 8 is not read so widely that its claims became unreal and unreasonable.[121] Safeguards against a overly broad reading of Article 8 include the parameters that the threat to a person's Article 8 rights must attain a certain level of seriousness, that absent an expectation of privacy there will be no interference with personal autonomy and that the breadth of Article 8(1) may be curtailed by the scope of the justifications in Article 8(2): see Laws LJ in *R (Wood) v Commissioner of Police for the Metropolis*.[122]

3.16 It is clear that the words "*the right to respect for ... private ... life*" which appear in Article 8 require not only that the State refrain from interfering with private life but also entail certain positive obligations on the State to ensure effective enjoyment of this right by those within its jurisdiction.[123] Such an obligation may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations between individuals.[124]

[118] Application 44599/98, [2001] 33 EHRR 10 at paras 46-47
[119] [2008] 1 AC 719 at paras 116,
[120] Application 21279/02, *Lindon v France* (2008) 46 EHRR 35
[121] *R (Wood) v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, [2010] 1 W.L.R 123
[122] *Loc. cit*
[123] Application 6833/74, *Marckx v. Belgium*, (1979) 2 EHRR 330 at para 31
[124] Application 59320/00, *Von Hannover v. Germany*, [2005] ECHR 555 at para 57

3.17 Article 10 is dealt with in some detail at paragraph 2.10 onwards above. In short, Article 10 protects the right to freedom of expression, which encompasses the right to hold and impart opinions and ideas and the right to receive information and ideas. In general terms Article 10 protects the freedom of the press and the plurality of the media, although the degree of protection extended to particular types of expression will vary depending on the content. Reporting on matters of public interest will invariably attract a greater degree of protection than gossip about an individual's private life.[125]

3.18 Article 10(2) expressly acknowledges that interference with Article 10 rights may be justified in order to protect the rights and the reputation of others. Article 10(2) permits a wide range of interests to be invoked as a justification for imposing restrictions on freedom of expression. Those most commonly invoked are the right to reputation or protection of privacy, often referred to as the tort of misuse of private information in domestic law.

3.19 It is the interplay between Article 8 and Article 10 rights that shapes the cause of action of misuse of private information.

Breach of confidence

3.20 Whilst misuse of private information will be the most relevant cause of action for individuals seeking to protect their privacy, the principles that relate to breach of confidence remain relevant, as it may be easier for a claimant to establish on the particular facts that a breach of confidence is actionable, and the existence of a relationship of confidence may support a claim for misuse of private information, or may be determinative of the claim.[126]

3.21 The starting point is to determine whether there is a relationship or duty of confidence. This may be by reason of express terms in a contract (for example an employment contract), or by reason of an implied term (for example an implied term that an employee will not use or disclose for the duration of his employment confidential information gained in the course of that employment). An obligation of confidence may also arise through the common law, and the courts have recognised that there are three elements to an action for breach of confidence. First, the information must have the quality of confidence. Secondly, the information must have been imparted in circumstances of confidence. Thirdly, there has been an unauthorised use of the information.[127]

3.22 In order to satisfy the first element, namely that the information has the quality of confidence, the information must not be widely available in the public domain. The courts have developed a comprehensive set of principles through case law, which assist in defining when personal information may have a quality of confidence. Many of these factors overlap with the first stage of a misuse of private information claim; namely whether there is a reasonable expectation of privacy. These factors include whether the subject matter is of an intimate nature, whether the information is either believed or expressly stated to be confidential, the extent to which access to the information is controlled or protected and the form of the information. Generally material will not have the necessary quality of confidence if the

[125] See *Armonienė*, cited above, at 39

[126] For example, in *Browne v Associated Newspapers Limited* [2006] 1 QB 103, the Court noted that the existence of a previous relationship of confidence was of considerable importance in determining whether the claimant had a reasonable expectation of privacy. See also on this issue the analysis of Tugendhat J as to what constitutes a breach of confidence in *Commissioner of Police of the Metropolis & Anor v Times Newspapers Ltd & Another* [2011] EWHC 2705 (QB) at paras 94-140

[127] *AG v Observer Ltd* [1990] 1 AC 109 and *Douglas v Hello! Ltd* [2008] 1 AC 1 at para 307

information is trivial tittle-tattle.[128] For example, in *Mills v News Group Newspapers Ltd*, on the particular facts of the case the court considered that the triviality of the claimant's address was a factor against granting an injunction.[129] The courts have also sought to distinguish the levels of detail which may attract a duty of confidence, for example in *Theakston v MGN Ltd*, Ouseley J drew a distinction between that fact that a television presenter had visited a brothel, from the details of what had occurred there.[130]

3.23 In terms of the second element, it needs to be demonstrated that confidential information comes to the knowledge of a person in circumstances where he is on notice, or has agreed, that the information is confidential.[131] The element of unauthorised use of the information requires an analysis of the confidant's conscience and whether the person would, or should, be troubled by the disclosure of the information.[132]

3.24 Where a third party acquires information from a person who himself is subject to a duty of confidence, the third party receiving the information may be restrained by an injunction from further disclosure of the information on the basis that the third party assumes a duty of confidence to the original confider. However, the extent of any relief will depend on the circumstances of the case. In order not to subvert an order of the court, a duty of confidence has been crafted that is binding on media organisations even where there has been no breach of confidence: see *Venables v News Group Newspapers Ltd* where the court imposed a duty of confidence on defendant news organisations and persons not party to the litigation with knowledge of the whereabouts and appearances of the killers of Jamie Bulger who, at the time of the killing, were 10 years of age.[133]

3.25 There are a number of possible defences to claims for breach of confidence, including consent to disclosure, waiver of the duty of confidence, or where the party seeking to restrain disclosure is relying on an unlawful restricting provision. Further, where the information is false there is generally no duty of confidence, although careful enquiry will be necessary to establish whether the information merely has a number of minor inaccuracies or can be said to be completely false before this principle is applied.

Remedies

3.26 Most commonly a party will seek an injunction to prevent disclosure of the confidential information. Often an injunction will be sought on an interim basis to prevent disclosure once the alleged breach of confidence comes to light. An interim injunction is unlikely to be granted where either the material will be published in the near future in any event, or where there is a lack of particularity as to the material that is confidential. A final injunction may be granted in relation to an actual or threatened breach of confidence. The courts more readily grant injunctions in respect of personal information than trade secrets, the latter being more readily assessed in monetary terms suitable for an award of damages.[134]

3.27 An injunction will bind the party to whom the injunction is addressed although third parties may be liable for contempt if they act in a manner which is contrary to the terms of an interim injunction of which they have notice so as to frustrate the purpose of the judge in making

[128] See the remarks of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41
[129] [2001] EMLR 95 at para 33
[130] [2002] EWHC 137(QB) at para 75
[131] *A-G v Observer Ltd* [1990] 1 AC 109 at 281
[132] *R v Department of Health ex parte Source Informatics Ltd* [2001] QB 424 at para 31
[133] [2001] EWHC 32 (QB)
[134] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 50

the order; this is known as the 'Spycatcher principle'.[135] Further, the test for the grant of an injunction in defamation cases is higher than for an interim injunction in breach of confidence claims and the courts will not allow parties to seek an interim injunction on the basis of a claim for breach of confidence where in reality what is sought to be protected is material that is said to be untrue and damaging to reputation.

3.28 The courts also have discretion to order the delivery up of and destruction of documents, articles or machinery obtained or made in breach of confidence.

3.29 Damages may be sought in addition to, or instead of an injunction and can be sought for both past and future losses. There is some uncertainty as to the extent of damages that may be awarded for breach of personal confidence and doubt has been expressed as to whether shock and distress caused by the unauthorised disclosure of confidential information can properly be reflected in an award of damages, however given that the courts have recognised that damages can be awarded for injury to feelings in cases of misuse of private information it may be that a parallel approach will be taken in breach of confidence matters.[136] An alternative remedy which may be sought by the claimant is an account of profits, namely depriving the defendant of the profits resulting from the misuse of confidential information and awarding these profits to the claimant.

Misuse of private information

Establishment of cause of action

3.30 In *A v B plc* Lord Woolf CJ explained that the court, as a public authority, was able to fulfil its duty under section 6 of the Human Rights Act 1998 Act "*by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence*".[137]

3.31 The leading domestic case remains the decision of the House of Lords in *Campbell v MGN Ltd*, which recognised a cause of action for misuse of personal information.[138] This claim is quite distinct from the claim of breach of confidence, with its foundations in Article 8 and 10 of the ECHR. Lord Nicholls observed that:[139]

> *"The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence … and are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority".*

3.32 On the basis that information about an individual's private life is more naturally described as private than confidential, Lord Nicholls said that "*the essence of the tort is better encapsulated now as misuse of private information".*[140]

3.33 The elements of the cause of action were defined in the following way by the House of Lords:[141]

[135] *A-G v Newspaper Publishing plc* [1988] Ch 333 at 375 and 380
[136] *W v Egdell* [1990] Ch 359 at 398–399
[137] [2003] QB 195 at para 4
[138] [2004] 2 AC 457
[139] *Ibid,* at paragraph 17
[140] *Ibid,* at paragraph 14
[141] *Ibid*, at paras 19-20, 92, 134-140, 166-167 per Lord Nicholls, Lord Hope, Baroness Hale, Lord Carswell

(1) The information at issue engages Article 8 of the Convention by being within the scope of the claimant's private or family life, home or correspondence; and

(2) The conduct or threatened conduct of the defendant is such that, upon analysis of the proportionality of interfering with the competing rights under Article 10, it is determined that the protection of the rights of others makes it necessary for freedom of expression to give way.

3.34 The threshold test for whether Article 8 is engaged by the publication, or threatened publication, of information in any given case is *"whether in respect of the disclosed fact the person in question had a reasonable expectation of privacy*".[142] Lord Hope defined the question as "*whether the information that was disclosed was private and not public*", noting that:[143]

> *"in some cases … the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities".*

3.35 The court will then proceed to determine whether the interference is proportionate. Where both Articles 8 and 10 are engaged, a balance must be struck, or the competing requirements of the Articles reconciled, by the application of the principle of proportionality.[144] This requires a focused and penetrating consideration of the proposed interference with the Article 8 right if publication occurs without remedy, and the value and proposed interference with the Article 10 right if a remedy is granted. There are different degrees of privacy, just as there are different orders of expression ranging in importance from political expression through educational or artistic expression to commercial expression.[145] The key issue is the weight to be given to each of the rights at stake in any particular case. As Lady Hale put it, the proportionality of interfering with one right has to be balanced against the proportionality of restricting the other.[146]

3.36 The Court of Appeal in *Murray v Express Newspapers* summarised the principles set out in *Campbell* in the following way:[147]

(1) The right to freedom of expression enshrined in Article 10 of the Convention and the right to respect for a person's privacy enshrined in Article 8 are vitally important rights. Both lie at the heart of liberty in a modern state and neither has precedence over the other.

(2) Although the origin of the cause of action relied upon is breach of confidence, since information about an individual's private life would not, in ordinary usage, be called confidential, the more natural description of the position today is that such information is private and the essence of the tort is better encapsulated now as misuse of private information.

(3) The values enshrined in Articles 8 and 10 are now part of the cause of action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and a public authority.

[142] *Ibid,* at paras 21, 85, 96, 134
[143] *Ibid,* at para 91
[144] *Ibid,* at paras 20, 55, 139-141
[145] *Ibid,* at paras 117, 144, 148
[146] *Ibid,* at paras 140-141
[147] [2007] EWHC 1908 (Ch)

(4) Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.

(5) In deciding whether there is in principle an invasion of privacy, it is important to distinguish between the first question whether Article 8 is engaged, and the subsequent question whether, if it is, the individual's rights are nevertheless not infringed because of the combined effect of Articles 8(2) and 10.

3.37 It is self-evident that Articles 8 and 10 are of the utmost importance in the reasoning process undertaken by the court; they are now "*the very content of the domestic cause of action that the English court has to enforce*".[148]

Elements of cause of action of misuse of private information

3.38 The two-stage test formulated in *McKennitt v Ash*[149] *per* Buxton LJ frequently cited in the case law, is as follows:

(1) First, the court must ask whether the information is private in the sense that it is in principle protected by Article 8 and, if so, whether the person has a reasonable expectation of privacy in respect of the information. If the answer is no, that is the end of the case.

(2) If yes, the second question is whether in all the circumstances, the Article 8 rights of the claimant must yield to the right to freedom of expression conferred on the defendant by Article 10.

3.39 In *Hutcheson (formerly known as "KGM") v News Group Newspapers Ltd and others*, the Court of Appeal cited the well-established test applied at first instance:[150]

> *"First, it is necessary to demonstrate that he has a reasonable expectation of privacy in respect of the subject-matter in question, having regard to article 8 of the European Convention on Human Rights and Fundamental Freedoms. If that hurdle is overcome, it next has to be shown that there is no countervailing public interest sufficient to outweigh his right to protect that information. At the second stage, the court will apply what has been termed 'an intense focus' to the particular circumstances of the case, in order to arrive at a determination of where the balance lies between the competing rights concerned."*

3.40 This summary encapsulates the test neatly.

3.41 The two stage approach is applied to both substantive actions (a trial of the claim) and interim injunctions; although in the latter context the test must be considered in the light of the burden imposed on the claimant to satisfy the Court that there are sufficient prospects to justify an injunction in view of the test in section 12 of the HRA.

3.42 It is important to recognise that Article 8 is engaged irrespective of whether the private information sought to be published is true or false.[151]

[148] *McKennitt v Ash* [2008] QB 73, Buxton LJ at para 11
[149] at para 11
[150] [2011] EWCA Civ 808
[151] Contrast the cause of action for breach of confidence which requires the information in question to be true

Stage 1 – Is there a reasonable expectation of privacy?

3.43 The key issue to be resolved by the court is whether the information sought to be protected is of a private, as distinct from a public, nature and whether the claimant has a reasonable expectation of privacy in respect of that information.

3.44 The law does not protect unreasonable demands to keep information out of the public sphere or 'hyper-sensitive' claimants and, for this reason, the question whether there is a reasonable expectation of privacy is an objective test considered in light of the circumstances of the claimant. Lord Hope in *Campbell* emphasised that the reasonable expectation was that of the person who is affected by the publicity:[152]

> *"The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".*

3.45 The Court of Appeal in *Murray v Express Newspapers* summarised the position as follows:[153]

> *"As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."*

3.46 The court does not address questions of privacy in terms of generalities. According to the authorities set out above, the question must be whether this particular person has a reasonable expectation of privacy in respect of the particular information at issue.[154]

Factors which guide the Court's decision on the stage 1 analysis

3.47 There are a number of matters to which the Court is likely to have regard in determining whether there is a reasonable expectation of privacy. These include, the following factors, which are not necessarily exhaustive:

(a) The nature of the information itself (namely its content)

(b) The form of the information (namely the medium in which it is kept)

(c) The effect of disclosure on the claimant (and other relevant individuals)

(d) The attributes of the claimant

(e) The circumstances in which the information came into the hands of the publisher

(f) The extent to which information is already in the public domain

Nature of the information

3.48 The nature of the information itself is likely to be significant in determining whether there is a reasonable expectation of privacy and there are certain types of information which the courts have readily been persuaded to describe as private information.

[152] [2004] 2 AC 457 at para 35
[153] [2008] EWCA Civ 446 at para 36
[154] *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) at para 87

3.49 Information relating to physical or mental health has been held to lie at the heart of the protection afforded by Article 8.[155] The courts have recognised that personal information about individuals held in medical records, reports or interviews is both confidential and private: *Venables v News Group Newspapers Ltd.*[156] In *Campbell* the House of Lords recognised that the Claimant's therapy for drug addiction related to treatment directed at her physical and mental health and was akin to the private information contained in medical records, although Lady Hale identified that not every statement about a person's health will carry the "*badge of confidentiality*".[157]

3.50 Sexual behaviour and sexual orientation are an aspect of private life and are protected by Article 8. For example, the ECtHR in *PG and JH v United Kingdom* held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected under Article 8.[158]

3.51 In *Mosley v News Group Newspapers Ltd*, Eady J considered in some depth the extent to which revelations concerning sexual relations could lawfully be made by the media.[159] Among other things, he reasoned as follows:[160]

> *"It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose".*

3.52 The judge noted that anyone indulging in sexual activity is entitled to a degree of privacy, especially if it is on private property and between consenting adults.[161] In articulating the standards expected of the media in this context, Eady J expressed his view that it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law, and this is the case whether the motive for such intrusion is merely prurience or a moral crusade:[162]

> *"It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose".*
>
> *"…where the law is not breached ... the private conduct of adults is essentially no-one else's business. The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or "perverted", does not give the media carte blanche".*

3.53 Whether there is a reasonable expectation of privacy between parties to a sexual relationship depends on the circumstances, and where the sexual conduct amounts to unlawful conduct, or conduct that is grossly immoral, that may prevent the claimant from protecting the information relating to it. The length of the relationship may be relevant. An expectation of privacy may not be reasonable in relation to a fleeting encounter, in contrast to a long term relationship.[163]

[155] *Peck v UK* (2003) EHRR 41 at para 57
[156] [2001] Fam 430
[157] [2004] 2 AC 457
[158] Application 44787/98, Judgment 25 September 2001
[159] [2008] EMLR 20, [2008] EWHC 1777 (QB) at paras 124-134
[160] para 125, *ibid*
[161] para 98, *ibid*
[162] At paras 127-128, *ibid*
[163] see Eady J in *CC v AB* [2006] EWHC 3083 (QB)

3.54 It is also important to note that the law more readily protects the details of a sexual relationship than the mere fact of a sexual relationship, or than the fact of sexual orientation per se. In *Goodwin v NGN Ltd* it was held that the fact that details of a sexual relationship are confidential or private does not necessarily mean that the bare fact of a sexual relationship is private, citing by way of example the case of Ntuli in which the judge at first instance had granted an anonymised Claimant an injunction restraining an anonymised Defendant from publishing, amongst other information "*the fact that the Claimant had a relationship with the Defendant*".[164] The Court of Appeal in that case varied the injunction, and named the parties and the fact of their relationship. Maurice Kay LJ observed that:[165]

> *"the material in respect of which Mr Donald has been found to have a reasonable expectation of privacy is not detailed in the judgment. The material in the judgment does not attract a reasonable expectation of privacy."*

3.55 The approach of the Court to the issue of whether there is a reasonable expectation of privacy in respect of a sexual relationship and sexuality can be further illustrated by *Trimingham v Associated Newspapers Ltd*. Both cases reveal that the fact of a relationship may, or may not, attract a reasonable expectation of privacy depending on the particular circumstances of each case, although the statement in *Goodwin* that it is rarely realistic for partners in a relationship to expect that the fact of their relationship will remain confidential between the two of them for a long or indefinite period may signal an approach which tends towards disclosure of the fact of the relationship.[166]

3.56 In *Goodwin*, the court explained that the circumstances why there might be a reasonable expectation of privacy of the fact of the relationship include when an abusive family will not allow the couple to be together and the fact of the relationship being known could create a risk of harm. By contrast, circumstances why the fact of a relationship may not attract a reasonable expectation of privacy include those where parties to a relationship are proud of, or at least content to disclose, the relationship. The court held there was not a reasonable expectation of privacy of the fact of a relationship between Fred Goodwin, the then Chief Executive of RBS and 'VBN', an employee of RBS, relying on the following reasons. Firstly, if an employee has a sexual relationship with a more senior person in the company there are any number of possible misunderstandings and grievances (whether well founded or not) that can arise if the fact of the relationship is not known, at least to the work colleagues of the more junior of the two partners to the relationship. Secondly, the extent to which men in positions of power benefit from that power in forming relationships with sexual partners who are less senior within the same organisation is also a matter which is of concern to an audience much wider than the work colleagues of either partner in the relationship. The court held that whatever limits there may be to the legal concept of a public figure, or of a person carrying out official functions, Fred Goodwin came within the definition, and distinguished him from sportsmen and celebrities in the world of entertainment, who do not come within it.[167]

3.57 However, the court held that VBN did have a reasonable expectation that her name would not be published by the press. The court permitted disclosure of her job description, even though the court recognised that this might lead some people to identify her, on the basis that she was unlikely to establish that prohibiting publication of her job description was necessary and proportionate for the protection of her rights.[168]

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[164] *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) at para 90
[165] *Ntuli v Donald* [2010] EWCA Civ 1276 at para 55
[166] *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) at paragraph 102
[167] At para 103, *ibid*
[168] At paras 119-123, *ibid*. The order at first instance was varied by a consent order in the Court of Appeal narrowing the scope of the information about VBN to less than that permitted to be published by the order at first instance*: JIH v News Groups Newspapers* [2012] EWHC 2179 (QB) at para 13

3.58 In *Trimingham v Associated Newspapers Limited* the Court took a robust approach to the expectation of privacy of the claimant's sexuality.[169] The Court was asked to consider whether the claimant, a bisexual woman living in a civil partnership who had conducted an affair with a married politician, had a reasonable expectation of privacy in respect of her appearance and her sexuality. Tugendhat J held that in light of the fact that the claimant had i) entered into a civil partnership recently and was actually living with her civil partner, ii) had engaged in a sexual relationship with a man who was a prominent politician, and who had conducted the election campaign the previous month in circumstances where revelation of the affair to the public at large was inevitable and, iii) that even before the revelation of her affair with the politician she had had relationships with other men, and those who knew her knew of her sexuality, it was unarguable that she had a reasonable expectation of privacy as to her sexuality. The court concluded that the claimant was not the purely private figure she claimed to be and that her reasonable expectation of privacy had become limited, mainly by reason of her involvement with a prominent politician, both professionally as his press agent, and personally by way of the sexual relationship, in circumstances where he campaigned with a leaflet to the electorate about how much he valued his family, but also by reason of what she herself had disclosed in the past. Therefore, despite the fact that the Defendant referred to the claimant's sexuality in 65 articles over about 15 months, it only did so (a) when writing about matters of public interest, mainly developments in the politician's personal life which were relevant to his public life, and (b) when the claimant and her conduct (and other information about her) were within the range of what an editor could in good faith regard as relevant to the story.[170]

3.59 The Courts have recognised that home is one of the matters expressly included in Article 8(1) of the Convention as deserving respect. In *McKennitt v Ash*, the judge at first instance protected the description of a person's home as private and confidential information, noting that to convey such details without permission to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs.[171] Another example of this approach can be observed in *Beckham v MGN Ltd* in which an injunction was obtained restraining the publisher of a tabloid magazine from publishing unauthorised photographs of the interior of a new home on the basis that this would invade the family's privacy and compromise their security.[172]

3.60 It is generally recognised that material obtained under compulsory powers for the purposes of criminal proceedings cannot be used for purposes other than those for which the powers were conferred and the same principle applies where the information has not been obtained through the use of compulsory powers but the threat of them.[173] Convictions and acquittals are generally not private, although the High Court has jurisdiction to grant an injunction to prohibit publication of the identities of individuals accused and convicted of criminal offences.[174] There may be circumstances in which information about criminal convictions is

[169] [2012] EWHC 1296 (QB). The Claimant is pursuing an appeal against this decision. Permission to appeal has been granted by the Court of Appeal but a hearing date has not yet been fixed. Any conclusions to be drawn from the case will have to be reviewed in the light of the appeal

[170] At para 338, *ibid*

[171] [2005] EWHC 3003, [2005] EWHC 3003 (QB) at para 135. Subsequently approved by the Court of Appeal, [2006] EWCA Civ 1714, [2007] 3 WLR 194 at paras 21-22

[172] See judgment of Stanley Burton J, 23 June 2001 unreported, and judgment of Eady J, 28 June 2001, unreported

[173] See *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208 at 217

[174] *Re Trinity Mirror plc (A intervening)* [2008] QB 770. Note also the power of the court to direct that no report of proceedings shall reveal the name address or school or particulars calculate to lead to the identification of any juvenile concerned in proceedings: see s39 Children and Young Persons Act 1933, breach of which is a summary offence. The court has power to lift these restrictions where it is appropriate to do so

capable of being protected as private, for example in the case of *Venables* where court orders have the effect of preventing publication of the present identities of the two claimants who had been provided with new identities having been convicted, as 10 year old children, of murder.

3.61 It has been held that a person has a reasonable expectation of privacy in relation to his or her financial affairs.[175] Information relating to business affairs may also be protected by relationships of confidence. However, once financial affairs have been raised in open court, the information will not always retain its character as private. It is also important to recognise that information relating to the salaries of public figures may not be regarded as part of their private lives.[176]

Form of information

3.62 In addition to the content of the information, the source or form of the information is likely to have a significant bearing on whether there is a reasonable expectation of privacy.[177] For example, personal diaries, private written communications and private conversations are generally more likely to fall within the sphere of private information than conversations in public places or photographs taken in a private place.

3.63 The law relating to the restriction of information about appearance, primarily through the publication of photographs, has developed rapidly and not always consistently. The Courts have recognised that the publication of photographs have the potential to be particularly intrusive. In *Douglas v Hello! Ltd* the Court of Appeal recognised that:[178]

> *"… special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable a person viewing the photograph to act as spectator, in some circumstances voyeur would be a more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive".*

3.64 The mere taking of a photograph may not involve an interference with privacy but clandestine recording may be regarded in itself as an unacceptable infringement of Article 8 rights. [179] Well known examples where the publication of a photograph has been held to amount to misuse of personal information include publication of a model leaving a Narcotics Anonymous meeting *(Campbell)*, and the video of the Head of Formula 1 participating in sadomasochistic sexual activities *(Mosley).* Other examples include injunctions granted to protect the publication of unauthorised photographs of an actress in a private hotel and photographs of a television presenter in a brothel.

3.65 In *Von Hannover* the ECtHR made clear that photographs of ordinary events in a person's life in public may nevertheless engage Article 8.[180] However, the domestic courts remain cautious in granting protection to routine activities which are part and parcel of daily life and played

[175] For example, *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 where it was held family financial affairs are private
[176] Application 29183/95, *Fressoz and Roire v France* [1997] ECHR 194
[177] In *HRH Prince of Wales v Associated Newspapers Ltd* [2008] 1 CH 57, the Court of Appeal explained that it was not easy to identify the extent to which information is private because of the nature of the information or because of the form in which it is conveyed and usually these facts form an interdependent amalgam of circumstances
[178] (2006) QB 125
[179] *Campbell* [2004] 2 AC 457 at para 73; *Mosley* [2008] EMLR 20, [2008] EWHC 1777 (QB) at paras 17-18
[180] Application 59320/00, (2005) 40 EHRR 1

out in public. In *Campbell*, Baroness Hale doubted that to photograph the claimant going out to buy milk would engage Article 8.[181] Lord Hope in *Campbell* drew a distinction between someone who photographed a person by chance in the street, as against where a photo was taken in secret with a view to publication.[182] The Court of Appeal in *Murray* addressed the potential conflict between the positions in *Von Hannover* and *Campbell* and concluded that no clear distinction could be drawn between family activities and routine acts, such as a visit to the shops, and that each case depended on its own circumstances.

3.66 In the recent case of *Von Hannover (No.2)* the ECtHR recognised that in the absence of evidence of harassment or illegal activity on the occasion that a photo complained of was taken, the restriction on publication of a photo taken in a public place which is innocuous and inoffensive will generally not outweigh Article 10 considerations.[183] The *Von Hannover* cases are considered further below.

3.67 Correspondence is specifically protected by Article 8. The ECtHR in *Copland v UK* held that personal emails are included within private life for the purpose of Article 8.[184]

3.68 The ECtHR has been prepared to treat telephone conversations as within the scope of "*correspondence*" in Article 8 and has held that telephone-tapping of private conversations may breach Article 8.[185]

3.69 The courts have held on numerous occasions that private journals and diaries are confidential documents.[186] However, it does not invariably follow that all the information contained in private journals will be protected, in particular in circumstances where details disclose misconduct that falls outside the scope of a reasonable expectation of privacy, or where details contained in the diary do not relate to the applicant.[187]

Effect on applicant and other affected persons

3.70 In *Campbell* a number of their Lordships considered that the extent of harm to the claimant was a significant factor in determining whether her rights had been infringed by the disclosures at issue. This follows from the fact that the tort of misuse of private information seeks to give effect to human dignity and autonomy and, as Lady Hale identified, damage to private life and to physical or moral integrity are key elements in determining whether a reasonable expectation of privacy existed.[188]

3.71 It is not just the effect on the applicant that must be considered but others that may be affected by publication, including family members. This point was underlined in *ETK v News Group Newspapers Ltd,* where particular weight was placed on the interests of the children, the court observing that the purpose of the injunction is both to preserve the stability of the family and to save the children the ordeal of playground ridicule that would inevitably follow publicity.[189]

[181] [2004] 2 AC 457 at para 154
[182] paras 122-123, *ibid*
[183] Applications 40660/08 and 60641/08, (2012) 55 EHRR 15
[184] Application 62617/00, (2007) 45 EHRR 37
[185] See for example Application 207605/92, *Halford v UK* (1997) 24 EHRR 523; see also *D v L* [2004] EMLR 1, [2003] EWCA Civ 1169
[186] See for example *HRH Prince of Wales* [2007] 3 WLR 222, [2006] EWCA Civ 1776 at para 35
[187] *Maccaba v Lichtenstein* [2004] EWHC 1577, [2004] EWHC 1577 (QB) at para 4; *Lady Archer v Williams* [2003] FSR 689 at para 34
[188] [2004] 2 AC 457 at paras 154, 157
[189] [2011] EWCA Civ 439 at para 17. The court noted that the children are "*bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment*"

Attributes of the claimant

3.72 A number of cases have tended to draw a distinction between a public and a private figure and suggest that individuals who can properly be described as public figures may enjoy a lesser degree of protection than others, although the extent of this distinction has not been consistently applied in case law. The jurisprudence in this area is not always straightforward to follow and the courts, initially inclined to adopt the concept of involuntary role models, appear to have retreated from this approach.

3.73 In *A v B plc* a married professional footballer failed in his attempt to restrain a national newspaper from publishing details of his sexual relationships with two women who wished to sell their stories. The Court of Appeal held that:[190]

> *"Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a Court when deciding on which side of the line a case falls."*

3.74 This decision represents a high water mark from which the courts have since retreated. Recent case law suggests that the courts have refrained from making findings that a person is a role model, however where a person's professional life or job description carries an expectation of high standards of behaviour the courts will take this into account.[191] Thus, the concept of some public figures being involuntary role models having a lesser entitlement to privacy was questioned in *Campbell v MGN Ltd*.[192] Lord Phillips MR noted that "*the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media*", and similarly the mere fact that a person is a public figure who has a relationship with the media does not disentitle them from a right to privacy.[193]

3.75 These latter sentiments were echoed in Strasbourg authority which demonstrated some reluctance to accept that prominent public figures are effectively stripped of their protection by virtue of their position. For example, in *Craxi (No.2) v Italy* the Court found that the rights of a former Italian Prime Minister had been violated by the playing in a domestic court of his covertly recorded private telephone conversations during the course of his prosecution for corruption, and held that public figures (even politicians of the highest order) are entitled to the enjoyment of the guarantees in Article 8 on the same basis as every other person.[194] Similarly, in *Tammer v Estonia,* the Court held that the sexual life of senior politicians can be wholly protected from publicity, finding that the penalties imposed by the national authority

[190] [2003] QB 195 at para 11(xii)
[191] See for example *Ferdinand v MGN Ltd (Rev2)* [2011] EWHC 2452 (QB) at paras 89-90
[192] [2004] 2 AC 457 at paras 40-41
[193] paras 4, 57, 120, *ibid*
[194] Application 25337/94, (2004) 38 EHRR 47

upon the press reporting of an affair between the Prime Minister and a former political aide were not a violation of Article 10.[195]

3.76 Having made the point that *A v B* might represent one high water mark, *Craxi* and *Tammer* might be thought of as the high water mark for protecting public figures. The seminal case of *Von Hannover v Germany*[196] adopts a less protective approach, namely that the public right's right to know about the lives of public figures can in certain circumstances extend to the private life of public figures, particularly where politicians are concerned, but this will depend on the particular facts and circumstances of the individual's role and duties. In this case Princess Caroline of Monaco complained about pictures of her engaging in ordinary activities in public places. The ECtHR held that, in balancing the Article 8 and 10 rights, *"a fundamental distinction"* had to be made between reporting facts capable of contributing to a debate in a democratic society relating to, for example, politicians in the exercise of their functions, and reporting details of the private life of an individual who, as in Princess Caroline's case, does not exercise official functions. The court held that:[197]

> *"…the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the Applicant exercises no official function and the photos and articles related exclusively to details of her private life."*

3.77 Significantly, and no doubt correctly, in *McKennitt v Ash* it was suggested that *A v B* was inconsistent with the decision of the European Court of Human Rights in *Von Hannover.*[198]

3.78 More recently in *Von Hannover (No.2)*[199] the Court was concerned again with a complaint of Princess Caroline of Monaco that photographs taken during a family holiday had been published with articles commenting on the Price's poor health. The Court upheld the finding of the domestic court that the health of the reigning Prince of Monaco was a matter of general interest and press were entitled to report on how the Prince's children reconciled their family obligations with legitimate needs of their private life, including holidaying. The Court accepted that the photos, considered in the light of the accompanying articles, did contribute to a debate of general interest.[200]

3.79 In *Murray v Express Newspapers* it was held that the law should protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child.[201]

Circumstances in which information comes into the hands of the publisher

3.80 Whilst breach of confidence is a distinct cause of action and misuse of private information may arise without there being any confidential relationship, the existence of a confidential relationship can be an important consideration as to whether there is a reasonable expectation of privacy. Where the proposed publication is set against a backdrop of a pre-existing relationship of confidence between the parties, the need for protection is greater.

[195] Application 41205/98, (2003) 37 EHRR 43
[196] (2005) 40 EHRR 1
[197] See (2005) 40 EHRR 1 at para 63
[198] [2008] QB 73 at para 62
[199] Application Numbers 40660/08, 60641/08
[200] Applications 40660/08 and 60641/08, (2012) 55 EHRR 15
[201] [2008] EWCA Civ 446 at para 57

3.81 The test for breach of a confidence was set out by the House of Lords in *Douglas v Hello! Ltd* as follows. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.[202]

3.82 In the case of *Lord Browne of Madingley v Associated Newspapers Ltd* the Court of Appeal accepted the principle that a pre-existing relationship between the relevant persons or parties is of enormous importance in answering in the affirmative Lord Nicholls' question (as set out in *Campbell*) about whether the subject of the disclosure has a reasonable expectation of privacy in the information to be published.[203] However it is important to recognise that the existence of a prior relationship of confidence is not determinative.[204]

Information in the public domain

3.83 The expectation of privacy in some circumstances may be limited by the extent to which information has already entered the public domain. The law will not restrain publication where this would serve no useful purpose, in other words where the re-publication of information would not have a significant effect. Consideration of this issue is relevant both to the Stage 1 question of reasonable expectation of privacy and to conducting the balancing exercise at Stage 2.[205]

3.84 The "*public domain*" is not always easy to define. In this regard there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper.[206] Whether information is known to the public at large is a matter of fact and degree for determination in each case depending on its specific circumstances.

3.85 The position can be summarised in a nutshell by reference to the remarks in *Douglas v Hello!*, that once intimate personal information about a celebrity's private life has been widely published, it may serve no useful purpose to prohibit further publication.[207] However, the Courts have been slow to conclude that no useful purpose would be served by injunctive relief unless the information has been widely publicised. For example, in *CTB v News Group Newspapers Ltd*, Tugendhat J continued an injunction in favour of protecting the identity of a professional footballer in spite of wide publicity revealing his identity on the grounds that continuing publicity would constitute unwarranted harassment.[208]

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[202] [2007] UKHL 21 at para 111
[203] [2008] QB 103
[204] [2007] EWCA Civ 295 at para 26
[205] *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at para 36
[206] *Browne v Associated Newspapers Ltd* [2008] QB 103 at para 61
[207] [2005] EWCA Civ 595 at para 105. This case reiterated (with particular references to photographs) the sentiment of Lord Goff in *Attorney General v Guardian Newspapers* (No 2) [1991] AC 109 at 260 E-H that harm may be caused by repetition of facts already known to an earlier but different readership
[208] [2011] EWHC 1334. It was said "*It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed. The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection*." See also the previous judgments in this case *CTB v News Group Newspapers Ltd & Another* [2011] EWHC 1232 granting anonymity and then *CTB v NGN and Another* [2011] EWHC 1326 (QB) (an early application to vary the injunction). Also see *Giggs v NGN* [2012] EWHC 431 (QB) in which Eady J declined to continue the anonymity of the footballer

3.86 It will be relevant to consider whether repeated publication is likely to engage Article 8 and further invade privacy. For example, in *Douglas v Hello! Ltd (No.3)* all members of the House of Lords accepted that privacy could be invaded by further publication of information or photographs already available to the public.[209]

3.87 Where information is put into the public domain by claimant themselves, the mere fact that a claimant has made limited disclosures about a particular area of his or her private life will not necessary prevent a claim for further, unauthorised publication of material in the same area.[210] However, previous disclosure by the claimant may limit the scope of reasonable expectation of privacy in a particular case. In *Axel Springer* the fact that a well known actor "*had actively sought the limelight*" in the past, revealing details about his private life in a number of interviews, meant that his "*legitimate expectation*" that his private life would be effectively protected was thereby reduced.[211]

3.88 In *X & Y v Persons Unknown* the Court held that there is a real distinction between what is written about an individual on the one hand and what he or she himself puts or agrees to put into the public domain on the other.[212] Eady J, in granting an injunction against further dissemination of allegations about the state of the claimants' marriage carefully scrutinised the press cuttings produced by the defendant containing references to or quotations from the claimants, noting that careful attention needed to be paid by the court as to how information had been made public – distinguishing between celebrities being prepared to go along with 'lifestyle' pieces without wishing to cross boundaries into personal relationships and those who took the view that any publicity is good publicity. It is clear there is no hard and fast rule and in each case the court will have to examine the specific evidence and make an evaluation (on which, inevitably, there may be room for differing opinions).

3.89 In *Ferdinand v MGN Ltd* Nicol J did not accept the argument that the Claimant had no reasonable expectation of privacy because explicit details about his sex life were already in the public domain as a result of the publication of previous articles (some of which resulted from disclosures by him, and others where he had not denied them or taken any action).[213] Nicol J stated that:[214]

> *"the Claimant had not, before the article, disclosed anything about his relationship with [a particular woman]. It is not necessary to consider whether in an extreme case there would be some merit in the argument that widespread and extensive discussion by a person of similar aspects of their private life would disentitle them to have a reasonable expectation of privacy. The present case is nowhere near that extreme. In this context, the Claimant was also entitled to say that the articles alleging affairs with other women were not published with his consent and the fact that he had not litigated them could not be taken as his tacit acceptance of another article, let alone another article about a different woman."*

[209] [2008] 1 AC 1 at paras 122, 255
[210] *McKennitt v Ash* [2008] QB 73 at paras 53-55
[211] Application 39954/08, *Axel Springer AG v Germany* (2012) 55 EHRR 6 at para 101
[212] [2006] EWHC 2783
[213] [2011] EWHC 2454 (QB)
[214] para 58, See also *Spelman v Express Newspapers* [2012] EWHC 355 (QB) in which a Cabinet Minister failed to obtain an interim injunction to prevent publication of private information concerning her 17 year old son, who was a successful Rugby player; and *Mcclaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB) in which the Court declined to grant an interim injunction prohibiting details of a sexual activity between the claimant (a professional football manager) and a third party in circumstances where the claimant was undoubtedly a public figure having formerly managed England's football team and in which he had previously disclosed details of an extra-marital affairs in a national newspaper

Place where the conduct occurs

3.90 As a general principle a person is entitled to expect that information about their behaviour in their home or another private place is and will remain private. However, protection of activities undertaken in public, in particular photographs or video recordings, has been expanded by the case law. For example, in *Campbell* the majority of the House of Lords concluded that the publication of photographs taken in a public place was actionable. In *Murray* the Court of Appeal held that a child of famous parents arguably had a reasonable expectation that photographs would not be taken of him for publication whilst in a pushchair on a public street. The circumstances in which the photographs were taken is also relevant, this issue has been addressed recently in *Von Hannover (No 2)* in which the Court held that there was not infringement of Article 8 by the publication of photographs taken in public (namely in a street of a skiing resort). The ECtHR held that the domestic court was correct to analyse the circumstances in which the photographs were taken including whether they have been taken surreptitiously or in a climate of harassment, but that there was no evidence to suggest that this was the case.[215]

False information

3.91 Unauthorised disclosure of personal information may be actionable even if the claimant contends that some or all of the material is false: see *McKennitt v Ash*. Buxton LJ stated:[216]

> *"that provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the Defendant cannot deprive the claimant of his Article 8 protection simply by demonstrating that the matter is untrue".*

Latham LJ went further in his concurring judgment, saying that:

> *"..the truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry."*

3.92 The rationale for this approach appears to be that the courts are reluctant to require a claimant to spell out which of the allegations are true or false, Eady J observing in *Beckham v Gibson* that this would defeat the purposes of the injunction.[217] This marks a departure from the law relating to breach of confidence where it has long been held that there can be no confidentiality in false information. Therefore in the context of a tort of misuse of private information, the truth or falsity of the information disclosed is of minor relevance, although in *Campbell*, it was observed by Lord Hope that:[218]

> *"there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not".*

Stage 2 – Balancing exercise between Articles 8 and 10

3.93 The second stage has been referred to by the Courts as the "*ultimate balancing test*" and the "*parallel analysis*" and requires an assessment of the comparative importance of the two rights.

[215] Applications 40660/08 and 60641/08, (2012) 55 EHRR 15
[216] [2008] QB 73 at paras 78-80, 86
[217] Judgment, unreported, 29 April 2005
[218] [2004] 2 AC 457 at para 102

3.94 The interaction between Articles 8 and 10 was explained by Lord Nicholls in *Campbell v MGN Ltd:*[219]

> *"Article 8(1) recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. Article 10(1) recognises the importance of freedom of expression. But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life."*

3.95 Lord Steyn in *Re S (A Child) (Identification: Restrictions on publication)* noted that neither Article 8 nor Article 10 has precedence over the other and that where the values protected by the two articles are in conflict an intense focus on the comparative importance of the rights being claimed is necessary. Further, the justification for interfering with or restricting each right must be taken into account and finally the proportionality test must be applied to each (also known as the ultimate balancing test). In conducting this balancing exercise, the courts have acknowledged that this process will require an "*intense focus on the facts of the individual case*".[220]

3.96 On the Article 8 side, the more intimate the aspect of private life that is interfered with the more serious must be the reasons for the interference before the restriction can be legitimate.[221] When striking a balance between competing rights the court is not restricted to considering the Article 8 rights of the claimant and the defendant but should take into account the extent to which other individuals would be affected by publication; for example the claimant's family.[222] In many cases the claimant's privacy interests will align with those of their family and the rights of family members may have a significant impact in determining these issues.

3.97 On the Article 10 side, different types of speech have varying levels of protection. Lady Hale in *Campbell* explained that political speech is top of the list and that the free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy and that without this, it can scarcely be called a democracy at all. Further, intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of the potential for an individual to play a full part in society, including in democratic life. Artistic speech and expression is important for similar reasons; fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. Lady Hale doubted whether the political and social life of the community and the intellectual, artistic or personal development of individuals is assisted by poring over the intimate details of a fashion model's private life, for example.[223]

3.98 Thus, as a matter of approach, there is a hierarchy of both privacy interests and of freedom of expression rights. The more intimate the nature of the information and the closer the information is aligned to Article 8, the greater weight the court will accord to the information

[219] [2004] UKHL 47 at para 17
[220] *Christopher Hutcheson (formerly KGM) v NGN* [2011] EWCA Civ 808 at para 28
[221] see *Douglas v Hello! Ltd* [2001] QB 967 per Keene LJ at para 168
[222] See, for example, *CC v AB* [2007] EMLR 312, Eady J at para 42
[223] [2004] 2 AC 457 at paras 158-159

in the balancing exercise. Similarly the more important the nature of speech being exercised, the more weight will be given to this.

3.99 In *Von Hannover v Germany (No 2),* various factors were identified by the Court as being relevant to the consideration of how the competing Convention Articles could be balanced. These included: the status of the person concerned (distinguishing between private individuals and persons acting in an official or public context such as politicians), the subject matter of the report (distinguishing between the press as a public watchdog and as a reporter of private facts about well known people), the prior conduct of the person concerned (noting that simply because an individual has co-operated with the press does not deprive them of privacy) and the form or content of the publication and its consequences.[224] The ECtHR in *Axel Springer*, identified similar factors as relevant to the "*criteria for the balancing exercise*": (1) contribution to a debate of general interest, (2) how well known the person concerned was and what was the subject matter of the report, (3) the prior conduct of the person concerned, (4) the method used to obtain the information and its veracity, (5) the content form and consequences of the publication, and (6) the severity of the sanction imposed.[225]

Public interest in publication

3.100 The most significant factor in the balancing exercise is the extent to which the information sought to be disclosed can truly be said to make a contribution to a debate of general interest. For example, the contribution that the published information would make to a debate of general interest was treated as the decisive factor in *ETK v NGN Ltd*.[226]

3.101 Two key issues need to be considered in this context, namely what is meant by "*public interest*" and who the arbiter of the meaning of public interest is.

3.102 The meaning of "*public interest*" is hard to pin down. The courts have drawn a distinction between matters which contribute to a debate on matters in the public interest and matters which are simply of interest to some members of the public. A striking and oft-quoted aphorism in this context is the observation of Lord Wilberforce in *British Steel v Granada Television*, that "*there is a wide difference between what is interesting to the public and what is in the public interest to make known*".[227] A statement to a similar effect is that of Stephenson LJ explained in *Lion Laboratories v Evans*, "*the public are interested in many private matters which are no real concerns of theirs and which the public have no pressing need to know".*[228]

3.103 In *Goodwin v NGN Ltd* the Court found there to be a public interest in disclosure, not because the publication would expose serious impropriety or crime but because it is in the public interest that there should be public discussion of the issues raised by the publication, namely the circumstances in which it is proper for a person holding public office or exercising official functions to carry on a sexual relationship with an employee in the same organisation.[229] It was held that:[230]

[224] Applications 40660/08 and 60641/08, (2012) 55 EHRR 15
[225] Application 39954/08, *Axel Springer AG v Germany* (2012) 55 EHRR 6
[226] [2011] EWCA Civ 439 at para 23
[227] (1981) AC 1096
[228] (1985) QB 526
[229] [2011] EWHC 1437 (QB) at para 133; it was held that "*it is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs. The public interest cannot be confined to exposing matters which are improper only by existing standards and laws, and not by standards as they ought to be, or which people can reasonably contend that they ought to be*."
[230] paras 136-137, *ibid*

> *"it is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs. The public interest cannot be confined to exposing matters which are improper only by existing standards and laws, and not by standards as they ought to be, or which people can reasonably contend that they ought to be."*

However, the Court emphasised that:

> *"[As a] matter of principle, the right to respect for private life of persons holding responsible positions cannot be overridden in the interests of freedom of expression simply because a newspaper alleges that they might have a worry that might distract them from doing their jobs. It cannot be right that the press should be free to interfere with a person's private and family life by exposing confidential information, and then seek to justify that by speculating that the information might have distracted him from doing his job."*

3.104 In *Mosley v UK*, the ECtHR recognised the distinction between reporting facts, even if controversial, capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life.[231] In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a "*public watchdog*" are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, and which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life. Such reporting does not attract the robust protection of Article 10 afforded to the press. Critically, the court confirmed the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, but stressed that in assessing whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interests of the public and not whether the public might be interested in reading it.

3.105 The Strasbourg authorities have also carefully scrutinised claims of public interest in relation to intimate details of persons' private lives. In *Campany Y Diex de Revenga v Spain*, the Court was concerned with the publication of a sex scandal between an aristocrat and a banker and, in rejecting the complaint of breach of Article 10, held that even though the persons were known to the public the reports could not be regarded as having contributed to debate on a matter of general interest to society.[232]

3.106 In considering the public interest in any publication it is important for the court to focus on the precise nature of the proposed publication and on the facts of an individual case, rather than reciting considerations of a generalised nature. In *McKennitt*, Eady J emphasised that:[233]

> *"[it is] necessary to scrutinise with care any claims to public interest – which are sometimes made by the media and their representatives on a rather formulaic basis".*

3.107 This does not sit easily with the submission advanced by some media groups, for example News International, that it is a common misconception that the media must justify any publication which involves private information of any kind by pointing to a specific public

[231] Application 48009/08, [2012] EMLR 1
[232] Application 54224/00, [2000] ECHR 696
[233] [2005] EWHC 3003, [2005] EWHC 3003 (QB) at para 95

interest in the publication of the particular information in question.[234] Although the point may be well made in instances where the alleged infringement of privacy is at too low a level as to engage Article 8 and whilst the Court in *A v B plc* stated that any inference with the press has to be justified irrespective of whether a particular publication is desirable in the public interest, the case law over the past decade has revealed that in any case where Article 8 is clearly engaged the courts will require the media to demonstrate the public interest in the particular publication and this will be highly material in the balancing exercise.[235]

3.108 The issue of who should be the arbiter of public interest has been the subject of analysis in recent authority. The case law suggests that it is for the court to determine whether the proposed publication would be in the public interest, although this position is not without its difficulties. In *Mosley v News Group Newspapers Limited*, Eady J held that on the current state of the authorities it is for the court to decide whether a particular publication was or was not in the public interest, and that there was little if any scope for considering the defendant's state of mind "*because it is only the court's decision which counts on the central issue of public interest*".[236]

3.109 However, this position in respect of misuse of private information can be contrasted with the provisions of the DPA in which the exemption available to the media in section 32 is dependent upon the data controller reasonably believing that publication would be in the public interest and therefore the enquiry pursued by the Court is into the state of mind of the data controller and whether their belief was a reasonable one.[237] Similarly, Parliament has amended the data protection legislation to provide for a public interest defence to the criminal offence in section 55 (although this section has not been brought into force), and the terms of this defence focus on whether the media defendant acted in the reasonable belief that its processing of data was in the public interest, and not on whether it actually was in the public interest.

3.110 These provisions were considered by Tugendhat J in *Terry v Persons Unknown*, where it was observed that there was uncertainty in the existing law as to the extent to which, if at all, the belief of a person threatening to make a publication in the media is relevant to the issue of public interest. After citing from the judgment of Eady J in *Mosley v News Group Newspapers Limited* and referring to the provisions of s32 of the Data Protection Act 1998, he observed that:[238]

> *"The Data Protection Act might well apply to a newspaper publication, and in particular to an online publication. If that Act did apply, it would be anomalous if the public interest defence under Section 32 required the Court to have regard to the reasonable belief of the journalist, but that the same defence under the general law did not. I cannot decide that any reasonable belief on the part of a journalist or editor would be irrelevant without hearing argument for that proposition, if it is to be advanced."*

3.111 However, the position was set out in more robust terms in *Goodwin v NGN Ltd* where Tugendhat J held that whilst newspaper editors have the final decision on what is of interest to the public: judges have the final decision what it is in the public interest to publish.[239]

[234] At para 19.1 of News International Submissions on Privacy Law
[235] *A v B (a company)* [2002] EWCA Civ 33
[236] *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, [2008] EWHC 1777 (QB) at paras 135 and 137
[237] See ss32(1)(b) and (c)
[238] [2010] EMLR 1 at paras 70-73
[239] [2011] EWHC 1437 (QB)

3.112 The correct approach based on present authority is that in conducting the balancing exercise between Article 8 and Article 10 and determining the public interest in publication, the Court is the ultimate arbiter of the public interest in the proposed/actual publication. It is for the Court to conduct a detailed and focussed analysis of the public interest in the publication and not simply enquire as to whether the journalist or editor had a reasonable belief that the publication was in the public interest. However, this is not to say that the state of mind of the journalist or editor is necessarily irrelevant to the balancing exercise under stage 2. As set out below, the defendant's motive is relevant to the strength of the Article 10 right: take the hypothetical case of a defendant making threats to publish, or blackmailing an individual. This may well weaken his or her Article 10 claim. In contrast, a defendant acting in good faith and in the reasonable belief that publication is in the public interest may well find himself in a stronger position as regards his or her Article 10 right.

Factors of relevance to the balancing exercise

3.113 Whilst not intended to be an exhaustive collection of the factors which may be relevant to the balancing exercise under stage 2, the following issues have been considered in the case law in undertaking the balancing exercise between Article 8 and Article 10.

Correcting false image

3.114 An example of the application of this principle can be identified in *Ferdinand v MGN Ltd.* Whilst Nicol J held in relation to a "*kiss and tell*" story about footballer Rio Ferdinand that the first stage test was satisfied, there was a public interest in publication on two grounds, one of which was to correct the "*false image*" created as a result of an interview given by the footballer in which he had portrayed himself as a family man and as a reformed character in a stable relationship. The Court held that while that perception of him continued to exist, there was a public interest in demonstrating that it was untrue. The judge acknowledged that it was an unattractive "*kiss and paid for telling*" story, but stated that:[240]

> *"stories may be in the public interest even if the reasons behind the informant providing the information are less than noble".*

3.115 In *McKennitt v Ash* the Court of Appeal suggested that a very high degree of misbehaviour must be demonstrated in order to justify the disclosure of private information on the basis that the information tends to expose hypocrisy or correct a false image.[241]

Affects performance of obligations and duties

3.116 In *Goodwin v NGN Limited and VBN* it was argued that there was a public interest in exposing details of a relationship between Fred Goodwin and a senior employee of the Royal Bank of Scotland on the basis that it had an impact on the financial difficulties of the bank. Whilst this argument was rejected in the absence of evidence, Tugendhat J recognised that there may be circumstances where the private life of a person holding a responsible position so impacted on his or her ability to carry out their role that it would be in the public interest to report it.[242] Any assertion that features of a persons' private life have a detrimental effect on the performance of public duties will require proper evidence.

[240] [2011] EWHC 2454 (QB) at paras 84 and 85
[241] [2008] QB 73 at para 69
[242] [2011] EMLR 27 at paras 136-137

Comparative value of different sorts of speech

3.117 Baroness Hale confirmed in *Campbell* that there are different types of speech just as there different types of information, some of which are more deserving of protection in a democratic society than others. The courts will therefore be more likely to find in favour of the defendant where the publication relates to political speech rather than gossip.[243]

Debate relating to public figures

3.118 The case of *Von Hannover v Germany* is of particular importance in confirming that disclosure of information about public servants or officials is likely to contribute to a debate of general importance which will weigh heavily in the Article 8 and Article 10 balancing exercise.[244] The Court held that *"a fundamental distinction"* had to be made between reporting facts capable of contributing to a debate in a democratic society relating to, for example, politicians in the exercise of their functions, and reporting details of the private life of an individual who, as in Princess Caroline's case, does not exercise official functions. In the former case, the Press exercises its vital role of "*watchdog*". In the latter case it does not perform that role, see para 63. Accordingly:[245]

> *"…the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the Applicant exercises no official function and the photos and articles related exclusively to details of her private life."*

3.119 A different approach was taken in *Axel Springer* and *Von Hannover (No.2)* which confirmed that reports of the private lives of public figures will be acceptable where they contribute to a matter of general interest and there is no evidence of other wrongdoing. In both cases the fact that the individuals involved were not private individuals but could properly be regarded as "*public figures*" was important. In *Axel Springer*, the court found that the TV personality had himself revealed details about his private life in a number of interviews and in the court's view had actively sought the limelight and was well known to the public. As a consequence, his legitimate expectation that his private life would be effectively protected was reduced.[246] In V*on Hannover (No. 2)*, the court was satisfied that Princess Caroline and her husband were "*undeniably very well known*", irrespective of the question of the extent to which the Princess assumes official functions on behalf of the Principality of Monaco.[247]

Defendant's motives in threatening to publish private information

3.120 To date the court has regarded as a relevant factor the Defendant's intentions in stating their intention to publish private information. Tugendhat J in *AMM v HXW* held that if a person is making unwarranted demands with threats to publish, that is a factor in deciding whether that person has any Article 10 rights, and, if so then the weight to be accorded to them in balancing them with the Applicant's Article 8 rights.[248]

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[243] [2004] 2 AC 457
[244] Application 59320/00, (2005) 40 EHRR 1
[245] para 76, *ibid*
[246] Application 39954/08, *Axel Springer AG v Germany* (2012) 55 EHRR 6
[247] Applications 40660/08 and 60641/08, (2012) 55 EHRR 15 at para 120
[248] [2010] EWHC 2457 (QB) at para 38; see also *EWQ v GFD* [2012] EWHC 2182 (QB) at para 96 ff

3.121 In another privacy case, Sharp J took into account the defendant's motives when balancing the claimant's Article 8 and the defendant's Article 10 rights when she observed in *DFT v TFD* that disclosure of the information in that case (whether to the media or generally) would be the fulfilment of a blackmail threat and that the expression rights of blackmailers are extremely weak, if they are engaged at all.[249]

3.122 It is unsurprising that the court will seek to inquire into the motives of the discloser, as this will likely go to the assessment of the strength and integrity of the argument of public interest.

Rights of another person to tell their story

3.123 In *McKennitt* v *Ash*, the defendant, Ms Ash, an author and close friend of Ms McKennitt, sought to resist the order for injunctive relief on the basis that her book was simply an expression of her relationship with the claimant and the role she played in her life and it was therefore argued that it was her right to tell her own story. In rejecting this argument Eady J held, having regard to the decision in *Von Hannover*, that if a person wishes to reveal information about aspects of his or her relations with other people, which would attract the prima facie protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person's privacy. He emphasised that it does not follow, because one can reveal one's private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming.[250]

Pre-notification requirement

3.124 Prior notification of publication can properly be described as good practice but is not a legal requirement. The law does not require advance notice of publication to be given to the subject of an article and a challenge to this before the ECtHR pursued by Max Mosley was unsuccessful. The Court noted that Article 10 does not prohibit the imposition of prior restraint on publication, any such restrains call for the most careful scrutiny although prior restraint may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.[251] However, the ECtHR held that Article 8 does not require a legal duty to be imposed on the press to notify the subject of a publication in advance in order to allow him the opportunity to seek an interim injunction and thus prevent publication of material which violated his right to respect for his private life. This conclusion was reached on the basis that there was a risk of a chilling effect on the press, and doubts as to effectiveness of a pre-notification requirement and the wide margin of appreciation in this area.[252]

Remedies for misuse of private information

3.125 There are three potential remedies for the tort of misuse of private information: an injunction, damages and a declaration.

[249] [2010] EWHC 2335 (QB) at para 23
[250] This was upheld on appeal by the Court of Appeal, who emphasised the fact that the individual who wished to disclose private information about another had been in, and only possessed this information because of a (more than transient) relationship of confidence
[251] Application 48009/08, *Mosley v United Kingdom* (2011) 53 EHRR 30 at para 117
[252] *Ibid*

Injunctions

3.126 An injunction may be sought on an interim or final basis. An injunction is often the most effective remedy for claimants seeking to restrain publication of personal information or pictures.

3.127 The Court has recognised that damages may not be an effective remedy in this context. The Court of Appeal in *Douglas & Ors v Hello Ltd. & Ors* held that:[253]

> *"The award of damages eventually made to the Douglases, although unassailable in principle, was not at a level which, when measured against the effect of refusing them an interlocutory injunction, can fairly be characterised as adequate or satisfactory. Only by the grant of an interlocutory injunction could the Douglases' rights have been satisfactorily protected. Further, the interests of Hello! at the interlocutory stage, which were essentially only financial, could have been protected by an appropriate undertaking in damages by the Douglases".*

3.128 In *Mosley v News Group Newspapers Ltd* Eady J observed that:[254]

> *"whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication".*

3.129 When an injunction is sought on an interim basis, the court will carefully scrutinise the basis for seeking to restrain publication. The burden for the applicant of establishing the need for restraining pre-publication is a heavy one. The court will consider, applying s12 of the HRA, whether the Claimant is likely to establish at trial that publication is an unlawful interference with their right to privacy and this process will require consideration of the principles set out in detail above.

3.130 The courts have repeatedly recognised the need for restraint in interfering with publication and the need for such interference to be justified.[255]

3.131 If a party proceeds to trial and is successful in establishing a cause of action in respect of the future publication or disclosure of information, the court may grant an injunction. Where a claimant has established his claim for misuse of private information at trial then, unless the grant of an injunction would be an exercise in futility because, for example, the private information is so widely in the public domain that there would be no point in restraining publication of it, he or she is very likely obtain an injunction restraining a defendant from further misuse.

3.132 In this area of the law that have recently been concerns regarding a number of procedural aspects of injunction, in particular the anonymity of claimants and publication of the mere fact of an injunction having been granted being prohibited, commonly referred to as a super injunction.

3.133 As a general principle, the names of parties to an action are included in the orders and judgments of the court. This is a corollary of the general rule that hearings are carried out in and judgments and orders are public and there is no general exception where cases concern

[253] [2005] 4 All ER 128 at para 259
[254] [2008] EMLR 20, [2008] EWHC 1777 (QB) at para 230
[255] *A v B* [2003] QB 195 at para 11

private matters: *JIH v News Group Newspapers Ltd*.[256] Article 6 provides for a public hearing and for a judgment to be pronounced publicly, although this right is subject to the need to protect the private life of the parties, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3.134 However, parties seeking an injunction to restrain publication often wish to preserve their anonymity to prevent further reporting of the circumstances giving rise to, and the claim for, an injunction.

3.135 The Court has jurisdiction to make an order for anonymity in accordance with section 11 of the Contempt of Court Act 1981 and CPR 39.2(4). Such an order is often sought together with a substantive injunction seeking, (a) the protection of private information and, (b) prevention of publicity concerning the existence of the proceedings and the claimant's interest in them (sought on the basis that to allow such publicity would encourage speculation about the subject matter of the action, which would be intrusive in itself and may well alight on the very class of secret which exists). If anonymity is not ordered, the fact that the claimant has had to seek relief against the defendants may become a story in its own right.

3.136 Derogations from the general principle of open justice can only be justified in exceptional circumstances. However, it is fair to observe that by 2010 claimants were frequently seeking interim injunctions against the media which had some or most or all of the following features: the applications were heard in private, the proceedings were brought in an anonymised form, there was no public judgment, they were sought without notice to anyone (for example, because the defendants were "*persons unknown*", or because the defendant media organisation was thought to be likely to frustrate the order if given notice), and the injunctions were served on media third parties with the intention of binding them in accordance with the *"Spycatcher"* principle.

3.137 Claimants often sought such orders on the grounds that if they were not granted these procedural protections they would be deterred from seeking any relief at all. Prior to the decision in *Terry,* such arguments tended to be successful.[257] However, the *Terry* decision marked an important check on the growing practice of the courts to entertain proceedings effectively shrouded in secrecy. Tugendhat J emphasised that these protections were only to be granted if necessary and a number of subsequent cases made clear that public judgment would be required, even if some material facts were omitted from the judgment and set out in a confidential schedule attached to the order. The concerns raised by Tugendhat J in *Terry* fed into the Report of the Committee on Super-Injunctions at para 2.35[258]:

> *"It is true that, until early 2010, there were justifiable concerns that a form of permanent secret justice was beginning to develop. However, that concern should be dispelled by the decision in the Terry case."*

3.138 Another feature of the practice in relation to obtaining injunctions which gave rise to legitimate concern was that interim injunctions were kept in place for long periods and potentially indefinitely, either because the initial orders granting interim relief did not contain a return date or because the substantive claims were not progressed by the claimant towards trial, in many cases because for a claimant once an interim injunction was granted no better result could be achieved at full trial and for the defendant the grant of an injunction on an interim basis was effectively determinative of the issue as the story may not be worth publishing

[256] [2011] EWCA Civ 42 at para 21
[257] [2010] EWHC 119 (QB)
[258] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf

months later. In *Giggs v News Group Newspapers Ltd* Tugendhat J noted the incentive for claimants to abuse the process, to avoid the need to prove their cases at trial.[259] Having obtained an interim non-disclosure order it may appear to be in interests of the claimant to hold on to it as long as possible and to proceed to trial as slowly as possible, if at all.[260]

3.139 During this period the media expressed concern against orders, in particular, super injunctions, which restrain a person from: publishing information which relates to the applicant and is said to be confidential or private, and, publicising or informing others of the existence of the order and the proceedings.

3.140 The Committee on Super-Injunctions chaired by the Master of the Rolls, Lord Neuberger, was set up in April 2010 in response to these concerns and the Report dated 20 May 2011 and accompanying "*Practice Guidance: Interim Non-Disclosure Orders*" issued by Lord Neuberger MR with effect from 1 August 2011 entrenched the developments towards open justice recognised in the case law and emphasised free speech and open justice.[261]

Damages

3.141 Where a claim for misuse of personal information is successful the claimant is likely to be compensated for any non pecuniary losses by an award of damages and the courts have tended to award damages for distress, hurt feelings and loss of dignity in privacy cases. Initially these awards have tended to be in the region of £2,000 – £10,000, with the *Mosley* case signalling a departure from these lower sums to an award of £60,000. In *Cooper v Turrell* Tugendhat J accepted the submission that the measure of damages in *Mosley*, in which the court took into account sums awarded in defamation cases, was the more appropriate guide to take than awards in earlier cases.[262] There are a number of reported settlements in the region of £30,000. In determining quantum the Court will have regard to all the circumstances of the unlawful disclosures that are relevant, including the seriousness and scale of the intrusion, the circumstances in which the information was obtained and the defendant's knowledge at to potential harm to the claimant. Particularly intrusive disclosure, for example photographs, may affect the severity of the conduct. The claimant's own conduct will also be scrutinised for the purposes of assessing damages and to the extent that the claimant's conduct has contributed to the nature and scale of the distress this is likely to be material.

3.142 Aggravated damages have been awarded in some privacy cases. For example, £1,000 aggravated damages were awarded in *Campbell v MGN* on the basis of the post-publication conduct of the newspapers. Whilst there had been some judicial movement towards recognising a claim for exemplary damages in this context, it has now been established that exemplary damages are not awardable in claims for misuse of private information, until such a course is sanctioned by Parliament or the Supreme Court. [263] In *Mosley v NGN* Eady J adopted a restrictive approach to the extension of exemplary damage, holding that it was not clear that misuse of private information was a tort to which the possibility of exemplary damages should necessarily extend.

[259] [2012] EWHC 431 (QB)
[260] However, delays should not occur in the future. See for example the approach in *JIH v News Group Newspapers Ltd* [2012] EWHC 2179 (QB)
[261] http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27302.htm
[262] [2011] EWHC 3269 (QB) at paras 93 and 106
[263] See for example *Douglas v Hello! Ltd* [2003] EMLR 601 in which Morritt V-C permitted the pleading of a claim for exemplary damages

Protection from Harassment Act 1997

3.143 The Protection from Harassment Act 1997 (PHA) has potential application both to the conduct of journalists, for example news-gathering activities by journalists and photographers, and also in relation to the actual content of publications.

3.144 The PHA provides that a person must not pursue "*a course of conduct*" which amounts to harassment of another and which he knows or ought to know amounts to harassment of that other.[264] A person "*ought to know*" conduct amounts to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.[265] A course of conduct must involve conduct on at least two occasions.[266]

3.145 "*Harassment*" is not exhaustively defined in the Act, although the Act provides that harassment includes alarming another person or causing that person distress.[267] However, the Act does not require alarm or distress to be caused; harassment may be demonstrated by other means, for example, the use by the press of offensive or insulting words about a person's appearance or repeated mocking by a newspaper of a person's sexual orientation, or in relation to other characteristics protected by the Equality Act 2010. The lack of an exhaustive definition of harassment gives the courts scope to interpret the Act so as to give effect to the rights under Article 8 and Article 10 of the ECHR.[268]

3.146 Section 1(3) sets out the defences to a claim for harassment, and these include that the course of conduct was pursued for the purpose of preventing or detecting crime, was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or in the particular circumstances the pursuit of the course of conduct was reasonable. In the context of the press seeking to rely on a reasonableness defence it has been held that the defence:[269]

> *"requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed".*

3.147 Section 2 of the PHA provides that the course of conduct pursued in breach of section 1 will be a criminal offence. This is discussed in more detail at paragraph 4.129 of the Annex. Section 3 provides that an actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. This has the effect that a civil claim can be brought to restrain an apprehended breach of section 1, by way of an injunction; or a claim can be brought after the conduct has occurred to seek damages for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.[270] If a court grants an injunction restraining a person from pursuing any conduct which amounts to harassment and the claimant considers that the defendant has breached the injunction, he or she may apply for the issue of a warrant for the arrest of the defendant.[271]

[264] s1(1)
[265] s1(2)
[266] s7(3)(a)
[267] s7(2)
[268] *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB)
[269] *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 at para 50
[270] s3(2)
[271] s3(3)

3.148 A limited number of claims have been brought against the press under the PHA on the basis that actual publication amounts to harassment, although the case law thus far suggest that claimants have enjoyed limited success in relation to claims that publication amounts to harassment.

3.149 The principle of such a claim being brought was first addressed in *Thomas v News Group Newspapers Ltd* in which News Group sought to strike out (as being unarguable) a claim for harassment based upon the publication of a series of articles in which the claimant, described as a "*black clerk*" was criticised for her involvement in a dispute over a racist comment at her place of work, and hate mail was subsequently received by the claimant in response to the article (the newspaper having published the claimant's name and address). The court stated that:[272]

> *"In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment".*

However, the Court of Appeal held that it was at least arguable that it was foreseeable that the publication of the articles complained of would lead Sun readers to address hostile letters to the claimant, causing her additional distress.

3.150 Recently, in *Trimingham v Associated Newspapers Limited* the claimant, who had worked with and had an extra-marital affair with a well known politician, pursued a claim under the PHA.[273] The basis of the claim was that the newspaper had engaged in a course of conduct which included publication of comments about the claimant's personal appearance as well as her sexuality, which she regarded as offensive, both in the articles complained of and in the readers' comments. The claimant sought damages, including aggravated damages, and an injunction against the newspaper ordering them to refrain from further publication which made reference to the claimant's sexual orientation unless relevant in a particular context distinct from her relationship with the politician and that the newspaper refrain from harassing the claimant.

3.151 Tugendhat J outlined that the correct approach was for the court to ask the following questions: (1) was the distress that the claimant suffered the result of the course of conduct, in the form of speech? (2) if so, ought the defendant to have known that that course of conduct amounted to harassment? (3) if so, has the defendant shown that the pursuit of that course of conduct was reasonable? To both questions (1) and (2) the Court noted there are subsidiary questions: namely was the claimant a purely private figure or not and, either way, was she in other respects a person with a personality known to the defendant such that it ought not to have known that the course of conduct amounted to harassment?

3.152 Tugendhat J also set out guidance in relation to the interpretation of a course of conduct consisting of speech which is alleged to be pejorative of a claimant: he did so by adopting the guidance provided by the Court of Appeal in *Jeynes v News Magazines Ltd* dealing with the meaning of words alleged to be defamatory:[274]

> *"The governing principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable [person] is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of*

[272] [2001] EWCA Civ 1233 at para 34
[273] [2012] EWHC 1296 (QB). As set out above, there is an appeal pending against this decision by the Claimant
[274] [2008] EWCA Civ 130

> *loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-[pejorative] meanings are available. (3) Over-elaborate analysis is best avoided… (5) The article must be read as a whole, ...”*

3.153 In relation to the defence of reasonableness, Tugendhat J noted in interpreting the decision in *Thomas* that:

> *“for the court to comply with HRA s.3, it must hold that a course of conduct in the form of journalistic speech is reasonable under PHA s.1(3)(c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10(2), including, in particular, for the protection of the rights of others under Art 8.”*

3.154 Although the decision is subject to challenge in the Court of Appeal, in *Trimingham* a narrow view was taken of the meaning of a private individual; and the Court concluded that the claimant was not a private person by reason of the fact that: 1) in her professional capacity she undertook to work for one of leading politicians in country, and 2) in her private capacity she conducted a sexual relationship with a politician which would lead to him leaving his wife. Ultimately, the Judge accepted that whilst the claimant was upset about the insulting and offensive language about her appearance, he did not accept that the defendant ought to have known that its conduct in relation to that language would be sufficiently distressing to be considered oppressive or amount to harassment and he did not accept that in fact it was so considered by the claimant.[275] The Court found that discussion or criticism of sexual relations which arise within a pre-existing professional relationship, or of sexual relationships which involve the deception of a spouse, or a civil partner, or of others with a right not to be deceived, are matters which a reasonable person would not think would be conduct amounting to harassment, and would think was reasonable, unless there are some other circumstances which make it unreasonable. One circumstance which may make such a course of conduct unreasonable is if it interferes with the Article 8 rights of the claimant. However the Judge found that the claimant’s Article 8 rights had become very limited because she was not a purely private figure.

3.155 The *Trimingham* decision illustrates the approach that will be adopted by the courts in assessing whether the publication of an article amounts to harassment. It appears that a key hurdle for any claimant is the need to establish that the journalist would have known that the course of conduct amounted to harassment, which appears from the decision to be a relatively high hurdle.

3.156 In addition to the content of publications, methods of news gathering may also amount to harassment. For example, there are a number of cases where interim injunctions have been granted against journalists and photographers to prohibit them from door stepping, or besetting the home of a person they wished to photograph or interview. In *AM v News Group Newspapers Ltd & Ors* an application for an injunction was made by a person who had become subject to media interest solely by reason of the fact that he was the landlord of a property rented by the cleric Abu Qatada.[276] The applicant’s home had been visited by journalists who were calling his phone, knocking at his door, and taking photographs of him when he went outside. His children could not go outside. Tugendhat J noted that Article 8 of the ECHR and s.6 of the HRA require measures to be put in place to ensure respect for a person’s home

[275] At para 254
[276] [2012] EWHC 308 (QB)

and family life, and therefore made an order imposing publishing restrictions prohibiting the publishing or broadcasting of: the claimant's name and address; or any photograph, film, video or image that identified the claimant's address or showed any occupier or invitee within the house or garden of the claimant's address; and also imposed a restraint on harassment in relation to the contacting the claimant or approaching the claimant's address.[277] The Judge noted that the order, in so far as it prohibited disclosure of information, was made with a view to preventing interference with the right to respect of one's home and family and not to preventing disclosure of information which is sensitive.

3.157 Another example is the case of *Ting Lan Hong and KLM v Persons Unknown* where Tugendhat J granted an injunction prohibiting harassment of the mother of the child of actor Hugh Grant, following prolonged harassing conduct from photographers.[278] The Court noted that Ms Hong had received numerous calls and messages from journalists, had been regularly followed and photographed without her consent when pregnant, had photographers outside her home every day for a period, and that photographers persisted in attending at her property despite a warning from the PCC to desist from such conduct. The order was granted prohibiting the harassment of the claimant.

3.158 These two cases are illustrative of the utility of the PHA in seeking to restrain the conduct of journalists and photographers where their conduct amounts to harassment within the meaning of the Act. It seems likely that where an individual is faced on more than one occasion with a number of journalists or photographers present at their home, telephoning or attempting to communicate with them in circumstances where distress and alarm is caused, this is likely to justify the grant of an injunction requiring the ceasing of such conduct, provided the relevant threshold of severity is established.

Defamation

3.159 In broad terms, the law of defamation protects a person's reputation. Unlike misuse of private information, defamation is not concerned with protecting a person from publication of private information but protects a person from the publication of untruths which have the effect of damaging their reputation.

3.160 The principles of the law of defamation are mostly contained in the common law with some overlay of statutory provisions, namely the Defamation Acts 1952 and 1996. The law is currently the subject of debate and likely reform. The Defamation Bill was presented to Parliament on 10 May 2012 and seeks to clarify and reform aspects of the law of defamation.

3.161 There are two varieties of each of the torts of libel and slander: personal defamation, where there are imputations as to the attributes or character of an individual; and business or professional defamation, where the imputation goes to an attribute of an individual, a business, or a charity, and that imputation is as to the way the profession or business is conducted. These varieties are not mutually exclusive: the same words may carry both varieties of imputation.

3.162 A person or organisation may bring a claim for defamation where they can be identified from the publication, for example by name or by their title, or where the material would lead people acquainted with the person to believe that he or she was the person referred

[277] in any newspaper, magazine, public computer network, interest website, sound or television broadcast or cable or satellite programme
[278] [2011] EWHC 2995 (QB)

to. There is no statutory definition of what is defamatory, however the test adopted by the courts is whether a statement "*lowers a person in the estimation of right-thinking members of society generally*".[279] Whether the words in fact convey a defamatory meaning is a question of fact applying the standard of the ordinary reasonable person.

3.163 The principles applied in determining the meaning of the words were summarised in *Jeynes v News Magazines Ltd* (to which reference is made above) where Sir Anthony Clarke MR identified principles which bear repetition: (1) the governing principle is reasonableness; (2) the hypothetical reasonable reader is not naïve but he is not unduly suspicious, he can read between the lines, he can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available; (3) over-elaborate analysis is best avoided; (4) the intention of the publisher is irrelevant; (5) the article must be read as a whole, and any "*bane and antidote*" taken together; (6) the hypothetical reader is taken to be representative of those who would read the publication in question; (7) in delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "*can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation*"; (8) it follows that "*it is not enough to say that by some person or another, the words might be understood in a defamatory sense*".[280]

3.164 There was previously some uncertainty as to whether the existing law imposes a "*seriousness threshold*", although the recent case of *Thornton v Telegraph Media Group Limited* surveyed the authorities and concluded that defamation must include a qualification or threshold of seriousness, so as to exclude trivial claims.[281]

3.165 As a general principle the claimant will need to establish that the material has been read, heard or seen by at least one other person and in some circumstances the courts may be prepared to draw an inference that material has been widely published in the absence of concrete evidence of receipt of the information by others, for example, where information is generally accessible (for example on the website of a mainstream newspaper).

3.166 The extent of publication is important, as proceedings may be stayed on the basis that where publication is very limited, the cost of proceedings may be disproportionate to the likely benefit in the event the claimant succeeds: see for example *Jameel v Dow Jones & Co Inc*.[282] It was recently observed by Tugendhat J that recent cases demonstrate that each of the three judges who are currently hearing most of the defamation cases are applying the principle of *Jameel v Dow Jones* with some frequency, and in a number of different, but related, contexts in defamation actions.[283]

3.167 Each separate publication of a statement (or re-publication) may give rise to a cause of action. For example, each transmission of a television or radio broadcast, and each copy of a newspaper sold is a separate publication. This issue is mainly of significant where some publications would otherwise be statute barred and in cases where publications are in different jurisdictions and where common law qualified privilege is a defence.[284] Further

[279] See for example *Sim v Stretch* [1936] 2 All ER 1237
[280] [2008] EWCA Civ 130 at para 14
[281] [2010] EWHC 1414 (QB) at para 89
[282] [2005] QB 946
[283] [2010] EWHC 1414 (QB) at para 62
[284] The rule is not applied in assessing damages and is usually not applied in determining meaning, where the single meaning rule is applied

publication by a different party of the same material may also give rise to a cause of action, this being known as the "*repetition rule*".[285] In some circumstances the original publisher will be liable for the subsequent re-publication if this was both caused by the original publication and a foreseeable consequence.[286] Some concern has been expressed whether this rule should be of equal application to the Internet, however the courts have to date rejected a "*single publication*" rule and held, for example, that each separate bulletin board posting, or display of content of a web page (for as long as that web page remains accessible) gives rise to a cause of action. [287] Publication will occur where a person intentionally or negligently takes part in, or authorises, the communication of material. Each person who publishes the defamatory material is in principle liable. Liability will not ordinarily attach to accidental publication of defamatory material.[288]

Defences

3.168 There are a number of defences available to publishers of defamatory material, including defences of justification, fair comment, absolute privilege, qualified privilege and innocent dissemination. These are considered below.

3.169 A defence of justification will be open to a publisher where the defamatory statement is substantially true.[289] This must be proven on the balance of probabilities and is an objective test: it is not sufficient for a publisher to show that they genuinely believed the statement was true.

3.170 A defence of fair comment protects expressions of opinion or comments (as distinction from assertions of fact), where the comment relates to a matter of public interest, the comment is based on facts which are true or absolutely privileged and the comment is fair.[290]

3.171 In certain limited circumstances the law recognises that defamatory statements will be immune from challenge, even where no other defence applies. These exceptions, known as absolute privilege, include statements made in the House by Members of Parliament,[291] statements made in the course of judicial and quasi-judicial proceedings by the judge, counsel, parties, witnesses and jurors,[292] and statements made to the police and investigatory agencies in the course of an inquiry into illegality or wrongdoing.[293] Fair and accurate reports of proceedings before various courts attract absolute privilege if published contemporaneously.[294]

3.172 The law also recognises certain forms of qualified privilege where publication of defamatory statements attract privilege if the statement was made in the performance of a legal, social or moral duty or to protect an interest and the statement was made to a person with a

[285] See *Stern v Piper* [1997] QB 134; and *Gatley on Libel and Slander* 11th Edition (2008) at para 11.4
[286] See for example *Slipper v BBC* [1991] 1 QB 283
[287] See *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208 – 209; *Harrods Ltd v Dow Jones & Co Inc* [2003] EWHC 1162
[288] Exceptionally where the defendant should reasonably have anticipated publication as a consequence of their conduct they will be unable to rely on the accidental nature of the publication itself
[289] See *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772 at para 34 and see s5 of the Defamation Act 1952
[290] Referred to in *Spiller v Joseph* [2010] UKSC 53 as "*honest comment*". The Supreme Court held that the comment must explicitly or implicitly indicate at least in general terms the facts on which it is based. See also s6 of the Defamation Act 1952
[291] See the origin of this privilege in the Bill of Rights 1688
[292] See the statement of Lord Devlin in *Lincoln v Daniels* [1962] 1 QB 237
[293] See for example *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177
[294] s14(1), Defamation Act 1996

corresponding duty or interest in receiving that material.[295] One aspect of qualified privilege of particular relevance is the application of the duty and interest argument to publication of material in the public interest, as articulated by the House of Lords in *Reynolds v Times Newspapers Ltd*.[296]

3.173 The defence of *Reynolds* privilege has recently been comprehensively analysed by the Supreme Court in *Flood v Times Newspapers Limited*.[297] This defence will protect publication of a defamatory matter where i) it is in the public interest that the information should be published and ii) the publisher has acted responsibly in publishing information.[298] This defence is accurately described as a public interest defence.[299]

3.174 In respect of the first element, the courts have recognised that this is not a black and white test, but rather it is necessary to consider "*the extent to which the subject matter is a matter of public concern*". The publisher must show that the publication was in the public interest, and this must go further than merely showing that the subject matter was of public interest.[300] The test adopted by Lady Hale in *Jameel* that "*there must be some real public interest in having this information in the public domain*" was supported by Lord Phillips in *Flood.*[301] The *Reynolds* privilege requires a balancing exercise between the importance of the public interest in receiving the relevant information and the public interest in preventing the dissemination of defamatory allegations with the injury to reputation that results.[302] Ultimately each case will turn on its own facts, however the seriousness of the allegation is a significant factor in assessing where the balance should be struck between the public interest in receiving information and the potential harm caused if an individual is defamed.[303] In respect of the public interest in publishing allegations made and being investigated against a senior police officer, the Supreme Court placed weight on the fact that the publication was with a view to ensuring that the allegations were properly investigated by the police in circumstances where the journalist had reason to believe they were not being so investigated.[304] Lord Mance explained that journalistic judgement carried weight in considering how much detail should be published, although any journalist must carefully consider the public interest in publishing allegations that have not been fully investigated or their accuracy determined.[305]

3.175 In *Flood* the Supreme Court addressed the extent of verification required before a journalist can rely on the defence. The Court emphasised that the privilege will attach only if the journalist has acted honestly and reasonably believed the published facts to be true, although no hard and fast principles can be applied. Where a journalist alleges there are grounds for suspecting a person to be guilty of misconduct the responsible journalist should satisfy himself that grounds for suspicion exist (these can be derived from reliable sources or inferred from the fact of a police investigation), but he need not know what the grounds are.[306]

[295] See also Schedule 1 to the Defamation Act 1996, which contains a table of reports and statements which are protected by qualified privilege, the privilege being defeated if it is shown that the publication was malicious and without the need to demonstrate corresponding duties and interests
[296] [2001] 2 AC 127
[297] [2012] UKSC 11. The defence has also been considered in *Loutchansky v Times Newspapers Ltd No 2 – 5* [2002] QB 783, *Bonnick v Morris* [2003] 1 AC 300, and *Jameel v Wall Street Journal Europe* [2007] 1 AC 359
[298] *Flood v Times Newspapers Limited* [2012] UKSC 11 at para 2
[299] para 27, *ibid*
[300] *Reynolds v Times Newspapers Ltd and Others* [2001] 2 AC 127 at 239 per Lord Hobhouse
[301] [2007] 1 AC 359 at para 42
[302] para 44, *ibid*
[303] para 48, *ibid*
[304] para 69, *ibid*
[305] para 177, *ibid*
[306] [2012] UKSC 11 at paras 80, 87. See also in this context the recent decision of the ECtHR in Application 39954/08, *Axel Springer AG v Germany* (2012) 55 EHRR 6 at para 82

3.176 The law also recognises, through common law and statute, a defence of innocent dissemination. Section 1 of the Defamation Act 1996 sets out a defence for a person who was not the author, editor or publisher of the statement, who took reasonable care in relation to the publication of the statement and did not know and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. The common law defence protects defendants who did not know a publication contained a libel, or that the publication was of such a character that it was likely to contain a libel and the absence of such knowledge was not by reason of negligence.[307]

Remedies

3.177 Whilst the primary objective for persons upon being defamed (or threatened with defamation) is to restrain publication, it is only in exceptional circumstances that the court will be content to grant an interim injunction restraining publication. Interim relief will be refused if the there is any proper basis for a believing a defence will be successful or that the claimant is only likely to recover nominal damages. Section 12 of the HRA will apply to an interim injunction sought in defamation claims and it has been held that nothing in this section weakens the common law rule that interim relief will only be granted if the material complained of is so clearly actionable that if a jury were to find for the defendant an appeal court would be obliged to set aside the jury's conclusion as unreasonable.[308]

3.178 Where a claimant is successful in a defamation trial, a permanent injunction restraining the defendant from further publication of the defamatory material will be granted if it can be established that future publication is likely and would constitute an actionable wrong.

3.179 The principal mechanism for vindicating damage to reputation is an award of damages. The law presumes that a defamatory publication has damaged the reputation of the claimant. Compensatory damages are awarded to compensate the damage to reputation and include damages for monetary loss occasioned by the attitude adopted by other persons towards the claimant (special damages) and damages for distress, hurt and humiliation. Aggravated damages may be awarded where the conduct of the defendant has increased the claimant's injury or where the defendant has acted improperly. Exemplary damages may be awarded in some cases to punish the defendant for particularly disgraceful conduct and where compensatory damages are inadequate in all the circumstances. A defendant who has given an apology prior to the commencement of the action may be able to mitigate the extent of an award of damages.

Application of the law of defamation to the internet

3.180 In an era where the internet has displaced nearly every other form of communication in terms of its scope, use and geographical reach, the extent to which claims of defamation can be pursued against statements published on the internet is a pressing concern. The internet facilitates the communication of information and opinion to a global audience of billions of people on an instantaneous basis. Freedom of expression demands that regulation should not interfere with the potential of this source of information, however the internet poses a significance potential for abuse and unregulated activity, including defamatory statements, to be widely published.

[307] See for example *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478

[308] Commonly known as the rule in *Bonnard v Perryman* [1891] 2 Ch 269. The relationship between this rule and s12 of the HRA 1998 was addressed by the Court of Appeal in *Greene v Associated Newspapers Ltd* [2005] QB 972

3.181 The desirability and practicality of regulating internet content is a hotly contested subject and the existing legal position is complex, both as a result of the fact that there is no comprehensive framework at a domestic level which establishes a mechanism for regulation of the internet and secondly because of the extent to which the courts have tried, not always successfully, to apply the traditional principles of defamation to the Internet.

3.182 The distinction between libel and slander is not straightforward in the context of the internet, where the medium through which the information is published may resemble television programmes (with video), radio programmes (with audio), or notice-boards or text akin to newspaper articles. In short, the internet may involve transient or permanent publication and may comprise spoken and/or written word. Section 166(1) of the Broadcasting Act 1990 has the effect of deeming a number of internet communications and internet services to be published in permanent form, and this is actionable as libel.[309]

3.183 Websites that host user generated content pose a particular difficulty in this context. The general position appeared to be that the websites were to be regarded as publishers of the material posted on their websites, although they would not be liable for the initial publication if they did not participate in the publication (for example by editing or approving the post). However, upon notice of a complaint as to the content of a post, if steps were not taken to remove the content, liability could be established, subject to defences, for example section 1(1) of the Defamation Act 1996 and Regulation 19 of the Electronic Commerce Regulations 2002.[310] The notice given to the website must disclose the facts or circumstances which form the basis of the allegation.[311] In *Davison v Habeeb*, the court determined that Google, as host of Blogger.com, was arguably a publisher under the common law of content hosted on the blog and that liability would follow notification of a complaint.[312] However, the recent decision of *Tamiz v Google* casts some doubt on this approach.[313] Eady J found that Google Inc was not a publisher even when on notice as to the offending blogs, even though it had the technical capabilities to take down the post. Google was not a publisher within the well recognised common law principles of defamation as its role as a platform provider was a purely passive one.[314]

[309] s166(1) of the Broadcasting Act 1990 provides that for the purposes of the law of libel, the publication of words in the course of any programme included in a programme service shall be treated as publication in a permanent form. This applies where material published via the Internet amounts to "*the publication of words in the course of any programme included in a programme service*". 'Programme' is defined in s202(1) and 'programme service' is defined in s201(1) as including a programme service within the meaning of the Communications Act 2003. S23 of the 2003 Act defines 'electronic communications network' as a transmission system for the conveyance, by the use of electrical, magnetic, or electro-magnetic energy, of signals of any description, which includes Internet communications

[310] See for example *Godfrey v Demon Internet Limited* [2000] 3 WLR 1020 where the Court held that every time one of the defendant's customers accessed the newsgroup in question and saw the posting defamatory of the plaintiff, there was a publication to that customer. Further, in seeking to rely on the defence provided by s1 of the Defamation Act 1996 the difficulty facing the website was that s1(1)(b) required the defendant to take reasonable care in relation to the publication of the statement and s1(1)(c) required the defendant to show that "*he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement*". However, once the defendant knew of the defamatory posting (because the claimant complained about the posting) but chose not remove it from its Usenet news-servers, it could not avail itself of the defence provided by s1. These implement in the law of the United Kingdom the provisions of Article 14 of Directive 2000/31/EC of the European Parliament and of the Council dated 8 June 2000 relating to electronic commerce

[311] See the statements of HHJ Moloney in *McGrath v Amazon*, Eady J in *Bunt v Tilley* [2006] EWHC 407 (QB) and HHJ Parkes QC in *Davidson v Habeeb* [2011] EWHC 3031

[312] [2011] EWHC 3031

[313] [2012] EWHC 449 (QB)

[314] Mr Tamiz's claim for defamation therefore failed. Eady J went on to consider s1 of the Defamation Act 1996 and concluded that a defence would be viable on this basis. He also concluded that an alternative defence based upon Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 would exempt Google from liability for defamation. Permission to appeal has been granted by the Court of Appeal and the appeal is listed to be heard in December 2012

3.184 The Electronic Commerce Regulations set out the circumstances in which Internet intermediaries are responsible for material which is not created by them, but which is hosted, cached or carried by them.[315] The Regulations draw a distinction between intermediaries who are mere conduits (regulation 17), who cache information (regulation 18), and who host information (regulation 19). Regulation 19 provides a defence where the service provider does not have actual knowledge of unlawful information or is not aware of facts and circumstances from which it would have been apparent to the service provider that the information hosted was unlawful.[316] Section 1(1) of the Defamation Act 1996 is regularly invoked by websites as a defence on the basis that they are not the author, editor or commercial publisher of a statement.

3.185 The courts have struggled to apply traditional defamation principles to the internet and the case law has thrown up a number of interesting issues of unique application to the internet. For example, a special feature of chatrooms, message boards or blogs is that the text can continually evolve with new comments being added which may affect the context and meaning of previous and subsequent post. It has been decided that the final thread must be treated as a single publication for the exercise of determining meaning.[317] Further, the meaning of the words must be considered in light of the purpose and role of chat rooms and message boards, where casual, emotive and imprecise speech are all common features. As Eady J explained in *Smith v ADVFN* people who participate in bulletin boards expect a certain amount of repartee or give and take.[318, 319]

3.186 The application of the defamation principles to the internet remains an area of considerable uncertainty. Whilst the courts have attempted to fashion principles that are workable in the short term, the law in this area is far from clear and this has given rise to conflicting decisions. Other jurisdictions have similarly struggled to grasp the complexities of the operation of the internet and recognised the need for the courts to view libel allegations within the unique context of the internet. A comprehensive framework of coherent rules and regulation remains lacking and it is likely that the law will be subject to further development in this area.

Defamation Bill

3.187 The Bill proposes a number of amendments to the law of defamation, including codification of matters which have been established in case law as well as proposing some changes to the existing law. The key features of the Bill in its present form can be summarised as follows.[320]

3.188 Clause 1 provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to reputation. This clause builds upon recognition by the courts that there is a threshold of seriousness and sets a relatively high bar for bringing a claim.

3.189 The Bill also includes a number of provisions that operate as defences to a claim for defamation, codifying much of the common law with some amendments. Clause 2 abolishes the common law defence of justification to provide for a statutory defence of truth, namely a defence where the statement complained of its substantially true. Clause 3 abolishes the common law defence of fair comment and provides for a defence of honest opinion which

[315] Regulation 19 Electronic Commerce (EC Directive) Regulations 2002
[316] See *Davidson v Google Inc* [2011] EWHC 3031 (QB)
[317] *McGrath v Dawkins, Amazon and others* [2012] EWHC B3(QB)
[318] [2008] EWHC 1797 (QB)
[319] para 14
[320] Full a full statement of the Bill in its current form and associated documents, including explanatory notes, see http://services.parliament.uk/bills/2012-13/defamation.html

is applicable where i) the statement was a statement of opinion, ii) the statement indicated, either generally or specifically, the basis of the opinion, and iii) an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published or anything asserted to be a fact in a privileged statement published before the statement complained of.[321] Clause 3(6) contemplates the scenario where the defendant is not the author of the statement (i.e. the defendant is the newspaper title, and the statement of opinion is written by a particular journalist), and provides that the defence is not available if the defendant knew or ought to have known the author did not hold the opinion that the statement was based on the relevant facts. There is no requirement for the opinion to be held on a matter of public interest.

3.190 Clause 4 abolishes the common law defence known as *Reynolds* privilege and sets out a defence of "*responsible publication on matters of public interest*" which is intended to broadly reflect the current law. The defence applies to statements of fact and opinion and has two components; namely that the statement complained of was or formed part of a statement on a matter of public interest, and that the defendant acted responsibly in publishing the statement. Clause 4(2) sets out the matters to which the court may have regard in determining whether the defendant acted responsibly. These factors, which are illustrative and not exhaustive, broadly reflect the current case law and include a) the nature of the publication and its context, b) the seriousness of the imputation conveyed by the statement, c) the relevance of the imputation conveyed by the statement to the matter of public interest concerned, d) the importance of the matter of public interest concerned, e) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information, f) whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement, g) whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement, h) the timing of the statement's publication, and i) the tone of the statement. Clauses 4(3) and (4) reproduce the common law doctrine of "*reportage*", namely where allegations are reported neutrally rather than adopted by the newspaper no verification of the truth is required.

3.191 Clause 6 provides for a new defence of qualified privilege relating to peer-reviewed material in scientific or academic journals. Clause 7 amends the Defamation Act 1996 which contains defences of absolute and qualified privilege to extend the circumstances in which such defences can be used.

3.192 Clause 8 sets out a single publication rule, which has the effect that the one year limitation period starts to run from the date of the first publication of the material to the public or section of the public. This will represent a substantive change to the law which previously had a "*multiple publication*" rule, namely that each publication of defamatory material gives rise to a separate cause of action subject to its own limitation period. The single publication rule bites provided that any subsequent publication is the same or substantially the same publication, and provided that the publication is not materially different from the manner of the first publication.[322]

3.193 The Bill also contains some provisions targeted at new media and in particular the internet. Clause 5 creates a new defence for operators of websites where a claim for defamation is brought in respect of a statement posted on the website if the operator did not post the

[321] As defined in clause 3(7). The defences listed include absolute privilege under s14 of the 1996 Act, the defence of qualified privilege under s15 of the 1996 Act, the defences in clauses 4 and 6 of the Bill relating to responsible publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal
[322] Clause 8(4)

statement. The defence will not be available however if the claimant could not identify the person who posted the statement, the operator was given notice of the complaint and failed to respond to that notice in accordance with the provisions to be set out in regulations to be made by the Secretary of State. The details of this clause, including what needs to be included in the notice and the steps required of the website operator are to be set out in regulations, and this gives rise to some uncertainty as to how this part of the new regime may operate.

3.194 Two clauses in the Bill seek to address practical considerations and costs concerns that have arisen in the context of defamation claims, namely the cost of jury trials and the volume of defamation cases issued in the courts of England and Wales where there are tenuous links to this jurisdiction. Clause 11 removes the right to trial by jury and any presumption in favour of a jury trial with the effect that defamation cases will be tried by a judge unless the court orders otherwise. The other clause of significance is clause 9 which seeks to address the problem of 'libel tourism' and sets a relatively high threshold for parties seeking to bring a claim against a defendant not domiciled in the UK, an EU member state or state which is party to the Lugano Convention: namely that the courts do not have jurisdiction unless it can be shown that England and Wales is clearly the most appropriate place to bring an action.

4. Regulatory law – legal framework relating to the Information Commissioner

Legislative background to the protection of personal data

4.1 A right to privacy, as distinct from specific protection of personal data, has been explicitly recognised at an international level since 1948 when the Universal Declaration of Human Rights incorporated in Article 12 a right to be protected against arbitrary or unlawful interference with privacy. Article 12 was reproduced in Article 17 of the International Covenant on Civil and Political Rights in 1966. Subsequently, the Organisation for Economic Co-operation and Development recognised the inherent link between protection of privacy and restrictions on processing personal information, and adopted guidelines seeking to restrain the cross border flow of information.[323]

4.2 The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe (the Convention) was opened for signature in 1981. This was the first legally binding international instrument with the specific objective of data protection. Its purpose was:

> *"to secure [...] for every individual [...] respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data."*

4.3 Chapter II of the Convention sets out the basic principles of data protection, rights of data subjects and requires parties to the Convention to take steps to ensure that domestic law gives effect to the basic principles set out in the Convention.

[323] The OECD guidelines set out eight basic principles of national application which are recognisable in the DPA 1998: (1) The collection limitation principle; (2) the data quality principle; (3) the purpose specification principle; (4) the use limitation principles; (5) the security safeguards principle; (6) the openness principle; (7) the individual participation principles; and (8) the accountability principle

4.4 Two particular provisions are worthy of note. Article 5 sets out the conditions for the automatic processing of personal data including the requirement that personal data is obtained and processed fairly and lawfully, stored for legitimate purposes, is adequate and relevant for its purpose, is accurate and up to date and preserved in a form which permits identification of the data subject for no longer than required for its purposes. Article 8 grants rights to data subjects, including the right to establish the existence of an automated personal data file, to confirm whether personal data are stored in the automated data file, to receive communication of such data in an intelligible form, to obtain rectification or erasure of such data if these have been processed contrary to the provisions of domestic law and to have a remedy if a request for confirmation, rectification or erasure is not complied with.

4.5 Chapter III restricts the cross border flow of personal data in certain circumstances and Chapter IV contemplates mutual assistance between the parties to the Convention in order to implement the Convention. Article 13 requires the parties to the Convention to designate one or more authorities to have responsibility for assisting other parties to the Convention and to furnish information on the law and administrative practice in the field of data protection.

Data Protection Act 1984

4.6 The Data Protection Act 1984 (the 1984 Act) implemented the United Kingdom's obligations under the Convention and sought to regulate the use of automatically processed information relating to individuals and the provision of services in respect of such information.

4.7 The 1984 Act established the position of Data Protection Registrar and also a Data Protection Tribunal.[324] It obliged organisations holding personal data to register with the Data Protection Registrar and thereafter to abide by the principles of data protection outlined in the Act. These principles mirrored those set out in the Convention and were replicated in Schedule 1 of the 1984 Act.

4.8 The Data Protection Registrar had responsibility for maintaining a register of data users who held and provided services in respect of personal data and a register of accepted applications for registration made by such users and for, determining applications to be a registered data user.[325] The Data Protection Registrar was given powers to take enforcement action against registered users who had contravened the data protection principles including the power to de-register a data user for breach of the data protection principles and to issue a notice prohibiting the transfer of personal data outside the United Kingdom.[326]

4.9 The 1984 Act made no special provision in relation to the press.

Data Protection Directive

4.10 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive) was adopted on 24 October 1995 and required implementation by October 1998. The Directive itself was a response to the Organisation for Economic Co-operation and Development guidelines and adopts a number of the same principles.

[324] s3
[325] ss4(1), 7(1)
[326] ss10(1), 11(1), 12(1)

4.11 The Data Protection Directive requires that each member state must set up a supervisory authority, which acts as an independent body that will monitor the data protection level in that member state, give advice to the government about administrative measures and regulations, and start legal proceedings when data protection regulation has been violated.[327] In the United Kingdom, this authority is the Information Commissioner.

4.12 The objective of the Data Protection Directive is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.[328] The Data Protection Directive sought to harmonise data protection legislation throughout the European Union by requiring member states to determine the conditions under which the processing of personal data is lawful, in accordance with the criteria and principles set out in the Directive.[329] It is a harmonisation measure and operates by setting a minimum standard to be adopted by member states.

4.13 The Data Protection Directive has been supplemented by other legal instruments, such as the e-Privacy Directive and specific rules for the protection of personal data in police and judicial cooperation in criminal matters.[330]

4.14 The Data Protection Directive defines a number of core terms which are replicated in the Data Protection Act 1998.[331] These terms are explored in detail below.

4.15 The general rules on the lawfulness of processing personal data are set out in Chapter II to the Data Protection Directive. Article 6 provides that the data controller is responsible for ensuring that personal data is processed in accordance with particular criteria, including fairly and lawfully. Article 7 of the Directive sets out the specific criteria for legitimate data processing and this is subject to the provisions of Article 8 which sets out categories of processing for which specific restrictions apply.

4.16 By recital 37, the European Parliament and the Council recognised that the processing of personal data:"*for purposes of journalism or for purposes of literary or artistic expression*" engaged the "*right to receive and impart information, as guaranteed in particular in art 10 of the ECHR*" and should therefore be exempt from the Directive's requirements to the extent necessary for the reconciliation of such conflicting rights. The Data Protection Directive requires Member States to provide exemptions or derogations from these provisions for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.[332] It also gives data subjects a prima facie right to obtain from the data controller data relating to herself or himself, although this right to data may be overridden by defined exceptions.[333]

[327] Article 28

[328] See Article 1(1). Lord Justice Buxton noted in *Johnson v Medical Defence Union Ltd (No 2)* [2007] EWCA Civ 262 at para 16 that "*it is not easy to extract from [the Directive] any purpose other than the protection of privacy*"

[329] Article 5

[330] Directive 2002/58 on Privacy and Electronic Communications; Framework Decision 2008/977/JHA

[331] 'Personal data' are defined as "*any information relating to an identified or identifiable natural person ('data subject')*". An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. Processing means "*any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.*" The responsibility for compliance lies with the "*controller*", meaning the natural or artificial person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data

[332] Article 9

[333] Articles 12 and 13

4.17 The European Parliament adopted the Directive on 24 October 1995 and in March 1996 the Home Office issued a consultation paper on the Directive. The Secretary of State for the Home Department subsequently presented proposals for new data protection legislation, which took the form of the Data Protection Act 1998.

Data Protection Act 1998

Introduction

4.18 The Data Protection Act 1998 (the DPA) replaced the Data Protection Act 1984 and sought to implement the provisions of the Data Protection Directive by establishing a system of data protection controls for manual data as well as computerised data. Lord Williams of Mostyn commenced his second reading speech for the Data Protection Bill on 2 February 1998 with the following comments:[334]

> *"The Bill will improve the position of citizens of his country by enabling them to rely on a wide range of civil and political rights contained in the European Convention on Human Rights. Those rights include the right to respect for private and family life. The Data Protection Bill also concerns privacy, albeit a specific form of privacy; personal information privacy."*

Key concepts and structure of the Data Protection Act 1998

4.19 In broad terms, the DPA seeks to ensure that personal data is used in accordance with the data protection principles, attaches certain conditions to the processing of personal data and adds extra safeguards where the personal data is sensitive. The DPA also establishes certain rights for a data subject and establishes a framework of enforcement. The legislation responds to the requirement to protect the privacy of recorded information relating to an individual.

4.20 At the heart of the DPA are a number of defined terms used throughout the Act. It is important to understand these. "*Data*" means information processed by automatic equipment, information recorded with the intention of being processed by such equipment, information held in relevant filing systems and recorded information held by a public authority.[335] "*Personal data*" means data which relate to a living individual.[336] "*Processing*" encompasses a wide range of uses of data including obtaining, recording, holding, organising, altering, adapting, retrieving, using and disclosing data.[337] Processing also includes putting data into print, namely publication.[338] "*Data controller*" means the person or organisation who determines the purpose for which and the manner in which any personal data are processed, i.e who

[334] HL Hansard, 5th series, vol 585, col 436

[335] The Court of Appeal in *Durant v Financial Services Authority* [2004] FSR 28 held that a relevant filing system is limited to a system: 1) in which the files forming part of it are structure or references in such a way as clearly to indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under section 7 is held within the system and, if so, in which file or files it is held; and 2) which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located

[336] Defined in s1(1)

[337] Defined in s1(1)

[338] The Court of Appeal in *Campbell v MGN ltd* [2002] EWCA Civ 1371 rejected an argument that processing did not include putting the data into print, and noted at 107 that "*where the data controller is responsible for publication of hard copies that reproduce data that has previously been processed by means of equipment operating automatically, the publication forms part of the processing and falls within the scope of the Act*". In *Johnson v Medical Defence Union Ltd (No 2*) [2007] EWCA Civ 262 the Court of Appeal drew a distinction between publication of information that has already been automatically processed (which is captured by the Act) and the manual analysis of data before any automatic processing begins

decides what is to be done with the information.[339] The definition of data controller includes the press and media organisations. "*Data processor*" is the person who processes the data on behalf of the data controller.[340]

4.21 Certain types of personal data are defined as sensitive personal data.[341] This includes information as to (a) the racial or ethnic origin of the data subject, (b) political opinions, (c) religious beliefs or other beliefs of a similar nature, (d) membership of a trade union, (e) physical or mental health or condition[342], (f) sexual life, and (g) the commission or alleged commission of any offence, proceedings relating to this or disposal of such proceedings.

4.22 The DPA applies to a data controller in respect of any data where the data controller is established in the UK and the data is processed in the context of that establishment or the data controller uses equipment in the UK for the processing of data other than for the purpose of transit through the UK. [343]

4.23 The DPA further sets out that it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he or she is the data controller.[344] This duty is subject to section 27, which introduces the exemptions in Part IV of the Act. Breach of this statutory duty to comply with the data protection principles gives rise to a private law cause of action, allowing the data subject to make a claim against the data controller.

4.24 The data protection principles define the manner in which all personal data must be processed. These principles are set out in Part 1 of Schedule 1 of the Act:

- Principle 1 – Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.[345]
- Principle 2 – Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
- Principle 3 – Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
- Principle 4 – Personal data shall be accurate and, where necessary, kept up to date.
- Principle 5 – Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

[339] Defined in s1(1)
[340] Defined in s1(1)
[341] s2
[342] For example in *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) at paragraph 87 photographs of Naomi Campbell leaving Narcotic Anonymous constituted sensitive personal data as they were information relating to her mental or physical health. The photographs were also sensitive by reason of constituting information relating to her racial or ethnic origin
[343] Defined in ss1(1), 5(1)
[344] s4(4)
[345] The phrase 'lawfully was considered by Patten J in *Murray v Express Newspapers plc* [2007] EMLR 22. He held at para 72: "*It seems to me that the reference to lawfully in Schedule 1, Part 1 must be construed by reference to the current state of the law in particular in relation to the misuse of confidential information. The draftsman of the Act has not attempted to give the word any wider or special meaning and it is therefore necessary to apply to the processor of the personal data the same obligations of confidentiality as would otherwise apply but for the Act*"

- Principle 6 – Personal data shall be processed in accordance with the rights of data subjects under this Act.
- Principle 7 – Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
- Principle 8 – Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

4.25 Attention is usually focused on the first data protection principle which imposes a three fold obligation on the data controller: fairness, lawfulness and compliance with one of six specified conditions in Schedule 2.[346] Schedule 2 introduces concepts such as consent of the data subject and necessity in order to fulfill a legitimate aim; for example, compliance with a contract, a legal obligation, to protect the vital interests of the data subject, to promote the administration of justice, or the exercise of public functions in the public interest. Special conditions apply for the purposes of the first data protection principle if the relevant data is "*sensitive*" personal data.[347] These requirements are set out in Schedule 3 to the Act and include: explicit consent to processing, processing to be necessary for exercising or performing any right or obligation conferred or imposed by law in connection with employment, processing to be necessary to protect vital interests of the data subject or another person, or information having been made public by steps deliberately taken by the data subject.

Rights of a data subject

4.26 The Act confers a number of rights on data subjects.[348] These rights include:

(a) the right to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller;

(b) if that is the case, to be given by the data controller a description of the personal data, the purposes for which they are being processed and the recipients or classes of recipients to whom they are or may be disclosed;

(c) to have communicated the personal data to him or her in an intelligible form. Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he or she is not obliged to comply with the request unless (a) the other individual has consented to the disclosure of the information to the person making the request, or (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.[349]

4.27 The Act also confers on a data subject a number of further rights to require data processing to cease, or not to begin where that processing is likely to cause distress or damage, or where the processing is for the purposes of direct marketing of personal data in respect of which a person is the data subject, and to require the data controller to ensure that no decision taken by or on behalf of the data controller which significantly affects that individual is based solely on the processing by automatic means of personal data.[350]

[346] Fairness is defined in Part II of Schedule 1 and in broad terms requires that processing is with consent if practical
[347] As defined in s2
[348] s7
[349] s7(4)
[350] ss10-12

4.28 Section 13 provides that an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of the Act is entitled to compensation from the data controller for that damage. Further, an individual who suffers distress by reason of any contravention by a data controller of any of the requirements of the Act is entitled to compensation from the data controller for that damage if the individual also suffers damage by reason of the contravention or the contravention relates to the processing of personal data for the special purposes.[351] In practice relatively small sums have been award by way of damages, namely in the region of £50 to £5000.[352] In April 2010 the Commissioner acquired the power under s55A to impose a monetary penalty if the Commissioner is satisfied that; (a) there has been a serious contravention of s4(4) by the data controller, (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and (c) the contravention was deliberate or the data controller knew or ought to have known of the risk of contravention, likelihood of causing substantial damage or distress and failed to take reasonable steps to prevent the contravention.

Restrictions on data controllers

4.29 Part III of the Act imposes certain notification requirements on data controllers. Personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Commissioner under s19.[353] Failure to comply with this constitutes an offence, subject to a defence that the controller exercised all due diligence to comply with the duty.[354] A data controller wishing to be included in the register must notify the Commissioner and the commissioner must maintain a register of persons who have given notification under section 18.[355]

Exemptions

4.30 Part IV sets out exemptions from compliance with certain obligations in the Act, where the obligations potentially conflict with other important public interest considerations.[356] The exemptions disapply some of the data protection principles and some of the requirements of the Act imposed on data controllers. The relevant exemptions cover national security, crime and taxation, health education and social work, regulatory activity, journalism, literature and art, research history and statistics, manual data held by public authorities, information available to the public under an enactment, disclosures required by law or made in connection with legal proceedings, parliamentary privilege and domestic purposes. Schedule 7 to the Act sets out further miscellaneous exemptions.

[351] In *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) it was held that 'damage' means special or financial damages. It was stated (obiter) in *Johnson v Medical Defence Union Ltd (No 2)* [2007] EWCA Civ 262 that there is *"no compelling reason to think that 'damage' in the Directive has to go beyond its root meaning of pecuniary loss".* However, in remitting the matter back to the trial judge the Court of Appeal stated at para 63 that *"it seems to us to be at least arguable that the judge has construed "damage" too narrowly, having regard to the fact that the purpose of the Act was to enact the provisions of the relevant Directive. All these issues should be authoritatively determined at a trial"*

[352] See for example £50 awarded to Catherine Zeta-Jones and Michael Douglas [2003] EWHC 786 (Ch); £5000 assessed damages for Mr Johnson (although his claim was unsuccessful the court assessed damages in case his DPA claim was successful on appeal) [2006] EWHC 321 (Ch); and £2,500 for Naomi Campbell (for breach of confidentiality and data protection claim) [2002] EWHC 499

[353] s17

[354] s21

[355] ss18-19

[356] The Act provides that providing that references to the data protection principles or provision of Parts II and III to personal data or to the processing of personal data do not include references to data or processing which by virtue of Part IV are exempt from that principle or other provision

Section 32 – exemption relating to processing of personal data for the purposes of journalism

Introduction to s32

4.31 The 1984 Act contained no specific exemption for the press, however Article 9 of the Directive required Member States to provide for exemptions or derogations for processing of personal data carried out solely for journalistic, literary or artistic purposes, to the extent that this is necessary to reconcile the right to privacy with the rules governing freedom of expression. The DPA approaches the potential conflict between the obligations imposed on data controllers and the public interest in preserving the right to freedom of expression principally by means of section 32.

4.32 As Tugendhat J observed in *Commissioner of Police of the Metropolis v Times Newspapers* the statute refers to "*journalism*" and "*journalistic material*" and not to "*journalists*" and this is consistent with the Strasbourg jurisprudence that distinguishes between types of speech rather than types of speaker.[357]

4.33 The passage of the DPA through Parliament was not uncontroversial, some concerns were expressed about s32, then clause 31 of the Bill, that the exemption for the press was too wide and undermined the legislation and that the clause failed to protect privacy.[358] Lord Lester of Herne Hill warned that the Bill failed to implement the directive in this respect.[359]

Scope of s32

4.34 Section 32(1) as enacted provides:

> *"(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—*
>
> *(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,*
>
> *(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and*
>
> *(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes."*

4.35 Section 32(3) provides that in considering whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his or her compliance with any code of practice which is relevant to the publication in question and has been designated by order of the Secretary of State.[360]

4.36 The proper scope of section 32(1) has been the subject of consideration in the evidence heard by the Inquiry and written submissions from a number of Core Participants to the Inquiry. These are recorded here for completeness.

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[357] [2011] EWHC 2705 (QB)
[358] See for example Hansard HL, Vol 585, cols 450- 452 and Vol 587, col 119
[359] See Hansard HL, vol 587, cols 1110-1122
[360] By the Data Protection (Designated Codes of Practice) (No.2) Order 2000 the Secretary of State has, pursuant to subsection 3, designated a number of Codes of Practice for the purposes of s32(3) including the PCC Code

4.37 The issue which has been canvassed before the Inquiry is whether s32(1)(a), properly interpreted, requires the processing of the relevant data to be undertaken with a view to publishing the data that is being processed ("*the narrow view*"), or whether s32(1)(a) requires only that the relevant data is processed with a view to publication of any journalistic material generally, irrespective of whether there is a view to publish the data ("*the wide view*"). The difference between these views can be illustrated by taking an example which Leading Counsel to the Inquiry canvassed with a number of witnesses. If a journalist obtained an ex-directory telephone number of the subject of a story they were writing for the purpose of contacting the individual and putting the story to them, does the act of obtaining and processing the telephone number fall within the s32 exemption on the basis that the processing is with a view to publication of an article generally, or does it fall outside the s32 exemption on the basis that the processing of the data is not with a view to publication of the data that is being processed; i.e the telephone number?

4.38 Mr Richard Thomas, former Information Commissioner, expressed the view that if the data controller is processing data with a view to contacting someone (for example someone who is about to be subject of a story) that would fall outside s32.[361] By contrast, Mr Graham responded that, whilst he agreed the processing was not with a view to publication of the data, the activity is for the preparation of an article for publication and some information may make it into the paper and some may not. Mr Graham stated that if the point is put that s32 covers writing the piece but it doesn't cover the obtaining of the evidence, this would be a challenging distinction about which he would need to think further.[362]

4.39 Guardian News Media have submitted that the broad view should be preferred and that the narrow view is inconsistent with the statutory language and case law. In their submission, in order for s32 to be interpreted in a narrow sense, i.e. where the processing of data must be undertaken with a view to publishing the data itself, this would arguably require the addition of words into s32(1)(a) of the Act, as follows:

> *"if (a) the processing is undertaken with a view to the publication by any person of [<u>that data in</u>] any journalistic material" (the words added are in square brackets and underlined).*

4.40 They further rely on the decision of the Court of Appeal in *Campbell v MGN* as being inconsistent with the narrow view of s32.[363]

4.41 The rationale for the exemption in s32 was expressed by the Court of Appeal in *Campbell v MGN Ltd* in the following terms:[364]

> *"The overall scheme of the Directive and the Act appears aimed at the processing and retention of data over a sensible period. Thus the data controller is obliged to inform the data subject that personal data about the subject have been processed and the data subject is given rights, which include applying under s.14 for the rectification,*

[361] pp18-19, [lines 24-1], Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

[362] p31, [lines 3-7], Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf. Mr Graham clarified that this was not a matter he had given great consideration to and leading counsel's opinion on this issue had not been sought

[363] [2003] QB 633

[364] [2002] EWCA Civ 1373 paras 122-124. The decision of the Court of Appeal was appealed to the House of Lords but this element of the judgment was not expressly considered by the House of Lords. The Court of Appeal in *Campbell* extended the duration of s32 to cover processing prior to or following publication and thus reversed the High Court's decision that s32 was only applicable to processing with a view to publication and not to publication itself

blocking, erasure or destruction of the data on specified grounds. These provisions are not appropriate for the data processing which will normally be an incident of journalism.

This is because the definition of processing is so wide that it embraces the relatively ephemeral operations that will normally be carried out by way of the day-to-day tasks, involving the use of electronic equipment, such as the lap-top and the modern printing press, in translating information into the printed newspaper. The speed with which these operations have to be carried out if a newspaper is to publish news renders it impractical to comply with many of the data processing principles and the conditions in Schedules 2 and 3, including the requirement that the data subject has given his consent to the processing.

Furthermore, the requirements of the Act, in the absence of s.32, would impose restrictions on the media which would radically restrict the freedom of the press."

4.42 The Court of Appeal in *Campbell* held that "*processing*" under the DPA includes publication in print, thus reversing the decision of the High Court and extending the duration of the s32 exemption to including processing for and after publication.[365]

4.43 Guardian News further submitted that the processing of personal data by journalists prior to publication, including the obtaining and use of a telephone number for the purpose of contacting a subject or source for potential comment or corroboration, must fall within the ambit of s32 otherwise the exemption would cease usefully to serve the objective it was designed to protect.[366]

Effect of s32 exemption

4.44 Where the conditions in s32(1) are met, there is an exemption from all data protection principles (save for the duty to keep data secure) and the obligation to comply with a number of rights of data subjects, including the right of subject access (s7), the right to prevent processing of personal data (s10), the right to prevent a decision being made on an automated basis (s12) and the rights relating to rectification, blocking, erasure and destruction of data (s14).

4.45 Further, s32(4) makes special provision for the conduct of proceedings that have been commenced by a person seeking subject access, the prevention of processing, rectification, blocking or erasing of data, or compensation for breach of the Act where the data is subject to processing for the purposes of journalism. If the data controller claims or it appears to the court that the data in question are being processed only for special purposes and with a view to publication of journalistic material which had not been published by the data controller previously the court must stay the proceedings until either the data controller withdraws their claim or a s45 determination is issued. The evidence of the Information Commissioner is that in many cases the Information Commissioner will not be in a position to make a s45 determination, leaving the proceedings stayed indefinitely.[367]

[365] At paras 96-120 in particular. On appeal to the House of Lords it was agreed that the DPA claim stood or fell with the outcome of the appeal on breach of confidence. The appeal in relation to the breach of confidence claim succeeded, although the House of Lords made no specific findings or comment on the Court of Appeal's analysis of the DPA

[366] Guardian News and Media rely on the statement of Buxton LJ in *Johnson v Medical Defence Union (No.2)* [2007] EWCA Civ 262, [2008] Bus LR 503 at para 41, where he stated: "*The argument put to the court [in Campbell], which had been adopted by the trial judge, was that the expression "with a view to" limited the exemption to acts prior to publication. The court was very concerned that that limitation would effectively nullify the investigative journalism that the exemption seemed designed to protect*"

[367] para 3.25, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf

Powers of investigation and enforcement

4.46 The duty to enforce the provisions of the DPA lies with the Information Commissioner (the Commissioner) whose powers and duties are set out in Part V of the Act and can be summarised as follows:

(a) If the Commissioner is satisfied that a data controller has contravened or is contravening any of the data protection principles, the Commissioner may serve an enforcement notice requiring him to take such steps or refrain from taking such steps as may be specified and/or to refrain from processing personal data.[368] In considering whether to issue an enforcement notice the Commissioner shall consider whether the contravention has caused or is likely to cause any person damage or distress.

(b) The Commissioner may serve on a data controller an assessment notice for the purpose of enabling the Commissioner to determine whether the data controller has complied or is complying with the data protection principles.[369] An assessment notice facilitates the exercise by the Commissioner of investigatory powers, including entry to premises, obtaining inspection or examination or documents, information or equipment, and requiring persons to be available for interview. Powers of entry and inspection are set out in detail in Schedule 9.

(c) If any person who is, or believes themselves to be, directly affected by processing of personal data requests an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act, the Commissioner shall make an assessment in such manner as appears to him to be appropriate.[370]

(d) The Commissioner may serve on a data controller an information notice requiring a data controller to furnish the Commissioner with specified information relating to the request or compliance with the principles.[371]

4.47 It is an offence to fail to comply with an enforcement notice, an information notice or a special information notice.[372] A person on whom an enforcement notice, an assessment notice, an information notice or a special information notice has been served may appeal against the notice to the Information Tribunal.[373]

4.48 Whilst the Commissioner has a broad suite of enforcement powers at his disposal, the balance of evidence before the Inquiry suggests that there has to date been limited use of formal enforcement powers.

4.49 Mr Thomas described the power to serve enforcement notices contained in s40 as the main formal power which the Commissioner had in its armoury for occasions when it felt that there had been non-compliance with the requirements of the legislation. He observed that the power was not used frequently, but there was a power to serve an enforcement notice on a data controller and that could be challenged, but if it was not challenged, then in due course it became a criminal matter not to obey the terms of an enforcement order.[374] In terms

[368] s40
[369] s41A
[370] s42
[371] s43
[372] s47
[373] s48
[374] p15, lines 1-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

of numbers of enforcement notices served, Mr Thomas estimated this was probably only two or three in a year, and they were normally preceded by a draft of a notice which was served before the Commissioner entered the actual notice as a matter of good regulation.[375] Mr Thomas agreed that in principle this power would apply to media organisations but this is subject to exemptions in s32.[376]

Enforcement powers in relation to the press

4.50 The enforcement powers set out in the Act are modified where the data processing is for the purposes of journalism.

4.51 The first step is for the Information Commissioner to establish whether processing is for the purposes of journalism linked to the publication of journalistic material. Section 44 of the Act empowers the Information Commissioner to serve a "*special information notice*" to instigate an investigation of the data controller where; i) he receives a request for an assessment by an affected person, or ii) court proceedings have been stayed on the basis that a data controller claims or it appears to the court that the processing under consideration is for the purposes of journalism and the Information Commission has reasonable grounds for suspecting that the personal data are not being processed only for the purposes of journalism or with a view to publication of journalistic material. As a consequence of these provisions the Information Commissioner is not able to issue a special information notice to initiate an investigation if it appears to him that information was gathered for journalism purposes with a view to publication (even if the gathering of the data was unlawful), unless a complaint is made by an affected person.

4.52 The extent of an investigation under s44 is limited to resolving the question of whether personal data are being processed for the purposes of journalism and to ascertain if they are processed with a view to future publication of material. There is no power to investigate under a special information notice whether the data controller has committed any other offence under the Act.

4.53 The second step is a determination. If it appears to the Commissioner (whether as a result of the service of a special information notice or otherwise) that any personal data are not being processed only for the special purposes, or are not being processed with a view to the publication by any person of any journalistic material which has not previously been published by the data controller, he or she may make a determination in writing to that effect.[377]

4.54 Until a determination is made under s45, the Information Commissioner may not issue an information notice requiring the data controller to provide him with other information, issue an enforcement notice or exercise their powers of entry and inspection provided under Schedule 9 of the Act where the data processing is for the purposes of journalism.[378] Thus the Commissioner's investigatory powers are restricted in these circumstances.

4.55 Section 46 imposes a procedural restriction on use of enforcement powers in respect of processing of data for journalistic purposes even if it appears to the Information Commissioner that enforcement action is justified. It prohibits the Commissioner from serving an enforcement notice on a data controller in respect of processing personal data for journalistic purposes

[375] p25, lines 10-18, *ibid*
[376] p15, lines 15-20, *ibid*
[377] s45
[378] s46(1), 46(3)

unless a determination under s45(1) has been made and the court has granted leave for the notice to be served. It is noteworthy that as at September 2011, no enforcement notices have been issued by the Information Commissioner in any cases where s32 is relevant.[379]

4.56 The court may not grant leave to serve the notice unless it is satisfied that the Commissioner has reason to suspect a contravention of the data protection principles which is of substantial public importance and, except where the case is one of urgency, that the data controller has been given notice of the application for leave in accordance with rules of court.

4.57 The Inquiry heard evidence that the investigative and enforcement powers at the Commissioner's disposal exist to ascertain whether personal data are being processed for purposes other than journalism and to act in relation to those other purposes, rather than to enable it to regulate the actual processing of personal data for journalistic purposes.[380]

4.58 Since April 2010 the Information Commissioner has had the power to impose a civil monetary penalty of up to £500,000 for serious breaches of data protection. Mr Graham observed that this power is beginning to have a very salutary effect, both on public authorities and on commercial companies who realise that the Information Commissioner has teeth.[381] However, he noted in relation to the media that, given the limitations on the investigatory powers available to the Information Commissioner, in practice it would be difficult for the Commissioner to establish whether the processing was in breach of the data principles or whether the exemption at s32 of Act applied such that the processing was exempt from compliance with data protection principles.[382]

Section 55 offence

Scope of s55(1)

4.59 Section 55(1) makes it a criminal offence to knowingly or recklessly, without the consent of the data controller (a) obtain or disclose personal data or the information contained in personal data, or (b) procure the disclosure to another person of the information contained in personal data, subject to specified defences in section 55(2). An offence can therefore be committed by three different types of activity: obtaining information, disclosing information, and procuring the disclosure of information.

4.60 This section of the Act is significant because, whilst the DPA primarily regulates data controllers, any person can commit an offence under s55. There may be effectively two victims when an s55 offence is committed: the data controller (i.e the organisation holding personal information) from whom the data is wrongfully obtained and the person to whom the data relates.[383]

[379] para 3.17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[380] para 3.20, *ibid*
[381] pp17-18, [lines 24-5], Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[382] para 3.19, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[383] para 9, , http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf. The practice of enforcement of s55 is considered in paras 10 – 14, *ibid*

4.61 Mr Thomas described s55 of the DPA 1998 as "*an entirely self-contained part of the Act*".[384] He also regarded a s55 offence as one of the utmost severity, noting that "*a section 55 offence is often as least as serious as phone hacking and may be even more serious*".[385]

4.62 In discussing the scope of the s55 offence, Mr Thomas expressed the view that "*obtain*" meant more than just receive. He said that it meant to seek out and obtain, but stated that the issue as to whether "*obtain*" could include the use of an agent or third party had not been considered by the ICO.[386] Mr Thomas was asked whether a journalist who asked a private investigator to obtain personal data, and subsequently received it through the agency of the private investigator would commit an offence under s55. Mr Thomas would not commit to a view as to whether this would fall within s55[387] although he noted that there is a greater challenge in bringing a successful prosecution under s55(1)(b), which relates to procuring the disclosure of information, than under s55(1)(a).

4.63 Commenting on the scope of s55 and whether position of a journalist could fall within ss55(1)(a) and (b), Mr Aldhouse, former Deputy Information Commissioner, stated that he was inclined to the view that the fact that you use an intermediary to obtain the information doesn't mean that you have not yourself obtained it and therefore the action of a journalist could either be "*obtaining*" within subsection (a) or "*procuring*" within subsection (b), and probably falls within both subsections. [388]

Public interest defence in s55(2)

4.64 There is an express public interest defence set out in s55(2), namely that an offence will not be committed where in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.[389] The defence set out in s55(2)(d) was described by Mr Thomas as an objective test.[390] He noted that "*public interest*" is not defined in the DPA and whilst the Information Commissioner has drafted some guidance on the meaning of public interest during his tenure this was never published.[391] The concept of public interest is one that is familiar to the courts and is regularly considered in the context of claims for misuse of private information and defamation.

4.65 The meaning of public interest was explored with Mr Thomas in his evidence. He agreed that it would be very difficult to justify conduct in public interest terms if someone was merely fishing for information without having identified in his or her mind what the public interest might be before starting the exercise.[392] He thought it would be difficult for someone to say that finding out the name, telephone number or the address of someone so they could talk to them (in the context of checking a story) would be a matter of public interest. He expressed the view that it would be difficult to justify the vast majority of celebrity tittle-tattle in public

[384] p8, lines 17-18, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[385] para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[386] p9, lines 9-10, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[387] p10, lines 1-5, *ibid*
[388] pp38, 39, lines15-25, 1-4, Francis Aldhouse, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[389] s55(2)(d)
[390] p10, lines 17-23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[391] p11, lines 2-18, *ibid*
[392] pp11, 13, lines 21-2, 5-9, *ibid*

interest terms.[393] Mr Graham noted that the broad scope given to the public interest in journalism in *Campbell v Mirror Group Newspapers* suggested that a successful prosecution of a journalist would be unlikely.[394] He said it was arguable that a journalist would have a public interest defence in circumstances where he was trying to obtain an ex directory telephone number from search group to contact the subject of a story. Mr Graham emphasised in his evidence that making a judgment on where the balance of the public interest lies on the facts of each case is something that the Information Commissioner is called upon to do under both the DPA and FOIA.[395]

4.66 Subsections 55 (4)-(8) make it an offence to sell or offer to sell personal data which has been or is subsequently obtained or procured knowingly or recklessly without the consent of the data controller.

Penalty for breach of s55(1)

4.67 Offences are punished by a fine of up to £5,000 in the Magistrates' Court and an unlimited fine in the Crown Court. However, since the Act came into force the penalties imposed by courts for the commission of data protection offences have been relatively light. Between November 2002 and January 2006, only two out of 22 cases resulted in fines amounting to more than £5,000.[396]

4.68 The Information Commissioner's report to Parliament "*What Price Privacy? The unlawful trade in confidential personal information*", published on 13 May 2006, and the follow up report "*What Price Privacy Now*?", published on 13 December 2006, recommended that the Lord Chancellor bring forward proposals to increase the penalty for persons convicted under s55 to a maximum of two years' imprisonment, a fine, or both on indictment; and on summary conviction to a maximum of six months' imprisonment, a fine, or both. The purpose of this recommendation was to discourage the undercover market in personal information, and to send a clear signal that unlawfully obtaining personal information would constitute a crime.[397]

4.69 The report "*What Price Privacy Now*?" set out in tabular form the publications which had been identified from documentation seized during Operation Motorman as being involved in the unlawful obtaining or procuring of personal data.[398] The report noted at paragraph 5.8 that documents seized as part of Operation Motorman showed thousands of s55 offences and gave details of a number of identifiable reporters who had been supplied with information obtained unlawfully; implicating some 305 journalists.

4.70 A summary of the penalties imposed following convictions for data protection offences is set out in Annex A of the report "*What Price Privacy?*" The table demonstrates that of the prosecutions pursued between 2002 and 2006 by the Information Commission, 23 of 26 resulted in convictions. It was noted that prosecutions brought under the Act have generally resulted in low penalties: either minimal fines or conditional discharges. Between November

[393] p56, lines 9-12, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[394] [2003] QB 633; para 4.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[395] para 6.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[396] Annex A, *What Price Privacy?*
[397] para 66, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[398] p9, *What Price Privacy Now?*

2002 and January 2006, only 2 out of 22 cases produced total fines that amounted to more than £5000.[399]

Investigation and enforcement of s55 offences

4.71 Under schedule 9 of the Act, the ICO has powers of entry and inspection if it has reasonable grounds for believing that an offence has been committed. Mr Thomas noted that the ICO needed a warrant from a district judge to exercise these powers.[400]

4.72 In terms of the practicality of investigation and enforcement of s55, Mr Thomas explained that s55 enforcement was the responsibility of a small investigations team composed of former police and customs officers and that the ICO felt that its teams were not large enough and were under-resourced.[401] Mr Thomas noted that if there is evidence of corruption and dishonest behaviour, which carries a stronger sentence, then it is inevitable that the case will be handed to the police and to the Crown Prosecution Service.[402] For example, he recalled that there was evidence that private detectives were paying money to people inside the DVLA, British Telecom and the police service to get information. As this was a far more serious matter than a breach of s55, the Crown Prosecution Service took over responsibility for prosecution.[403]

4.73 In his evidence, Mr Graham noted that there are practical challenges in the investigation of the involvement of individual journalists for s55 offences, including demonstrating the degree of knowledge on the part of the individual journalist, addressing the public interest defence available to the media, and in the absence of a power of arrest securing any co-operation from a journalist who would undoubtedly say that he or she does not reveal sources.[404] However, he commented that none of these considerations of principle and practicality should prevent the proper enforcement of the criminal law against the media.[405]

4.74 In relation to the scope of s55, Mr Graham explained that in some circumstances personal data could be obtained in a way that suggests the commission of offences under s55 of the Data Protection Act and other legislation. The investigation of offences which carry custodial sentences are, in practice, given precedence over the investigation of offences which do not, and the police will lead investigations where offences that carry a custodial penalty are suspected.

Amendments to s55

4.75 The Department of Constitutional Affairs (DCA) commenced a consultation exercise on 24 July 2006 in relation to the possibility of increasing penalties for deliberate and wilful misuse of personal data. The DCA published their response on 7 February 2007, which contained the following summary:

[399] p6, *What price privacy now?*
[400] p14, lines 16-17, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[401] para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf; p21, lines 21-23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[402] p42, lines 16-19, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[403] p84, lines 20-25, *ibid*
[404] para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Francis-Aldhouse.pdf
[405] para 11, *ibid*

(a) Respondents generally welcomed the introduction of custodial penalties to provide a deterrent to potential offenders, to provide public reassurance that offenders would receive the appropriate sentence and to achieve parity with a number of disparate pieces of legislation which deal with similar types of offences.

(b) The majority of respondents agreed that custodial penalties would be an effective deterrent because it would demonstrate the legal importance of data protection compliance and the seriousness of the offence. A few respondents did not agree with the proposal and argued that unlimited fines were more appropriate.

(c) Many respondents agreed with the proposed length of custodial sentence and that the courts should have access to the same sanctions as it would for similar offences. A minority of respondents argued that a maximum sentence of twelve months on summary conviction and five years on indictment would be more effective.

4.76 The Criminal Justice and Immigration Bill contained a clause to introduce custodial sentences for s55 offences. A number of press organisations opposed this proposal and the clause was amended such that custodial sentences could be introduced only after a Ministerial Order, the Order being preceded by consultation with media organisations and other interested parties.[406] This is now found in s77 of the Criminal Justice and Immigration Act 2008 (CJIA).

4.77 The other amendment to the DPA contemplated by the CJIA is the inclusion of a further defence to the s55 offence, which is of specific relevance to journalists. This was enacted in s78 of the CJIA, although this section is not yet in force. If brought into force, it would be a defence where a person acted for special purposes, including journalism, with a view to the publication by any person of journalistic material and in the reasonable belief that the obtaining, disclosing or procuring of that information was in the public interest. The amended defence is broader in terms than the defence currently set out in s55 DPA: the extended defence contemplated by s78 CJIA does not require a journalist to show that their conduct in obtaining, procuring or disclosing the data is objectively justified in the public interest, but introduces a subjective element, namely that the journalist has a reasonable belief that the conduct is in the public interest and that they acted with a view to publication of journalistic material. Mr Graham described the proposed amended defence as a "*very, very good increased defence for journalists*".[407]

4.78 In terms of the possible amendments to the legislation which are currently found in s77 and s78 of the CJIA, Mr Graham explained that the current position is that the Government is awaiting the outcome of the Inquiry before taking a decision on activating ss77 and 78.[408]

4.79 There is support for the amended defence from a number of media organisations. For example, News International submitted that the statutory language of s55 at present produces the bizarre result that a journalist investigating allegations of improper conduct in the honest and reasonable, though mistaken, belief that publication would be in the public interest would be able to establish an exemption from civil liability but unable to establish a defence to a criminal charge arising out of the same facts. It is further argued that the importance of that amendment is that Parliament has expressly reconfirmed in the field of regulation of misuse of personal data by media organisations that the focus must be on whether the media

[406] paras 24-28, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[407] p62, lines 9-17, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[408] pp46-47, lines 14-4, *ibid*

defendant acted in the reasonable belief that its processing of data was in the public interest, and not on whether it actually was in the public interest.

Guardian News argued that s55 is more far reaching than unlawful theft and trading of confidential information, catching not just those responsible for obtaining personal data but also those responsible for its procurement and – perhaps most critically for present purposes – for its subsequent disclosure.[409] Whilst s78 of the CJIA provides specific protection for journalistic activity based on a subjective threshold, the reasonableness of the journalist's belief at the time of publication remains to be assessed against an objective standard.

Role of the Information Commissioner

4.80 The role of an independent data protection regulator was first established by the Data Protection Act 1984 under the name of Data Protection Registrar.[410] The regulator was renamed as the Data Protection Commissioner under the DPA 1998 and the name was changed to Information Commissioner when the FOIA 2000 came into force.[411] The functions of the Information Commissioner are set now out in the Data Protection Act 1998 and the Freedom of Information Act 2000.[412] The various powers and duties contained in the Acts are vested in the Commissioner; although in practice they are largely discharged through some 300 staff who constitute the Information Commissioner's Office (ICO).[413]

Duties of the Information Commissioner in relation to the Data Protection Act 1998

4.81 The Act sets out a number of general functions and duties of the Commissioner. Generally these relate to promoting good practice rather than punishing poor practice and can be described as functions relating to education and co-operation.[414]

4.82 It is the duty of the Commissioner to promote the following of good practice by data controllers and, in particular, to promote the observance of the requirements of the Act by data controllers.[415]

4.83 The Commissioner has a duty to disseminate information and guidance to the public relating to the Act. The information must set out details of the operation of the Act, good practice and other matters within the scope of his or her functions under the Act.[416]

4.84 The Commissioner must arrange for the dissemination, in such form and manner as is considered appropriate, of such information as may appear expedient to give to the public about the operation of the Act, about good practice, and about other matters within the scope of his or her functions under the Act, and may give advice to any person as to any of those matters.[417]

[409] See pp37-42 of the Submissions of News International on Privacy Law
[410] para 2.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[411] s18(1) of FOIA changed the name of the position of The Data Protection Commissioner to the Information Commissioner
[412] s6 of the DPA 1998 provides that for the purposes of the DPA 1998 and the Freedom of Information Act 2000 there shall be an officer known as the Information Commissioner
[413] para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[414] para 2.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[415] s51(1)
[416] s51(2)
[417] s51(2)

4.85 The Commissioner has a duty where either (1) the Secretary of State so directs by order, or (2) the Commissioner considers it appropriate to do so, to prepare and disseminate to such persons as he considers appropriate codes of practice to provide guidance as to good practice. Prior to issuing codes of practice the Commissioner must consult trade associations, data subjects or persons representing data subjects as appears to him to be appropriate.

4.86 The Information Commissioner must prepare a code of practice which contains (1) practical guidance in relation to the sharing of personal data in accordance with the requirements of the DPA, and (2) such other guidance as the Commissioner considers appropriate to promote good practice in the sharing of personal data. Before a code is prepared, the Commissioner must consult such of the following as the Commissioner considers appropriate: (a) trade associations, (b) data subjects, and (c) persons who appear to the Commissioner to represent the interests of data subjects.[418] When such a code is prepared, it must be submitted to the Secretary of State for approval and there are rules as to procedure.[419]

4.87 The Commissioner also has responsibility for disseminating information relating to: (a) any finding of the European Commission that a country or territory outside the European Economic Area does, or does not, ensure an adequate level of protection, (b) any decision of the European Commission which is made for the relevant purposes, and (c) such other information as it may appear to him or her to be expedient to give to data controllers in relation to any personal data about the protection of the rights and freedoms of data subjects in relation to the processing of personal data in countries and territories outside the European Economic Area.[420]

4.88 In terms of duties to report, the Commissioner must lay annually before each House of Parliament a general report on the exercise of his or her functions under the DPA. The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he or she thinks fit, under s52. In 2006, the Information Commissioner published two reports, *"What Price Privacy? The unlawful trade in confidential personal information*" and the "*What Price Privacy Now?*", pursuant to this section.

4.89 A corollary of the fact that the DPA largely leaves it to individuals to take action to assert their rights in relation to processing of personal data for special purposes, including journalism, is that such individuals may apply to the Commissioner for assistance in their cases. An individual who is an actual or prospective party to any proceedings which relate to personal data processed for the special purposes, including the purposes of journalism, may apply to the Commissioner for assistance in relation to those proceedings.[421] The power to provide assistance is limited to cases which involve a matter of substantial public importance. Assistance in most cases refers to the costs of advice or assistance from legal representatives or an agreement to indemnify the applicant against costs. The Commissioner must consider and decide whether and to what extent to grant the application, but cannot do so unless the case involves a matter of substantial public importance.[422] The existing Information Commissioner notes that since 2009 no applications for such assistance have been made.[423]

[418] s52A
[419] s52B
[420] s51(6)
[421] s53
[422] s53(2)
[423] para 3.22, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf

Duties of the Information Commissioner in relation to the Freedom of Information Act 2000

4.90 The Commissioner has a number of powers and duties under FOIA. Whilst FOIA has not been the subject of extensive evidence before the Inquiry, it is useful to summarise the provisions of FOIA to the extent that they relate to the Commissioner in order to understand the entire framework of the regulatory position.

4.91 The purpose of the Act is stated at the outset to be, "*to make provision for the disclosure of information held by public authorities or by persons providing services for them*".[424]

4.92 The FOIA creates a general right of access, on request, to information held by public authorities. On receipt of a freedom of information claim a public authority has two corresponding duties. Firstly, a duty to inform a member of the public whether or not it holds the information requested and secondly, if it does hold that information, to communicate that fact to the person making that request.[425] A critical distinction between the DPA and the FOI is that whilst under the DPA a request for data is limited to data held about yourself as a data subject, there is no such constraint in relation to information held by the public authority that is sought under the FOIA.

4.93 The basic duty is supplemented by an additional duty to aid individuals in making requests and ensuring that they frame their FOI requests appropriately.[426] A public authority is to be taken to have complied with this duty in any particular case if it has conformed with the provisions of this Code in relation to the provision of advice and assistance in that case. The duty to assist and advise is enforceable by the Information Commissioner. If a public authority fails in its statutory duty, the Commissioner may issue a decision notice under s50, or an enforcement notice under s52.

4.94 At the heart of the FOIA is the definition of public authority – namely those bodies against whom the right to information can be asserted. Section 3 of the Act defines a public authority as any body, person or office-holder listed in Schedule 1, designated by order under s5 and publicly owned companies as defined in s6. Schedule 1 sets out a broad range of public bodies subject to the Act, including central Government departments, local government, strategic health authorities and primary care trusts, governing bodies of maintained schools, police authorities and a wide range of committees and commissions exercising public functions.

4.95 The Act contains a number of provisions which provide for exemptions from disclosure in relation to certain types of information. There are two forms of exemption: an absolute exemption which is an absolute bar to disclosure, and qualified exemption which is subject to a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

4.96 The absolute exemptions include information that: i) is accessible by other means, ii) relates to or deals with security matters iii) is contained in court records, iv) the disclosure of which would infringe parliamentary privilege, v) information held by the House of Commons or the House of Lords, where disclosure would prejudice the effective conduct of public affairs, vi) information which (a) the applicant could obtain under the Data Protection Act 1998; or (b) where release would breach the data protection principles, vii) information provided in confidence, viii) where disclosure of the information is prohibited by an enactment; incompatible with an EU obligation; or would commit a contempt of court.[427]

[424] s1
[425] ss1(1)(a)-(b)
[426] s16(1)
[427] ss21,23, 32, 34, 36, 40, 41, 44

4.97 The Act also contains qualified exemptions which introduces a two stage test. First, the public authority must decide whether or not the information is covered by an exemption and second, the authority must disclose the information unless the application of a public interest test is such that the public interest outweighs disclosure.

4.98 A number of qualified exemptions relate to particular classes of documents, namely information which that: i) is intended for future publication ii) required for the purpose of safeguarding national security, iii) is held for purposes of investigations and proceedings conducted by public authorities, v) relates to the formation of government policy, ministerial communications, advice from government legal officers, and the operation of any ministerial private office, vi) relates to communications with members of the Royal family, and conferring honours, vii) prevents overlap between FOIA and regulations requiring disclosure of environmental information, viii) is covered by professional legal privilege, and ix) is a trade secret.[428]

4.99 A number of qualified exemptions relate to particular harm that may be occasioned by compliance with the duty to disclosure. These include where disclosure would prejudice: i) defence or the capability, effectiveness or security of any relevant forces, ii) international relations, iii) relations between any administration in the United Kingdom and any other such administration, iv) the economic interests of the UK, v) law enforcement (e.g., prevention of crime or administration of justice), vi) the auditing functions of any public authorities, or vii) would in the reasonable opinion of a qualified person prejudice the effective conduct of public affairs, prejudice collective responsibility, or inhibit the free and frank provision of advice or exchange of views, viii) would endanger physical or mental health, or endanger the safety of the individual, (ix) would endanger commercial interests.[429]

4.100 A public authority is entitled to refuse to comply with the duties in s1(1) in particular circumstances (set out in Part II): where an absolute exemption is conferred on the public authority, or where in all the circumstances of the case the public interest in maintaining an exemption outweighs the public interest in disclosing the information. In the first instance, it is for the public authority to determine whether there are grounds for an exemption to apply, and if necessary, conduct a balancing exercising with the public interest in disclosure. If the person seeking the information is dissatisfied with the response there is a route of complaint to the Information Commissioner who must determine whether there are proper grounds for the information to be withheld and must issue a decision notice setting out the decision reached by the ICO.

4.101 It is important to note that for four public authorities listed under Schedule 1, the Act has limited effect. For example, Part VI of Sch 1 provides that the BBC, the Channel Four Television Corporation, the Gaelic media service and the Sianel Pedwar Cymru (the Welsh television channel known as S4C) are subject to the Act only in respect of information which is "*held for the purposes other than those of journalism, art or literature*". The purpose of this exemption is to protect journalistic activities from possible compromise. This section of the Act was recently analysed by the Supreme Court, which held that information held predominantly for the purposes of journalism does not fall within the scope of the Act, even if the information is held for other purposes as well.[430]

4.102 The Office of the Information Commissioner oversees the operation of the Act. Part IV of FOIA gives the Information Commissioner a number of enforcement powers.

[428] ss22, 24, 30, 35, 37, 39, 42, and 43(1)
[429] ss26-29, 31, 33, 36, 38, and 43(2)
[430] *Sugar (deceased) (Represented by Fiona Paveley) v British Broadcasting Corporation and another* [2012] UKSC 4

4.103 The powers of the Information Commissioner include: i) a power requiring a public authority to furnish the Commissioner with information he or she reasonably requires to determine whether a public authority has complied with its obligations under Part 1 and whether its practices comply with the Code of Practice, (ii) a power to issue an enforcement notice, if the Commissioner is satisfied that a public authority has failed to comply with Part 1, requiring the public authority to take the steps in the notice, (iii) certify that a public authority has failed to comply with a decision notice, information notice or enforcement notice, which allows the High Court to inquire into the matter and the deal with the public authority as if it had committed contempt of court, (iv) powers of entry and inspection pursuant to Schedule 33.[431]

4.104 Pursuant to s57 the public authority may appeal against a decision notice, information notice or enforcement notice to the Information Tribunal.

4.105 There are a number of general functions conferred on the Information Commissioner pursuant to s47 of the FOIA:

(a) The Commissioner has a duty to promote the following of good practice by public authorities and in particular to perform his or her function under the Act to promote the observance by public authorities of the requirements of the Act and the provisions of the codes of practice under ss45 and 46. The Act confers a number of powers on him or her to enable this, specifically in relation to the Code.

(b) The Commissioner shall arrange for the dissemination of information as it may appear expedient to give to the public about the operation of the Act, about good practice and other matters within the scope of his or her functions under the Act.

(c) The Commissioner may, with the consent of any public authority, assess whether that authority is following good practice.

(d) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under the Act does not conform with that proposed in this Code of Practice, a recommendation may be given to the authority under s48_specifying the steps which should, the Commissioner's opinion, be taken for promoting such conformity.

(e) The Commissioner may also refer to non-compliance with the Code in decision notices issued as a result of a complaint under s50 of the Act and enforcement notices issued under s52 of the Act where, irrespective of any complaints that may have been received, the Commissioner considers that a public authority has failed to comply with any requirement of Part 1 of the Act.

(f) If the Information Commissioner reasonably requires any information for the purpose of determining whether the practice of a public authority conforms to the Code, under s51 of the Act the Commissioner may serve an "*information notice*" on the authority, requiring it to provide specified information relating to its conformity with the Code.

(g) The Commissioner shall from time to time as considered appropriate consult the Keeper of Public Records about the promotion by the Commissioner of the observance by public authorities of the provisions of the code of practice under s46 in relation to records which are public records for the purposes of the Public Records Act 1958.

[431] ss51, 52, 54, and 55

4.106 Section 49 provides that the Commissioner shall lay annually before each House of Parliament a general report on the exercise of his or her functions under this Act and other such reports from time to time with respect these functions as thought fit.

Possible reform of the law in this area

4.107 In November 2010 the European Commission announced a review of the Data Protection Directive.[432] On 25 January 2012, the European Commission published a draft European Data Protection Regulation that will supersede the Data Protection Directive.[433] The Commission has proposed a new regime comprising:

(a) a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), and

(b) a proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

4.108 The draft Regulation seeks to modernise the legal framework for data protection needs in the EU in response to increasingly sophisticated information systems, global information networks, mass information sharing and the collection of personal data online.

4.109 A number of amendments to the current Directive are contemplated by the draft Regulation. These include:

(a) strengthening provisions relating to consent to the processing of data, by requiring explicit rather than implied consent,

(b) strengthening the right to object to processing of data, with no requirement to show that use of the data would cause substantial damage or distress,

(c) placing important legal obligations directly on processors: introducing a compulsory data breach notification duty that applies across all sectors, a requirement to demonstrate compliance with the regulation through the adoption of policies and procedures, the requirement to undertake data protection impact assessments prior to processing that is likely to impact on the privacy of a data subject, and the power of supervisory authorities to impose sanctions on data controllers for administrative offences such as not complying with a data subject request, a failure to maintain the requisite records or a failure to comply with the right to be forgotten.

Article 80 is of particular relevance and concerns the processing of personal data and freedom of expression. It provides as follows:

> *"Member States shall provide for exemptions or derogations from the provisions on the general principles in Chapter II, the rights of the data subject in Chapter III, on controller and processor in Chapter IV, on the transfer of personal data to third countries and international organisations in Chapter V, the independent supervisory*

[432] Commission Communication COM (2010) 609 final (4 November 2010)
[433] http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

authorities in Chapter VI and on co-operation and consistency in Chapter VII for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression".

4.110 Article 80 imposes a duty on Member States to make provision for exemptions from the obligations imposed by the new Directive and Regulation where processing is carried out solely for the journalistic purposes, but the exemptions need extend only to reconcile the protection of personal data with the right to freedom of expression.

4.111 The explanatory memorandum to the draft regulation sets out that Member States should classify activities as "*journalistic*" for the purpose of the exemptions and derogations to be laid down under this Regulation if the object of these activities is the disclosure to the public of information, opinions or ideas: irrespective of the medium which is used to transmit them. They should not be limited to media undertakings and may be undertaken for profit-making or for non-profit-making purposes.

4.112 Responses to the draft Regulation have been provided by the ICO and the Government. The Justice Select Committee was tasked by the European Scrutiny Committee to give its opinion on the EU Commission's proposals to reform EU data protection laws. The Justice Select Committee has heard evidence on this issue over a number of sessions and taken written evidence on the proposals.

5. Criminal law

Introduction

5.1 The criminal law imposes restrictions on the methods and practices used to obtain information from or about third parties. The conduct of journalists in this respect is restrained by the provisions of the law which criminalise forms of hacking, blagging, obtaining information by payments to public officials, obtaining, disclosing or procuring the disclosure of personal data and obtaining information in breach of the Official Secrets Act. The criminal law also restricts the content of publications in certain respects: for example, there are statutory provisions which prevent the reporting of certain criminal proceedings, which criminalise the publication of information that has been disclosed in contravention of the provisions of the Official Secrets Acts, and which criminalise publications which incite hatred on grounds of race, religion or sexual orientation.

5.2 Whilst some offences are strict liability offences, other criminal offences are subject to an express defence that the conduct was in the "*public interest*". In these circumstances a journalist acting in the course of their profession may seek to persuade the court that their conduct, or the publication in question, was in the public interest.

5.3 A journalist is not above the law and a journalist who breaks the law will be in the same position as any other member of the public – there is no exemption from compliance with the criminal law simply by virtue of their profession. However, particular provisions of the law and defences have special application to journalists. It is generally rare for the CPS to prosecute journalists who commit offences in the course of their work and a prosecutor will be required to balance the competing considerations in determining whether prosecution is

in the public interest.[434] The Director of Public Prosecutions has released interim guidelines on the approach that prosecutors should take when assessing the public interest in cases affecting the media. These guidelines have immediate effect. The interim consultation period closed on 10 July 2012, after which final guidelines will be issued.

5.4 As is apparent from the analysis in Part D Chapter 1 of the Report (to which reference is essential for an understanding of the role of regulation), that the operation and enforcement of the criminal law generates real challenges for the police and other law enforcement agencies. Having said that, the key provisions of criminal law of relevance to journalists, in particular the restrictions on methods and practices for obtaining information and the content of publications are as follows.

Restrictions on the methods of obtaining information

Interception of communications – Regulation of Investigatory Powers Act 2000

5.5 The Regulation of Investigatory Powers Act 2000 (RIPA) creates two offences relating to the interception of communications:

(a) It is an offence for a person intentionally and without lawful authority to intercept at any place in the United Kingdom any communication in the course of its transmission by means of a public postal service or a public telecommunication system, see s1(1).

(b) It is an offence for a person intentionally and without lawful authority to intercept at any place in the United Kingdom any communication in the course of its transmission by means of a private telecommunication system, see s1(2). It is a defence for a person who would otherwise be liable under s1(2) if they have a right to control the operation or the use of the system; or have the express or implied consent of such a person to make the interception, see s1(6).[435]

5.6 Section 1(1A), which came into force on 16 June 2011, provides that the Interception of Communications Commissioner may serve a monetary penalty notice on a person if the Commissioner considers the person has intercepted without lawful authority any communication in the course of its transmission by means of public telecommunication system and was not, at the time of the interception, making an attempt to act in accordance with an interception warrant which might explain the interception, and the Communications Commissioner does not consider that the person has committed an offence under s1(1).

5.7 Section 2(1) defines various terms including public postal service, public telecommunications service and private telecommunications system. Interception is defined in s2(2) as follows: a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he (a) so modifies or interferes with the system or its operation, (b) so monitors transmissions made by means of the system, or (c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system, as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication. A tape recording of a telephone call by one party to the call without the knowledge of the other party does not

[434] para 11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Keir-Starmer-QC.pdf

[435] Control in this context means authorise and forbid, rather than the ability to physically use and operate the system: *Stanford* [2006] 1 WLR 1554

amount to interception of a communication within s2.[436] Further, a recording of one side of a telephone conversation picked up by a surveillance device in a car that does not record the speech of the other party does not amount to interception of a communication.[437]

5.8 The Inquiry has heard evidence that there has been some uncertainty as to the circumstances in which an offence will be committed under s1, and the interpretation of interception, as defined in s2(2).[438] In particular, the statutory provisions are unclear as to whether an offence will be committed only if a voicemail message was intercepted before it was accessed by the intended recipient (the narrow view), or whether an offence is also committed if a communication is intercepted after it was accessed by the intended recipient and for so long as the system in question is used to store the communication in a manner which will enable the recipient to have access to it (the wide view). Whilst there is arguably some support for the narrow view in the judgment of Lord Woolf CJ in *R (NTL Group) v Crown Court at Ipswich* the written opinion of Leading Counsel articulates persuasive arguments in favour of the wide view.[439] Without seeking to determine the point, I endorse the view expressed by Leading Counsel that there are convincing arguments in support of a wider construction of the meaning of interception.

5.9 The offence is not committed in circumstances where the person intercepting the communication has lawful authority to do so. Lawful authority is defined in s1(5) as:

(a) authorisation by virtue of the consent to the interception of both the person who sent the communication and the intended recipient of the communication (s3);

(b) authorisation under s4 (in relation to a person outside the UK and the interception is in accordance with circumstances set out in regulations made by the Secretary of State)[440]

(c) interception takes place in accordance with an interception warrant (s5);

(d) interception in relation to any stored communication in the exercise of any statutory power that is exercised for the purpose of obtaining information or of taking possession of any document or other property.

5.10 The provisions and procedures in relation to issuing, exercising and overseeing a warrant are set out in ss5-11 of RIPA.

5.11 There is no public interest defence for breach of the provisions and there is no provision for anyone outside the police or security services to obtain a warrant to intercept calls or messages.

5.12 The maximum penalty on conviction on indictment is a term of two years of imprisonment and/or a fine, or on summary conviction a fine not exceeding the statutory maximum.

[436] *Hardy* [2003] 1 Cr App R 494
[437] *E* [2004] 1 WLR 3279
[438] paras 128 – 132, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Second-Witness-Statement-of-Keir-Starmer-QC.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-David-Perry-QC.pdf; pp29-31, 33-38, [lines 3-2, 8-3], Keir Starmer QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-4-April-2012.pdf ; pp19-23, [lines 20-6], David Perry QC, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-4-April-2012.pdf
[439] [2002] EWHC 1585 (Admin); Opinion of Mark Heywood QC (Annex 65 to Second witness statement of Keir Starmer QC), see also Opinion of David Perry QC Annexs 55 and 56 to Second witness statement of Keir Starmer QC
[440] The Regulation of Investigatory Powers (Conditions for the Lawful Interception of Persons outside the United Kingdom) Regulations 2004 (SI 2004 No. 157) prescribe the conditions in which conduct will be authorised under s4(1)

Computer hacking – Computer Misuse Act 1990

5.13 The Computer Misuse Act 1990 was introduced in August 1990 following a Law Commission report surrounding computer misuse and the need to react to increasing technological development and potential abuse of this technology.[441]

5.14 The Act provides, in ss1, 2, 3 and 3A for criminal sanctions for unauthorised access to any material held on a computer and for impairment of the operation of a computer, with further sanctions if this is done with a view to the commission of a crime and for making, supplying or obtaining articles for use in the relevant offences.[442]

5.15 The Computer Misuse Act introduced three new offences into UK criminal law which can be summarised in broad terms as follows: unauthorised access to computer material, unauthorised access with intent to commit a further offence, and unauthorised modification.

5.16 Section 1 concerns unauthorised access to computer material. It provides that a person is guilty of an offence if they:

(a) cause a computer to perform any function with intent to secure access to any program or data held in any computer;[443]

(b) the access intended is unauthorised; and

(c) the person knows at the time when they cause the computer to perform the function that that is the case.[444]

5.17 The meaning of computer is not defined in the Act, although there are strong arguments in favour of an interpretation which includes a voicemail system within the meaning of computer.

5.18 A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding two years and/or to a fine, or on summary conviction to imprisonment for a term not exceeding six months and/or to a fine not exceeding the statutory maximum.[445]

5.19 Section 1 does not require the use of one computer to gain unauthorised access to another: an offence under section 1 can be committed if a program or data is accessed directly from the computer to which the defendant has access: *A-G's Reference (No 1 of 1991)*.[446] Further, s1(1) creates an offence which can be committed as a result of having intent to secure unauthorised access without in fact actually succeeding in accessing any data.[447] The offence is drafted to include conduct that ordinarily would be within the scope of the law of attempt.

[441] See Law Commission's Working paper No.110 "*Computer Misuse*" and its report "*Computer Misuse*", Law Com No.186 (1989) (Cm. 819); and the Scottish Law Commission's *Report on Computer Crime*, Scot. Law Com No 106 (1987) (Cm. 174)
[442] As amended and added by ss 35(1), (3), 36, 37, Sch 14 paragraph 17 of the Police and Justice Act 2006
[443] The intended access need not be directed at any particular program or data, or program or data of any particular kind, or a program or data held in any particular computer, s1(2). 'Secure access' is defined in s17. A person secures access to any program or data held in a computer if, by causing a computer to perform any function, he or she (a) alters or erases the program or data, (b) copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium where it is held, (c) uses it, or (d) has it output from the computer in which it is held
[444] s1(1) of the Computer Misuse Act 1990
[445] ss1(3)(a), (c) of the Computer Misuse Act 1990, section 1(3) substituted by the Police and Justice Act 2006, ss35(1)-(3); Police and Justice Act 2006 ss38(6)(a), (7)(a)
[446] [1993] QB 94
[447] [2000] 2 AC 216 at 225-226

5.20 Access of any kind by any person to any program held in a computer is "*unauthorised*" if they are not entitled to control access of the kind in question to the program or data, or do not have the consent to access the kind of program or data in question from any person so entitled.[448] The section identifies two ways in which authority may be acquired – either by being oneself the person entitled to authorise access or by being a person who has been authorised by a person entitled to authorise access. It also makes clear that the authority must relate not simply to the data or programme, but also the actual kind of access secured.[449]

5.21 There is some uncertainty as to whether an offence is committed under s1 by a person who is authorised to secure access to particular computer material, or data, but does so for unauthorised purposes.[450] The leading authority on this point under the Data Protection Act 1984 (now repealed) was *DPP v Bignell*, in which the Court held that the retrieval of information from the police national computer (PNC), by someone with the proper authority under the Computer Misuse Act 1990, but at the request of others who were to use the data for non-police purposes, was a matter for the Data Protection Act 1984 or for police disciplinary proceedings rather than the Computer Misuse Act 1990.[451] However, dicta in *DPP v Bignell* which related to the Computer Misuse Act 1990 were disapproved in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Government of the United States of America* which held that the Computer Misuse Act 1990 prevented someone with the authority to access data at a particular level on a computer system from accessing other data held on the same system for improper purposes, on the basis that such access will be unauthorised access within the meaning of section 1(1).[452] It therefore remains unclear as to whether a person who had authorised access to information held on a computer, for example the PNC, but accesses this information for improper purposes, for example to sell it to a journalist, would commit an offence under s1 as well as s55 of the DPA. In a number of cases involving misuse of information held on police computers, offenders have been prosecuted for misconduct in public office rather than under the 1990 Act.[453]

5.22 Section 2 covers unauthorised access to computer material pursuant to s1, with the intent to commit an offence or to facilitate the commission of further offences. The basis notion is that someone guilty of an offence under s1 will have further criminal sanctions imposed on them if this is done with the intention to commit or facilitate the commission of further offences, although it is not necessary to prove that the intended further offence has actually been committed.

5.23 Further offences for the purposes of s2 are offences which have a sentence fixed by law or where an individual found guilty of that offence would be liable for a term of imprisonment of five years or more. For example, a person will be guilty of an offence under s2 if unauthorised access to sensitive information held on a computer was obtained for the purposes of blackmailing a person to whom that information related, or where unauthorised access was obtained for the purposes of theft.

5.24 It is immaterial for the purposes of s2 whether the further offence is to be committed on the same occasion as the unauthorised access or on any future occasion and a person can

[448] s17(5)
[449] [2000] 2 AC 216 at 224
[450] See commentary in *Archbold 2012* at 23-87
[451] [1998] 1 Cr App Rep 1
[452] [2000] 2 AC 216 at 224–225
[453] For example, *A-G Ref (No 68 of 2009) (Turner)* [2010] 1 Cr App R (S) 684; *Lewis* [2010] 2 Cr App R (S) 666

be guilty of the offences under s2 even though the facts are such that the commission of the further offence is impossible.[454]

5.25 Section 3 creates an offence for unauthorised modification. A person is guilty of an offence if they do any unauthorised act in relation to a computer, knowing at the time that it is unauthorised and either:

(a) they intend by doing the act to impair the operation of any computer, to prevent or hinder access to any program or data held in any computer, or to impair the operation of any such program or the reliability of such data;[455] or

(b) they are reckless as to whether the act will do any of these things.[456]

5.26 A person found guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years and/or to a fine, or on summary conviction to imprisonment for a term not exceeding six months and/or a fine not exceeding the statutory maximum.[457]

5.27 Section 3A relates to the making, supplying or obtaining of articles for use in offences under ss1 or 3. Section 3A provides that a person is guilty of an offence if a) they make, adapt, supply or offer to supply any article intending it to be used to commit, or to assist in the commission of, an offence under ss1 or 3, (b) they supply or offer to supply any article believing that it is likely to be used to commit or to assist in the commission of an offence under ss1 or 3, (c) they obtain any article with a view to its being supplied for use to commit, or to assist in the commission of, an offence under ss1 or 3. For the purposes of s3A "*article*" includes any program or data held in electronic form.[458]

5.28 There are no guideline cases on sentencing for offences under the Computer Misuse Act 1990. In the case of *Delamere*, an employee who sold confidential details of two bank account holders was sentenced to four months' detention.[459] In the case of *Lindesay* a computer consultant who corrupted a website of a client company which had dismissed him was sentenced to nine months imprisonment following a guilty plea to three s3 offences.[460]

Section 55 Data Protection Act 1998

5.29 Section 55(1) makes it a criminal offence to knowingly or recklessly, without the consent of the data controller, (a) obtain or disclose personal data or the information contained in personal data, or (b) procure the disclosure to another person of the information contained in personal data, subject to specified defences in s55(2). This is considered above at 4.59.

[454] ss 2(3)-(4)
[455] The intention need not relate to any particular computer, any particular program or data or a program or data of any particular kind, or any particular modification or a modification of any particular kind: s3(4). For s3(2) see for example *Zezev and Yarimaka v Governor of HM Prison Brixton* [2002] 2 Cr App R 515 where it was held than an offence was committed under the substituted s3 where the accused placed in another person's email inbox a bogus email purported to have come from a person who had not sent it
[456] s3(3)
[457] s3(6)(c)
[458] s3A
[459] [2003] 2 Cr App R (S) 474
[460] [2002] 1 Cr App R (s) 370

Blagging offences – obtaining information by misleading or deceitful practices

5.30 There are a number of offences that potentially criminalise "*blagging*" or. in other words, the obtaining of information by using a pretence, false identity or false representations:

(a) s1 Fraud Act 2006 (fraud by false representation) and deception offences under the Theft Acts;

(b) s1 Forgery and Counterfeiting Act 1981, Identity Cards Act 2006 (use of false documentation to prove identity);

(c) s90 Police Act 1996 (impersonation of a police officer);

(d) Official Secrets Act 1920 (unauthorised use of uniforms, falsification of reports, forgery, impersonation or the false use of documents to gain admission to a prohibited place within the meaning of the Official Secrets Act 1911);

(e) s55 DPA (unlawfully obtaining personal data).

The Theft Acts 1968 and 1978

5.31 The Theft Acts 1968 and 1978 set out deception offences which criminalise conduct in which something was dishonestly obtained. For example, s15 of the Theft Act 1968 criminalised obtaining property by deception and s1 of the Theft Act 1978 criminalised obtaining services by deception. By s15(4) of the Theft Act 1968, "*deception*" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person. The judicial definition of deception frequently cited is "*to deceive is … to induce a man to believe that at thing is true which is false*".[461]

5.32 These offences were repealed by the Fraud Act 2006 with effect from 15 January 2007. The old law is not, however, without relevance: it will continue to apply in so far as offences were committed or partly committed before that date.

Fraud Act 2006

5.33 The Fraud Act 2006 repealed the offences under the Theft Acts 1968 and 1978 and replaced them with a general offence of fraud as set out in s1 of the Act and an offence of obtaining services dishonesty, s11. It applies to offences committed after 15 January 2007.

5.34 Section 1(1) of the Act provides that a person is guilty of fraud if he or she is in breach of any of the sections listed in s1(2). There sections are:

(a) fraud by false representations, s2;

(b) fraud by failing to disclose information, s3;

(c) fraud by abuse of position, s4.

5.35 Breaches of ss2 – 4 are not stand-alone offences, but are variations of an offence of fraud under s1.

[461] Buckley J in *Re London and Glove Finance Corporation* [1903] 1 Ch 728 at 732

5.36 Section 2 concerns fraud by false representation. A person is in breach of s2 if they dishonestly make a false representation and intend by making that representation to i) make a gain for themselves or another, or ii) to cause loss to another or to expose another to a risk of loss.[462]

5.37 Section 3 concerns fraud by failing to disclose information. A person is in breach of s3 if they dishonestly fail to disclose to another person information which they are under a legal duty to disclose and intend, by failing to disclose the information i) to make gain for themselves or another, or ii) to cause loss to another or to expose another to a risk of loss.[463]

5.38 Section 4 concerns fraud by abuse of position. A person is in breach of s4 if they occupy a position in which they are expected to safeguard, or not to act against, the financial interests of another person, dishonestly abuse that position and intend, by means of the abuse of that position i) to make a gain for themselves or another, or ii) to cause loss to another or to expose another to a risk of loss.

5.39 The focus of these offences is the conduct and the intent of the defendant as opposed to the consequences of the conduct. Attempts to defraud that are unsuccessful, for example false representations made to obtain information that do not result in the obtaining of the information, may nevertheless still amount to fraud.

5.40 Dishonesty in fraud cases requires a two part test to be considered: firstly whether according to the ordinary standards of reasonable and honest people what was done was dishonest, and secondly whether the defendant must have realised that what they were doing was (by reference to the standards of reasonable and honest people) dishonest.[464]

5.41 The *mens rea* (i.e. mental) element common to all variants of the fraud offences is that the defendant must act either, with intent to secure a gain for themselves or another, or with intent to cause loss to another or expose another to a risk of loss. It is not necessary that the gain, loss or exposure to risk of loss actually occurs – the focus is on the mental state of the defendant. Gain and loss are defined in s5.

5.42 A person guilty of fraud is liable on summary conviction to imprisonment for a term not exceeding six months and/or a fine not exceeding the statutory maximum. A person convicted on indictment is liable to imprisonment for a term not exceeding 10 years or to a fine.[465] The relevant sentencing guidelines for fraud offences are the *SGC Guideline, Sentencing for Fraud – Statutory Offences.*[466]

5.43 Section 11 concerns obtaining services dishonestly. A person is guilty of an offence under s11 if they obtain services for themselves or another, a) by a dishonest act and, (b) in breach of s11(2), namely services are made available on the basis that payment has been, is being, or will be made for or in respect of the services, they obtain them without any payment having been made for the services in full, and, when they obtain the services they knows that, i) they

[462] s2(2) defines a representation as being false if: a) it is untrue or misleading, and (b) the person making it knows that it is, or might be, untrue or misleading . S2(3) defines a representation as being any representation as to fact or law, including a representation as to the state of mind of: (a) the person making the representation, or (b) any other person. S2(4) states that a representation can be express or implied. For the purposes of s3, a representation is regarded as being made if it (or anything implying it), is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)

[463] 'Legal duty' is not defined in the Act but the Law Commission provided an explanation in its Report (Cm 5560, 2002) at paragraphs 7.28 and 7.29

[464] *Ghosh* [1982] QB 1053

[465] Fraud Act 2006 s1(3)

[466] The guidelines were considered in *Nejatti* [2011] EWCA Crim 245 and *Chaytor* [2011] EWCA Crim 929

are being made available on that basis or, ii) they might be, but intend that payment will not be made, or will not be made in full.

5.44 A person guilty of an offence under s11 is liable on summary conviction to imprisonment for a term not exceeding 6 months and/or to a fine not exceeding the statutory maximum, or on conviction on indictment to imprisonment for a term not exceeding 5 years or to a fine, or to both.

Falsification, forgery and counterfeiting

5.45 Offences of falsification will often also amount to fraud within the meaning of the Fraud Act 2006, although dishonesty need not be proved in cases charges under the Forgery and Counterfeiting Act 1981.

5.46 The Forgery and Counterfeiting Act 1981 repealed a number of older statutory offences of forgery and abolished forgery at common law. Part 1 of the Act creates the following offences:[467]

(a) making a false instrument, s1;

(b) copying a false instrument, s2;

(c) using a false instrument, s3;

(d) using a copy of a false instrument, s4;

(e) having custody or control of specified kinds of false instrument, s5(1); and

(f) making or having custody etc of machines paper etc for making false instruments of that kind, s5(3)..

5.47 These offences all require an "*intention to induce*" somebody to accept the instrument as genuine and "*by reason of so accepting it to do or not to do some act to his own or any other person's prejudice*".[468]

5.48 An instrument is only regarded as false if it purports to be something it is not, or it tells a lie about its own authorship, origins or history.

Offences relating to identity documents

5.49 The Identity Cards Act 2006 was repealed on 21 January 2011 by the Identity Documents Act 2010, although the offences created by s25 of the 2006 Act were re-enacted with consequential amendments in ss4, 5 and 6 of the 2010 Act.

5.50 Section 4 provides that it is an offence for a person with an improper intention to have in their possession or under their control an identity document that is false and that they know or believe to be false, an identity document that was improperly obtained and that they know or believe to have been improperly obtained, or an identity document that relates to someone else.[469]

[467] 'False' for the purposes of Part I of the Act is defined in s9. 'Instrument' for the purposes of Part I of the Act is defined in s8

[468] 'Intention to induce prejudice' is defined in s10

[469] 'Improper intention' is defined in s4(2) as the intention of using the document for establishing personal information about oneself or the intention of allowing or inducing another to use if for establishing, ascertaining or verifying personal information about oneself or anyone else. 'Personal information' for the purposes of ss4 and 5 is defined in s8

5.51 Section 5 provides that it is an offence for a person with the prohibited intention to make or have in their possession or under their control, any apparatus which, to their knowledge, is or has specially been designed or adopted for the making of false identity documents or any article or material which, to the person's knowledge, is or has been specially designed or adapted to be used in the making of such documents.[470]

5.52 Section 6 provides that it is an offence for a person, without reasonable excuse, to have in their possession or under their control, (a) an identity document that is false, (b) an identity document that was improperly obtained, (c) an identity document that relates to someone else, (d) any apparatus which, to the person's knowledge, is or has been specially designed or adopted for the making of false identity documents, or (e) any article or material which, to the person's knowledge, is or has been specially designed or adapted to be used in the making of such documents.

Impersonation of a police officer

5.53 It is an offence contrary to the Police Act 1996 s90(2) for someone who is not a police officer to wear any article of police uniform, which includes distinctive badges, marks and documents where it gives that person an appearance so resembling a member of a police force that is calculated to deceive, s90 Police Act 1996.

5.54 The offence is punishable on summary conviction with a fine not exceeding level 3.

Gaining access to a prohibited place

5.55 Section 1 of the Official Secrets Act 1920 creates an offence where a person, for the purpose of gaining admission or of assisting any other person to gain admission to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State:[471]

(a) uses or wears without lawful authority, any naval, military, air-force, police or other official uniform, or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents themselves to be a person who is or has been entitled to use or wear any uniform;

(b) orally or in writing in any declaration or application, or in any document signed by them or on their behalf, knowingly makes or connives at the making of any false statement or any omission;

(c) tampers with any passport or naval, military, air-force, police or other official pass, permit, certificate, licence, or other document of a similar character, or has in their possession any forged, altered or irregular official document;

(d) personates or falsely represents themselves to be a person holding, or in the employment of a person holding office under His/Her Majesty or to be a person to whom an official document or secret official code word or pass word has been duly issued or communicated, or with intent to obtain any official document, secret official code word or pass word, for themselves of another, knowingly makes any false statement;

[470] 'Prohibited intention' is defined in s5(2) as the intention that the person or another will make a false identity document, and that that document will beused by somebody for establishing, ascertaining or verifying personal information about a person

[471] ss3, 12 of the Official Secrets Act 1920

(e) uses or has in their possession or control, without the authority of the Government Department or the authority concerned, any die, seal, stamp of or belonging to, or used made or provided by any Government Department, or by any diplomatic, naval, military or air force authority or any die, seal or stamp so nearly resembling any such die, seal or stamp as to be calculated to deceive or any counterfeits of such die, seal or stamp.

s55 DPA – unlawful obtaining of personal data

5.56 Section 55 of the Data Protection Act may also cover blagging offences where conduct amounts to a person knowingly or recklessly without the consent of the data controller, (a) obtaining or disclosing personal data or the information contained in personal data, or (b) procuring the disclosure to another person of the information contained in personal data. This offence is dealt with above at paragraph 4.59.

Making payments to public officials in order to obtain information

5.57 Making payments to public officials in order to obtain information may amount to an offence under the Bribery Act 2010 (if committed after 1 July 2011), the common law of bribery, or under the Prevention of Corruption Acts 1889 and 1916 (in relation to acts prior to July 2011), and may give rise to misconduct in public office on the part of public officers.

5.58 Prior to the implementation of the Bribery Act 2010, statute and common law laid down offences in relation to bribery. The principal legislation dealing with corruption was contained in the Public Bodies Corruption Practices Act 1889 and the Prevention of Corruption Act 1906, which were supplemented by the Prevention of Corruption Act 1916. The 1889 Act concerned corruption in public bodies and local government and criminalised the giving or receipt of money, gifts of other consideration in relation to a person in the employment of the Crown, any government department or public body.[472] "*Corruptly*" for the purposes of the 1889 Act referred to purposefully doing any act which the law forbids as tending to corrupt and would likely include improper gifts, payments or other inducements offered to a councillor or other officers or employees of a public authority.[473] It was no defence for the recipient to prove that their acceptance of a corrupt gift failed to influence them in the performance of his duties.[474]

5.59 The 1906 Act is concerned with the corruption of agents, whether agents of public bodies or otherwise.[475] Section 1 sets out that it is an offence if any agent corruptly accepts or obtains, agrees to accept or attempts to obtain from any person, for themselves or any other person, any gift or consideration as an inducement for doing or forbearing to do any act in relation to their principal's affairs or business.

5.60 Bribery and corruption committed abroad was criminalised by the Anti-Terrorism, Crime and Security Act 2001, s109. Further, prior to the implementation of the Bribery Act 2010, it was an offence at common law to bribe the holder of a public officer, or for an office holder to accept such a bribe.[476]

[472] As defined in s7 of the 1889 Act, supplemented by the 1916 Act, s4(2)
[473] *Wellburn* (179) 69 Cr App R 254
[474] *Parker* (1985) 82 Cr App R 69
[475] The definition of 'agent' in ss1(2) and 1(3) of the Prevention of Corruption Act 1906 is supplemented by s4(3) of the Prevention of Corruption Act 1916
[476] See for example *Whitaker* [1914] 3 KB 1283

5.61 The Bribery Act 2010 was brought into force on 1 July 2011 and sets out a consolidated scheme for bribery offences in the UK and abroad. Section 17 and Schedule 2 abolish the common law offences of bribery but leave intact the common law offence of misconduct in public office. New offences are created by ss1, 2, 6 and 7 of the Bribery Act 2010. The Act does not have retrospective effect, and acts undertaken prior to the commencement date will be charged under the old law.

5.62 The key offences in the Act are ss1 (bribery of another person) and 2 (being bribed). The offences apply equally to the public and private sector.

5.63 Section 1 of the Act provides that a person is guilty of an offence in one of two cases. The first case is where a person offers, promises or gives a financial or other advantage to another person and the person intends the advantage to, i) induce a person to perform improperly a relevant function or activity or ii) to reward a person for the improper performance of such a function or activity.[477] The second case is where a person offers, promises or gives a financial or other advantage to another person, and knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

5.64 In relation to the first case it does not matter whether the person to whom the advantage is offered, promised or given, is the same person as the person who is to perform, or has performed, the function or activity concerned, s1(4). In the first and second cases, it does not matter whether the advantage is offered, promised or given by the person directly or through a third party: s1(5). It is not a requirement of either of these offences that the bribe or advantage is actually accepted.

5.65 Section 2 provides that a person is guilty of an offence if one of a further three cases applies.

5.66 The third case is where the person requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly by themselves or another. The fourth case is where a person requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by a person of a relevant function or activity. The fifth case is where a person requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance, whether by themselves or another, of a relevant function or activity. The sixth case is where, in anticipation of, or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by the person or another at the person's request or with the person's assent or acquiescence.[478]

5.67 The Director of the Serious Fraud Office and the DPP published joint guidance on 30 March 2011 on the approach to prosecutorial decision-making in respect of offences under ss1,2, 6 and 7 of the Act.

[477] 'Relevant function or activity' is defined in ss3, 4 and 5 of the Bribery Act 2010, and broadly includes the following: any function of a public nature, activity connected with a business, performed in the course of a person's employment or performed on behalf of a body of persons (whether corporate or incorporate) and the person performing the function or activity is expected to perform it in good faith, is expected to perform it impartially or is in a position of trust by virtue of performing it

[478] ss2(2)-(5)

Misconduct in public office

5.68 The common law offence of misconduct in public office remains an offence and has not been extinguished by the Bribery Act 2010. The offence was explained by the Court of Appeal in *A-G Ref (No 3 of 2003)*, which held that the offence of misfeasance in public office is committed by a public officer acting as such who wilfully neglects to perform his or her duty and/or wilfully misconducts themselves to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification. Wilful in this context involves "*deliberately doing something which is wrong, knowing it to be wrong or with reckless indifference as to whether it is wrong or not*".[479] As to the requirement that the neglect of duty or the misconduct must amount to an abuse of the public's trust in the office holder, the court said that threshold is a high one and a mistake, even a serious one, will not suffice.[480]

5.69 In respect of cases involving police officers, the Court of Appeal reviewed the authorities on sentencing in *A-G Ref (No 30 of 2010) (R v Bohannan),* and concluded that the authorities illustrated four important principles: punishment and deterrence were always important because police officers must be deterred from misconduct and the public must see that condign punishment will be imposed on police officers who betray the trust in them, an incentive, money or otherwise, increases the seriousness of the offence, misconduct that assists organised criminals to keep ahead of law enforcement agencies increases the gravity of offences, misconduct that impact on police operations moves an offence into a different category of gravity.[481]

5.70 The offence can involve an improper act or omission, but the misconduct must be wilful and the offender must be a public officer acting as such.[482] Public officers include magistrates, judges, registrars, council officials, ministers, civil servants and police officers.

5.71 For example in *A-G's Ref (No 1 of 2007)*, a police officer was convicted of misconduct in public office for misusing the Police National Computer in order to supply confidential information to a known criminal.[483]

5.72 The principal legislation dealing with corruption prior to the Bribery Act 2010 was the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916.

Handling stolen goods

5.73 Section 22 of the Theft Act 1968 sets out that a person handles stolen goods if (otherwise than in the course of the stealing) know or believing them to be stolen goods they dishonestly receive the goods, or dishonestly undertake or assist in their retention, removal, disposal or realisation by or for the benefit of another person or if they arrange to do so. Section 34(2)(b) defines "*goods*" as including money and every other description of property except land, and includes things severed from the land by stealing.

5.74 Dishonesty in this context bears the same meaning as fraud or deception in the case of *Ghosh*. For a charge of handling stolen goods to be made out, it must be proved that the defendant

[479] [2004] 2 Cr App R 23 at para 28
[480] *Ibid,* at para 56
[481] [2011] 1 Cr App R (S) 106
[482] Wilful misconduct involves "*deliberately doing something which is wrong, knowing it to be wrong or with reckless indifference as to whether it is wrong or not*", para 28. The threshold is a high one, requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice, para 56
[483] [2007] 2 Cr App R (S) 544

knew the goods were stole. or correctly believed they were and this state of mind must correspond with the time when the handling takes place.

Restrictions on content of publications

Official Secrets Act 1989

5.75 Section 1 of the Official Secrets Act 1989 contains an offence relating to the disclosure of information and material by a person who is or has been a member of the security and intelligence services or has been notified they are subject to the OSA 1989. Section 2 creates the offence of damaging disclosure of defence information, s3 relates to damaging disclosure of material relating to international relations or other confidential information, documents or articles which were obtained from a State other than the UK or an international organisation, and s4 creates an offence of disclosure of information relevant to criminal investigations.[484]

5.76 The House of Lords in *R v Shayler* held that ss1, 3 and 4 do not entitle a defendant prosecuted under those provisions to be acquitted if they show that it was, or that they believed that it was, in the public or national interest to make the disclosure in question or if the jury concluded that it might have been, or the defendant might have believed it to have been in the public or national interest to make the disclosure in question.[485] Lord Bingham held that:[486]

> *"It is in my opinion plain, giving sections 1(1)(a) and 4(1) and 3(a) their natural and ordinary meaning and reading them in the context of the OSA 1989 as a whole, that a defendant prosecuted under these sections is not entitled to be acquitted if he shows that it was or that he believed that it was in the public or national interest to make the disclosure in question or if the jury conclude that it may have been or that the defendant may have believed it to be in the public or national interest to make the disclosure in question. The sections impose no obligation on the prosecution to prove that the disclosure was not in the public interest and give the defendant no opportunity to show that the disclosure was in the public interest or that he thought it was. The sections leave no room for doubt, and if they did the 1988 white paper quoted above, which is a legitimate aid to construction, makes the intention of Parliament clear beyond argument."*

5.77 Of particular relevance to journalists is s5, which sets out offences relating to disclosure of information resulting from unauthorised disclosures. Section 5(2) provides that a person will be guilty of an offence where the person into whose possession the information, document or article has come, discloses it without lawful authority, knowing or having reasonable cause to believe that it is a protected disclosure under the provisions of the OSA, and the material has come into their possession either directly or indirectly by reason of disclosure by a crown servant or government contractors without lawful authority, or disclosed in breach of confidence.[487] Section 5(2) applies to any information, document, or other article which is protected against disclosure by ss1-4. An offence is not committed under s5(2) unless

[484] Damaging disclosure is defined in s3(2) of the OSA 1989. Ss2-4 prevent disclosure of information by a person who is or has been a crown servant or government contractor who makes a damaging disclosure of defence information, international relations information or information relevant to criminal investigations

[485] [2003] 1 AC 247

[486] At para 20

[487] s5(5) defines a protected disclosure as being a disclosure which (a) relates to security or intelligence, defence or international relations within the meaning of ss1,2,3 or 3(1)(b) or is information or a document or article to which s4 applies

the disclosure is damaging and the person makes it knowing or having reasonable cause to believe that it would be damaging, s5(3).

5.78 Further, it is an offence contrary to s5(6) of the Official Secrets Act 1989 for a person to disclose any information, document or other article which they know or have reasonable cause to believe to have come into their possession as a result of a contravention of s1 of the Official Secrets Act 1911.

Contempt of court

5.79 The law of criminal contempt of court is found in both the common law and the Contempt of Court Act 1981. In broad terms, criminal contempt can take one of two forms, contempt in the face of the court (for example a refusal to give evidence), or indirect contempt (for example publication of an article on a forthcoming trial). The law of contempt is based on the principle that the courts cannot and will not permit interference with the due administration of justice.[488]

5.80 At common law, contempt of court is an act or omission calculated to interfere with the due administration of justice: *Att- Gen v Times Newspapers Ltd* [1992] 1 AC 191. Examples of contempt of relevance include as follows.

5.81 It is contempt to publish material that is so defamatory of a judge or a court as to be likely to interfere with the due administration of justice by seriously lowering the authority of the judge or the court: *R v Gray*.[489] It is only in exceptional cases that this jurisdiction will be exercised and this species of contempt was described as virtually obsolescent by Lord Diplock in *Secretary of State for Defence v Guardian Newspapers Ltd*.[490] The offence will be made out where the publication is intentional, the article is calculated to undermine the authority of the court and the defence of fair criticism in good faith is inapplicable, see *Ahnee v DPP*.[491] It has been acknowledged that restrictions on the freedom of expression will be necessary in some circumstances in order to maintain the authority and impartiality of the judiciary within the meaning of Article 10(2) of the ECHR: see Munby J in *Att-Gen v Harris*.[492]

5.82 It is also an offence to publish matter calculated to prejudice a fair trial. To establish the offence of contempt at common law it must be established that a) the publication of the material created a real risk of prejudice to the due administration of justice, and b) that the material was published with the specific intention of causing such a risk.[493]

5.83 The question is whether the publication created a substantial risk that the court of justice would be substantially impeded or prejudiced. The court must assess the risk of prejudice by looking at the prejudice from the date of publication. It is no defence that no prejudice was in fact caused, for example because there was no possibility that jurors saw the publication.

5.84 Contempt of court in this context may include publishing material which may prejudice a jury against an accused, publishing the photograph of a person charged with an offence where it is reasonably clear that the identity of the accused has arisen or may arise, by revealing matters

[488] Per Donaldson MR and in *A-G v Newspaper Publishing plc* [1988] Ch 333 at 368
[489] [1900] 2 QB 36
[490] [1985] AC 339
[491] [1992] 2 AC 294
[492] [2001] 2 FLR 895
[493] *Att-Gen v Sport Newspapers Ltd* [1991] 1 WLR 1194 at 1200 per Bingham LJ

which might be inadmissible in evidence and which may influence jurors or by sensational and misleading coverage of a trial.[494]

5.85 There is no common law power to make an order postponing the publication of a report of proceedings conducted in open court. This power is conferred by statute in some instances, for example the Contempt of Court Act 1981, the Children and Young Persons Act 1933, and the Administration of Justice Act 1960, s12.

Contempt of Court Act 1981

5.86 The Act has a twofold purpose – to remove liability for technical but venial contempt and to clarify the balance between a fair trial and a free press.[495] The Act restricts limited liability for contempt under the "*strict liability rules*", deems specific conduct to be contempt of court and makes provision for penalties for contempt.

5.87 The strict liability rule imposed by the Act in s1, i.e. that conduct can be treated as contempt of court without requiring intent to interfere with the course of justice, applies to publications which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, where the proceedings in question are active at the time of publication.[496]

5.88 The application of the strict liability rule to publications was considered by the Court of Appeal in *Att-Gen v News Group Newspapers Ltd*, which noted that there was a need to balance the public interest in general discussion being permitted and to ask whether the proceedings sought to be protected were sufficiently proximate to the apprehended publication to require protection.[497] *In Re Lonrho plc* the House of Lords explained that the question whether a particular publication, in relation to particular legal proceedings which are active, creates a substantial risk that the course of justice will be impeded or prejudiced by a publication must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed.[498]

5.89 The risk that has to be assessed is that which was created by the publication of the allegedly offending matter at the time when it was published. The Court should look at each publication separately as at the date of publication and consider the likelihood that it would be read by a potential juror, the likely impact of the article on an ordinary reader at the time of the publication and its residual impact on a notional juror at the time of the trial.

5.90 Section 2(2) sets out two separate risks, impede and prejudice.[499] Impede means to slow down, delay, hinder or obstruct. Prejudice is to say or do that which is detrimental or injurious to the interest of that thing or person.[500]

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[494] *R v Bolam ex p Haigh* (1949) 93 SJ 220; *R v Daily Mirror Newspapers ex parte Smith* [1927] 1 KB 845; *Clarke ex parte Crippen* (1910) 103 LTd 636; *Parke* [1903] 2 KB 432; comments of Lord Justice McCowan in *Taylor* (1993) 98 Cr App R 361

[495] See *Lord Diplock in Att-Gen v English* [1983] AC 116 at 139

[496] ss2(1)-(3); which proceedings will be treated as being active are set out in Schedule 1, s2(4)

[497] [1987] QB 1

[498] [1990] 2 AC 154 at 209

[499] The Divisional Court clarified in *HM Attorney-General v MGN Ltd and another* [2011] EWHC 2074 (Admin) that impeding the course of justice and prejudicing the course of justice are not synonymous concepts

[500] *Att-Gen v BBC* [1992] COD 264

5.91 In *Her Majesty's Attorney General v MGN Ltd and another*, the Divisional Court heard proceedings for contempt brought against the publishers of the Daily Mirror and The Sun newspapers in respect of articles published relating to Mr Christopher Jefferies. Mr Jefferies was arrested on suspicion of the murder of Joanne Yates in December 2011 and subsequently released from police bail without charge. Another man was subsequently charged with the murder of Miss Yates. The Divisional Court considered whether the newspapers were guilty of contempt on the basis that the criminal proceedings in which Mr Jefferies was involved at the date of publication were at serious risk of being prejudiced and/or impeded. The Divisional Court noted that the vilification of a suspect under arrest readily falls within the protective ambit of s2(2), as such publication may discourage witnesses from coming forward to provide information helpful to the suspect, and that in this case the impact of the articles on any potential defence witnesses would have been extremely damaging to Mr Jefferies. The impugned articles were held to have created substantial risks to the course of justice and to constitute contempt under the strict liability rule. The Daily Mirror was subsequently fined £50,000 and The Sun £18,000.[501]

5.92 More recently, in *Her Majesty's Attorney General v Associated Newspapers Ltd and MGN Ltd* the Divisional Court determined that the publication of material withheld from the jury in relation to the activities of Levi Bellfield but published after the jury had convicted him of kidnap and murder of Milly Dowler but while it was continuing to deliberate in relation to an outstanding charge of attempted kidnapping of another girl created "*a separate and distinct risk of serious prejudice*" which was substantial and over and above that which had been the consequence of television broadcasts.[502]

5.93 Sections 3 and 5 set out defences in respect of innocent publication/distribution and fair and accurate reports of proceedings respectively. Section 3 provides that a publisher is not guilty of contempt of court under the strict liability standard if, at the time of publication, having taken all reasonable care, they do not know and have no reason to suspect that relevant proceedings are active; and that a distributor of the publication is not guilty of the offence if, at the time of distribution, having taken all reasonable care, they do not know that it contains such matter and have no reason to suspect that it is likely to do so. Section 4 provides that a person is not guilty of contempt of court under strict liability in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and made in good faith. Section 5 provides that a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

5.94 Section 6(a) preserves any defences available at common law; for example fair and accurate report of proceedings of a public body, *R v Payne and Cooper*.[503] Section 6(b) clarifies that no one can be found guilty of contempt who would not have been found guilty under the common law prior to the 1981 Act.

[501] [2011] EWHC 2383. The Divisional Court held that it was irrelevant that Mr Jefferies had successfully pursued a civil remedy for damages for defamation and that damages had been agreed with an apology to be made to him. Further, it was an aggravating feature of the case that the Attorney General had given a warning of the risks to the administration of justice and the Court found it impossible to accept that no one in either newspaper knew that the warning had been given, or understood its terms

[502] [2012] EWHC 2029 (Admin)

[503] [1896] 1 QB 577

5.95 Any proceedings for contempt of court under the 1981 Act require the consent of the Attorney General, or for the proceedings to be instituted on the motion of a court having jurisdiction to deal with it.

5.96 Pursuant to s4(2) of the Act, the court has the power to order that the publication of any report of proceedings or any part of the proceedings be postponed for a period the court thinks necessary where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings or in other proceedings pending or imminent. The court has a discretion to hear representations from the press regarding the making of an order under s4(2), although it has been held that it would generally be right to hear from the press who represent the public interest in publicity which the court has to take into account in performing the necessary balancing exercise.[504] The relevant practice direction is Practice Direction (Criminal Proceedings: Consolidation). Para I.3 notes that when considering whether to make an order under s4(2) it is likely that the court will wish to hear from representatives of the press.[505]

5.97 All orders made under s4(2) must include: a) the precise scope of the order, b) the time at which it shall cease to have effect, and c) the specific purpose for which it was made.[506]

5.98 In *ex parte MGN Ltd* Lord Judge CJ summarised the principles as follows. The first question is whether the reporting would give rise to a not insubstantial risk of prejudice to the administration of justice. The second question is whether an order made under s4(2) would eliminate that risk. If not, there would be no necessity to impose such a ban. If the order would achieve the objective of eliminating the risk the court has to consider whether the risk could satisfactorily be overcome by less restrictive measures. Third, even if there is no way of eliminating the perceived risk of prejudice, it does not follow that an order necessarily had to be made – the court's approach should be that unless it is necessary to impose an order it is necessary not to impose one and it if is necessary to impose an order at all it must go no further than necessary. A section 4(2) order should be a last resort.[507]

5.99 Section 4(2) is designed to enable the court to postpone the reporting of proceedings where the publication during the course of proceedings would prejudice those proceedings. The need for postponement cannot extend beyond the proceedings.[508]

5.100 The interplay between Article 8 (respect of private and family life) and Article 10 (freedom of expression) in this context was analysed by the House of Lords in *Re A (a child) (identification: restriction on publication).*[509] Lord Steyn emphasised that full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice and promotes the values of the rule of law. The Court of Appeal in *Re Trinity Mirror plc* stated that it was:[510]

> *"impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials … this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed".*

[504] *Clerkenwell Stipendiary Magistrate ex parte The Telegraph plc* [1993] QB 462
[505] [2002] 1 WLR 2870
[506] *R v Horsham Justices ex parte Farquharson* [1982] QB 762
[507] [2011] EWCA Crim 100
[508] See decision of the Court of Appeal in *Times Newspapers Ltd* [2008] 1 WLR 234
[509] [2005] 1 AC 593. This decision was analysed in *A Local Authority v W, L, W, T and R* [2006] 1 FLR 1
[510] [2008] QB 770, at para 32

5.101 The Supreme Court in *Re Guardian News and Media* stated that the press and law reporters should ordinarily be permitted to name litigants or parties to proceedings before the courts, although some exceptions had been created by statute. In other cases where anonymity might be necessary, the court had to balance Articles 8 and 10.[511]

5.102 Deliberate breach of reporting restrictions imposed under the Contempt of Court Act 1981 may constitute contempt of court, irrespective of whether there is any real risk of prejudice.[512] Further contempt of court may be committed in certain circumstances where information relating to proceedings before a court sitting in private is published, s12 of Administration of Justice Act 1960.

5.103 Section 11 of the Contempt of Court Act 1981 provides that in any case where a court allows a name or other matter to be withheld from the public in proceedings before the court, the court may give directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was withheld. The power to grant anonymity is that derived from the common law. A court can only exercise its powers under s11 to give directions prohibiting the publication of a name in connection with court proceedings if the court first legitimately exercised its power to receive evidence of information without it being disclosed to the public.[513]

5.104 Examples of where anonymity has been granted include where there is potential embarrassment arising out of a medical condition or because a witness fears violence or reprisals.[514] However financial damage or damage to reputation which results from the commencement of court proceedings concerning a person's business is unlikely to amount to special circumstances entitling the court to restrict press reporting.[515]

5.105 Particular reporting restrictions to protect anonymity for certain categories of defendant are set out in statute. For example, s39 of the Children and Young Persons Act 1933 (CYPA) provides that a Crown Court or a Magistrates' Court may make an order protecting a juvenile's anonymity. This can be contrasted with the youth court, where reporting restrictions to protect the juvenile's identity apply automatically (see s49 CYPA). Alleged victims in a case involving one of the sexual offences set out in s2 of the Sexual Offences (amendment) Act 1992 are entitled to anonymity from the point when the allegation has been made. Nothing may be published that is likely to lead members of public to identity the alleged victim, and this continues for lifetime of the complainant. Section 3 permits a court to lift the restriction in certain circumstances, for example where publicity is required by the accused so witnesses come forward and the conduct of the defence is likely to be seriously prejudiced if the direction not given, or where the trial judge is satisfied that the imposition of the prohibition imposes a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to relax the restriction.[516] Section 46 of the Youth Justice and Criminal Evidence Act 1999 allowsr a party to make an application for the court to give reporting directions in relation to a witness order than the accused if the direction is likely to improve the quality of the evidence of the witness or their co-operation in the case preparation of any party to the proceedings.

[511] [2010] 2 AC 697
[512] *Horsham Justice ex parte Farquharson* [1982] QB 762
[513] *R v Arundel JJ ex p Westminster Press Ltd* [1985] 1 WLR 708
[514] For example *H v Ministry of Defence* [1991] 2 QB 103; *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249
[515] *R v Dover JJ ex p Dover District Council* 156 JP 433
[516] s3(2)

Offences involving writing, speech or publication

5.106 The common law offences of publishing an obscene libel, defamatory libel and sedition and seditious libel were abolished by s73 of the Coroners and Justice Act 2009 and the old "*speech crimes*" have now been replaced by other offences, including those under the Protection from Harassment Act 1997 and the Public Order Act 1986. Other offences relating to writing, speech or publication are now set out in the Obscene Publications Act 1959.

Obscene Publications Act 1959

5.107 It is an offence under s2(1) of the Obscene Publications Act 1959 for any person, whether for gain or not, to publish an obscene article, or for any person to have an obscene article for publication for gain (whether gain to themselves or gain to another).

5.108 Pursuant to s1(2) a person shall be deemed to have an article for publication for gain if with a view to such publication they has the article in their ownership, possession or control. Article is defined in s1(2) as:

> *"any description of article containing or embodying matter to be read or look at or both, any sound record, and any film or other record of a picture or pictures".*

5.109 An article may be a single item, for example a novel, which must be considered in its totality. It may also comprise a number of items, for example a magazine. In the latter case each item must be judged individually and it is sufficient if the effect of any one of the items, taken as a whole, is to tend to deprave and corrupt. The point was analysed in *Anderson* [1972] 1 QB 304 where it was held that a novelist who writes a complete novel and who cannot cut out particular passages without destroying the theme of the novel is entitled to have his work judged as a whole, but a magazine publisher who has a far wider discretion as to what is inserted is to be judged on an item by item basis.

5.110 Publication is defined in s1 of the Act as including where a person (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting for hire or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it, or, where the matter is data stored electronically, transmits that data.

5.111 Obscenity is defined in s1 of the Act as follows:

> *"if its effect or (where the article comprises two or more distinct items), the effect of any one of its items is, if taken as a whole, such as to tend to deprive and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it."*

5.112 The definition of obscenity goes further than shocking or immoral suggestions, but must constitute a serious menace.[517]

5.113 It is a defence under s2(5) to a charge of publishing, for the accused to prove that they have not examined the article in respect of which they are charged and have no reasonable cause to suspect that it was such that their publication of it would make them liable to be convicted of an offence under s2. This provides a limited defence for defendants who acted as innocent disseminators of material.[518] Where the accused is charged with having publication for gain

[517] See dicta in *Knuller v DPP* [1973] AC 435 at 456- 457

[518] See for example the case of *R v Love* (1955) 39 Cr.App R. 30 in which the Court of Appeal quashed the conviction of a director of a print company who had been absent when a printer order for obscene books had been accepted and he had no personal knowledge of the content of the books

pursuant to s1(3)(a) of the Obscene Publications Act 1964 (which is a separate offence) the law provides a similar defence, namely that the person had no reasonable cause to suspect that it was such that having it would make them liable.

5.114 Section 4 sets out a defence of public good, namely where the publication of the article is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. Whilst the publishers' intentions, namely whether the publication was intended to educate or corrupt, are not relevant to the offence itself (which looks simply at the effect of the publication), they will be relevant to a public good defence.

5.115 The maximum penalty on indictment is five years' imprisonment, a fine, or both; or six months' imprisonment or a fine not exceeding the statutory maximum or both summarily.

The Children and Young Persons (Harmful Publications) Act 1955

5.116 The publication of material harmful to children and young persons is rendered an offence pursuant to s2 of the Children and Young Persons (Harmful Publications) Act 1955 and this applies to any book, magazine or other like work which is of a kind likely to fall into the hands of children or young persons and consists wholly or mainly of stories told in picture portraying the commission of crime, acts of violence or cruelty or incidents of a repulsive or horrible nature in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall.

5.117 The Protection of Children Act 1978 and the Criminal Justice Act 1988 also establish offences relating to the making, possession, publication and distribution of indecent images of children.

Protection from Harassment Act 1997

5.118 Section 2 of the Protection from Harassment Act 1997 creates an offence when a person pursues a course of conduct which amounts to harassment of another and which they know or ought to know amounts to harassment of the other. Harassment is an arrestable offence, so that the police can apprehend a person whom they have reasonable grounds to believe has committed it. The victim can also bring civil proceedings, including applying for an injunction restraining a person from acting in a manner which constitutes harassment. If the victim considers that the harasser has engaged in conduct prohibited by the injunction, a power of arrest may be attached to the injunction, breach of which without reasonable excuse is a criminal offence.[519]

5.119 Harassment is defined in s7 as including alarming the person or causing the person distress. A course of conduct must require conduct on a least two occasions, either in relation to one person or one occasion each in relation to two or more persons. It has been held that publication of press article is in law capable of amounting to harassment: *Thomas v News Group Newspapers Ltd*.[520] It was common ground before the court in that case that there must be some exceptional circumstances which justify sanctions and the restriction on the freedom of expression before publications are capable of amounting to harassment.

5.120 In the context of a civil claim for harassment pursuant to the PHA 1997, the courts have interpreted *Thomas* in the following way. For the court to comply with s3 HRA, it must hold

[519] PHA 1997, ss3 and 3A
[520] (2001) The Times, 25 July 2002

that a course of conduct in the form of journalistic speech is reasonable under PHA s1(3)(c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10(2), including, in particular, the protection of the rights of others under Art 8.[521]

5.121 It is not only publication itself but news gathering activities which may be caught by s2. For example, the attention and investigations of unwelcome reporters and photographers may amount to distress and constitute harassment under the Act.

5.122 The powers in the PHA 1997 were increased by the Criminal Justice and Police Act 2001 and the Serious Organised Crime and Police Act 2005. Section 42 of the 2001 Act gives the police powers to give directions to stop harassment of a person in their home, for example where there is a scrum of reporters and film crew outside a person's home. Such directions can be to go away, and to stay away for up to three months. It is an offence to act outside a person's home in a way which will cause harassment, alarm or distress to a resident or neighbour, for the purpose of persuading a person to do something they are not under any obligation to do, or to do something which they are not entitled or required to do (see s42A). SOCA added a new offence to the PHA 1997, involving harassment by two or more persons which is intended to persuade the victim either to do something which they are not obliged to do, or not to do something they are entitled to do, s1(1A).

Public Order Act 1986

5.123 Section 4A, inserted into the Public Order Act 1986 in 1994, provides that:

> *"A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he... (b) displays any writing, ... which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress".*

5.124 In contrast to the PHA, the Public Order Act requires intent to cause harassment, alarm or distress. It has been held that where a person posts an image of another on a website that is available to the public, the fact that the subject is unaware of it until shown it by a third party does not break the chain of causation, and it would also be immaterial that if at the time the harassment, alarm or distress was caused the mage was no longer displayed on the website.[522]

5.125 Section 5 provides for a similar type of offence but does not require intent to cause harassment, alarm or distress. This section prohibits the display of:

> *"any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby".*

5.126 The relationship between s5 and Article 10 of the ECHR was summarised as follows: i) the starting point is the right to freedom of expression, iii) that right must extend beyond protecting people who hold popular, mainstream views so that minority views can be freely expressed even if distasteful or offensive to some, and iii) the restrictions in Art 10(2) need to be narrowly construed and the justification for invoking the criminal law is the threat to

[521] *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB) per Tugendhat J
[522] *S v CPS* [2008] QCD 46 DC

public order.[523] It is a defence pursuant to s5(3)(c) for the defendant to prove that his conduct was reasonable.

5.127 Section 18 creates an offence of using words or behaviour or displaying written material intending to stir up racial hatred. It provides that a person who uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred or having regard to all the circumstances racial hatred is likely to be stirred up.[524]

5.128 Section 19 creates an offence of publishing or distributing written material stirring up racial hatred. This section provides that a person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if, (a) they intend thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up. References to publication or distribution of written material are to its publication or distribution to the public or a section of the public. It must be shown that the material was generally accessible to all or available to all, or placed before or offered to the public.

5.129 Part 3A of the Act contains provisions about offences involving the stirring up of hatred against persons on racial grounds, or hatred on grounds of sexual orientation. The thrust of the offence contained in s29B is to criminalise the use of threatening words or behaviour or display of written material where the defendant intended thereby to stir up religious hatred or hatred on the grounds of sexual orientation. Section 29C provides that a person who publishes or distributes written material which is threatening is guilty of an offence is they intend thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

5.130 There are provisions for the protection of freedom of expression (as required by the Strasbourg cases cited below), including s29JA. This provides that:

> *"… the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred".*

Communications Act 2003

5.131 Section 127(1) of the Act creates an offence when a person 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 causes any such message or matter to be so sent. Section 127(2) creates an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a person sends by means of a public electronic communications network, a message that they know to be false, causes such a message to be sent, or persistently makes use of a public electronic communications network.

5.132 This section has been recently considered by the Divisional Court in hearing an appeal against the conviction of Mr Paul Chambers for sending a public electronic message that was grossly offensive or of an indecent, obscene or menacing character contrary to s127(1)(a) and (3) of the Communications Act 2003. Mr Chambers, upon hearing that an airport he was due to travel from was closed due to adverse weather conditions, posted a message on twitter to the effect that the airport had a week to resolve the issue or he would be "*blowing the airport sky high!!*" Mr Chambers was convicted on the basis that the content of the message was of a menacing character. The Divisional Court concluded that a tweet was a message sent

[523] *Abdul v DPP* 175 JP 190

[524] s17 defines racial hatred as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship), ethnic or national origin

by an electronic communications service and thus falls within s127(1) of the Act, however, on an objective assessment, the decision of the Crown Court that the tweet constituted or include a message of a menacing character was not open to it. The Court held that a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside the Act for the simple reasons that the message lacks menace. The Court considered, *obiter*, the mental element of the offence and held that the offender must have intended the message to be of a menacing character or be aware of, or recognise the risk, at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it. If the sender intended the message as a joke, it is unlikely that mental element of the offence would be established.

Conspiracy and secondary liability

5.133 In relation to each of the offences identified above there is also potential conspiracy liability contrary to s1 of the Criminal Law Act 1977 and potential secondary liability (see s8 of the Accessories and Abettors Act 1861) or encouraging or assisting an offence (ss44-46 of the Serious Crime Act 2007).

6. Criminal procedure

Police powers of investigation in relation to journalists

6.1 As a general rule, in the event that the police seek to make inquiries as part of a police investigation a journalist is in the same position as any other member of the public in that they are under no general duty to provide assistance. In exceptional circumstances, the police have the power to insist on answers being provided to questions in the context of suspected breaches of s1 of the Official Secrets Act 1911.[525] Further, investigators and inspectors appointed under the Financial Services and Markets Act 2000 to investigate specific allegations in relation to a range of regulatory offences have powers to compel answers from interviewees the production of information and documents.[526]

6.2 Police powers of investigation, including powers of entry and search of premises, are contained primarily in the Police and Criminal Evidence Act 1984 (PACE). A general power to search any premises occupied or controlled by a person who is under arrest for an indictable offence can be exercised if a police officer has reasonable grounds for suspecting that the premises contain relevant evidence.[527] Once at the premises, a police officer has the power to seize anything which they have reasonable grounds for believing they would be authorised to search and seize, where it is not reasonably practicable to determine at the time whether they do have such authorisation.[528] However, these powers are only available once a person is under arrest and are not available at a preliminary stage of an investigation. Further, if a police officer seizes anything which appears to be excluded material or special procedure material (as defined below), this must be returned as soon as reasonably practicable unless it cannot be separated from other property it is lawful to retain.[529]

6.3 By statute, journalists occupy a privileged position in relation to material in their possession; it is more difficult for the police to obtain this material which is hedged with greater legal

[525] See s6 of the Official Secrets Act 1920
[526] Financial Services and Markets Act 200, see ss14,15 and 168
[527] s18 PACE
[528] s50 of the Criminal Justice and Police Act 2001
[529] s55 of the Criminal Justice and Police Act 2001

protection. In practice, therefore, the police mostly rely on the specific provisions in PACE in order to obtain journalistic material, although the statutory powers of search and seizure are modified in relation to material held by journalists in circumstances where the information sought falls within the definition of "*excluded material*" or "*special procedure material*".

6.4 Journalistic material for the purposes of PACE is defined as material acquired or created for the purposes of journalism, but only if it is in the possession of a person who acquired it or created it for that purpose, and a person will be deemed to have acquired it for that purpose if it was given to them with the intention that it be used for that purpose.[530] The purposes of journalism are not defined in the Act, although the Supreme Court has recently considered the phrase "*purpose of journalism*" in the context of the Freedom of Information Act in *Sugar v British Broadcasting Corporation* and the majority held that the phrase should be narrowly construed to mean where an immediate object of holding the information is to use it for the purpose of journalism.[531] This requires a direct link between the holding of the information and achievement of its journalistic purposes. The wider 'dominant purpose' test was rejected.[532]

6.5 Excluded material for the purpose of s11(1) of PACE 1984 includes journalistic material consisting of document or records, if it is held in confidence. The paradigm example of excluded material is where a source gives information to a journalist on condition that his identity is not disclosed in any publication of the information. Excluded material generally does not include film taken by broadcasting crews or photographs, unless obtained in circumstances giving rise to a duty of confidence.

6.6 Journalistic material other than that falling within the definition of excluded material is defined as special procedure material for the purposes of s14 of PACE. Special procedure material is excluded from a warrant to search or enter premises issued by a justice of the peace, s8(1) PACE.

6.7 Section 9(1) of PACE enables access to be obtained to "*special procedure material*" and "*excluded material*" for the purposes of a criminal investigation, provided that the conditions set out in Schedule 1 of the Act are met.

6.8 Schedule 1 of PACE permits a constable to apply to a Circuit Judge for a Production Order, or in some circumstances a search warrant, where particular access conditions are met.

6.9 The first set of access conditions applies to applications for special procedure material and only permit a warrant to be granted where:[533]

(a) there are reasonable grounds for believing an indictable offence has been committed;

(b) material consisting of or including special procedure material (but not excluded material) is held at the premises specified in the application or controlled by the person named in the application;

(c) that the material is likely to be of substantial value, whether by itself or together with other material, to the investigation in connection with which the application is made;

[530] ss13(1), (2) and (3)
[531] [2012] UKSC 4
[532] See Lord Phillips at para 67, Lord Walker at para 84, Lord Brown at para 106
[533] Schedule 1, para 2 to PACE 1984

(d) the material is likely to be relevant evidence;

(e) other methods of obtaining the special procedure material have been tried without success or have not been tried as they would be bound to fail; and

(f) it is in the public interest to produce or allow access to the material, having regard to the benefit of the investigation if the material is obtained and the circumstances under which the person holds the material.

6.10 The second set out access conditions which applies to excluded matter provide that an order may be made where:[534]

(a) there are reasonable grounds for believing that there is material which consists of or includes excluded or special procedure material on the premises owned by the person named in the application, and/or premises occupied or controlled by the person set out in the application;

(b) a warrant would have been appropriate and available, but for the repeal by s9(2) of PACE of all provisions allowing warrants to be issued for such material.

6.11 Examples of circumstances in which a power to issue a search warrant in respect of an offence being investigated prior to PACE coming into force include investigations into stolen goods and offences under the Official Secrets Act. It is therefore unlikely that journalistic material would be sought pursuant to the second condition and case law indicates that journalist material is generally sought by the police under paragraph 2 of Schedule 1. It can be observed that there is very limited scope for obtaining access to excluded material.

6.12 Again, for the protection of journalistic privilege, the procedure for obtaining a production order is fairly rigorous. An application must be made to a Circuit Judge and notice must be given to the person in possession of the material.[535] A judge may only make an order if satisfied that one of the access conditions is fulfilled and the judge must exercise their powers with great care and caution and must be shown such material as is necessary to enable them to be satisfied before making the order, and told of anything which may weigh against the making of the order.[536] The judge must determine whether the conditions are met. It is not sufficient to simply consider whether the decision of the constable that the conditions were met is reasonable. The judge retains discretion to refuse to grant the order, even if the necessary condition is satisfied, and this permits the possibility that in an appropriate case, the view may be taken that there is a lack of proportionality between what might be gained to the investigation as against stifling public debate.[537] Once an order has been made, it is subject to challenge by way of judicial review.

6.13 On a number of occasions the police have used these powers to obtain orders requiring the press to hand over film and photographs of demonstrations or events giving rise to public order offences. These provisions have been recently analysed in the case *of R (on the application of British Sky Broadcasting Ltd and others) v Chelmsford Crown Court*.[538] The claimants included BSkyB, ITN, BBC, an independent production company and a freelance video journalist who had filmed for news purposes the Dale Farm evictions of travellers. Essex Police sought and were granted orders for production of footage on the basis that the footage would be of

[534] Schedule 1, para 3 to PACE 1984. s9(2) of PACE abolished searches for special procedure material and excluded material pursuant to any prior enactment
[535] Schedule 1, para 8 to PACE 1984
[536] *Crown Court at Lewes ex parte Hill* (1991) 93 Cr App R 60 and *R (Bright) v Central Criminal Court* [2001] 1 WLR 662
[537] *R (Bright) v Central Criminal Court* [2001] 1 WLR 662 per Judge LJ
[538] [2012] EWHC 1295

substantial value to police investigations into offences of violent disorder and other offences. The orders were challenged by way of judicial review. The Divisional Court held that full account must be taken of Article 10 considerations when determining an application under Sch 1.[539]

6.14 The court further noted that there was a need to balance the competing public interest considerations in the context of journalistic material and, whilst it is difficult to dispute that there is a real public interest in tracing any of those persons who were involved in public disorder or violence, that had to be set against the level of interference with the Claimants' Article 10 rights inherent in the production orders made. Having regard to the terms of Art 10(2), it was for the Essex Police to demonstrate that this degree of interference and the wide scope of the production sought was necessary and proportionate because of the "*substantial value*" attaching to the relevant material in the context of the investigation. On the facts there was insufficient evidence to justify this conclusion.[540]

6.15 It was noted that whilst the statutory provisions allowing disclosure orders can be of great value in tracing those responsible for public order and other offences and thus in serving the public interest, the importance of establishing the access conditions should never be underestimated. There is a burden to be discharged and disclosure orders against the media, intrusive as they are, can never be granted as a formality. There must at least be cogent evidence as to; (i) what the footage sought is likely to reveal, (ii) how important such evidence would be to carrying out the investigation, and (iii) why it is necessary and proportionate to order the intrusion by reference to other potential sources of information. In these proceedings, the burden was not discharged.[541]

6.16 Other material that does not fall within the definition of journalistic material that attracts the categorisation of "*excluded*" or "*special procedure*" material, is subject to normal procedures for search warrants and can be granted by a magistrate without any right on the part of the media to object and without a public interest test.

6.17 An issue of some importance is whether "*journalistic material*" includes material which has been obtained with the intention of furthering a criminal purpose, or, put another way, whether the protections set out in PACE for "*excluded*" or "*special procedure*" material still apply where the material has been acquired in furtherance of a crime.[542]

6.18 PACE includes an express caveat in the context of legal professional privilege that items held with the intention of furthering a criminal purpose are not subject to legal privilege, however there is currently no equivalent provision for journalistic material.[543] There is no direct authority which addresses the issue of whether journalistic material will not be held under an obligation of confidence where it has been obtained in the context of criminal behaviour, although the case law on the duty of confidentiality more generally acknowledges that the public interest in protecting confidences can be outweighed in certain circumstances, For

[539] *Ibid,* at para 14
[540] *Ibid,* at para 24
[541] *Ibid,* at para 31
[542] This issue is comprehensively and usefully dealt with in the submissions of Deputy Commissioner Craig Mackey dated 12 July 2012. These are considered in the context of recommendations concerning the relationship between the press and the police
[543] Section 10(2). It is also noted that Schedule 5 of the Terrorism Act 2005 includes provision to apply for an order for excluded or special procedure material (as defined in PACE) on the basis either that the material is likely to be of substantial value to a terrorist investigation and there are reasonable grounds for believing it is in the public interest that material should be produced or access to it given having regard to the benefit likely to accrue to the terrorist investigation and the circumstances in which the person has any of the material in his possession, custody or control

example, a person cannot be a confidant in respect of a crime of fraud.[544] It is therefore currently unclear whether material obtained in the context of criminal behaviour by a journalist would attract the protections of Schedule 1 by virtue of being excluded or special procedure material.

[544] *AG v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 282-283

APPENDIX 5
EVIDENCE RELEVANT TO THE GENERIC CONCLUSIONS ON THE RELATIONSHIP BETWEEN POLITICIANS AND THE PRESS: PART I CHAPTER 8

1. Introduction

1.1 This Annex should be read as a whole. In particular, it should be noted that:

(a) the references are set out in alphabetical order by the name of the witness. No particular inference should, therefore, be drawn from the order in which they are presented;

(b) in most cases, the facts upon which the conclusion is based in Part I Chapter 8 are readily apparent from the terms of the criticism itself and the evidential references, and are not separately stated at length;

(c) some of the conclusions overlap and the supporting facts and evidence are not always set out more than once;

(d) the evidence referenced in support of each conclusion is intended to be representative rather than exhaustive, especially in cases where the Inquiry received significant volumes of similar evidence.

1.2 It is the cumulative effect of the evidence cited, taken together and looked at as a whole, which supports the conclusion.

2. Referencing

2.1 The full title of each witness is given in the first reference to their evidence. Witness statements, exhibits and transcripts are identified by a hyperlink to their location on the Inquiry website, www.levesoninquiry.org.uk.

2.2 When reference is made to a witness statement, the numbering system of that document, i.e. paragraph or page number, has been used. For example, page 12 of the Supplementary Witness Statement of Mr Alan Rusbridger is cited as follows:

> Mr Alan Rusbridger p12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Supplementary-Statement-of-Alan-Rusbridger.pdf

A reference to a page in a witness statement does not necessarily imply that the content of the entire page is cited as support for the related fact. Where available, paragraph numbers have been used.

2.3 When reference has been made to a passage in a transcript, the passage is identified in the form [page number]/[line number]. The page number is a reference to pages of the transcript, not to pages of the pdf document. There are 4 transcript pages per page of the document. For example, the passage from page 19, line 5 to page 21, line 4 in the transcript of the afternoon of 23 April 2012, during Mr Evgeny Lebedev's evidence is cited as follows:

Mr Evgeny Lebedev 19/5-21/4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf

3. Development and maintenance of an over close relationship between politicians and national Newspapers

Conclusion

(i) The political parties of UK national government, and of UK official opposition, have had or developed too close a relationship with the press. This conclusion relates at least to the period of the last thirty to thirty-five years. Although aspects, and the problematic nature, of this relationship have fluctuated over time, there has been a perceptible increase in proximity which has not been in the public interest.

(ii) The relationship between the press and the politicians has been too close in the following principal respects:

a. politicians have spent a disproportionate amount of time, attention and resource on this relationship in comparison to, and at the expense of, other legitimate claims in relation to their conduct of public affairs;

b. in conducting their relationship with the press, politicians have not always maintained with adequate rigour appropriate boundaries between the conduct of public affairs on the one hand and their private or personal interests on the other;

Evidence base and factual summary

Mrs Sly Bailey:

- 118/8-119/4, on access to politicians, esp. "if you are the editor of a national newspaper you can pretty much get to see whomever you want to", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-16-January-20121.pdf

Mr Aidan Barclay:

- paras 37, 40-43, 47, 48, on his contact with senior politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Aidan-Barclay.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Appendix-D-to-Witness-Statement-of-Aidan-Barclay.pdf
- 71/17-79/18, 83/18-88/24, 89/2-90/1, 100/1-101/14, on his contact with senior politicians, including text messages, levels of access, sufficiency of transparency, and privileged position of the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
- 94/6-95/20, 100/1-100/24, on Liam Fox and David Davis requesting meetings with him at the time of the Conservative Party's last leadership contest, and on the privileged position of the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf

The Right Honourable Tony Blair:

- list of meetings with proprietors and editors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Exhibit-to-Witness-Statement-of-Tony-Blair.pdf
- 35/13-36/25, on the degree of proximity between the press and politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
- 9/8-11/14, 87/18-89/8, View (from his speech of 12 June 2007) that inordinate attention paid to the media, courting the media in the run up to the 1997 election, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

Mrs Rebekah Brooks:

- para 43-4, 48, 53-55, 57, 58, 65-66, on the frequency of her contact with senior politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Rebekah-Brooks.pdf
- 24/14-45/16, on her proximity to Tony Blair, Gordon and Sarah Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
- 45/17- 50/9, 73/16-81/18, 82/10-82/14, on her proximity to David Cameron and George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
- 91/16-91/23, on lobbying against the amendment to s55 Data Protection Act, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
- 94/18-98/5, on politicians' desire to get close to Rupert Murdoch, and her own friendships with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
- 6/2-8/2, on messages of support from politicians, 20/22-21/7, political attendees at her 40th birthday party, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
- paras 30-32, 40-44, on her relationship with public figures, working relationships and friendships, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Rebekah-Brooks.pdf
- para 35, on the relationship between press and politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Rebekah-Brooks.pdf
- 53-63, 65-68, on contact with recent prime ministers and their families, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Rebekah-Brooks.pdf
- 31/25-32/14, on The Sun being the first to receive scoops http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

The Right Honourable Gordon Brown MP:

- list of meetings with the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-GB3-to-Witness-Statement-of-Gordon-Brown-MP.pdf

The Right Honourable Dr Vincent Cable MP:

- 25/9-25/22, on the political influence of News Corporation, and the leaders of the major political parties having got too close to them, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

The Right Honourable David Cameron MP:

- meetings with media figures as Prime Minister, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf
- 70/22-72/24, on text contact with Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
- note on meetings with media figures as Leader of the Opposition, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf
- register of member's interests entries referring to media related hospitality, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-3.pdf
- paras 184-185, Jeremy Hunt's notes referring to speculation about a "deal" and that there was general suspicion when politicians met media barons; 188-191, publication since 15 July 2011, of lists of meetings with media proprietors, senior executives and editors (to be contrasted with the position in the past); 206-207, post 2010 election meeting with Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- on his personal friendships with journalists and the circumstances in which he came to meet Rupert Murdoch in Santorini, para 79, 195, 199, 209-210, 212-214, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- 47, 218, acceptance that the relationship between politicians and the media has become too close, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- 12/5-12/7, 14/21-15/5, relationship between press and politicians has been too close, has unhealthy aspects and has not been right for the last 20 years, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
- 33/5-33/10, 42/3-43/2, 57/12-59/17, 74/13-86/20, friendships with journalists and others, and dealings and friendships with Matthew Freud, Charlie and Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
- text messages, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Copy-of-R-Brooks-text-message-to-D-Cameron-7.10.09.pdf
- 13/4-14/4, 50/15-50/24, 52/20-53/11, 53/12-54/8, 97/20-98/4, on the effort required to deal with the news agenda and the risk of being distracted from policy by the news agenda; on the need to govern whilst fighting media battles; on the time spent dealing with the media; the risk of media engagement intruding on policy formation, leadership and government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

Mr Alastair Campbell:

- pp33-34, on his contacts with proprietors and journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- 53/13-56/10, on Rebekah Brooks as a constant presence, the frequency of his contact with her, and access to the then Prime Minister, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- 50/5-55/9, on his and New Labour's relations with Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- pp20, 23 on clinging on to the media management techniques of opposition whilst in government and on the time and energy required to deal with the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
- 60/15-63/6, on that part of Tony Blair's speech of 12 June 2007 dealing with the damaged relationship between the media and public life, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-30-November-2011.pdf
- p25, on the time and energy required to deal with the press and on government seeking to be over controlling of the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- 65/15-65/23, 82/4-84/4, on the amount of time required to deal with the media having become a problem, and his response to Lord Mandelson's view that too much time was spent managing media at the expense of managing policy, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- 13/17-13/20, on newspapers becoming part of the political process, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-30-November-2011.pdf
- pp21-22, on the failure of politicians to stand up to the media, patronage and the giving of privileged access to certain parts of the media by politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- 66/10-66/19, on political patronage towards the media and giving the media too much of a sense of their own place within the political firmament, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf

The Right Honourable Kenneth Clarke QC MP:

- table of contacts with media proprietors etc., http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-KC3-to-Witness-Statement-of-Kenneth-Clarke-QC-MP-redacted.pdf
- 28/9-30/9, on the rise of media pre-briefing and pre-budget leaks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
- 53/9-55/3, on political competition for the support of The Sun and Gordon Brown's preoccupation with it, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf

- 48/18-49/22, on the development of a preoccupation with newspapers and 24 hour a day interaction with them, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
- 29/8-30/9, on pre-briefing and off the record conversations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf

The Right Honourable Nick Clegg MP:

- list of meetings and events, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-NC-1.pdf
- paras 36-43, on his contact with figures in the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 21/20-25/1, 32/4-33/8, on his contact with figures in the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- para 19, politicians must never again develop the dependency relationships of the past decades, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 47/2-47/10, on the privileged access of journalists to politicians http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- para 10, on the need for the media and politicians to build relationships but to avoid mutual dependency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 98/13-99/9, on the consequences of the excessive proximity between press and politician (and press and the police): a feeling that the press could do what it liked, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- 25/8-26/16, on the context of intimacy between the press (editors and proprietors) and politicians, and the need for distance, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf

Mr Paul Dacre:

- 111/10-120/9, access to Mr Straw and Mr Brown in relation to the proposed amendments to s55 Data Protection Act 1998 and other issues of concern to him, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-6-February-20121.pdf

Mr Tony Gallagher:

- 83/10-84/7, on maintaining distance, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-10-January-2012.pdf

The Right Honourable Michael Gove MP:

- table of meetings with media organisations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-MG5.pdf

- 3/20-4/11, on the minority of journalists and politicians who develop an overly close relationship which is not in the public interest, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf
- 38/4-38/10, on some politicians paying too much attention to what newspapers say, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf

Mr James Harding:

- 91/1-92/5, on his social and semi-social contacts with politicians, and meetings with the Prime Minister, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-17-January-2012.pdf
- p1, letter supplementing and correcting his evidence as to the occasions on which he had met politicians with either Rupert or James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Letter-to-the-Inquiry-from-James-Harding.pdf
- 110/21-110/24, on the dangers of getting too close, in particular the historical example of politicians getting too close to a newspaper: The Times' support for appeasement, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-17-January-2012.pdf

The Right Honourable Jeremy Hunt MP:

- table of meetings with media organisations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Annex-B-MOD300005624.pdf

Mr Evgeny Lebedev:

- 19/5-21/4, on the extent of his contact with Prime Ministers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
- pp3-4, his contact with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Evgeny-Lebedev.pdf
- 35/7-35/21, on politicians leaking information and speaking off the record, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf

Mr John Lloyd:

- para 9, on contacts between journalists and politicians, especially the attitude of senior politicians to media proprietors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-John-Lloyd.pdf
- 3/22-8/4, on the nature of the relationship between press and politicians in other countries and compared to the UK, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-26-June-2012.pdf
- 23/24-27/10, on the relationship between the press and politicians, especially "feeding the beast", New Labour's constant proactivity and more widely the "extremely attentive" attitude of politicians to the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-26-June-2012.pdf

Mr Kelvin MacKenzie:

- 33/3-33/13, on the desire and motivation of politicians to meet tabloid newspaper editors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-9-January-2012.pdf

The Right Honourable Sir John Major

- contact with the press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-1.pdf
- turning down media hospitality and discouraging his ministers from doing so, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-3.pdf
- lunch for editors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-4.pdf
- para 27, on the excessive proximity between press and politicians and the resulting damage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- 14/6-14/16, overly close relations prevent the press from holding government to account, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

The Right Honourable Lord Mandelson

- p6, on the closening relationship between successive prime ministers Tony Blair, Gordon Brown and David Cameron respectively with Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
- 55/7-62/14, 79/10-79/11, on News International's and especially Rebekah Brooks' approach, especially assiduously keeping in touch; Gordon Brown's friendship with Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
- p5, on media demands taking time from policy formulation and discussion, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
- 86/13-87/18, on New Labour's excessively media centric approach during its early years in government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

Mr Andrew Marr:

- pp4-5, on the potential dangers of friendships between politicians and journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- p7, on the self defeating amount of energy spent on presentation, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- 98/3-98/21, on the obsessive interest in headlines, media management and PR, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf

- p5, on privileged information and the privileged position of News International's titles, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- 64/20-67/25, on the privileged position of Rupert Murdoch's journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf

The Right Honourable Ed Miliband MP:

- list of media contact, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-EM-1.pdf
- 31/16-31/21, on the "permanent campaign", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf

Mr Dominic Mohan:

- 57/23-58/2, on the frequency of his contact with the Prime Minister, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-9-January-2012.pdf

Mr Piers Morgan:

- 101/17-104/12, on his own very frequent contact with Tony Blair and on Tony Blair's early interactions with Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-20-December-2011.pdf

Mr James Murdoch:

- para 9.6 & JRJM9, list of meetings and social events with UK prime ministers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf-; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-9.pdf
- para 9.6 & JRJM9, list of meetings and social events with UK prime ministers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-9.pdf
- 56/8-69/14, his access to and contact with Tony Blair, Gordon Brown, and David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
- 83/16-85/20, on politicians' perception that the endorsement of a newspaper is very important and their interest in whom a newspaper is going to endorse politically, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf

Mr Rupert Murdoch:

- paras 99-100, on Tony Blair's conversation with Mr Prodi about Mediaset, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf

- paras 82-84, 90, 93, 110, 117, 119, on his relations with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
- 74/17-76/9, Tony Blair writing about Europe in The Sun, Rupert Murdoch's reasoning in backing Tony Blair and his timing in doing so, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf

Mr Peter Oborne:

- para 5, first two sentences, observing that the Murdoch press typically forms an alliance with the party in power, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Peter-Oborne.pdf
- 19/9-22/11, on the overly close relationship between press and politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf
- 50/1-51/7, on the leaking of details of Mr Osborne's budget, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf
- 22/12-24/22, on favouritism, proximity and the crossing of appropriate boundaries between press and politician, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf

Lord O'Donnell:

- paras 14-19; p. 11, on the risks and consequences of an overly close relationship, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 18/23-19/5, 22/10-26/16, on the increasing closeness of the relationship, the reasons for it and the risks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- 28/15-30/25, on the transition from opposition to government and politicians' relations with the media during this transition, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- paras 16, 18, on the relationship between the press and politicians, especially the development of unhealthy "feedback loops" and the need for distance, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 75/11-76/14, on the increase in resources allocated to media relations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- p14, on the increasing number of SpAds with a media or PR background and the tendency of SpAds to see their role as boosting their minister's media profile, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 53/14-58/15, on the growth in the use of special advisers and the change in their skills base, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

- para 14, on the problem of the supply of political news to favourites, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 46/20-46/21, on certain editors getting in to see prime ministers more than others, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- para 17, on the use of mobile phones, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf

The Right Honourable George Osborne MP:

- tables of meetings with media proprietors etc. May 2005 – present, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Annex-A-to-First-Witness-Statement-of-George-Osborne-MP.pdf
- 11/20-19/24, oral evidence about contact with media figures generally, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
- 50/11-51/12, 55/2-55/16, on the media pressures felt on 21 December 2010 after Vince Cable's remarks about the "Murdoch empire" were made public, and on the speed of reaction required of government to respond to breaking stories (including those arising from events at the Inquiry), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

The Right Honourable Lord Patten of Barnes:

- 11/18-15/19, on the worsening problem of over closeness, how and why the problem emerged and where to draw the line, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-23-January-2012.pdf
- 8/15-9/5, 11/8-11/16, on politicians "groveling" to the media and on paying excessive attention to front pages, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-23-January-2012.pdf

Mr Jeremy Paxman:

- 118/2-123/3, on the need for personal distance and the relationship between politicians and journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-23-May-2012.pdf

Mr Alan Rusbridger:

- p12, News International dominant in British cultural and political life; politicians accept that they were too close to News International, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Supplementary-Statement-of-Alan-Rusbridger.pdf

The Right Honourable Jack Straw MP:

- 79/11-80/3, on the responsibilities of both politician and journalist, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

- 4/15-5/24, 65/6-67/14, 87/9-88/4, on the development of overly close relations between opposition spokespeople and journalists; the need for a different relationship with the media in government, pre-briefing's role in the development of an overly close relationship between press and politician; and recognition that all parties got too close to the press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
- 17/23-20/21 on Rupert Murdoch's shifting political support and its effect on News Corporation's relationship with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
- para 124-127, on the problem of the pre-briefing of speeches and the need for tighter rules, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
- 65/12-67/14, 75/8-77/12, on pre-briefing, the problematic relationship that results from it, and the leaking of the Lawrence report, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

Mr Richard Wallace:

- on the type and frequency of his contact with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Richard-Wallace.pdf
- paras 43-46, on his contacts with senior politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Richard-Wallace.pdf
- 39/17- 40/9, on the importance which politicians attach to media coverage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf
- 41/16-42/4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf
- 44/4-45/15, view that politicians got too close to News International, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf

Mr Neil Wallis:

- 91/8-91/13, on the connections and interactions between The Sun and New Labour after the 1997 general election, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-2-April-2012.pdf
- pp19-25, on his contact with politicians and what motivates them to communicate in the way that they do, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- pp18-29, his contact with politicians over the years, the frequency and nature of that contact, including his observation that politicians would "crawl over broken glass" to see Mr Murdoch and the example which he gives of sharing of an opinion poll with Mr Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- pp23, 24, 27, on his contact with politicians, their desire to mix with journalists, e.g. the politician who ate three political breakfasts with different newspapers at a party conference, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Neil-Wallis.pdf

- 92/3-92/15, on the courting of News International by New Labour and the extent of their interaction, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-2-April-2012.pdf
- p.2 , on the courting of the press by New Labour, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf

Ms Tina Weaver:

- para 64, on the type and frequency of her contact with politicians, particularly the frequency of her contact with Labour prime ministers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tina-Weaver.pdf
- 6/25-7/3, view that politicians got too close to News International, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-16-January-20121.pdf
- para 63, on the fact that politicians leak stories, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Tina-Weaver.pdf

Lack of transparency and accountability

Conclusion

(iii) Politicians have failed to conduct their relationship with the press sufficiently transparently and accountably from the point of view of the public.

Evidence base and factual summary

Tony Blair:

- 39/16-40/12, on not publishing media meetings and on Rupert Murdoch visiting Downing Street by the back door, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

Gordon Brown MP:

- 96/24-98/4, on failing to reform the lobby system, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
- 23/5-23/12, on the difficulties in changing the way politicians communicated with the press; 50/11-51/6, on the difficulty of changing a closed culture of politicians' communication with press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

David Cameron MP:

- para 3, on the limits of disclosure of meetings made by Government departments; 4, 6, that social interactions which do sometimes involve political discussions are not disclosed, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf
- para 4, the reasons why a comprehensive list of contacts with members of the media could not be provided http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf

- paras 5-8, on incomplete records of interactions with members of the media; 21, on changes in transparency; 26, on changes in transparency; 69, on interactions with media figures that are still not declared; 96, on a previous lack of transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- 54/1-56/11, on distance, transparency and mutual respect, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf

Alastair Campbell:

- paras. 48, that some meetings were not put in the public domain; 53, on avoiding the front door when Rupert Murdoch visited Downing Street, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- 49/3-49/19, on the use of the back door of Downing Street to avoid media attention, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- 57/24-61/6, on the risk of undue influence arising from disproportionate access and the need for transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- pp19-20, on problems when lobby briefings were off the record, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
- paras 19-22, on the problems with a closed lobby system, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf

Nick Clegg MP:

- paras 36-43, that some interactions are not recorded; 48-50, on changes to recording meetings with senior media figures, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- paras 12-16, 71, on the perception of undue influence when Rupert Murdoch acquired The Times and when New Labour opposed the retention of certain plurality controls in the mid-1990s, on the need for transparency, and on one-to-one meetings between the press and senior politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 8/19-9/25, increases in transparency and the link between transparency and accountability, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- para 11, on the need for transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf

Michael Gove MP:

- para 63, that it would be impractical to put all meetings with members of the media in the public domain, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Michael-Gove-MP.pdf

Jeremy Hunt MP:

- para 91, that there is a need for greater transparency on politicians' meetings with the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf

John Lloyd:

- para 16, on the risks of an overly close relationship between press and politician and of press power and the need for (inter alia) greater transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-John-Lloyd.pdf

Lord Mandelson:

- pp15, on phone contact with Rupert Murdoch and the "sensitivity" of him being seen to use the front door of Downing Street; 17, on Rupert Murdoch being welcomed into Downing Street and ministers having "a cosy fireside chat over mulled wine in Oxfordshire with their favourite mogul to discuss media regulation", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
- pp4, 5, on the consequences of spin and the need for an open relationship with the press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Mandelson-Annex-1.pdf

Andrew Marr:

- p7, on secrecy and self policing in the lobby system, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf

Ed Miliband MP:

- p6, that until recently interactions with senior media figures were considered private, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf
- p2, on the need for transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf

Rupert Murdoch:

- 13/5-13/14, on entering and leaving Downing Street by the back door, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
- 10/5-15/13, lunch with Mrs Thatcher at Chequers in January 1981, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-14.pdf

Peter Oborne:

- 47/9-47/24, on the lobby system and that political reporting has become "too inside", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf

- p1, that the existence of personal friendships between political and media figures is private, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-PO2-to-Witness-Statement-of-Peter-Oborne.pdf

Lord O'Donnell:

- para 26, on limiting the meetings with members of the media which are published, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 36/15-38/2, on not disclosing meetings with journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- pp3-7, discussions of amendments to the Ministerial Code with regard to transparency, that the increase in transparency was limited, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-LOD-1.pdf
- paras 28-31, on changes in government communications to be more open and transparent, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 20/12-21/9, on changing the lobby system in relation to who was allowed in and how it could be reported; 76/19-77/17, on a London-centric atmosphere at the lobby, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- para 10, that there should be greater transparency about personal relationships, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- paras 5-6, on the importance of transparency; 9-11, the importance of transparency and the need for greater transparency; 23, increasing transparency in the role of special advisors who brief media; pp. 10-11, on the need for transparency, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf

George Osborne MP

- paras 2.2, 2.4, on incomplete records of interactions with members of the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
- 10/13-11/9, on incomplete records of interactions with members of the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

Jeremy Paxman:

- para 3.2, on the risk of undisclosed close personal relationships, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jeremy-Paxman.pdf

Jack Straw MP:

- 17/10-17/13, that the lobby has been even more incestuous than it is today, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

4. The consequences of excessive proximity

Conclusion

(iv) In consequence of, or associated with, this relationship of inappropriate closeness, politicians have conducted themselves, contrary to the public interest, so as to:

a. place themselves in a position in which they risked becoming vulnerable to unaccountable influences, in a manner which was potentially in conflict with their responsibilities in relation to the conduct of public affairs;

b. permit, accept or encourage the power and dominance of certain voices in the press, to the impoverishment of public debate and the formulation and implementation of public policy;

c. miss a number of clear opportunities decisively to address, and persistently fail to respond more generally to public concern about, the culture practices and ethics of the press;

d. seek to control and manipulate the supply of news and information to the public in return for favourable treatment by sections of the press, to a degree and by means going beyond the fair and reasonable partisan conduct of public debate, particularly bearing in mind the responsibilities of parties in government.

Evidence base and factual summary

Tony Blair:

- 3/21-5/19, on his decision as a leader not to confront the issue of politicians' relationship with the press; 6/25-7/16, on responsibility for not confronting issues of proximity and the power of the press; 12/24-13/16, on his "strategic decision" not to take on the media, and the fear of the media's power; 43/19-43/22, that an inquiry on cross-media ownership would have been "a distraction for the Labour party coming into office"; 44/2-46/21, on communication with Rupert Murdoch on the issue of an inquiry into media ownership; 53/21-60/18, on the power of the press and his "strategic decision" not to take on media issues; 67/18-68/25, on his decision not to confront the Murdoch media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
- 24/18-25/10, on the responsibility of the political class for not dealing with the problem, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-28-May-2012.pdf

Rebekah Brooks:

- paras 81-82, on the effect of newspaper campaigning on the Domestic Violence, Crime and Victims Bill 2005, and the campaign for resignations in the Baby P case; 84, that newspapers campaign for political resignations and that politicians talk to her about the newspaper's readers' perceptions of them, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Rebekah-Brooks.pdf
- 103/4-103/14, that Dominic Mohan or Tom Newton Dunn would have talked to Number 10 or the Home Office when launching a campaign for a review of the McCann case; 105/22-106/7, that she was part of a strategy to use the campaign to persuade the government to undertake a review of the McCann case; 106/19-106/21, that the campaign was launched

in order to convince the government to undertake a review; 107/2-107/11, that the campaign succeeded and The Sun 'won', http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

- 46/12-49/19, on The Sun's call for Sharon Shoesmith to resign, on discussing this with politicians and the way in which the campaign worked, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-11-May-2012.pdf

Gordon Brown MP:

- 86/14-91/25, on special advisors briefing against other politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
- 21/15-23/4, on a system of communication with the press where select people got early information, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

David Cameron MP:

- paras 22-33, on the risks in the relationship between politicians and journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- 33/12-34/12, that politicians have briefed against others, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
- 33/12-34/7, on favourite journalists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
- paras 29, that the media can pressure politicians to modify specific policies and there is a risk that politicians allow the media to shape the political agenda; 31-32, that the risk is greater for politicians in government; 137, that sustained negative media coverage and pressure can make decision making in government difficult; 138-139, that the media can affect political and public appointments; 141, the effect of media pressure on Liam Fox and his decision to resign; 149-154, giving an example of the press shaping the political agenda in the Baby P case by bringing issues to the attention of politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
- paras 30-32, that lobbying by the media in relation to their interests has an 'added angle' in that politicians have a relationship with and interest in the media, and that this risk is greater for politicians in government who implement policy and set the news agenda; at para 56, describing the concerns of media companies about media and regulatory policy; at para 99, that media companies have a greater interest in the formation of media policies close to a general election when manifestoes are written; at paras 101-102, that media organisations engage with political parties on media policies; at para 104, that the particular thing about media policy is that those affected by it also report it and communicate it to the electorate; at paras 105-120, describing the development of media policies whilst in opposition and the consultations with media representatives during the formation of *Plurality in a New Media Age*; at para 121, that media businesses seek to represent their interests to Government and parties; at para 156, that he would have discussed the BBC with Rupert Murdoch; at para 161, that he discussed the BSkyB bid with James Murdoch on 23.12.10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

Alastair Campbell:

- 26/7-30/10, on Rupert Murdoch requesting that Tony Blair raise the Mediaset issue with Romano Prodi, and Tony Blair doing so, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- p42, on leaks with a political motive, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
- 79/1-81/4, on media advisors and media teams using relationships with the press for "character assassination" and to undermine other politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- paras 13-14, on presenting policies in certain ways to win support, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- paras 5-2, on the Conservative HQ feeding lines of attack, and stories that were often untrue, to newspapers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- p49, on offering articles and interviews to the Mail, and briefing ahead of speeches, in order to improve Labour's relationship with the newspaper, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
- 64/24-70/1, on the influence of the media on the way in which government works and that some political power has been ceded to the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
- 22/5-22/19, saying that the impact of cross media ownership policy on the Murdoch press would be considered as a factor, in that the way in which a policy was written up or perceived was a factor in the policy making process, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf

Kenneth Clarke QC MP:

- 45/5-45/12, on transactional relationships between journalists and proprietors, the engagement between PR operations of political parties and political operations in the press by media proprietors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
- 45/15-46/21, on giving certain journalists early stories in order to control coverage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
- paras 65-68, that government decision making has become more influenced by the media, the policy making climate has an excessive emphasis on media presentation, short term policy making in response to media coverage can lead to long term policy failures; 70, that the Government should strive for a better balance between effort spent on policy and on presentation, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Kenneth-Clarke-QC-MP.pdf
- 8/11-8/22, that policy decisions have sometimes been taken primarily because of the fear of press reaction and because of press campaigning; at 10/10-10/16, that editors and proprietors can drive a weak government like a flock of sheep in some policy areas; at 11/9-11/20, that the power of the press is greater than that of Parliament, and that in some policy areas decision making is dominating by avoiding retribution from the press

or by winning favour from the press; at 21/21-22/5, at 40/1-40/25, that the previous government, with 'a certain lack of subtlety', had appointed Paul Dacre to consider the 30 year rule for the disclosure of documents; at 55/11-56/19, that politicians have responded to tabloid newspaper campaigns with criminal justice legislation; at 57/19-58/12, that politicians' responses to calls by certain newspapers for tougher sentences has (in his opinion) been detrimental, in that it has increased the prison population and overcrowding and has worsened reoffending, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf

- 3/21-4/16, that the previous government's announcement before the election that they would only act on Lord Justice Jackson's recommendations in the areas of privacy and defamation was a way to win favour with the media; at 42/12-43/5, that he would expect the newspapers to win when it came to lobbying Parliament, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf

Nick Clegg MP:

- 6/12-8/18, on political clientism; 93/6-95/1, that politicians don't need to or shouldn't pander to press whims, and that an assertion of the right of politicians to make decisions in their own right would be helpful, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- paras 5-8, on media influence over government policy and the responsibility of politicians to resist undue media pressure, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- paras 62-64, describing the influence of media campaigns, the influence of media reaction on the content and timing of government announcements, and the risk of government being driven by press reaction; 67-70, that the press can have a censoring effect on politicians; 75, that media reaction is taken into account in public appointments and resignations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 2/13-3/12, on media influence over government policy; 20/22-21/10, on the power of a press campaign and the temptation of politicians to respond positively to campaigns in order to communicate themselves positively to the public, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
- paras 12-15, that the media have a unique amount of contact with the politicians that they lobby, that there is a risk of inappropriate relationships where the goodwill and opinion of the media is offered to politicians, and that the media has a direct route to influence public opinion on matters to do with its own sector, and that perceptions of media influence over policy has arisen in the past; at paras 36-43, describing contact with the media, and that media and commercial issues did arise during that contact; at paras 57-58, referencing examples of media lobbying on media policies; at paras 71-72, that newspapers can be one of the most powerful lobbying machines and are able to meet politicians without officials being present, and that there is a danger that lobbyists for the media have more power over politicians that other lobbyists, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
- 10/1-10/23, that media are often lobbyists in their own commercial interests and that the press are able to be judge and jury in their own affairs; at 31/15-31/25, that in discussions with editors and proprietors media and commercial issues have arisen, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf

Michael Gove MP:

- 2/12-2/24, that some politicians will regard their relationship with journalists as transactional, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf
- 33/3-33/10, that some politicians change policies to win good headlines, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf
- 10/1-10/14, that some politicians have bent to the will of newspaper proprietors in the political sphere; at 16/2-16/13, that newspaper proprietors can influence politicians in a way that is unethical or contrary to the public interest, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf

Jeremy Hunt MP:

- 91/25-93/14, on giving favoured journalists exclusive stories in the hope of positive coverage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

John Lloyd:

- at paras 10-12, describing areas of media influence over political policy and areas of policy that impact on the media, and saying that it is observed and reported that the media's influence over public opinion gives them an edge when lobbying or negotiating with politicians; at para 22, that the media use the power their audience gives them to persuade politicians not to damage their interests, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-John-Lloyd.pdf

Sir John Major:

- paras 12, on politicians trading leaks or stories that denigrate colleagues for favourable coverage; 50, on hostile briefing and leaking of the Framework Agreement with the Irish Government in 1995, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- on an example of untrue stories being given to the media for party political advantage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Second-Witness-Statement-of-Sir-John-Major.pdf
- 16/14-17/6, on stories being leaked by politicians to the press maliciously, in order to denigrate other politicians; 17/18-18/8, on politicians leaking private discussion of policy in order to gain advantage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
- 88/4-91/2, on politicians or their advisors briefing the press with untrue stories, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
- paras 16, on political press secretaries managing news using favoured journalists and papers; 32, on party political press secretaries, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- 17/25-18/8, on the leaking of private political discussions in government in order to seek press favour and damage opponents; 19/12-20/13, on spin and on journalists being

given exclusive stories and reporting them with a favourable tilt for the government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

- 18/9-20/13, on politicisation of government information services, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
- paras 17-18, on politicians using a relationship with the press to make inaccurate allegations about opponents' policies; 50, on hostile briefing and leaking of the Framework Agreement with the Irish Government in 1995, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- para 31, on the exchange of information to favoured sources for friendly treatment, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- 63/6- 87/18, on the response of government to Calcutt 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

Lord Mandelson:

- 25/15-26/20, on leaking or briefing to the press on the subject of whether Tony Blair would call a referendum on the EU constitutional treaty, with the result that it became a fait accompli, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
- pp12, on Britain's national interests coming second to appeasing media prejudice on Europe, and Tony Blair having "sold the pass over Europe", 14, on influence of media over government policy via editorial content and campaigns and lobbying by e.g. Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
- 19/16-21/3, on making concessions "at least on rhetoric and tone, language" on policy areas such as Europe; 29/1-33/1, on changing the presentation of policies and attaching too much importance to press proprietors, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
- pp2, on the transactional relationship between politicians and journalists, exchanging help with stories for favourable treatment; 4, the risk of abuse inherent in the transactional relationship, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
- 94/12-96/23, on the nature of the relationship between politicians and journalists as a trade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
- 1/11-1/23, on the "transactional process" between politicians and the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
- pp11, that the media can shape how policies are received by the public which can have an effect on party leaders, describing media influence in particular policy areas, and the way in which media reaction influenced Tony Blair's appointment of Jack Straw as Foreign Secretary; 12, that Britain's interests on Europe have come second to governments pandering to media prejudice; 14, that media influence on policies can take the form of bullying editorials, that Rebekah Brooks was adroit at pushing her views on government,

and that Sun campaigns intruded into government policy making; 16, the relationship between Labour party policy on Europe and Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf

Andrew Marr:

- 64/20-67/25, on relationships between politicians and newspapers or journalists that gave them favourable treatment, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf
- pp3-4, on ministers leaking against other ministers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- p8, on Tony Blair offering different presentations of his views on Europe to different newspapers, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- 68/1-69/1, on an article by Tony Blair in The Sun, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf
- p7, on politicians spinning and distorting information, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- p4, that getting stories requires a personal relationship with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- pp7, that politicians are terrified to be seen to impose controls on journalism; 10, that the largest media organisations have a strong influence on media policies, giving examples, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf
- p10, that the largest media organisations have a strong influence on media policies, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf

Ed Miliband MP:

- p2, on the risk of media support in return for favours from politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf
- 30/19-31/11, on off the record briefing against colleagues, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
- p2, that the risk of a relationship between senior politicians at a national level and the media is that an inappropriate degree of closeness affects decisions in relation to issues such as media ownership, giving the example of concerns over BSkyB; at p4, that the concentration of media ownership has increased the conflict between politicians' duty to the public interest and their interest in remaining on good terms with a powerful media proprietor, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf

Peter Oborne:

- para 7, on the link between government ability to do media organisations favours and positive coverage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Peter-Oborne.pdf
- p1, on a culture of client journalism, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-PO2-to-Witness-Statement-of-Peter-Oborne.pdf
- 45/2-46/2, on implicit deals between politicians and journalists that briefing against colleagues is exchanged for favourable coverage; 46/15-46/18, on meetings between journalists and ministers leading to "some sort of bitchy piece about a colleague", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf
- p2, on the reporting of untruths by politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-PO2-to-Witness-Statement-of-Peter-Oborne.pdf
- p1, on a culture of client journalism, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-PO2-to-Witness-Statement-of-Peter-Oborne.pdf
- 37/5-38/11, that there was a sense that News International was above that law and was given political protection by the government, giving examples, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf

Lord O'Donnell:

- p14, on the link between leaking and pre-briefing and media interest in disagreements in government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 23/1-26/16, on the risks of politicians being motivated to persuade newspapers that their policies are right, and explaining policies in a certain way to garner support; 31/24-32/21, media reaction as a factor when politicians make policy decisions, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
- paras 18-19, on a "feedback loop" between politicians feeding stories to supportive newspapers and newspapers' political biases becoming stronger, and leaks and advance briefing of government measures in order to put them in a good light, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- para 25, on the inappropriateness of the Order in Council in relation to Alastair Campbell contrasted with the impartiality of civil servants, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 31/24-32/21, that politicians take into account likely media reaction to and support for a policy and that in relation to regulation and taxation of the press politicians are very nervous because of the possibility of personal attack by the press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

Jeremy Paxman:

- para 2.12, on politicians telling journalists things to settle a score or undermine a colleague, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jeremy-Paxman.pdf
- para 2.13, on the politicisation of the government information service, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jeremy-Paxman.pdf
- paras 2.10, that the media has an influence over public policy; 10.1, giving examples of governing in response to headlines, including amendments to legislation to reform the NHS, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jeremy-Paxman.pdf
- 121/23-122/19, that politicians caring too much about how they are portrayed in the media risks ending up with legislation like the Dangerous Dogs Act, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-23-May-2012.pdf

Jack Straw MP:

- para 11, on the risk of politicians being influenced by the agendas of media organisations, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
- para 24, on the risk of opposition politicians "playing fast and loose with statistics", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
- 5/3-5/11, on most political stories being "knocking stories", and on relationships between particular journalists and opposition spokespeople; 5/12-5/17, on building relationships with correspondents to "build up stories and enjoy the results", http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
- 78/14-79/6, on the privileging of some journalists and newspapers over others, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
- 78/14-79/6, that specific newspapers or journalists were favoured by Downing Street or ministers, that these groups were "very, very incestuous", http://www.levesoninquiry.org.uk/wpcontent/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
- paras 115, that the media plays an important role in the development of policy; 117, the political class has indulged the tendency of sections of the media to exercise power without responsibility; 119-122, that pressure from the press can be intense in certain policy areas, and that he had sometimes pursued a policy due to media coverage, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
- paras 83-90, describing media lobbying and influence on the penalty for misuse of data; at para 91, the appointment of Paul Dacre to head the review of the 30 year rule and that Gordon Brown and Paul Dacre had discussed the appointment ahead of Gordon Brown becoming Prime Minister; at paras 102-111, describing media influence over the formation of s. 12 of the Human Rights Act,
- http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf

- 13/8-13/23, that prior to becoming leader Gordon Brown had discussed Paul Dacre heading an inquiry into the 30 year rule and that there were lots of conversations between government and Paul Dacre and other members of the press in relation to s55 of the Data Protection Act; at 31/8-31/25, on press lobbying and involvement that resulted in s13 of the Human Rights Act; 37/14-38/22, on the development of s13 of the Human Rights Act and Lord Wakeham's influence on behalf of the press; at 40/4-40/9, that Lord Wakeham's agreement would deliver the support of both the press and the Conservative front bench; at 44/21-46/12, describing the lobbying of influential media figures on the issue of s55 of the Data Protection Act ; at 51/6-51/12, discussing the negotiation with the press that led to ss77 and 78 of the Data Protection Act; at 52/24-53/23, describing the influence of lobbying from regional and local press over conditional fee agreements, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

Richard Wallace:

- 44/4-45/1, that politicians should have more backbone when dealing with media organisations and take care of the welfare of the people not the welfare of a media organisation, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf
- 45/22-46/12, that politicians would listen when he expressed a view on behalf of a newspaper that they did or did not like a policy, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-16-January-2012.pdf

Neil Wallis:

- pp21-22, on supporters of Gordon Brown briefing against Tony Blair and planting disinformation, and Rupert Murdoch's support for Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- p21, that his relationship with Alastair Campbell helped him to gain exclusive stories as an editor, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- pp16-17, that in general politicians will not wish to go to war with the media, that being in the middle of a media onslaught is deeply unpleasant, and that some politicians are very sensitive to press coverage; 28, that politicians at a senior level knew of phone hacking but lacked the political will to expose it because of the interest all political parties have in access to supportive press, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- pp7-9, on newspapers seeking to influence political events and acting in an 'opposition role', and on media influence on policy such as Tony Blair's undertaking to hold a referendum on the Euro and the setting up of the Leveson Inquiry; 14-15, on media influence over government appointments; 23, on the effect of a News of the World poll on Gordon Brown's decision whether to call a snap election, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf
- pp10-12, gives examples of the media lobbying government on media issues, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf

Tina Weaver:

- 4/5-4/23, on raising policy concerns and campaigns with Labour Prime Ministers; 5/1-5/10, that she would discuss policies in meetings with politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-16-January-20121.pdf

5. The consequences on public confidence in and the public perception of the relationship between politicians and the press

Conclusion

(v) *A combination of these factors has contributed to a lessening of public confidence in the conduct of public affairs, including by giving rise to legitimate perceptions and concerns that politicians and the press have traded power and influence in ways which are contrary to the public interest. These perceptions and concerns are particularly acute, inevitably, in relation to the conduct by politicians in government of public policy issues in relation to the press itself.*

Evidence base and factual summary

The matters set out below are in addition to the matters already set out above in this notice insofar as they are relevant to public confidence and public perceptions.

David Cameron MP:

- para 25, that a relationship between senior politicians and the media can lead to a public perception of media influence over politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

Alastair Campbell:

- para 30, that the diminution in trust between the media and politicians has negatively impacted on the public debate and engagement in politics, and that as a consequence our politics, quality of democracy and the country have been damaged, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf

Kenneth Clarke QC MP:

- 47/13-49/5, that political appointments with tabloid experience to the post of Director of Communications for the government was a marked changes of culture that has affected the way in which government interacts with services, and has led to an unhealthy preoccupation with newspapers on the part of government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf

Sir John Major:

- para 32, that party political appointees as press secretaries and as special advisers have meant that the word of the government spokesman is less likely to be accepted as dispassionate and accurate, and creates an invidious position if the person returns to journalism having had access to sensitive material, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
- 18/9-20/13, that making political appointments to government communications was a retrograde step, and that the politicisation of government information services meant the news is not presented accurately and fairly, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

Lord Mandelson:

- pp3 and 4, in an extract from *The Blair Revolution Revisited*, that much of what government does is dismissed as spin, that ministers are disbelieved and government as a whole is mistrusted; that policies should not be announced as if driven by headlines, re-announcing should not happen, government should be scrupulous with the facts and ministers should be more open and directly engage with all the media rather than a selection, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Mandelson-Annex-1.pdf
- 98/1-102/2, about the relationship between the government and the media, describing the relationships of specific governments with the media, that the demands and scepticism of the press have become greater, and that the tension in the relationship became unbearable; that the losers in the breakdown of the relationship are the public, who do not know who or what to believe and who are misguided by the way news or political information is presented, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
- Lord Mandelson 87/22-89/21, referring to his book *The Blair Revolution Revisited*, that the overuse and misuse of media skills by the New Labour government had harmed the character of the government, and that spin in the eyes of the media became anything that a minister or someone working for a minister said, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

Ed Miliband MP:

- p4, that trust in media and politicians has been harmed by revelations of relationships between some representatives of the media and politicians, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf

Peter Oborne:

- para 6, that the invisible connection between politicians and the media has done harm to the public interest, and that a great deal of 'news' has been a manifestation of manipulative populism – i.e. a manifestation of power, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Peter-Oborne.pdf
- 6/16-7/19, that government communications under New Labour constituted a new epistemology where truth was defined as that which served the purposes of the government or the party in power, and that denials or assertions were an instrument of government rather than of the truth; and at 39/15-40/25, that having a political figure deliver briefings to the lobby is a hazard, and that a civil servant should brief on behalf of the government, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf

Lord O'Donnell:

- at para 32, that the Order in Council used by the Blair government created the impression of politicisation in Downing Street communications and that it is perception that is the critical test in propriety and ethics, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
- 77/18-82/8, that it is important that the Prime Minister's official spokesman is a civil servant with absolute credibility, and that there is a weakness in the special adviser system with regards to managerial responsibility, and that ministers should be clear about what their special advisers should be doing in relation to the media, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

Jack Straw MP:

- 2/9-2/24, that politicians getting too close to the press undermine their own integrity, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

Neil Wallis:

- pp3-4, that government and political party PR machines do not give the public the rounded impression of elected politicians that they need, that official PR can be described as propaganda, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Third-witness-statement-of-Neil-Wallis-signed-13.06.12.pdf

APPENDIX 6
BIBLIOGRAPHY

Reports

Australian Government, *Report of the Independent Inquiry into the Media and Media Regulation*, (Canberra, Australian Government, 2012)

Australian Government, *Convergence Review, Final Report*, (Canberra, Australian Government, 2012)

Department of National Heritage, *Review of Press Self-Regulation,* (London, HMSO, 1993)

Great Britain, *Report on the British Press,* (London, PEP, 1938)

Great Britain, *Royal Commission on the Press, 1947-1949: Report,* (London, HMSO, 1949)

Great Britain, *Royal Commission on the Press 1961-1962: Report*, (London, HMSO, 1962)

Great Britain, *The Report of the Committee on Privacy,* (London, HMSO, 1972)

Great Britain, *Royal Commission on the Press: Final Report,* (London, HMSO, 1977)

Home Office, *The Report of the Committee on Privacy and Related Matters*, (London, HMSO, 1990)

Information Commissioner's Office, *What Price Privacy Now?*, (Wilmslow, Information Commissioner's Office, 2006)

Information Commissioner's Office, *What Price Privacy?*, (Wilmslow, Information Commissioner's Office, 2006)

The Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, (Wellington, the Law Commission, 2011)

Books and other publications

Barendt, E, *Freedom of Speech,* (Oxford, Oxford University Press, 2007)

Bingham, A, 'Drinking in the Last Chance Saloon: The British press and the crisis of self-regulation, 1989-95' in *Media History* 13 (1) (2007)

Bingham, T, *The Rule of Law* (London, Penguin, 2010)

Blair, T, *A Journey*, (London, Hutchinson, 2010)

Burden, P, *News of the World, Fake Sheikhs and Royal Trappings*, (London, Eye Books, 2008)

Campbell, A, *Diaries Volume* One*: Prelude to Power 1994-1997*, (London, Hutchinson, 2010)

Campbell, A, *Diaries Volume Two: The Power and the People*, (London, Hutchinson, 2011)

Campbell, A, *Diaries Volume Three: Power and Responsibility*, (London, Hutchinson, 2011)

Campbell, A, *Diaries Volume Four: The Burden of Power: Countdown to Iraq*, (London, Hutchinson, 2012)

Cathcart, B, *Everybody's Hacked Off: Why We Don't Have the Press We Deserve and What to Do About It*, (London, Penguin, 2012)

Davies, N, *Flat Earth News*, (London, Vintage, 2009)

Dean, M, *Democracy Under Attack: How the Media Distort Policy and Politics,* (Bristol, Policy Press 2011)

Eberwein, T, Fengler, S, Lauk, E, Leppik-Bork, T, (Eds.), *Mapping Media Accountability – in Europe and Beyond,* (Cologne, Halem, 2011)

Feldman, D, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' in *Current Legal Problems* (1994) 47(Part 2), pp41-71.

Frost, C., *Journalism Ethics and Regulation,* (London, Pearson, 2007)

Jukes, P, *The Fall of the House of Murdoch*, (London, Unbound, 2012)

Labour Party, *The People and the Media, (*London, Labour Party, 1974)

Lester, A, & Pannick, D, *Human Rights Law and Practice*, (London, Lexis Nexis, 2009)

Lyons, D, *Mr Paparazzi*, (London, John Blake Publishing Ltd, 2010)

Major, J, *John Major: The Autobiography,* (London, Harper Collins, 2010)

Mandelson, P, *The Third Man,* (London, Harper Press, 2010)

Marr, A, *My Trade: A Short History of British Journalism,* (London, Macmillan, 2004)

Marshall, S, *The Tabloid Girl: A True Story*, (London, Sphere, 2010)

McAfee A, *The Spoiler***,** (London, Vintage, 2012)

MediaWise Trust, *Satisfaction Guaranteed: Press Complaints Systems under Scrutiny*, (Bristol, MediaWise, 2004)

Moore K, Lewis P, & Lewis J, *Images of Islam in the UK: The Representation of British Muslims in the National Print News Media 2000-2008*, (Cardiff, Cardiff University, 2008)

Moore, M, *The Origins of Modern Spin: Democratic Government and the Media in Britain, 1945-51*, (London, Palgrave Macmillan, 2006)

Morgan, P, *The Insider: The Private Diaries of a Scandalous Decade*, (London, Ebury Press, 2005)

Mullin, C, *A Walk on Part: Diaries 1994-1999*, (London, Profile Books, 2012)

Oborne, P, *The Rise of Political Lying***,** (London, Free Press, 2005)

O'Malley, T, & Soley, C, *Regulating the Press*, (London, Pluto Press, 2000)

Page, B, *The Murdoch Archipelago*, (London, Simon & Schuster, 2003)

Powell, J, *The New Machiavelli: How to Wield Power in the Modern World*, (London, Vintage 2011)

Price, L, *Where Power Lies: Prime Ministers v The Media,* (London, Simon & Schuster, 2010)

Rawnsley, A, *The End of the Party*, (London, Penguin, 2010)

Robertson, G, *People Against the Press: An Inquiry into the Press Council,* (London, Quartet, 1983)

Shannon, R, *A Press Free and Responsible: Self Regulation and the Press Complaints Commission, 1991-2001*, (London, John Brown, 2001)

Shawcross, W, *Rupert Murdoch*, (Chalto & Windus, London, 1992)

Snoddy, R, *The Good, the Bad, and the Unacceptable: The Hard News about the British Press*, (London: Faber and Faber, 1992)

Watson, T, & Hickman, A, *Dial M for Murdoch*, (London, Allen Lane, 2012)

Wolff, M, *The Man Who Owns the News*, (London, The Bodley House, 2008)

Wyatt, W, *The Journals of Woodrow Wyatt, Volume One*, (London, MacMillan, 1998)

Wyatt, W, *The Journals of Woodrow Wyatt, Volume Two,* (London, MacMillan, 1999)

Wyatt, W, *The Journals of Woodrow Wyatt, Volume Three*, (London, MacMillan, 2000)

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