Evidence from Tim Suter to the Leveson Inquiry

September 16th 2011

Introduction

I welcome the opportunity to give evidence to the Leveson Inquiry.

I have structured this evidence in line with the questions I set out in the letter of 12 August from the Solicitor to the Inquiry. It falls naturally into two broad sections. The first part deals with my experience in Ofcom, my assessment of how it operates now, and the extent to which it ever faced issues similar to those unearthed by the phone hacking.

In the second part of my evidence, I consider the wider regulatory framework, of which Ofcom is a central part. I suggest that while the system has some strengths, it also has some fundamental weaknesses. While I do not believe, on the limited evidence of what has emerged into the public domain, that these weaknesses have been responsible for the failure of standards and ethical behaviour that phone hacking revealed, I nevertheless believe that there now exists both an opportunity and appetite for more radical reform that would be broadly beneficial.

I confirm that I do not seek any restriction on the publication of my evidence under section 19 of the Inquiries Act 2005.

<u>My background</u>

I joined Ofcom in April 2003 as the Partner responsible for Content and Standards, and a member of the statutory Content Board of Ofcom. I had executive responsibility for the development and introduction of Ofcom's Broadcasting Code – against which Ofcom judged issues relating to journalistic and other production standards across the broadcasting sector.

Of relevance in my career before joining Ofcom is the year I spent as Head of Broadcasting Policy in the DCMS, overseeing, among other things, the passage of the 2003 Communications Act (which set Ofcom's duties and powers); and before that, the fifteen years I spent in a variety of different production departments and editorial roles in the BBC. Recruited initially as a drama producer for BBC Radio, I was then the Editor of feature and documentary programmes for BBC Network Radio, a producer and reporter on BBC *Newsnight*, and the Managing Editor of BBC Current Affairs across television and radio (including the World Service in English).

Part 1: Ofcom

A description of Ofcom covering (at least) its origins, status, history (in brief summary), organisation, remit, authority and powers.

Ofcom took up its formal powers at the end of 2003, replacing five separate regulatory bodies: Oftel, the Radio Communications Agency, the Independent Television Commission, the Radio Authority and the Broadcasting Standards Commission.

Ofcom's principal duties cover the effective management of the radio spectrum; the regulation of telecommunications networks and services, in line with the European Directives currently in force; and the regulation of broadcasting services on television and radio.

In this evidence I focus specifically on the regulation of standards, primarily through the Broadcasting Code, rather than other aspects of Ofcom's role.

It is also important to note that Ofcom's content regulation applied initially to broadcast services only. Following the passage of the EU's Audio Visual Media Services Directive, some limited regulation is also applied to video-on-demand services. However, Ofcom has no role in the regulation of the content of the printed press.

Ofcom requires all broadcasters to hold a licence, through which it imposes a requirement to abide by the terms of the Broadcasting Code. (The publicly funded broadcasters, BBC and S4C, are not licensed by Ofcom, but the Communications Act 2003 brings them under the same broad regime – although the BBC is responsible for regulating itself with regard to the accuracy and impartiality of its news).

In broad outline, the Broadcasting Code requires each service

- to maintain "generally accepted" production and journalistic standards with regard to protection from offensive and harmful material
- to broadcast only duly impartial and accurate news,
- not unwarrantably to infringe the privacy of individuals or organisations, nor deal with them unfairly
- to comply with detailed provisions designed to maintain a clear distinction between editorial and commercial content (mostly advertising or sponsorship) and to guarantee that editorial content cannot be distorted by commercial relationships

Ofcom is additionally required to ensure that the Public Service Broadcasters (the BBC services, ITV, Channel 4, Five and S4C) meet a number of "positive" obligations relating to specific types of content that must be carried (eg independent productions; regional programmes). When it comes to content standards, however,

the Broadcasting Code makes no distinction between Public Service Broadcasters and others.

The steps which Ofcom takes, in general terms, to discharge its regulatory function.

Discretion and flexibility

In drafting and applying its code, Ofcom is required to take into account the nature of the service, the time of broadcast and the likely expectations of the intended audience. In practice, this allows considerable flexibility: material broadcast late at night on a subscription film channel can be significantly "stronger" than material scheduled on a mainstream channel in the mid-evening without breaching the code.

However, Ofcom would not expect to offer much flexibility, if any, in the way it dealt with issues relating to the protection of privacy, fair treatment, impartial and accurate news, and the separation of editorial content from commercial influence.

Production practice

As a regulator, Ofcom's interest is almost solely in the material broadcast, rather than production practice. As a result, Ofcom's code largely avoids prescriptive instruction on production methods. However, where there are complaints about unacceptable intrusion into privacy, Ofcom is required to assess whether this applies to the way the programme was made, as well as in the final broadcast.

Co-regulation

Ofcom exercises some of its powers through a number of industry led co-regulatory bodies. The **Advertising Standards Authority** regulates broadcast advertising under the terms of an MOU with Ofcom, under which Ofcom retains "back-stop powers" in the event that a formal sanction is required. **PhonepayPlus** is designated to regulate the provision, content, marketing and promotion of Premium Rate phone services. And following the introduction of the Audiovisual Media Services Directive across the EC, the regulation of the content of video-on demand services is undertaken by **ATVOD**, with Ofcom acting as back-stop.

The role of complaints

When dealing with potential breaches of the Broadcasting Code, Ofcom relies very heavily on complaints: given that "generally accepted standards" are the benchmark against which potential breaches are measured, the absence of complaint is in itself of potential significance. In practice, Ofcom only monitors output systematically where it has already been alerted to potential systemic or repeated problems with particular channels or types of content: with many hundreds of licensed services, a broader and more random programme of monitoring would almost certainly be an unacceptable and inefficient use of Ofcom's resources.

However, once Ofcom decides to investigate a complaint, the number of complaints is much less relevant. It is striking that there were very few complaints about the

original broadcast of the Russell Brand Show on BBC Radio 2 which was later found to be in serious breach both of the Broadcasting Code, as well as of the BBC's own internal guidelines. It is also worth noting that by far the most serious issue I dealt with while in Ofcom – the abuse of contestants in broadcasting quizzes and competitions – resulted from very few actual complaints; while the programme that attracted the most complaints (Celebrity Big Brother) was found against in only 3 of the 14 potential breaches.

However, while an investigation is usually triggered by a complaint, Ofcom's role is to maintain standards of broadcast content: and it has therefore taken the view that it must be able to consider material even where no complaint has been made. This is particularly relevant – and contentious – in investigations into unfairness or infringement of privacy. The Broadcasting Act of 1996 establishes a requirement, carried forward by the 2003 Act, that a complaint under those headings can only be entertained by Ofcom if it is made by the party directly affected. However, the 2003 Act broadened the requirement on the regulator to ensure that services should avoid unwarranted infringements of privacy. Ofcom has concluded that the absence of a complaint does not remove that obligation, and that the regulator must therefore be able to mount its own investigation if it has reason to believe this standard has been breached.

The law under which Ofcom operates is equally clear that no complaint should be pursued by Ofcom if it appears to them that the complainant has either initiated court proceedings, or where there is a remedy available in a United Kingdom court. The same structure applies to complaints brought against broadcasters for any breach of the Broadcasting Code.

This leads to the very important question of the relationship between standards regulation and the criminal law, which I consider in the next section.

Ofcom's experience of regulating the media, in particular in relation to phone hacking, computer hacking, "blagging", bribery and/or corruption. To include examples and evidence which conveys the scale on which these issues came to your attention during your tenure.

Regulation and its relationship to the criminal law: the theory

I wish to start by saying that, to the best of my knowledge, during my time in Ofcom we were never asked to judge a complaint about any of the activities listed in the question – i.e. a broadcaster involved in phone hacking, blagging, computer hacking, bribery or corruption.

Indeed, all of these practices are illegal - and, as pointed out above, Ofcom is specifically prevented from considering complaints where redress exists in the courts.

Nevertheless, it is too simplistic to say that the regulator never has any role in such cases. A statutory regulator such as Ofcom operates alongside, rather than instead of, the criminal authorities and the courts; and, in judging whether an individual's privacy has been unwarrantably infringed, Ofcom's role potentially overlaps that of the courts.

Even so, Ofcom's remit covers the protection of privacy, not the prevention of criminal behaviour. If a complaint deriving from any of the activities listed in the question were brought, Ofcom would have to focus on whether the privacy of the individual had been infringed, either in the transmission of the material or in the way the material was gathered – and if so, whether the disclosure or discovery of the material was nevertheless in the public interest.

This is an importantly different question from whether the material had been gathered illegally. Nevertheless, if the regulator's investigation suggested that there was *prima facie* evidence that the law had been broken, it would be normal practice to inform the police about the nature of the complaint, the course of the investigation, and the potential issues that go beyond the scope of the regulator.

It would then be a matter for the police to decide whether they wished to take on the investigation straight away, or leave it to the regulator to continue and then decide what to do when Ofcom had done its work.

My experience in Ofcom

Although I was never required to investigate a complaint involving phone hacking, computer hacking, blagging, bribery or corruption, I was nevertheless very heavily involved in the handling of very serious breaches of the code in relation to competitions and quizzes – complaints arising from activity which might have been considered as fraudulent, and therefore illegal.

Ofcom kept the police informed of the nature of the complaints and the course of its investigation: but it was not, and could never have been, Ofcom's role to investigate whether the actions of the broadcasters amounted to criminal fraud. In the majority of instances, the police were content for Ofcom to complete its investigation and make its decisions, including severe sanctions of the offending broadcasters. I am not aware that the police took any further action.

This is almost certainly because the regulatory process has some significant advantages over the courts: it is speedier, the burden of proof is lower (no individuals have to be found knowingly and intentionally guilty of crime), and sanctions can be highly targeted and broadly effective – not only addressing the breach in the particular broadcaster, but also acting as a wider deterrent. These are significant benefits of a regulatory system.

There were some instances where the complaint Ofcom received was specifically about criminal behaviour rather than a breach of the Broadcasting Code: for instance, a complaint that a journalist using undercover or surreptitious recording had entrapped a participant into committing a criminal act. In such instances, the complainant would be told that this was a matter for the police and the courts rather than the regulator.

Regulation and the public interest

One of Ofcom's most important duties is to consider complaints about unwarranted infringements of privacy. If Ofcom concludes that an individual's privacy has been infringed, it must then determine whether there was an overriding public interest in that infringement.

Although complaints are judged on a case by case basis, the Broadcasting Code nevertheless gives a non-exhaustive set of criteria against which public interest may be judged:

- revealing or detecting crime
- protecting public health or safety
- exposing misleading claims made by individuals or organisations
- disclosing incompetence that affects the public

Although not criminal behaviour, many complaints referred to Ofcom concerned material that had been gained using some form of deception. Undercover reporting often requires the journalist to "pose" as somebody or something they are not, and to conceal the real reason for their presence. In judging whether the covert or surreptitious recording was justifiable, Ofcom sets out in its code the circumstances in which broadcasters can use such activities. These are that:

- there is prima facie evidence of a story in the public interest
- there are reasonable grounds to suspect that further material evidence could be obtained

- it is necessary for the credibility and authenticity of the programme

It is interesting to note that, while the Press Complaints Commission's Editors' Code of Practice cites exactly the same list of criteria for judging public interest, it includes the additional statement that "there is a public interest in freedom of expression itself". While the statement itself is clearly true, its inclusion could make the regulator's task very much more difficult. It is unclear how a definition of such latitude is supposed to interact with narrower definitions, and therefore on what grounds the regulator should seek to impose limits. It was for this reason that, when we were drawing up the Broadcasting Code, we resisted suggestions from stakeholders that we should include a similarly broad statement.

Part 2: The strengths and weaknesses of the current Ofcom-led system and, in particular, your views on the steps which might be taken to improve the regulatory framework and effort.

In responding to this question, I argue that the system for content regulation in its entirety – broadcast, non-broadcast, press - needs to be addressed. Recent events have shown that a new approach to self-regulation is needed if it is to command public confidence; but I also believe that this can best be accomplished by significantly changing Ofcom's role at the centre of the regulatory framework, and ensuring that it is better able to sponsor effective regulation across current and future content services rather than being narrowly prescriptive in approach.

The current Ofcom-led system

The power to license, and to impose conditions through that licence, has some real benefits. It gives great certainty to the licensed broadcast sector about how they will be regulated. It also ensures that Ofcom cannot extend its regulatory reach beyond a set of strictly defined services. And although Ofcom has a duty to promote self-regulation where possible, this only applies in areas where it has regulatory duties in the first place – not in areas that fall beyond its regulation.

But this strength is also a weakness.

First, the current system locks the regulator into an old, "broadcasting world" set of concerns, and limits its ability to engage with issues raised by new types of service delivered in new ways. The cost of limiting Ofcom to a restricted range of services has been to entrench an unhelpful divide between "statutory regulation" and "self regulation".

Second, the current approach requires Ofcom to exercise a degree of control over some services that is increasingly hard to justify. The basis of most content regulation lies either in the privileged access to the scarce radio spectrum, or from the need to impose specific content obligations in return for public funding. But the vast majority of services licensed by Ofcom neither use spectrum, nor do they take public subsidy of any kind.

The justification for regulating these services lies in assumptions about the particular power of the broadcast media. While this may be true of a small but powerful subset of the major broadcast services, it is of decreasing relevance to many, if not most, of the licensed services, many of whom more closely resemble the on-line and on-demand services that offer broadly similar niche content but which are very differently, and very lightly, regulated, if at all.

Problems with self-regulation

The focus of my submission is, inevitably, on Ofcom and how it can best play its role in future: but it is offered against a backdrop of perceived failure elsewhere in the system, and it is therefore important to comment, not on the individual phone hacking case, but on the wider issues of self-regulation.

Allowing the industry to take the lead in regulating itself has some distinct advantages:

- it ensures industry ownership of the code
- it ensures high levels of industry knowledge and anticipation in creating and enforcing the standards set in the code
- it removes the state from having to interfere in potentially explosive issues of political comment and debate

And it shares some distinct advantages over courts-based approaches with other forms of code-based regulation:

- it is speedy
- it can ensure effective action, with industry and public assent, in areas where the burden of criminal proof would be too high for effective action in the courts
- it can respond more swiftly to changes in the technological or consumer context

Most of the "self-regulation" that Ofcom engages with is really "co-regulation" – i.e. regulation where the state retains some backstop powers. The ASA, PhonepayPlus and ATVOD all regulate with Ofcom operating as back-stop – designating, approving codes, imposing sanctions, reviewing operational effectiveness – and, if necessary, taking the regulation back to itself.

"Pure" self-regulation – as in the case of the PCC – is distinctive in having no back-stop statutory body. This ensures complete independence from the state – which is clearly important in areas dealing with the potential regulation of political reporting and analysis; but the price – in the case of the PCC at least – has been in some other key areas:

- it has no power to compel membership and compliance with the code – Northern and Shell's Express titles famously removed themselves from the PCC framework, and there is nothing to prevent other titles from doing the same
- it has weak powers of investigation
- its powers of sanction are limited to demanding a published apology

I believe that any future system of press regulation will need to find convincing answers to these three problems, without undermining the essential freedom from state interference without which a free press cannot operate.

A radical future

The new system should start in a radically different place: that instead of a binary system of statutory and self regulation, the whole system of content regulation should be carried forward by a number of industry led regulatory bodies, operating under terms that have been agreed with Ofcom.

A new system might have therefore be shaped around the following requirements:

- **A single set of content outcomes relevant for the overall communications sector**

There is already a common core of outcomes on which most existing codes would agree: protecting privacy, ensuring fair treatment, taking steps to minimise offence where possible, having particular regard to the sensitivities of vulnerable consumers. There will be others that do not have universal application: ensuring impartiality in news and analysis is an obvious example.

Ofcom should be given the task of identifying the range of content outcomes that might be relevant to content services; and then deciding which are relevant to which category of service. Ofcom would therefore be able to ensure that a very tight regime should apply to PSBs, with far greater freedom permitted to narrower niche channels; or that some categories of news service should be bound by impartiality rules that would not be applied to the printed press.

- **A duty on Ofcom to approve industry led regulatory codes that comply with the relevant content standards**

Having determined which content outcomes are relevant for different types of service, Ofcom's next task should be to approve the codes put in place by the relevant industry led regulatory bodies. The requirement to approve the codes would follow directly from the obligation placed on Ofcom to determine which of the content outcomes need to apply to different categories of service.

Ofcom should not be prescriptive about the scope of services covered by these bodies. Some might logically cover types of institution in terms of all of their content, across different platforms (for instance, PSBs and their on-line services; or newspapers and their websites and audio-visual offerings). Others might be more narrowly focused on specific media – non-PSB commercial TV channels, or commercial radio stations, for instance.

Only a system is designed around a single regulator applying a single set of rules to all content services – which would be wholly undesirable - could avoid some apparent inconsistencies. Regulatory bodies built around types of media enterprise – for instance, PSBs or Newspapers – would have the advantage of offering those organisations a single regulatory body to deal with for all their content; but this

would mean that the content they both offered on the same platform (IPTV, for instance) would be regulated by different bodies. Alternatively, attaching regulation primarily to the type of distribution would ensure uniformity of approach to services on that platform, but would result in PSBs or newspapers finding content that they share between their different services now subject to different regulators covering different distribution platforms.

The truth is that the future will be complex and fast moving, and the regulatory architecture should form itself around the expectations of the consumer: brands and institutions may be as important as, and in some cases more important than, distribution platforms, and the regulatory framework should be flexible enough to be able to cope with both approaches, provided that it delivers a comprehensive approach. The underlying principle, as set out above, must be that Ofcom must determine the minimum content outcomes appropriate for different types of service and ensure that any regulatory body dealing with that type of service delivers them.

Ofcom should also ensure that the governance arrangements of the new bodies are likely to secure independence from government and politicians, as well as sufficient distance from the industry or institutions they regulate. Ofcom should also be given back-stop powers for any of the codes it approves: this might involve applying sanctions, or taking a service under direct regulation by Ofcom if it has consistently failed to observe the standards required by the self-regulatory body. The experience of existing self-regulatory bodies suggests that enforcement – especially the power to impose serious sanctions – is typically difficult to achieve, and that a backstop statutory power may therefore be helpful to these new industry led bodies.

And in the event that Ofcom concluded that the regulatory body was failing in its duty, it could be required to regulate that sector until a new body could be formed to replace the failing one.

- **Ofcom should be relieved of most of its licensing obligations**

Apart from a limited number of cases where licensing will still be appropriate – typically, those where scarce spectrum is being used (eg multiplex licences for the broadcast of digital terrestrial TV) or where particular public service obligations are involved in return for an implicit or explicit subsidy – all other broadcasting services should be freed from the need to hold a licence.

However, as the decision by Northern and Shell to withdraw from the PCC shows, a situation where organisations are completely free to choose whether or not to submit to the appropriate level of regulation is unsustainable. Ofcom should therefore be given the power to require a content service to join the appropriate industry led body. Ofcom could also have the power, if the service refused to join the appropriate code, to apply the code itself, and charge an administrative fee.

The advantages of this new system – compared to the weakness of the current approach

Today's system of content regulation is largely out-dated:

- it perpetuates an unhelpful divide between statutory and non-statutory regulation, building up unhelpful boundaries
- Ofcom is locked into focusing on broadcasting at the expense of playing a wider role in relation to the whole communications sector
- self-regulation is patchy: in some areas it has worked well (the ASA) but in other areas enforcement has been difficult and demonstrable independence hard to achieve

Radical reform along the lines I suggest would

- greatly reduce the tension between statutory and industry led regulation, by putting industry led regulation at the core of the system
- give Ofcom a meaningful, purposeful and consistent role across the whole communications sector
- put industry led regulation at the heart of the system, allowing Ofcom to focus on ensuring that the benefits of self-regulation – speed, knowledge, anticipation of problems, the ability to tailor interventions and remedies in the most appropriate ways – are complemented by a statutory backstop that finds the best way to support independence, and the powers to investigate and where necessary sanction

A note on terminology

You will see that I have resisted describing the new bodies as either self-regulators or co-regulators. The reason for not using "self-regulator" is that it would be inaccurate – Ofcom would have a key role in approving the code, and operating as a backstop power. And the reason for not using "co-regulator", even though it is more accurate – and no doubt the legally correct term – is that it suggests a primary regulatory role for Ofcom that I do not think it ought to exercise in future. Instead, it should operate as the sponsor, approver and backstop to the bodies set up by industry itself.

I have also resisted speaking of "content standards" and referred to "content outcomes" in describing Ofcom's role. This is not simply semantic, but is because I believe it would be appropriate for Ofcom to set, at a very high level, the characteristics of a properly regulated content sector, and to define the types of service to which these are relevant; but it is for the different parts of industry themselves to define, and abide by, the standards that are necessary to meet them.