

Dated 19 July 2012

**IN THE MATTER OF THE LEVESON INQUIRY INTO THE CULTURE,  
PRACTICES AND ETHICS OF THE PRESS**

**CLOSING SUBMISSIONS FOR NEWS INTERNATIONAL**

**OVERVIEW**

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Appendix 1 - Submissions in relation to Rule 13 warning letters on behalf of News International, dated 21 March 2012

Appendix 2 - Further submissions for News International in relation to Rule 13, dated 13 April 2012

Appendix 3 - Hansard transcript of debate on moral rights

## Introduction

- 1 News International (“NI”) has previously filed submissions on 24 February 2012 and 11 May 2012 on the evidence and issues arising in Module 1 (the press and the public) and Module 2 (the press and the police), as well as submissions on the law of privacy and plurality issues. At the close of the Inquiry, NI is now filing:
  - (a) An overview of issues relevant to the Inquiry as a whole, including future regulation and the approach to findings of fact;
  - (b) An analysis of the issues thrown up by the evidence given in Module 3 (the press and politicians), including issues concerning plurality and the attempted distinction between fact and comment;
  - (c) An addendum to NI’s previous submissions on Module 1 (the press and the public) to address significant evidential developments on Module 1 issues since 24 February 2012 and to respond to submissions of other core participants in relation to Module 1;
  - (d) An addendum to NI’s previous submissions on Module 2 (the press and the police) to address significant evidential developments on Module 2 issues since 11 May 2012 and to respond to submissions of other core participants in relation to Module 2; and
  - (e) An up-date to NI’s submissions on the law of privacy.

## The genesis of the Inquiry

- 2 On 5 July 2011, The Guardian reported that in March 2002 journalists from The News of the World (the “NoTW”) had intercepted and deleted the voicemail messages of Milly Dowler and that, as a result, friends and relatives of Milly had concluded wrongly that she was still alive. The article reported that this caused false hope and extra agony for those who were misled by it.
- 3 On the day after that report in The Guardian, 6 July 2011, the Prime Minister told the House of Commons that an inquiry was needed. On the day after that, 7 July 2011, Mr James Murdoch announced that the next issue of the NoTW would be its last. On 13 July 2011 the Prime Minister announced that the Chairman would be appointed to chair an inquiry under the Inquiries Act 2005 and promulgated draft terms of reference.
- 4 This Inquiry was not established in July 2011 in order to carry out or oversee a thorough criminal investigation into phone hacking. The Metropolitan Police Service (the “MPS”) had begun Operation Weeting for that purpose six months earlier in January 2011, the first three arrests had been made in April 2011 and the conduct of Operation Weeting under Deputy Assistant Commissioner Sue Akers has commanded general confidence. The

Inquiry has, rightly, eschewed any detailed exploration of matters likely to be the subject of criminal proceedings.

- 5 The *raison d'être* of the Inquiry has not, therefore, been the need for a criminal investigation but a widely expressed concern that the reason for the absence of an earlier thoroughgoing investigation into phone hacking and other press misconduct was to be found in the existence of unhealthy relationships between the press, and NI in particular, and both the MPS and politicians.
- 6 This is not to say that the remit of the Inquiry has been confined to the issue of why phone hacking was not more fully investigated before 2011. The Inquiry's Terms of Reference require it to range far more widely than that and it has done so, but the momentum for the establishment of this Inquiry lay in the need to know whether there were insidious reasons why these stones were not turned over earlier.
- 7 Thus, on 27 February 2012, leading counsel to the Inquiry, Robert Jay QC, opened Module 2, concerning the press and the police, by identifying its purpose as being to examine the hypothesis that the relationship between the police and the media, and NI in particular, was at best inappropriately close, if not actually corrupt, and to consider whether any such relationship explained why the police did not properly investigate phone hacking until 2011. Similarly, on 10 May 2012, when opening Module 3 concerning the press and politicians, Mr Jay identified as being at the heart of the problem a perception that the trade-off for political support by the press is the deliverance by government of media policies which favour the commercial interests of newspapers in general or of particular newspaper groups.

### **The lessons of the Inquiry**

- 8 Three key lessons have emerged from the evidence heard by the Inquiry, corresponding to the three Modules into which the Inquiry divided the factual evidence.
- 9 First, the evidence given, particularly in Module 1, by members of the public, celebrities and politicians (in their private capacities) has demonstrated that there have been cases of unethical conduct by the press. For its part NI accepts and regrets that such conduct included voicemail hacking, the procurement of personal data through private detectives, instances of unwarranted intrusion into privacy, harassment and, in the case of Chris Jefferies, a breach of the Contempt of Court Act 1981. The current MPS investigation into allegations of illegal payments to police officers and other public officials at The Sun also gives rise to serious concerns. In the case of voicemail hacking and the use of private detectives to obtain personal data, it is important to note that, in respect of NI, there is no evidence of persistent abuses occurring after the arrests of Mr Goodman and Mr Mulcaire in 2006 and the publication of the Information Commissioner's two reports in the same

year. The current Information Commissioner and his predecessor confirmed in evidence to the Inquiry that their problems since 2006 have not been with the press.

- 10** The second key lesson, established by the evidence heard in Module 2, is that the decisions made by the MPS as to the extent of the phone hacking investigation in 2006 and whether or not to re-open that investigation in 2009 were not the product of any corrupt or overly close relationship with NI. On the contrary, the decisions were made by the MPS themselves and of their own volition.
- 11** In 2006 the critical decisions were made by a much respected officer, Deputy Assistant Commissioner Peter Clarke, against whom there has been no suggestion of inappropriate relations with the media in general or NI in particular. DAC Clarke acted for entirely proper resource and operational reasons that had nothing to do with any relationship with NI and everything to do with the resourcing demands of an unprecedented number of anti-terrorist operations, which inevitably took priority over phone-hacking investigations.
- 12** The speed with which Assistant Commissioner John Yates made decisions following the publication of The Guardian article of 9 July 2009 has been much criticised, but there is no evidence whatsoever that he reached his decisions for any improper reason. In particular, there is no evidence that he acted as he did because of an improper relationship with NI or because of any influence exercised by NI over him. On the contrary, there is ample evidence that he came to his conclusions on the basis of the information provided to him by his colleagues at the time and because, in 2009, the MPS saw themselves as rebutting an attack on the integrity of the 2006 investigation. That belief may have engendered an unduly defensive reaction to The Guardian's article, but the response of the MPS was not the product of any influence exercised by NI.
- 13** As a supplement to the Module 2 evidence, in the course of Module 3, a succession of three Home Secretaries (John Reid, Alan Johnson and Theresa May) gave evidence which confirmed that the decisions taken by the MPS in relation to phone hacking investigations were not subject to improper influence by politicians. Nor has there been any suggestion that NI sought to influence the MPS through politicians.
- 14** The third key lesson derives from the evidence given in Module 3 (and the overlapping evidence of the proprietors). Here, an overwhelming weight of documentary and oral evidence has put paid to the much peddled conspiracy theories that express or implied deals were done between NI and politicians by which favourable press coverage was traded for governmental favours. The most popular of these theories assert a deal with Mrs Thatcher in 1981, a deal with new Labour in 1997 and a deal with Mr Cameron in 2009. Not one of these theories has withstood scrutiny.
- 15** In the case of 1981, the documents now available tell a clear story. The decision not to refer Mr Murdoch's bid for The Times and The Sunday Times to the Monopolies and

Mergers Commission (the “MMC”) was taken by the Secretary of State, Mr John Biffen, who was responding to figures from the Thomson companies showing both papers not to be economic as going concerns and to a deadline imposed by Thomson and which they refused to extend. For his part, Mr Murdoch said that he would not withdraw his bid in the event of a referral to the MMC and that he would cooperate with an investigation by the MMC. Mr Biffen’s recollection in 1998 was that “*so far as he knew everything had been above board*” (Mr Mullin’s diary entry for 4 November 1998). Mr Biffen made the decision and defended it in the House of Commons. His view, that everything was above board, is incontrovertible.

- 16 In the case of new Labour in 1997 and the Conservative party in 2009, the supposed deals were comprehensively refuted by Mr Rupert Murdoch and Mr James Murdoch, and by the evidence of three prime ministers, Mr Blair, Mr Brown and Mr Cameron. Each gave oral evidence to the Inquiry and each denied any deal with Mr Rupert Murdoch or with NI. Their evidence was not exceptional; they were supported by a panoply of political figures from across the political spectrum.
- 17 This evidence is not surprising. As more than one witness pointed out, it would be a very naive politician who expected the press to stay off his back if events turned against him and a very naive press baron who expected politicians to show quarter if events turned against him. Nor, indeed, should the Inquiry fall prey to the undue cynicism of which the press is often accused. It is a strong thing to accuse a government minister of exercising political or governmental power in accordance with a secret underhand deal rather than in accordance with his judgment and conscience and it is an equally strong thing to accuse a newspaper publisher of trading the editorial integrity of his paper for improper advantage.
- 18 Each of these three lessons is of vital importance. The first demonstrates that, although some types of abuse are in the past, more needs to be done to protect the public from transgressions by the press in the future and to provide responsive remedies if transgressions do occur.
- 19 The second and third lessons are negative findings: that MPS investigations were not cut short due to improper relationships and that there have not been illicit deals between the press and politicians. Such lessons are no less important for finding an absence of wrongdoing. The Inquiry has performed a signal public service through hearing the evidence which establishes that the MPS made their own decisions in relation to phone hacking, uninfluenced by NI, and that politicians have not been engaged in underhand deals with Mr Rupert Murdoch or with NI. Clearing the air of myths and conspiracy theories is a valuable public service in itself.
- 20 In that context, the Inquiry also asked the MPS for a report on the status of the investigation into the hacking of Milly Dowler’s voicemail. Detective Chief Inspector Macdonald provided a witness statement summarising the position on 8 May 2012. Whilst

noting that it may never be possible to reach a definitive conclusion as to what happened 10 years ago, he reported that the MPS were able to say with some confidence that Mrs Dowler's 'false hope moment' occurred on 24 March 2002, that there was complete call data covering a period up to 23:59 on 24 March 2002 and that there was no evidence to support a suggestion that any journalist attempted to hack into Milly's phone prior to 26 March 2002 (two days after the 'false hope moment'). Furthermore, there is a clear alternative explanation for the 'false hope moment', namely that messages were automatically deleted from Milly's voicemail after 72 hours. Thus the MPS investigation gives no support to the most emotive element of The Guardian's story, namely the claim that journalists from the NoTW caused false hope and extra agony for family and friends of Milly Dowler by deleting voicemail messages left for her. This is itself an important contribution to the history.

- 21** Taking together the three lessons of the Inquiry, it is apparent that the principal focus of the Inquiry's recommendations must be on the future protection of the public from journalistic abuses. There are differing views about proposals to improve further the transparency and conduct of relations between the press and the police, but the fear of improper influence over police investigations has proved unjustified. In the case of relations between press and politicians, greater transparency has already been introduced through an amendment to the Ministerial Code requiring the publication by the government of quarterly lists of meetings with newspaper and other media proprietors, editors and senior executives (and the Opposition has adopted the same practice). There is room for debate over whether further details should be given, but the real need is for an increase in mutual respect and a decrease in cynicism. As was common ground amongst the witnesses, such improvements in conduct have to be earned rather than legislated for. That problem is, moreover, wider than the Inquiry, embracing as it does the behaviour of broadcasters on radio and television as much as the press.

#### **Changes at NI**

- 22** NI acknowledges that the voicemail hacking at the NoTW was profoundly wrong and the company is seriously concerned by the allegations of payments to police officers and other public officials at The Sun which are under current investigation by the MPS. In addition, The Times deeply regrets the e-mail hacking in the Nightjack case and the failure to disclose to the court and Mr Horton the true means by which his identity was discovered.
- 23** NI has, however, recognised the need to take decisive action and to renew its standards and controls. It has voluntarily passed information to the MPS since January 2011. Indeed, DAC Sue Akers informed Tom Watson MP in a letter of 28 February 2011 that her investigation (Operation Weeting) started as a result of new information that was provided to the MPS by NI [MOD300005447].

- 24** In July 2011, Lord Grabiner QC was appointed as the independent Chairman of the Management and Standards Committee (the “MSC”). The MSC reports to independent members of the board of News Corporation and has responsibility for ensuring full co-operation with all investigations into voicemail hacking and related issues, including this Inquiry and the investigations by the MPS. The MSC pro-actively commissioned rigorous reviews by Linklaters designed to unearth all evidence of wrongdoing at NI titles. Those reviews have been completed and, subject to appropriate protections for sources, where evidence of potential criminal conduct has been found it has been passed to the MPS. A significant number of arrests have resulted.
- 25** These reviews have been an enormous and painful exercise but, having been completed, they have had two salient consequences. First, in relation to the past, NI can be confident that the MSC has taken appropriate action to ensure that any relevant evidence uncovered by the reviews has been provided to the MPS for their consideration. Secondly, for the future, it cannot be other than clear to every journalist and other member of staff that criminal conduct at NI titles will not be tolerated. The current MPS investigations concern events going back up to 10 years. In future, no NI journalist will think for a moment that it is worth harbouring the hope that they might get away with criminal conduct (the commission of technical offences which are fully justified in the public interest is, of course, a different matter).
- 26** The salutary consequences of past misconduct are, in themselves, a powerful force for good behaviour in the future, but governance and compliance structures have also been improved, expanded and reinvigorated. A new post of Chief Compliance Officer for NI has been created and filled, a new General Counsel has been recruited for NI, written policies have been over-hauled and fresh training has been given to journalists and editorial staff. In short, lessons have been learned and NI is determined to ensure that past misconduct will not be repeated at its titles.

#### **Future regulation of the press**

- 27** For the future, NI supports the proposals put forward by Lord Black and Lord Hunt for an improved system of independent regulation of the press, based upon a contractual model. NI’s titles have always been members of the PCC and its predecessors and they intend to join any successor body. Ofcom in its advice to the Inquiry recognised that a statute was not necessary if the industry was prepared to participate in a binding form of self-regulation [MOD40000860 [4.31]].
- 28** There are adequate precedents for regulatory and disciplinary systems founded on contractual models. The enormous edifices of modern professional and amateur sport, from grass roots clubs to national bodies to international bodies, depend upon contractual agreements and successfully exercise disciplinary functions. As Michael Beloff et al explain in *Sports Law* (Hart Publishing, 1999) this system has grown up internationally

*“without any legislative underpinning to speak of”* [1.10]. Nor is it doubted that sporting disciplinary bodies can conduct investigations and impose fines and other penalties, as they have done on numerous occasions. There can be no public policy objection to the imposition of a merited fine by an industry regulator.

- 29** It is the case that contractual bodies cannot force people to join them, but there will be potent persuasive factors in the recognition by the principal players that independent regulation is required, the advantages of what Lara Fielden of the Reuters Institute persuasively described as a “Fairtrade Mark” [130712PM/87/11-88/6] and such other incentives as Lords Black and Hunt are able to devise.
- 30** NI considers that there remain principled constitutional objections to any element of Parliamentary or statutory control over the freedom of the press. It may well be posited that, if the press are the guardians, someone should have the power to guard them (*Quis custodiet ipsos custodes?*). But, the chain of guardianship has to come to an end at some point. Both history and principle argue that at the end of the chain there should be found the traditionally disparate, unruly and iconoclastic characters who make up the press and wield only their pens, in preference to a body created or recognised by statute and, almost inevitably, staffed by the usual cadre of powerful but unelected and unaccountable establishment figures who populate quangos up and down the land.
- 31** Further, there are two reasons why any statute opens the door to future Parliamentary intervention. First, it is very much easier to find Parliamentary time and appetite for an amendment to an existing statute than for the introduction of a new Bill in a controversial area. Consider the amendment to the DPA 1998 introducing custodial sentences for s.55 offences for (amongst others) journalists. This was inserted into an existing Criminal Justice and Immigration Bill and Parliamentary time was found for it. It is extremely unlikely that Parliamentary time and appetite would have been secured for an “Imprisonment of Journalists Bill”. This is why Ofcom in its advice to the Inquiry described the fear of amendment as “a credible risk” [MOD40000862 [6.2(f)] – see also [4.12] and [4.34]]. Secondly, almost all new statutes these days provide for at least some powers to make delegated legislation. Any “Leveson Act” will doubtless do the same. The power to make delegated legislation extending the scope for interference with the press could well be just too tempting for a government under attack from the press.
- 32** In addition to this objection of principle, formidable practical and legal obstacles face any scheme under-pinned by statutory compulsion. A notable advantage of a non-statutory scheme is that it does not need to be too doctrinaire about who it admits to membership, or how it raises the funds it needs. By contrast, a statutory scheme must face up to two intractable problems of definition and a third problem of funding.
- 33** First, a compulsory scheme must define the press. Even for the printed press, this is not easy. What frequency and regularity of publication and what circulation is required to

qualify? But an answer to those questions is not enough because it has been widely recognised that any regulator established in or after 2013 must address internet publishing as well as print. The likes of Google News, MSN, The Huffington Post, Guido Fawkes, Popbitch and TMZ.com, as well as regional sites such as the Mercury Press and Media website (serving Liverpool) and influential blogs cannot fairly be ignored, and nor can the imminent prospect of well known existing print titles moving partly or wholly online.

**34** The rate of change of the internet and the devices that access it must also be borne in mind. By way of a reminder of the speed of change: Google was founded in 1998, Wikipedia in 2001, Facebook in 2004 and Twitter in 2006. Just as importantly, the iPhone was launched in 2007 and the iPad in 2010. The rate of change is unlikely to slow. It is inevitable that there will be major developments within the next few years which will impact upon how news is delivered and consumed.

**35** The recent Reuters Institute Digital News Report for 2012<sup>1</sup> reported that the estimated 77% of the UK population that uses the internet accessed the following news sources in a week:

Online:	82%
Television:	76%
Print:	54%
Radio:	45%

Amongst the younger age-group (16-24) the use of online news sources increases to 88%, while other sources fall, in the case of print to 49% [table 1.2a, p.23]. The recent Ofcom report entitled “Measuring media plurality” (considered in detail below in the Plurality section of the Module 3 Submissions) reaches similar conclusions [4.4–4.7], as does the report by FTI Consulting submitted by NI and entitled “The Importance of the Internet in How News is Obtained in the UK Today”. The presentation to the Inquiry’s seminar by Enders Analysis demonstrates a powerful correlation between increased internet access and a decline in both print circulations and advertising revenue garnered by print publications [MOD00001237-45].

**36** Thus, the printed press is already economically fragile and suffering commercially from its competition on the net. In the internet age, the imposition of compulsory regulation (and its associated costs) on the printed press alone would be unfair and unjustifiable.

**37** Not only would such compulsory but partial regulation be economically unfair, it would also constitute an interference with the rights to freedom of speech enshrined in Article 10. While interferences with freedom of speech may be justified if prescribed by law and

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<sup>1</sup>[http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Other\\_publications/Reuters\\_Institute\\_Digital\\_Report.pdf](http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Other_publications/Reuters_Institute_Digital_Report.pdf)

necessary in a democratic society, a discriminatory regime which applied to publications in print, but not to publications on the internet, would be exceptionally difficult to justify as it would confer a clear competitive advantage on providers of online journalism over providers of print journalism, although both provide comparable services to the same consumers.

- 38** A compulsory scheme would therefore require, as a starting point, a workable definition of that part of the internet that was to be within the regulated fold and that part which was not. Such a definition is an elusive target, not least because of the speed at which the net can change. For a recent illustration of the difficulty of defining particular kinds of online service see the Ofcom decision of 21 December 2011<sup>2</sup> on the appeal by News Group Newspapers Limited against the determination by ATVOD that part of The Sun’s online product fell within the definition of an “on-demand programme service” for the purposes of Part 4A of the Communications Act 2003 (as amended to implement the Audio Visual Media Services Directive, 2010/13/EU). ATVOD and Ofcom reached different conclusions about whether video content on The Sun’s website was a “TV-like” service.
- 39** The second definitional problem would then be to produce a formula that spread the cost of regulation fairly between print and internet publishing (assuming that this cost is not to be met from public funds). Again, this is an elusive target, particularly given the speed of change on the internet.
- 40** The third problem, if the first two can be solved, is to devise and collect a lawful levy from internet publishers. It will not be legally or practically possible to exact such a levy directly from those who publish on the internet from outside the UK. The ‘Newzbin’ litigation (which concerned copyright piracy) provides a vivid example of the difficulties of enforcing judgments against internet operators who make full use of foreign jurisdictions and are determined not to pay (Twentieth Century Fox v BT [2011] EWHC 1981 and 2714 (Ch); [2012] 1 AER 806 and 869 (Arnold J)). Nor could such a levy legally be collected through Internet Service Providers (ISPs)<sup>3</sup>. The Government has recently failed in an attempt to impose on ISPs the costs to be incurred by Ofcom and by a putative appeals body in dealing with cases of copyright infringement on the internet. In R (on the application of British Telecom plc) v Secretary of State for Business, Innovation and Skills [2011] EWHC 1021 (Admin); [2011] 3 C.M.L.R. 5 (Parker J) and [2012] EWCA Civ 232; [2012] 2 C.M.L.R. 23 (Court of Appeal), it was held that such costs could not be imposed on ISPs by reason of Article 12 of European Directive 2009/140 (the Authorisation Directive), which restricts the types of costs which can be imposed on ISPs. The Directive would not permit the costs of publishing regulation to be imposed on ISPs, any more than it permits the costs of copyright regulation to be imposed on them.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

<sup>3</sup> As suggested by Mr Max Mosley in his submission [MOD40000483].

**41** If these objections of principle, fairness, law and practicality result in the promotion of an independent regulator without statutory support, it should not be thought that such a regulator will constitute the only body which calls the press to account. The press remains subject to the criminal and the civil law which have been in force throughout, but of which there is now a heightened awareness. If there ever was a mutual self-restraint doctrine among the press, it has now gone. Private Eye has long fulfilled a scandal watching function and The Guardian, The Independent and The New York Times have been active in reporting the voicemail hacking story. Websites such as Full Fact, Daily Mail Watch and the Media Standards Trust (which runs Churnalism.com) test and comment on the accuracy of stories in the printed press (as well as statements by politicians and others) and there is now a veritable industry of media academics, many of whom write blogs. At the same time, political blogging sites such as Liberal Conspiracy and Guido Fawkes keep a Private Eye-style watch on people and publications across the political spectrum. Parliament's Culture, Media and Sport Select Committee takes regular evidence from and about the printed press. In sum, there are an increasing number of people and bodies willing and keen to follow up any promising scandals concerning the press.

**42** Nor does the chronology of the voicemail hacking story suggest that scandals concerning the press lie hidden for longer than others. The MPS decided not to widen their investigation into journalists (beyond Mr Goodman) in about October 2006. The Guardian published its opening article in July 2009 and the MPS re-opened their investigation in January 2011. The story may be said to have been quiescent for less than three years (October 2006 to July 2009) and simmering for another 18 months (July 2009 to January 2011). By way of comparison:

- (a) Simon Walters gave evidence to the Inquiry that he had written a story about MPs expenses in 2002, but it was not until May 2009 that The Telegraph began publishing details of the expenses claimed by MPs. Investigations since have concentrated on the period since 2004, but it is likely that the scandal has far older roots, possibly back to the 1980s; and
- (b) Despite a very extensive regulatory framework, the financial services industry appears to move from one scandal to another (notable examples being BCCI, mis-selling of pension transfers and payment protection insurance and the current LIBOR fixing scandal).

There is, in truth, no proper analytical basis for a conclusion that scandals involving the press go undetected and unreported for longer than other scandals.

### **The merits of the press**

**43** The Inquiry has provided a forum for those with complaints to make against the press. Perhaps inevitably, there has been less focus on the many things the press does well. Within the lifetime of this Inquiry the Chairman will have noted, to take only a few examples

from NI titles, the convictions in November 2011 in the Pakistan Cricket spot fixing case, following an investigation undertaken by the NoTW, the first conviction under the Bribery Act 2010 in October 2011 of a Magistrates' Court Clerk who was filmed by journalists from The Sun accepting a bribe to suppress a road traffic offence, the fearless reporting from Syria for The Sunday Times of the late Marie Colvin, and the recent revelations in The Times of aggressive tax avoidance.

- 44** Publishing in the public interest also deserves to be considered in a wider context than the merits of the best individual stories. The best stories do not come round every day, or even every week, but the press speaks to its readers every day and must maintain their interest from day to day and week to week. Confined to a pure diet of 'worthy' public interest stories the popular press, and probably the broadsheet press too, would collapse. But it is in the public interest that the press should reach a mass market of readers and inform, educate and entertain them on the current issues of the day so that the country can exist as a functioning democracy. Tabloid newspapers like The Sun, the UK's best-selling national newspaper, are eye-catching and often raucous, but they command widespread public approval through the ballot box of purchase.
- 45** The tabloid and mid-market press has a readership of 17.5 million (of which The Sun has 7.1 million) compared with a total combined readership of 5 million for the Telegraph, The Times, the Guardian, the Financial Times and the Independent. By creating a unique chemistry of stories every day, The Sun educates and entertains. The Sun's popular campaigning journalism gives millions of people a sense of their own place in the nation's public life and gives a voice to their passions and concerns. Such popular journalism, which distils complex issues of the day into easily understood copy - alongside sport, celebrity and scandal - connects with the values and broad interests of millions of ordinary working men and women every day, and in doing so it serves a proper and vital purpose in our democracy. Whilst the Inquiry has not explored why readers of tabloid newspapers value their favourite title, they must not be ignored. Their interests should be granted the same legitimacy as those of a reader of, for example, The Economist.
- 46** The Sun, The Times and The Sunday Times each play their part in the role of the press in a free society. That role is to inform; to hold the powerful and privileged to account; to give a voice to those who are unheard and to tell many people what few people know. A free press, able to challenge the power of the state, is an essential protection of individual liberty and prerequisite of a free society. These tenets are shared equally by The Times, The Sunday Times and The Sun, three titles that reflect the broad spectrum of readership in the United Kingdom.
- 47** The Times has a proud history of news reporting, political analysis, campaigning and expert commentary. It speaks truth to power with an independent and authoritative voice.

- 48** The Sunday Times has a distinguished record of investigative journalism, shining a light into corners that others would prefer to remain in shadow. When information cannot be found by any other means, it may use subterfuge and adopt the "ratlike cunning" that Nicholas Tomalin, a great Sunday Times reporter who died for his trade, said was essential in every successful journalist. The country needs this robust form of reporting if we want to preserve an open society. At times it may be troublesome, uncomfortable and noisy, but the alternative of a cosy establishment looking after itself is worse.

**The approach to findings of fact**

- 49** NI makes submissions on factual matters in its submissions on the evidence heard in Modules 1, 2 and 3. It has previously made submissions on 21 March 2012 and 13 April 2012 (see Appendices 1 and 2) which address the Inquiry's approach to criticisms of individuals in the context of Rule 13 of the Inquiry Rules 2006 and the Chairman has made a ruling dated 1 May 2012 on the Application of Rule 13 of the Inquiry Rules 2006, with a supplementary ruling on 4 May 2012 in relation to the MPS.
- 50** NI adopts its previous submissions on this subject, but something more should be said about the approach to findings of fact at this final stage of the Inquiry, now that the evidence is complete. Indeed, a good deal more evidence has been given, and a fresh range of issues considered, since NI's submissions of 13 April 2012.
- 51** The extent to which the Inquiry can and should make findings of fact is necessarily conditioned by the procedure the Inquiry has adopted. That procedure has been designed to cover an enormous amount of ground on a very tight timescale. In the result:
- (a) Core participants have generally had little notice of the evidence to be heard, although that evidence has covered an enormous range of factual issues over a period reaching back more than 30 years (of course those who are not core participants, and individuals outside the confidentiality circles within core participants, have had no advance notice of the evidence to be given);
  - (b) Where more than one witness has given evidence on the same factual topic, notice of the evidence of the later witnesses has not generally been available when the first witness has given evidence;
  - (c) The oral evidence of witnesses has been almost exclusively elicited in a non-confrontational manner by questions from Counsel to the Inquiry. Counsel for core participants have, from time to time, applied for and been granted permission to ask questions by way of clarification or challenge but there has been no instance where a witness has undergone what would ordinarily be regarded as a searching cross-examination. Nor has the time been available to allow for the preparation or the conduct of full cross-examinations;

- (d) There has been no precise formulation, in writing or otherwise, of any factual issues which the Inquiry might seek to resolve;
- (e) The Chairman has adopted as a 'mantra' the principle that he is not interested in "*who did what to whom*" [311011AM/63/22] and has explained more fully that "[T]his Inquiry is not concerned with individual behaviour – that is to say, who did what to whom – and has eschewed such investigation as a matter of fairness, but is rather concerned with custom, practices and ethics" [120312AM/12/22-13/1-9]. Similarly at [37] of the ruling on the approach to evidence dated 7 November 2011 the Chairman explained that the purpose of calling for evidence (and subsequently bringing witnesses to the Inquiry to give evidence in person) was '*to understand, in a general sense, what has been happening*'. This would avoid '*descending into the detail of specific acts of alleged illegal or unethical conduct (which requires naming names...)*' [34]. Further statements to the same effect are collected in NI's submissions of 13 April 2012;
- (f) In fairness, this principle must apply not only to the question of 'who did what to whom', but also to those of 'who said what to whom' and 'who knew what when'. There is no fair basis for not making findings on the first, but making them on the second or third.

**52** In these circumstances it is submitted that the position in relation to the making of findings of fact is as follows:

- (a) Where the Inquiry has received credible evidence which is not the subject of any credible dispute, then it can, and if material should, make findings of fact. An example would be the evidence of DAC Clarke as to the decisions he made in relation to the phone hacking investigation in 2006 (Operation Caryatid);
- (b) Where there are disputes of fact with material which is capable of being credible going both ways, the Inquiry is not in a position to resolve the dispute by making findings of fact. As explained above, the Inquiry's procedures have not been designed for that purpose. An obvious example in this context is provided by the disputes between Mr Michel and Mr Norman Lamb MP as to what was said at their meetings on 10 June and 27 October 2010. Mr Lamb has not been cross-examined on the issues and they have not been put to Mr Michel at all. In these circumstances, the Inquiry cannot make findings as to what happened.

**53** In relation to criticisms of individuals, two further issues arise. First, it has long been a tenet of the English legal system that a witness should not be criticised for dishonesty, or for giving dishonest evidence, unless that criticism has been squarely formulated and put to the witness during his evidence. In George Wimpey UK Ltd v VI Construction Ltd [2005] EWCA Civ 77; [2005] BLR 135; Peter Gibson LJ said (at [31]):

*It is trite law that dishonesty must be pleaded with full particulars and put to the person alleged to be dishonest (see, for example, the remarks of Lord Millett in Three Rivers District Council v Bank of England [2003] 2 AC 1 at paras. 183–186 in a speech which, although dissenting in the result, was fully in accord with the views of other members of the House of Lords on this point). This is an essential procedural safeguard on which the courts insist. It is not open to the court to infer dishonesty from facts which have not been pleaded. Nor is it open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty.*

- 54** As this is a principle of fairness and justice, not simply of procedure, it applies equally to Inquiries. Of course, there are no pleadings in Inquiries, and the inquisitorial procedure of an inquiry is different from the mechanisms of adversarial litigation, but nonetheless any allegation as serious as that of dishonesty (or equivalent conduct) ought to be formulated and notified and put to the person concerned. Similarly, if it is to be suggested that a witness is lying, the challenge should be squarely made. However unlikely it may seem that the witness might be able to add to or explain their evidence so as to rebut the charge, they should be given the opportunity.
- 55** In this Inquiry, there has been no instance where a witness has been notified that they are facing a charge of dishonesty or where their evidence has been challenged as dishonest. This state of affairs cannot be altered through the Rule 13 process. It is a premise of that procedure that the Inquiry has reached and formulated an initial view. An opportunity for rebuttal at that stage is too late to be consistent with the requirements of natural justice. Moreover, the Rule 13 procedure only enables a person facing potential criticism to advance arguments and to draw attention to evidence already given. It is not a re-opening of the evidential stage.
- 56** The second issue is simply that, regardless of the points made above, the Inquiry should be exceedingly wary of reaching conclusions as to the veracity or reliability of a witness's evidence on the basis of the Tribunal's assessment of the way the witness gave his or her evidence. As Lord Bingham explained in his essay: The Judge as Juror: The Judicial Determination of Factual Issues (Current Legal Problems, vol 38 (1985), 1-27; re-printed in 'The Business of Judging', OUP, 2000), perceptions of the witness's demeanour are a very dangerous guide. Sincere witnesses can make mistakes, and apparently insincere ones may be right after all.
- 57** None of this should inhibit the Inquiry from doing its job. As the Chairman noted in the quotation above, the Inquiry "*is not concerned with individual behaviour ... but is rather concerned with custom, practices and ethics*". The Inquiry has received sufficient evidence to enable it draw conclusions as to the customs, practices and ethics of the press, and to make appropriate criticisms falling short of dishonesty, without it being necessary or

appropriate for it to resolve specific disputed issues of fact or to make findings of dishonesty (or the equivalent) against individuals.

### **Summary of NI's position on recommendations**

**58** We summarise here NI's position on areas in which the Inquiry will wish to consider making recommendations.

#### **(1) The future regulation of the press**

**59** As explained above, NI supports the proposals advanced by Lord Black and Lord Hunt for independent regulation without statutory intervention.

#### **(2) Prior notification**

**60** NI submits that a general requirement of prior notification would be an unjustified limitation on the freedom of the press, as confirmed by the ECHR in Mosley v United Kingdom [2012] E.M.L.R. 1; (2011) 53 E.H.R.R. 30 (see further [36.1] to [36.13] of NI's submissions on privacy law).

#### **(3) Contacts between press and the police**

**61** NI is concerned that any recommendations made by the Inquiry should not hamper proper journalistic interaction with the police through the introduction of unnecessarily bureaucratic record keeping requirements.

#### **(4) Contacts between press and politicians**

**62** Greater transparency has already been introduced through an amendment to the Ministerial Code requiring the publication by the government of quarterly lists of meetings with newspaper and other media proprietors, editors and senior executives (and the Opposition has adopted the same practice).

#### **(5) Custodial sentences for breach of the Data Protection Act**

**63** NI submits that, given that both the present and past Information Commissioners have given evidence that, since 2006, there has not been a problem with breaches of the Data Protection Act by journalists, there is no justification for an order under s.77 of the Criminal Justice and Immigration Act 2008 introducing custodial sentences for breach of s.55 of the DPA (save insofar as such sentences are not available in journalism cases). To introduce such sentences (particularly without evidential justification) would create an unwarranted chilling effect (see NI's Module 3 closing submissions at [222] – [239]).

#### **(6) A public interest defence for journalists**

**64** NI proposes that there should be a general public interest defence for journalism. To that end, NI supports the bringing into force of s.78 of the Criminal Justice and Immigration Act

2008 (see [62.1] to [67.13] of NI's submissions on privacy law and the addendum to those submissions).

**(7) Plurality**

- 65 Although the Inquiry has been pressed to recommend caps on market-share for print and other media organisations, the weight of evidence has been against any such recommendations (see NI's Module 3 closing submissions at section I ([653] to [676]).

**(8) Moral rights**

- 66 The issue of moral rights over journalists' copy was considered by Parliament in the course of consideration of the bill which became the Copyright, Design and Patents Act 1988. An amendment was introduced to exclude the acquisition of moral rights by journalists (now s.79(6), and see also relevant exceptions at s.79(3), (4)(a), (4)(d), and (5)). 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.*" Excerpts from Hansard<sup>4</sup> are at Appendix 3. As recently as 2009 the UK Intellectual Property Office consulted on this issue. The government subsequently issued a policy statement ("Consultation on Modernising Copyright") in 2011 which stated that the government did not propose to alter the UK's moral rights regime<sup>5</sup>. It is submitted that the reasoning applied by Parliament in 1988 still stands and, further, 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. This issue has been raised at a late stage and evidence has not been received on it.

**Rhodri Davies QC**  
**Antony White QC**  
**Lorna Skinner**  
**Anna Boase**  
**Oliver Butler**

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<sup>4</sup> <http://hansard.millbanksystems.com/lords/1988/feb/25/copyright-designs-and-patents-bill-hi>

<sup>5</sup> [www.ipo.gov.uk/response-2011-copyright.pdf](http://www.ipo.gov.uk/response-2011-copyright.pdf)