

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

**CLOSING SUBMISSIONS
ON BEHALF OF GUARDIAN NEWS AND MEDIA LIMITED**

Introduction

1. These closing submissions should be read with GNM's previous interim submissions on Modules 1 and 2 and on plurality in Module 3 and in the context of GNM's witness statements.
2. GNM does not propose to address in detail the following propositions which it accepts:
 - The occurrence in recent times of grave abuses of individual rights to privacy by unjustifiable press intrusion in sections of the national media (not confined to the activities of News International);
 - The failure of the PCC (despite achievements in some areas) to impose adequate sanctions or to take adequate remedial action in relation to many of those abuses;
 - The consequent loss of public confidence in the present regulatory system;
 - The consequent need for a reappraisal of the regulatory structure in terms of its powers, its personnel, and its functions generally.
3. In addition, the media core participants were asked by the Inquiry to identify five recently published investigations which they consider to be particularly illustrative of the value of public interest journalism (and also the difficulties which it can frequently face). These are attached as Appendix A to these submissions.

1. THE STRUCTURE AND FUNCTION OF A REGULATORY REGIME

4. In Module 4 the Inquiry has heard proposals for potential press regulatory solutions. The Inquiry invited comments on three inter-related aspects of any new regulatory regime – firstly what a regulatory regime should do; secondly, how it should be structured to achieve those objectives; and thirdly, the substance of a new code. The Inquiry also published 'Draft Criteria for a proposed regulatory solution' and asked for submissions relating to the definition and interpretation of the public interest in the context of media regulation.

5. In response to a s21 Notice served by the Inquiry, Alan Rusbridger submitted a further statement which set out GNM's opinion of the regulatory model proposed by Lord Hunt and Lord Black. In summary, GNM believes that the work which has been done by the Press Standards Board of Finance (PressBof) in developing a framework for a new regime, including the use of a contractual bond and the development of meaningful powers of sanctions for non-compliance, has been valuable. GNM has proposed significant amendments to those proposals (arguing in favour of ending the role of PressBof; enhancing the independence of the new body from those it regulates; and using the 'polluter pays' principle to support funding). A number of those issues are analysed further below.
6. In view of the natural emphasis on negative aspects of press conduct in recent times, however, it is important to emphasise at the outset that regulation, the substantive law and the procedural routes available for the resolution of disputes should encourage good journalism as well as deterring the bad. GNM therefore argues for a holistic approach. The new model should also seek to engage the public in a way likely to restore confidence. Not all the recommendations can or need be compulsory. GNM is, for example, a committed supporter of Readers' Editors. It would be wrong to impose such a system on publishers, but there is no reason why it cannot be recommended by a Regulator as best practice (if it agrees with GNM) and as a desirable first port of call in relation to many types of complaint.

The scope for enhancing Press Freedoms

7. It may be thought obtuse for an Inquiry established against a backdrop of press misconduct to be concerned to expand or protect the media's fundamental freedoms. However reform should encourage the press to aspire to the societal ideals of which they are supposed to be the guardian.
8. GNM believes that there are three central issues confronting the media which presently serve to fetter the practice of responsible journalism in the UK and which, if rectified, would further encourage the best in public interest journalism, while discouraging irresponsible practices:

(1) The present state of the law of defamation

9. The present law of defamation is out of kilter with the demands of a modern media. As the Joint Parliamentary Select Committee on the Draft Defamation Bill noted (citing Lord Lester of Herne Hill):

'Our law suffers from the twin vices of uncertainty and overbreadth. The litigation that it engenders is costly and often protracted. It has a severe chilling effect on the freedom of expression not only of powerful newspapers and broadcasters, but also of regional newspapers, NGOs and citizen critics, as well as of scientific discourse. That chilling effect

leads to self censorship. It impairs the communication of public information about matters of legitimate public interest and concern.'

Recourse to the courts is disproportionately expensive, burdensome and time-consuming.

10. Reform of the libel laws is currently before Parliament. The Joint Select Committee was highly critical of the cost of resolving libel complaints through Court proceedings. Not only is the prohibitive cost contrary to the media's interests, it restricts access to justice for ordinary members of the public (the more so when CFAs are abolished or radically reduced in scope) and allows the wealthy 'to play the system'. However the Defamation Bill addresses the substantive law rather than procedural improvement. It would serve the wider public interest for a regulator to offer a proportionate system of alternative dispute resolution for defamation and privacy complaints with costs consequences if subsequently Court proceedings do not produce a materially better result for a claimant. There are detailed Article 6 issues to be addressed, but the principle is sound.

(2) *Plurality*

11. GNM has argued previously that it is vital that when the Inquiry comes to address how any new system of press regulation is to be operated, that it also considers the impact of ownership and plurality as it specifically relates to the culture, practices and ethics of the press. It is GNM's strong belief that a lack of plurality fundamentally diminishes all three. The potentially toxic impact of a dominant media entity lies at the heart of problems identified in previous Modules. There is a real risk that a report which seeks only to improve the quality and effectiveness of future regulation in a vacuum may serve to treat the short-term symptoms of media misconduct, but will fail to address the underlying disease which precipitated its most egregious incidents.
12. A system of regulation which still allows the concentration of power in the hands of fewer multi-billionaire proprietors – whether corporations or individuals – will impoverish our society. It will also greatly increase the risk that there will be a need for another inquiry into press ethics. The issue of plurality also goes beyond any current questions around News Corporation's publishing interests. Recent developments in the Australian newspaper market and the growing consolidation in national newspapers here indicate that this is a broad and real concern. GNM recognises that the Inquiry has not had the time to consider detailed recommendations on media ownership but given that policymakers have refrained from pursuing this question until the Inquiry is complete, GNM believes it is vital the Inquiry identify the need for and nature of reform.

13. Plurality is, of course, valuable in itself. Variety of voice and perspective enhances debate and the public interest. Yet the vice of a dominant media entity goes deeper.
14. GNM does not address in detail here the evidence heard and documents submitted in the course of Module 3. It is evident, however, that lobbying becomes abusive when disproportionate power is wielded by one media entity above all others. The contrast between the way in which News International / News Corp (NI) executives promoted the BSkyB bid, *and* the way in which government responded, is in contrast to the limited access given to those media entities opposing the bid. That disparity is contrary to the public interest and good political governance. It is a mirror of the dealings between NI and the police. Evidence given during Module 2 shows a similar bias in the focus of senior police officers in the MPS towards NI's titles.
15. The scandal which precipitated the present Inquiry was unearthed in part by the Guardian, an independently-owned newspaper supported by a trust, which held another media company to account at a time when the police, parliament and regulator all seemed reluctant to do so. This is a critical and further aspect of how plurality is central to raising standards.

(3) Safeguarding public interest journalism

16. A critical function of the press is as public watchdog which is clear from both domestic and European jurisprudence. Any new system of press regulation must protect and encourage performance of that role. This is a time when economic forces, including the competition provided by new digital platforms, are putting pressure on investigative journalism, which is costly and has no direct revenue return attached. Other forms of public interest reporting – foreign correspondents, specialists, parliamentary and court reporters – are increasingly vulnerable.
17. The interim guidelines recently produced by the DPP for prosecutors on assessing the public interest in cases involving the media is welcome, although the matters to be weighed are very abstract and likely to differ in assessment from one prosecutor to another. However it is submitted that if a criminal offence merits a public interest defence as a matter of policy, it should have one. The issue is a necessary feature of publication offences. There are distinctions in current statutes between a requirement to prove public interest objectively and a lower requirement to prove reasonable belief in the public interest. Save in exceptional circumstances the latter is preferable. To attach criminal liability, where an editor makes a reasonable judgment, should ordinarily provide a defence. It is no less important that the civil

law offers consistency. Alternative causes of action or criminal offences (for instance, RIPA, the Computer Misuse Act 1990 and s.55 of the Data Protection Act 1998) directed – in whole or in part - at the same mischief should not vary in terms of the availability and nature of any public interest defence. It is well settled that the law should be sufficiently certain to allow a citizen to regulate his or her conduct. Prosecutorial discretion is not a sufficient guide by itself.

The Role of Press Regulation – a balancing deterrence

18. By way of counterbalance GNM believes the press must accept a regulatory system which is effective, transparent and sufficiently independent of media interests to command public respect. Sanctions and investigatory powers must be real and readily usable when the circumstances warrant it.

19. It follows from the above that GNM contends that the new regulator should serve a number of functions:

- *Supervisory* – a Regulator should be fully entitled to issue general advice and warnings as well as communicating on specific issues. The Code itself may need review and amendment to reflect changing conditions or lessons learnt.
- *Complaint resolution* – this may involve both a quick and efficient mediation process and, when necessary, ADR.
- *Investigative* – in terms of the right to call for documents or explanation as required. Both on principle, and in view of the cost, the exercise of these powers would have to be kept proportionate.
- *Disciplinary* – a range of sanctions utilised up to and including the right to fine for individual serious transgressions or for serial offending of the same type (especially after a warning has been given).
- *Reporting* – the Regulator should be transparent as to its activities so its efficacy is open to review.

20. Turning to the core question of complaint resolution. There are a wide variety of complaints including those which involve an alleged civil wrong and those which are only under the Code. GNM has already emphasised the value of a Readers' Editor as a first port of call for all complaints. Another advantage of the system is that it encourages record keeping by someone independent of the editor and journalist.

Alternative Dispute Resolution

21. GNM is comfortable with PressBof's intended format of separate complaints and investigations panels. However GNM strongly submits that there should also be an alternative dispute resolution service. This would provide extensive mediation and adjudication on complaints which would otherwise be actionable in law (for example, defamation, privacy, breach of confidence and harassment). The regulator could deliver the ADR service itself or else utilise the services of an already accredited and reputable external provider.
22. The advantages of the system would include speed, low costs and relative privacy, encouraging a constructive and proactive relationship between the complainant and the press in contrast to the litigation route, which tends to lead to ever more entrenched positions. The Regulator's mediation and adjudication system should work in many cases in a complementary manner with Readers' Editors.¹
23. The Regulator's complaints procedure would require a filtering process at the outset to identify issues such as:
- (a) which complaints are suited to mediation by the Regulator and which are better suited to alternative dispute resolution (ADR).
 - (b) Which are remediable (if upheld or accepted) by the publication of a suitable correction and/or apology;
 - (c) where there is a clear and genuine issue as to meaning or fact or opinion;
 - (d) which involve an alleged civil wrong and assert a right to compensation;
 - (e) which truly *require* the resolution of complex issues of fact which can only sensibly be resolved by oral evidence and the full Court process (for the avoidance of doubt not including the kind of issues canvassed in (c));
 - (f) which are so serious that they require consideration of a sanction by the Regulator;

¹ The BBC's Editorial Complaints procedure operates according to a similar 3-stage process with the initial complaint being directed to a specialist internal department tasked with handling such matters and resolution initially being sought within 2 exchanges of correspondence.

24. As to potential legal claims, there would need to be a provision (whether by statute or by amendment to the CPR) to the effect that no legal claim could be brought against a member publication until the ADR process had been completed or the regulator specified otherwise. This category is discussed further in the following section.

25. It follows from the above that the Regulator would need some specialist staff with an understanding of media law (particularly privacy and defamation).

Complaints involving legal claims

26. Complaints which (if upheld) give rise to an enforceable legal right (for instance, defamation, privacy, breach of confidence or harassment) would be subject to an adjudication process, supervised by the regulator although delivered by them or existing accredited external providers. The adjudicator would have the power to make findings on suitable issues arising from such complaints, including:

- The meaning borne by an article;
- Whether the article was fair and accurate;
- Whether the article was an opinion or an allegation of fact;
- Whether the subject of an article should have been given (and, if so, was given) a reasonable chance to respond to criticism and whether his or her response was sufficiently reported;
- Whether the information published about the subject engaged his or her reasonable expectation of privacy under Article 8 and, if so, whether there was a public interest justification for doing so in the circumstances.

27. To comply with Article 6, a complainant would continue to hold the right to pursue a claim through the courts if dissatisfied with the ADR process. However, the courts would have regard to the history of the ADR when determining whether the claimant had acted reasonably. An unreasonable decision to pursue legal proceedings would be likely to leave the claimant exposed to paying the costs of those proceedings, irrespective of their outcome. One possibility is that the mediator could prepare a report as to whether the parties have acted reasonably. That report would then be admissible on costs at the conclusion of any subsequent legal proceedings (thereby treating the mediation process as without prejudice save as to costs).

28. The offer of amends procedure under the Defamation Act 1996 remains open until service of the defence in a libel action. Accordingly these proposals do not interfere with that procedure. However the interface between that procedure and the regulator's role may merit further consideration.

Sanctions and Remedies

(1) Adequacy of corrections and apologies

29. The regulator should have the power to rule on the prominence and adequacy of the wording of any published apology or correction. Where it considers a published correction to be inadequate, the regulator should have the power to direct the newspaper to publish a summary of the regulator's adjudication on the issue (in line with the power presently exercised by the courts when considering applications for summary determination of defamation claims under section 8 of the Defamation Act 1996).

(2) The power to fine

30. GNM agrees with PressBof's recommendation that the regulator would also have the power to impose fines on the publisher for a grave breach, or serial breaches of the same type. Levying small fines for minor infractions is undesirable. Ofcom's practice of limiting fines to substantial penalties for serious cases would seem to balance deterrence and proportionality.
31. Where the regulator has imposed fine, it should discount (or entirely remove) any award of exemplary damages in an ensuing civil action. This is right in principle as the sole purpose of an exemplary award is punitive. Whatever the arguments as to the need or exemplary damages in privacy (see below), the fact they go to the claimant as a windfall is anomalous.

(3) The power to compensate

32. Where appropriate, the ADR process will have the power to award damages and reasonable costs. Consideration will need to be given to suitable levels and caps. This does raise an issue as to the damages available from the regulator and the Court. They should be commensurate, which may mean that the most serious cases would have to go to Court if the complainant insisted to determine the level of compensation (see the filtering process discussed above).

(4) Investigative powers

33. GNM also supports Pressbof's proposal empowering the regulator to investigate fully post publication serious or serial breaches of the Code without their being necessarily contingent on a complaint. A refusal to co-operate may itself be regarded as a serious breach.

(5) Audit

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

(6) Class complaints

35. GNM would not wish to exclude 'class' or 'third party' complaints from the regulatory process entirely, but they should have to satisfy a threshold of seriousness to be entertained.

The Structure and Mechanics of the New Regulatory System

(1) Participation

36. GNM acknowledges the acute problem posed by the possibility that a major media entity may decline to subscribe to the new regulatory scheme, if it is voluntary, so escaping sanctions for what may be serious and serial breaches.
37. GNM's view is that participation in any regulatory scheme should be voluntary. It does not believe that a compulsory scheme, which would ultimately constitute a form of licensing, is either desirable or likely to be sufficiently flexible to keep pace with a rapidly evolving media.
38. There is real legal uncertainty as to whether a compulsory system (especially one with fines and the imposition of standards which go beyond the criminal and civil law) is Convention compliant. GNM notes Ofcom's position on this issue and the division in academic opinion. In broadcasting, the more onerous duties and responsibilities imposed on 'audio-visual' journalists are justified by the realities of spectrum scarcity and the more immediate and powerful effect of the medium (*Jersild v Denmark* (1995) 19 EHRR 1, §31; a point endorsed

by Lord Bingham in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, §30). The ECHR has pointed out that it is reasonable for national authorities:

'... to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court and acknowledged by the applicant, as having a more immediate, invasive and powerful impact including... on the passive recipient.'

(Murphy v Ireland (2004) 38 EHRR 13, §74)

39. A similar point was made by Lord Hoffman in *R (ProLife Alliance) v BBC* [2004] 1 AC 185, at 227-8 (§21):

"The power of the medium is the reason why television and radio broadcasts have been required to conform to standards of taste and decency which, in the case of any other medium, would nowadays be thought to be an unwarranted restriction on freedom of expression. The enforcement of such standards is a familiar feature of the cultural life of this country. And this fact has given rise to public expectations. The Broadcasting Standards Commission puts the point with great clarity in paragraph 2 of its Code on Standards (Codes of Guidance, June 1998):

"There is an implied contract between the viewer, the listener and the broadcaster about the terms of admission to the home. The most frequent reason for viewers or listeners finding a particular item offensive is that it flouts their expectation of that contract—expectations about what sort of material should be broadcast at a certain time of day, on a particular channel and within a certain type of programme, or indeed whether it should be broadcast at all."

40. GNM has doubts about a 'closed' or exclusive press card system whereby only those with proper accreditation could obtain access to specific events or information. It would work against the grain of open journalism and freedom of information which is flourishing today. Instead, we believe that PressBof's proposed contractual mechanism constitutes a realistic and effective means of implementing membership. To ensure that membership is sufficiently universal, GNM endorses the suggestions of others that publishers should be encouraged to join the new body by means of an extensive variety of carrots and sticks which would have the effect of making non-participation by significant publishers highly unlikely and economically illogical.

41. The following are examples of carrots / sticks:

- (a) The right of access to alternative dispute resolution of legal complaints (as outlined above).
- (b) In effect discounted damages and costs in defamation and privacy cases for those publishers who participate.

- (c) Allowing participants to benefit from not being subject to the overlapping jurisdictions of other regulators (such as ATVOD). This would be a real and practical benefit.
- (d) Where possible, making participation in or the rates of commercial partnerships such as ABC, NRS and PA dependent on contracting in. Indeed there could be a substantial premium for non-participating publishers which could go towards helping to fund the Regulator. All of this would have to be compliant with competition law, although GNM believes this would be Article 10 compliant.
- (e) Similarly, making membership of the regulatory body a condition precedent of an industry kite-marking scheme.
- (f) Liaising with advertising authorities to recommend those contracting in.

42. GNM believes that significant web publishers should also be encouraged to join the new body. A scheme which is limited (in intention or effect) simply to national newspapers and which ignores the realities of media convergence is liable quickly to become redundant – it is also another reason why a compulsory scheme (which by its nature will be limited and confined to UK domiciled publishers) is undesirable. Where possible, the incentives offered under the scheme should be tailored so as to be equally attractive to both online media and the press. Many of the incentives listed above (perhaps most notably the legal benefit offered by an effective alternative dispute resolution service, but also matters such as kite marking and exemption from ATVOD) are likely to appeal equally to both the established print media and substantial online content publishers. In addition, there should be lower barriers to entry for smaller publishers whether in print or on line in terms of funding, auditing requirements and other elements which may be seen as tailored to large newspaper organisations.

(2) The role of statute

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

(3) Independence

44. The ultimate goal of the process of reform should be to ensure that the board of any new regulatory body cannot be unduly influenced by those which it regulates. With that in mind, GNM believes that PressBof (or any similar entity such as the Industry Funding Body ('IFB') in PressBof's proposal) should be abolished and the tie between funding and control as it exists today should be ended. The regulator's responsibilities for regulated entities should instead be incorporated into its contract with the publishers, which would specify the fees payable (or other funding formula) for participation. Some publishers have expressed concern that such a system would mean that they lose the visibility inherent in the Pressbof model, by which they are able to ensure that their fees are managed and spent appropriately. On balance, however, GNM believes that the better course to address this concern is to ensure that specific auditing arrangements are made within the contract or the articles of the new regulator with a view to providing for such oversight.
45. There are a number of roles provided for the IFB in the proposal from PressBof, all of which GNM believes are superfluous or can be fulfilled by the Regulator itself. For instance, while GNM agrees with PressBof's recommendation that an independent appointments process should be established to appoint both the regulator's board and to select its various committees, GNM does not see the need for the IFB to play a role in any appointment. The appointment body to manage the appointment of an independent Chair and the proposal for unanimity in appointment between press and lay representatives is very welcome. Such measures would appear vital in order to overcome both real and perceived problems arising from the industry appointing its own representatives in a non-transparent manner.
46. Generally, GNM is of the view that it is appropriate for the regulator's committees to comprise a majority of lay appointees. These lay appointees would be supplemented by experienced and respected journalists – including, but by no means limited to, current editors – who should be encouraged to join the regulator's key committees. Their appointment should be based on criteria formulated and published by the same independent process. In that way, the relevant committees of the new body would maintain sufficient independence from the industry to command public confidence, while still ensuring that the relevant committees hold sufficient expertise to sustain the industry's confidence. The ultimate aim of press membership would be to add experience and knowledge, rather than to effect 'balanced voting'. This would appear to be consistent with best practice in public appointments.
47. The one exception to this rule that GNM would propose would be in respect of the Code Committee, a body which GNM considers it is important to maintain a journalistic majority as

well as additional lay appointees. Such a Committee ensures the commitment of newspapers to standards and places editorial judgement at the heart of content regulation. Few commentators have criticised the substance of the PCC Code. The problem has been with powers and enforcement. However, the work of this Committee must be complemented by and take account of an ongoing process of research and consultation with the public on the terms and operation of the Code. Unlike PressBof's proposal, GNM believes appointments to the Code Committee should likewise be made via an independent and transparent process, not by industry bodies.

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

(4) Funding

49. This is part addressed in paragraphs 44 above. GNM believes that it is critical that the new regulatory body should be funded primarily on the basis of the 'polluter pays' principle. This could be enforced in several ways, including through annual adjustments to or rebates from the annual fee depending on respective rates of 'offending', levies in respect of exceptional investigation costs, and fines for significant breaches of the Code. Further the costs of addressing a successful complaint should ordinarily fall on the offender.
50. Such a mechanism would ensure that local newspapers and smaller publishers do not face greater financial pressures than they already do. It would also provide a strong financial incentive for publishers to moderate their conduct.

2. THE STANDARDS TO BE APPLIED BY THE CODE AND THE PUBLIC INTEREST

Defining the public interest

51. GNM believes that aspects of the present Editors Code, and the relevant criminal and civil law with which that Code must ultimately interact and complement, could be substantially improved with a view to encouraging public interest journalism. As Lord Hunt stressed when announcing his proposals on reform of the PCC:

'If we get this right, the new regulator will be not only the scourge of bad, irresponsible journalism – but also the candid and supportive friend of good, robust, fearless journalism

that characterises the trade at its best, and is genuinely in the public interest.'

52. Mr Rusbridger's recent statement referred to the case for reform of defamation law and procedure and for the need properly to protect for plurality. Defining the public interest, however, is a delicate issue. GNM would stress the following:

- (a) There should be a measure of public consultation as regularly conducted by Ofcom in respect of applicable programme standards.
- (b) The Code as a whole should be reviewed by the new Editors' Committee in the light of the conclusions and recommendations of this Inquiry.
- (c) There is however a real danger in being over prescriptive.

53. As to the last point, GNM would resist any attempt exhaustively to codify the public interest. The parameters of the public interest in any given set of circumstances are inherently fact sensitive. Many of the definitions proposed surprisingly contain little or no reference to opinion. Moreover, a box-ticking approach is what led to the unduly narrow application of the *Reynolds* defence, notwithstanding that Lord Nicholls' guidelines for responsible journalism in that case were specifically expressed to be non-exclusive for like reasons. A 'comprehensive' definition would be delimiting in practice and an invitation to an over lawyerly approach.

54. Nonetheless it is certainly right and helpful that guidelines should be set out (as in the present Code), as to which GNM submits:

- (a) Any public interest must be sensitive to context. In the privacy context, it should be consistent with the law – although clearly that is a difficult and elusive objective where there appear to be different formulations within the substantive law of privacy and data protection directed at the same problem.
- (b) The present PCC Code is a valuable template for a new regulatory regime. Its definition of the public interest could be improved by adding material informative on issues for public debate. This potential addition has been supported by several academics who have given evidence to the Inquiry.² It is well expressed in the BBC's Guidelines in these terms:

² See, for instance, the witness statement of Professor Steve Barnett, p.7 (MOD100048884)

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

However, the Inquiry is referred to the important qualification in (f) below.

(c) Given the need to respect the importance of Article 8 as well as Article 10 rights, it should better articulate proportionality along the lines of the 'Omand principles' which GNM supports.³ GNM would propose their incorporation or a similarly robust framework in a revised Code.

(d) The test should be applied by reference to:

- The facts and circumstances as they were known to the journalist/editor at the time or should have been known on responsible enquiry (an incentive to pre-notify).
- The reasonable judgment of the editor in the light of the facts as described above.
- Due allowance for presentational freedom and to editorial judgment on the tone and timing of the publication.⁴ See, for instance, Lord Hope of Craighead in *Campbell v MGN* [2004] 2 AC 457, at §112:

'The choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, are pre-eminently editorial matters with which the court will not interfere. The respondents are also entitled to claim that they should be accorded a reasonable margin of appreciation in taking decisions as to what details needed to be included in the article to give it credibility. This is an essential part of the journalistic exercise.'

(e) Where it is clear that the publisher has ignored the obvious absence of any public interest justification, this may be treated as a serious breach of the Code. If, as the GNM submits, the test should be the journalist's/editor's reasonable belief, then they should be able to provide the grounds for that belief, when challenged.

(f) While considerations of the public interest in its widest sense may inform the Code on some issues (for instance, payments to criminals), it would be wrong in principle to

³ See the first witness statement of Alan Rusbridger (MOD10002882)

⁴ See for instance the proposals of the Joint Committee on Defamation in respect of the analogous principles applicable to the defence of responsible journalism in that tort.

require all journalism to justify itself by reference to a public interest test. The public interest is in play, when other rights are under threat. Freedom of expression is *not* otherwise circumscribed under Article 10.2. Moreover the right under Article 10.1 extends to publishing material which some may regard as offensive or provocative.

- (g) A form of regulation which requires journalism to conform to some idealised objective (such as limiting it by reference to amorphous concepts like the public's interest in "good political governance") would be overly restrictive, harmful and open to abuse. Subject to the constraints of the criminal and civil law, publishers must be allowed the editorial latitude to cover issues in a manner which they consider fit, and not how others may consider more appropriate (*Re Guardian News & Media Limited* [2010] 2 WLR 325; *Re British Broadcasting Corporation* [2010] 1 AC 145; *K v News Group Newspapers* [2011] EWCA Civ 439; and *Hutcheson v News Group Newspapers* [2012] EMLR 2) including for this purpose politicians and the police:

*'... the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'*⁵

55. Nor (subject to the laws of contempt, misconduct in public office, privacy and defamation) should the press be required to moderate in any way its reporting of the work of law enforcement agencies so as to accord with what those organisations perceive to suit their interests.

3. REPORTING THE POLICE

⁵ *Jersild v Denmark* (1994) 19 EHRR 1, at §31. See also *Fressoz and Roire v France* (1999) 31 EHRR 28, at §28, where the ECtHR said that in essence article 10 leaves it for journalists to decide whether or not it is necessary to reproduce material to ensure credibility, adding: *'It protects journalists' rights to divulge information on issues of general interest provided 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.'*

56. GNM reiterates its profound concern about the consequences for important public interest journalism if key recommendations of the Filkin Report are implemented. The failure to investigate the full extent and nature of voicemail interception by journalists at the News of the World was a central reason for the setting up of this Inquiry. Equally, a core reason why that failure was ultimately exposed was investigative scrutiny of police conduct by the press. Had police-press contacts been confined to 'official' police channels, as Ms Filkin advocates, the truth would probably not have emerged.
57. While Ms Filkin's Report rightly identifies the critical importance of public scrutiny in respect of policing and the media's vital role in holding the police to account in that regard, it makes a number of recommendations which would undermine those fundamental objectives. In particular:
- (a) It conflates two quite different activities: (a) the inappropriate familiarity which arose from the aggressive high-level 'corporate-style' PR undertaken by senior police officers with equally senior newspaper executives for the purpose of enhancing the MPS's organisational reputation on the one hand, and (b) the day-to-day exchange of information between police sources and newspapers for the purposes of legitimate public interest journalism; and
 - (b) It pejoratively characterises of all instances of (b) as 'leaking' which it then treats as intrinsically unhealthy.
58. Many informal disclosures between the police and the media will be in the public interest – in some instances, significantly so. The fact that disclosures may be 'unofficial' or 'unauthorised' has no direct bearing on whether they are improper.⁶ Indeed official information is all too often 'improper' in the sense of being neither objective nor accurate, and spun to promote the police's own interests.

6 A point emphasised by Mr Davies in an exchange with the Chairman during his oral evidence to the Inquiry:

'It isn't that official sources are inherently good or that the unofficial, unauthorised sources are inherently bad. They are equally good or bad, equally liable to operate in the public interest, equally vulnerable to being abused... Don't identify the unauthorised source as the cause of the problem. I could give you examples, even in the phone hacking saga, of a press officer calling me up in order to encourage me to run a smear story.' (D42 (p.m.) 41:21 onwards)

59. Largely as a consequence of treating all informal information as 'leaks' in the pejorative sense, the Filkin Report seems concerned to close off unofficial briefing of the press by the police in recommending that:

- (1) All police officers and staff who provide information to the media should be required to maintain a personal record of the information they provide; the journalist to whom it was disclosed; and the circumstances which prompted that disclosure. It is proposed that these records will be subject to 'random' audits by senior officers on a periodic basis to ensure compliance.
- (2) According to the Report, there will be *'very few instances where legitimate contact with the media is not transparent.'* Instead, Filkin suggests that *'police officers and staff who are concerned about the accuracy of information being provided by their organisation should be able to trust internal processes for putting it right. Examples of genuine public-interest 'whistle-blowing' should be rare and should be dealt with proportionately.'*

60. GNM would comment as follows:

- (a) The idea that there are few instances of police misconduct which merit exposure is regrettably hopelessly over-optimistic.
- (b) Equally unrealistic is the premise that internal whistleblowing procedures can be relied on to expose unlawful or improper conduct by other police officers. Irrespective of the safeguards, the risk of being stigmatised as a troublemaker and of disruption to career progression in a closed occupation has an obvious capacity to deter officers from coming forward, and particularly so when the allegation would place them at odds with the interests of their force's own senior officers. Inevitably it is often junior officers who witness abuse of power by their seniors. If the press is to fulfil its role as a public watchdog, the police above all should not be immunised against media scrutiny.
- (c) Where an officer is concerned that the public are being misled by official publicity or considers that contrary statistics or interpretations should be available, the public interest favours that voice being heard. The importance of informed public discussion on such matters is of the highest public interest. The notion that there is one 'correct' view is over simplistic and dangerous. There is also the natural temptation for any single official police view to be the one which puts them in the best light. Senior officers, in particular, are likely to wish to sanitise any debate which fuller information might open up. Nor is the public interest in modern case law remotely limited to the exposure of wrongdoing:

'I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved

so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there is no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information.⁷

- (d) The Filkin Report's proposal that there should be a renewed policy aimed at encouraging a more open flow of *official* information into the public domain is to be welcomed as far as it goes. However, the Report's further contention that such a policy can guarantee objective scrutiny of the police is wholly unrealistic. Spin is part of modern culture, and the police are in no way immune.

The dangers of requiring an auditable record

61. Against that background, GNM has particular concerns over the recommendation of the Filkin Report (which was also discussed at length during Module 2) that police officers should be required to compile an auditable record of their contacts with journalists. A police officer who was concerned that the public were being misled about the success or otherwise of an investigation or strategy and who believed that state of affairs needed public ventilation will be inherently more likely to confide in a journalist who he or she knows and trusts. The requirement to keep an auditable record of prior contacts with such journalists would materially threaten the essential confidence of that relationship – it is inevitable that any subsequent internal scrutiny would focus on those officers with known and established dealings with the journalist who published the relevant information. Inevitably too the relationship would be curtailed (and probably stopped).
62. As the House of Lords expressly acknowledged in *Reynolds v Times Newspapers*, confidential source relationships lie at the heart of the exercise of responsible public interest journalism.⁸ The importance of preserving confidential channels of information and ensuring that the trust on which they are founded is not threatened have been repeatedly stressed:

'The absence of a general right to freedom of information in the UK makes journalists, like police officers, rely on informants, often from inside the organisations which the journalists are investigating. If it is accepted as being in the public interest to inform the public about certain matters, those who supply the information may be acting in the public interest, yet be breaching civil duties of confidence and even the criminal law... If the public interest role of journalists is to flourish, it is important that their informants should not be discouraged from providing information, lest the flow of information to the public should dry up.'

⁷ *Lion Laboratories v Evans* [1985] QB 526, per Griffiths LJ at 553C

⁸ [2001] 2 AC 127, per Lord Nicholls at 205: 'In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it.'

63. Indeed, the importance of the public interest in preserving such confidences and ensuring the flow of information to the public will commonly override concerns which may arise as to the motivation of a particular source. Sources necessarily act for a variety of reasons, some legitimate, some questionable. As Laws LJ noted in *Ashworth Hospital v MGN Ltd*, however, the vice of measures which have the effect of disclosing the identity of press sources is *'not to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared to betray his employer's confidences. The public interest in non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source.'*⁹ The same fundamental point was put vividly by Lord Scarman during a House of Lords debate:

*'One knows that if information is going to reach the public through the media of the press of misdoings and inefficiency in high places, it is more than likely (let us face it) that the channel, the agent or the messenger of that information will be some 'weasel', some pretty despicable person, and his confidence is essential if the journalist is to get the information. One does not wish to protect the 'weasel'; there is no need to protect the journalist; but there is every need to ensure that the right of the public to the information is supported.'*¹⁰

64. As indicated above, there is an obvious danger of self-interested witch-hunts from senior officers, whether impugned themselves or concerned to prevent criticism of their force or the police generally. Their reaction is likely to be dictated not by the public interest, but by what they perceive to be the reputational interests of themselves and the police. Recommendation 7 (p.55) of the Filkin report proposes that the police *'must create an environment where improper disclosure is condemned and deterred... Where leaks cannot be proved to the evidential standard required for criminal prosecution, robust management action should nevertheless be pursued.'* GNM submits that this proposal – which again elides notions of unauthorised disclosure and discreditable 'leaks' – is very troubling in terms of chilling public interest debate and the flow of information needed to sustain it.

65. There must be very real doubts over whether a policy of 'auditing' contact would achieve its stated objective in any event. It is far more likely to inhibit the responsible officer seeking to act in the public interest (who scrupulously records his previous contact with journalists) than the irresponsible and/or corrupt officer seeking to exploit for personal advantage the value ascribed to exclusive 'inside' information. The risk of misuse and corruption caused by a 'black market' of exclusive information is unlikely to be much affected.

9 [2001] 1 WLR 515, at 537 (§101)

10 *Hansard* HL, Vol.417 (5th series) col.156, 10 February 1981

66. The same considerations would apply with equal force to a system of auditing contact between the media and politicians. Any such measures would be likely to impede the exchange of information between the political class and the press, which is of vital democratic importance. Inappropriately close contact at the highest level with one dominant media group should not, as with the police, be used to constrain the very valuable ordinary sharing of information, which is beneficial. GNM repeats its submissions on plurality in paragraphs 11 to 15 above in this context.

A suggested alternative approach

67. GNM strongly disagrees therefore with Ms Filkin's unsubstantiated assertion that adopting her recommendations would not materially threaten the sort of public interest investigative journalism which exposed the phone hacking scandal in the first place.¹¹ Moreover, it would be ironic if the reaction to the phone-hacking scandal were to be the introduction of severe controls on unofficial communications between the police and the media, which were so vital in uncovering the story. The introduction of such controls would, it is submitted, work against the overwhelming public interest in openness and accountability, by giving greater control to senior officers over the flow of information and thereby giving them and the police generally greater immunity to informed criticism.

68. Instead, it is GNM's submission that existing safeguards – if properly policed, enforced and encouraged and if applied in the context of a new regulatory regime – can provide a sufficient mechanism by which to address the dangers of corrupt and/or improper information entering the public domain from police sources. Although there have been troubling aspects to evidence heard by the Inquiry in this context, the volume of improper information disclosed to the media should not be overstated. Abuses will always occur and always have the capacity to attract attention in a way that the valuable everyday informal exchanges of information do not. That is not to say they are not important. In this context:

- (a) GNM agrees with the Filkin Report's recommendation that renewed efforts should be made to ensure that all officers are given a sufficient level of training and clear guidance such as to allow them to communicate with the media independently and in line with the public interest. It appears incongruous that officers are routinely trusted with responsibility for making decisions of fundamental importance regarding the conduct of a criminal investigation and yet cannot be trusted to judge what information is in the

¹¹ See, for instance, the statement to this effect at p.43 of the Filkin Report.

public interest to disclose to the media.¹² A proactive approach of this nature would seem to constitute a more effective method of ensuring best practice from police officers.

(b) There are extensive existing legal and practical safeguards against the publication by the media of improperly disclosed material. Every newspaper has its own legal department, as well as editorial supervision which will have to be accountable to any new regulator. Despite what some may maintain, few newspapers operating in today's climate will wish to publish information in the knowledge that it is very likely to leave them open to an indefensible claim (regardless of whether that is in defamation, breach of confidence or privacy). Still less will an editor take a risk that either he or she may be held in contempt of court lightly.

(c) The most troubling cases heard by this Inquiry – the coverage endured by Christopher Jefferies and the McCann's – were, and have subsequently been found to be, breaches of current laws (laws which have been far more robustly applied in the past 2 years). The relevant legislation, most notably the Contempt of Court Act 1981, was designed so as carefully to calibrate the competing rights of freedom of expression on the one hand and the rights to a fair trial and a presumption of innocence for an accused or suspect on the other. Rigorously policed and enforced – as it has been by the current Attorney-General – it remains the most proportionate and effective deterrent against irresponsible and damaging disclosures. That carefully weighed balance in the current law (a consequence of an adverse finding against the government in the ECHR) does not need to be redrawn.

4. THE ISSUE OF PRIOR NOTIFICATION

69. The fact that damages do not generally offer a comprehensive remedy for a breach of an individual's privacy has been a dilemma that has been raised throughout Part I of the Inquiry. It was recently revisited by Max Mosley, who argued that a newspaper should be obliged to consult a Press Tribunal before publication in order to 'clear' any decision not to notify the subject of an article involving private or confidential disclosures. That was a theme which was also considered in an exchange between the Chairman and Sir Charles Gray where the

¹² See, for instance, the vice identified in the current approach evident in the quote from DAC Mark Simmons of the MPS at p.21 of the Filkin Report: '*We do policy: 'You will do, you won't do'. We shut stable doors when horses have bolted or we try to rush through policy and we end up with some unwieldy policy as a result of it and then we try and legislate to take away people's discretion because we don't trust people's discretion. I don't think we as an organisation know how to set a framework for decision making at the most individual level for people that encompasses something around integrity and ethics.'*

concept of a pre-publication advisory service was canvassed by the Chairman:

'What I would like your view on, based upon your experience in the field, is whether there isn't room for saying to a newspaper: you don't have to pre-notify if you think that it will be inimical to your interests to do so, but rather than -- if I borrow somebody else's phrase -- mark your own homework, if you think you have got a good case not to pre-notify, there is nothing to stop you going to somebody who wouldn't otherwise be involved -- one could take -- I'm not talking about Early Resolution, but somebody in your position... To say, look, this is our story. This is why we don't want to pre-notify; what do you think? And that person could look at it, and assuming the facts were right, because that would be the premise of the view, say, no, I think this is a very good case for not pre-notifying that... In which event, of course, there wouldn't be pre-notification, and if there was a challenge, that the newspaper would then be able to use the fact that they had taken the responsible step of getting a second opinion on the issue to mitigate potentially exemplary or aggravated damages.

I'm not trying to punish anybody for not doing it, but I'm trying to underline the risk of publishing without notification. Alternatively, if you choose not to ask, or to ignore the advice, you're entitled to do that. You might be right, and the judge at the end of the day may say that was perfectly legitimate, and there's nothing wrong with that. But if the judge took the view that, no, actually the advice you received was right, or you should have gone for advice, then I can take that into account as a matter of aggravation.¹³

70. On its face, the notion of a publisher or journalist being able to seek advice from an independent advisory body prior to publication has superficial appeal. Indeed Nick Davies canvassed the idea when he gave evidence to the Inquiry on 29 November 2011. However GNM is strongly opposed to the implementation of such a procedure on a variety of grounds:

- (a) It is a wrongful interference with editorial discretion, or at least places the editor in a highly invidious position.
- (b) All newspapers have access to internal and external legal and other independent advice which an editor will consult on issues of this type – especially if the Code is vigorously enforced and has adequate sanctions. It is unlikely that third party advice would be as well informed or as considered as this.
- (c) There is an inherent and natural risk that an advisory body will adopt a conservative and cautious approach for fear that a court may reach a different decision subsequently.
- (d) It opens up a secondary area of dispute as to the rightness of the advice and as to the facts as they existed and as to how they were presented to the advisory body.

13 D91 (p.m.): 44-45

71. It is submitted that the proper answer is, where relevant, to make pre-notification a requirement and therefore a breach of the Code, in the absence of proper justification. Such an approach is consistent with the conclusions of the Joint Parliamentary Committee on Privacy & Injunctions in its report of March 2012, §§127-129, which we endorse:

‘We reject the case for a statutory requirement to pre-notify. However, the reformed media regulator's code of practice must include a requirement that journalists should notify the subject of articles that may constitute an intrusion into privacy prior to publication, unless there are compelling reasons not to.

If a complaint is made to the new regulator about an individual's right to privacy having been infringed and that individual was not given prior notification of the story, the publication should be required to explain why they did not do so. If it was because it was in the public interest not to, the publication should state how, and with whom, the public interest was established at the time.

Courts should take account of any unjustified failure to pre-notify when assessing damages in any subsequent proceedings for breach of article 8.’

23 July 2012

ANDREW CALDECOTT QC
DAVID GLEN

1 Brick Court, Temple

APPENDIX A

**RECENT PUBLIC INTEREST INVESTIGATIONS
CONDUCTED BY GNM**

1. The Death of Ian Tomlinson

In the days after the death of newspaper seller Ian Tomlinson during protests over the G20 summit in April 2009, dogged reporting by the Guardian's Paul Lewis raised questions about the police account of the sequence of events leading up to his collapse. The official account was unpicked when the Guardian obtained video footage showing Tomlinson being struck by a police officer before his collapse. Lewis's reporting led to the reversing of the original pathologist's finding that Tomlinson died of natural causes, an inquest returning a verdict of unlawful killing, and the prosecution (and subsequent acquittal) of a police officer for manslaughter.

2. The Tax Gap

In a two week series of articles based on several months of investigation, a Guardian team in February 2009 revealed how leading companies including Barclays, GlaxoSmithKline and Shell were using a range of highly complex offshore devices to avoid millions in UK tax. The reports embroiled the Guardian in a legal battle with Barclays which sought to prevent publication of documents outlining its tax avoidance schemes and later led to the government taking significant steps to crack down on tax avoidance.

3. Trafigura

In May 2009, the Guardian acquired a confidential document which suggested that the waste dumped from a tanker chartered by oil trading firm Trafigura in the Ivory Coast port of Abidjan was highly toxic. A large number of local residents became sick. Trafigura later attempted to gag the paper by seeking a superinjunction preventing not just publication of the key document but even reporting of an MP's question about it. After a public campaign the superinjunction was lifted and Trafigura was later convicted by a Dutch court with regard to the delivery of the toxic waste to, and its export from, Amsterdam and fined one million euros. The company is appealing the decision.

4. Rendition and torture of detainees

For more than five years and in scores of articles, the Guardian's Ian Cobain has painstakingly uncovered the extent of Britain's complicity in the torture and rendition of detainees in the face of countless official denials. Cobain has linked Britain to the mistreatment of prisoners in Iraq, Libya, Pakistan, Bangladesh and Afghanistan. Cobain's reporting was one of the key factors leading to the government's decision to order an inquiry into allegations of British complicity in torture, now delayed until police investigation of two cases is complete.

5. WikiLeaks

The Guardian's collaboration with whistleblowers' website WikiLeaks and four other international newspapers in 2010 and 2011 led to the publication of a string of major public interest stories touching almost every corner of the globe. They included the disclosure that Saudi Arabia was secretly putting pressure on the US to attack Iran, that US diplomats believed Russia was "a virtual Mafia state" and that a British oil company claimed to have "infiltrated" all of Nigeria's major ministries. The Guardian played a central role in ensuring that hundreds of thousands of documents which might have been dumped "raw" on the internet were carefully analysed first and redacted to avoid the exposure of vulnerable sources. More than 30 Guardian specialist reporters and foreign correspondents were involved in the huge effort to comb and authenticate the documents over several months.