## The Leveson Inquiry

## SECOND STATEMENT OF IAN HISLOP

1. I have read and reflected on the evidence I gave to the Inquiry on 17 January 2012: see the transcript of the morning session, pages **1-42**. I would like to add to what I said in relation to points raised by the Inquiry about a possible new "arbitral mechanism" which might resolve matters swiftly and cheaply: see the transcript at **30/7 – 34/20** (page/line). I am aware that the possibility of an "arbitral" system has been "floated" with other witnesses, including the Editor of the Financial Times, Lionel Barber: see Day 23, **58/7 – 62/5**, and Lord Hunt: see Day 34, **102/16-107/7**. I do not wish to add to what I have said in my witness statement and evidence about the role of a regulator in setting (and policing) standards or in dealing with complaints about articles which have been published.

2. From what was said to me, it appears that the Inquiry might contemplate giving a new arbitral (or regulatory) body power to consider complaints *before* any publication has taken place and, in particular, to decide what can, and cannot, be published: see **31/2 – 31/13**. There are two points I wish to make:

    (1) It is undesirable that a regulatory body should entertain any complaint about content before publication (I do not comment on any procedure to stop harassment or similar behaviour by "desist" notices or otherwise, which does not depend on whether or not publication has taken place) and it is particularly important, as a matter of principle, that the courts (and only the courts) should have power to make an order preventing publication: see [9-13] below.

    (2) If a regulatory body were to be given the power to decide whether publication should be prevented (or permitted), this would not obviate the need to ensure that the court process can deal speedily and effectively with applications and appeals in relation to the prevention of publication, since such a decision by a regulatory body would be subject to review by the court: see [14-18] below.

    To put those points in context, I set out briefly some background on the present position as to prior restraint in the courts: see [3-8] below.

**Prior restraint: the present position.**

3. The grant of an injunction to prevent publication is a very serious matter. While the right to freedom of expression is not absolute – and Article 10 does not rule out the grant of an injunction as a matter of principle - I am informed by Private Eye's lawyers that the Strasbourg court has acknowledged that the "dangers inherent" in prior restraint are such that they call for "the most careful scrutiny" by the court: *Observer v UK* (1992) 14 EHRR 153 at [60], cited in many later cases, including in *Mosley v UK* [2012] EMLR 1 at [117]. Although, in that context, the judgments refer to the supervisory jurisdiction of the European Court of Human Rights, the principle applies more generally: the domestic court must subject any application for an order restricting the exercise of freedom of speech to close scrutiny; the court must comply with the requirements imposed by Parliament in section 12 of the Human Rights Act 1998.

4. I have referred in my witness statement to concerns about the grant of injunctions by the courts at [22.9] and to the *Napier* case at [22.11]-[22.12]. The time taken by the court to deal with the *Napier* application caused me concern. I set out here a short, but expanded, timetable in that case:

   4.1 Hearing before Eady J: 13 January 2009
   4.2 Judgment of Eady J: 16 January 2009.
   As you are aware, the judge refused the application for an injunction and refused permission to appeal, but granted a temporary injunction pending application for permission to appeal ("PTA") and, if PTA granted, an appeal.
   4.3 Application for permission to appeal filed: 30 January 2009
   A delay of two weeks after decision of judge.
   4.4 Decision of single judge (to refer PTA for oral hearing): 6 February 2009
   That decision was made within 7 days of application for PTA.
   4.5 Hearing before the Court of Appeal: 26 March 2009
   A delay of seven weeks after the decision by the single judge.
   4.6 Court of Appeal decision: 19 May 2009
   A delay of over seven weeks delay between the hearing and the judgment.

   In my view, there was too much delay, especially at 4.3, 4.5 and 4.6 above.

5. I understand, however, that the court can deal much more speedily with matters in relation to publication injunctions, including appeals. Applications can be brought to court very swiftly, including evenings and weekends. Appeals can be made and disposed of far more quickly than in that case. I have been told that examples of this include:

(1) The original application for an injunction in the *Douglas v Hello!* case: the application was heard on 20 November 2000 and decided the next day by the judge; on 21 November 2000 a two-judge Court of Appeal heard an appeal, but could not agree; a three-judge court was convened and announced its decision, with reasons to be given later, on 23 November 2000. So, from application to appeal, the matter was dealt with within 4 days: [2001] 1 QB 967 at 970e-971b.

(2) *ETK v News Group Newspapers*: Collins J refused to grant an injunction on Saturday 5 March 2011; the Court of Appeal heard an appeal on Thursday 10 March 2011 and announced the result that day [2011] 1 WLR 1827 CA, [1], [4]. The matter was dealt with within 5 days, with a reasoned judgment being given later (19 April 2011).

The same is so in other types of cases, for example in relation to threatened industrial action: in *British Airways v Unite* [2010] ICR 1316, the judge's decision was given on 17 May 2010, the expedited appeal heard on 18 May 2010 and the Court of Appeal decision was given on 20 May 2010.

6. For convenience of the Inquiry, I refer to some recent Reports and Guidance dealing with appeals:

6.1 The DCMS Report "Press Standards, Privacy and Libel" in February 2010 recommended (amongst other matters) that there should be a "fast-track appeal system":

> "[32] We understand that the refusal by a court to grant an injunction does not necessarily mean the defendant can publish straightaway: if the claimant appeals the decision, then the Court of Appeal has to hold the ring, pending the outcome of that appeal. That said, it seems to us wrong that once an interim injunction has been either refused or granted in cases involving the Convention right to freedom of expression a final decision should be unduly delayed. Such delay may give an unfair advantage to the applicant for the injunction as newspapers often rely on the currency of their articles. We recommend that the Ministry of Justice should seek to develop a fast-track appeal system where interim injunctions are concerned, in order to minimise the impact of delay on the media and the costs of a case, while at the same time taking account of the entitlement of the individual claimant seeking the protection of the courts."

6.2 The Government, in its Response to that Report (April 2010) (http://www.official-documents.gov.uk/document/cm78/7851/7851.pdf) rejected that recommendation, on the basis that the current system catered for urgent consideration of appeals:

> "2.2 The current system allows for the urgent consideration of appeals in all civil cases, including those where freedom of expression is concerned. As in all civil proceedings it is for the parties to request that an appeal be dealt with according to the expedited process. Where necessary applications can be turned around very quickly and if ordered a court can be convened even on the same day. The decision

as to whether a case will be heard urgently depends on the facts of the case in question, allowing the flexibility to deal with circumstances which may vary widely.

2.3 The Government's view is that the court is best placed to assess the case before it, and to list it for hearing at an appropriate time, expedited as necessary, taking into account the specific circumstances of that case."

6.3 The "Superinjunctions" Committee, chaired by the Master of the Rolls (http://www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011) also took the view that there was no need for a "fast-track" appeals process for injunctions, since it was possible to seek expedition already; it suggested that the practice on seeking expedition in the *Unilever* case - *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243 at 246 – 247 (which, I am told, gives guidance for cases which are "so urgent that justice can only be done if the appeal is heard either immediately or within days") - should be "updated generally to clarify its application to appeals from orders which adversely affect the exercise of rights under Article 10 of the European Convention on Human Rights (Article 10)".

6.4 Further guidance was issued on 1 August 2011 in the "Practice Guidance: Interim non-disclosure orders" [2012] EMLR 5. That includes this paragraph in relation to appeals:-

"Appeals
46 Any appeal from an interim non-disclosure order may be expedited: *Unilever Plc v Chefaro Proprietaries Ltd (Application for Expedited Appeal)* [1995] 1 WLR 243 at pp.246–247. It will depend on the circumstances of each case whether, and to what extent, expedition is necessary."

Having regard for the desirability of dealing with these matters swiftly, it seems to me that the hearing of any appeal concerning an order that has the effect of preventing publication should be expedited *unless* the court is satisfied, having regard to the circumstances, that expedition is not necessary. If the guidance were to be put in such a way, the general or default position would be expedition, but the court would still have flexibility to move more slowly, depending on the facts.

7. There is no reason to suppose that there are so many applications for interim injunctions in relation to publication that the courts cannot cope with them without undue delay. I note that reference was made during my evidence at **22/16 – 22/25** to regulatory bodies being inundated with work: would a new arbitral system or regulator be better funded, or be better able to deal with urgent applications, than the court system?

8. As I have said, it is vital that a broad public interest test should be applied in relation to any application to prevent publication: see my witness statement at [22.1]-[22.7] and the transcript of my evidence at **27/7 – 29/3**. A clear and broad objective test – covering what a reasonable editor (or, in a case of non-media publication, a reasonable person) could (reasonably) judge to be in the public interest – is practicable and strikes a proper balance between competing interests.

**Complaints *before* publication**

9. There is a huge difference between dealing with a complaint about something that has been published and seeking to deal with a complaint about what might be published. As I mentioned in my evidence, an inquiry by a journalist, made with a view to finding out information or checking facts, can result in an aggressive letter from solicitors – which, under a new regime, might equally be a complaint to a regulator: see **34/21 – 36/7** (the letter from Schillings to *Private Eye* was in evidence to the DCMS). If a complaint were to be made at that stage, the publisher might not even have decided whether to publish, let alone what to publish. Yet it might become bogged down, unnecessarily, in a regulatory process.

10. It would be undesirable to give a new regulator (or other new body) the power to deal with a complaint about the content of a proposed publication, before publication has taken place. It is striking that Ofcom, the broadcast regulator, cannot entertain a complaint until a programme has been broadcast.

    10.1 I understand from Private Eye's lawyers that this was the position also for Ofcom's predecessors as broadcast regulator, the Broadcasting Complaints Commission and Broadcasting Standards Commission. There was an unsuccessful attempt to challenge this limitation in *R (Barclay) v Broadcasting Standards Commission* [1997] EMLR 62 (although that was under earlier legislation - s143 of the Broadcasting Act 1990 – the same still applies: Broadcasting Act 1996, s107, 110).

    10.2 Ofcom makes the position plain to potential complainants on its website:

    > "We **do not** watch or listen to programmes before they are broadcast. If you would like to complain about a programme that has yet to be broadcast, you should contact the broadcaster directly."

See http://consumers.ofcom.org.uk/tell-us/tv-and-radio/a-specific-programme/.

10.3 Ofcom's guidance to broadcasters in relation to the Broadcasting Code (which sets the relevant standards) also shows that it does not make rulings prior to broadcast:

**"General guidance on the Code**

It is the responsibility of the broadcaster to comply with the Code. Programme makers who require further advice on applying this Code should, in the first instance, talk to those editorially responsible for the programme and to the broadcaster's compliance and legal officers.

Ofcom can offer general guidance on the interpretation of the Code. However, any such advice is given on the strict understanding that it will not affect Ofcom's discretion to judge cases and complaints after transmission and will not affect the exercise of Ofcom's regulatory responsibilities. Broadcasters should seek their own legal advice on any compliance issues arising. Ofcom will not be liable for any loss or damage arising from reliance on informal guidance. "

10.4 The current version of the Broadcasting Code applies to all programmes broadcast after 28 February 2011 (there were, obviously, previous codes applicable to earlier broadcast material): http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/

10.5 In its guidance on Part 8 of the Code, which relates to privacy, in relation to 8.1, Ofcom reiterates that it does not act pre-broadcast (my emphasis):

"Ofcom may only consider an infringement of privacy in the making of a programme **if the programme is broadcast**."

http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section8.pdf

So the position is that until a programme has been broadcast, Ofcom has no power to consider whether the Code has been broken in relation to privacy. The position changes after broadcast: at that stage, Ofcom can taken into account material which was not broadcast and the steps taken to obtain such material.

11. I am aware that the reference has been made to the regulatory position in Ireland, where a new Press Ombudsman and Press Council scheme was established in January 2008: see Day 34 (pm), 102/16 – 107/3 (Lord Hunt's evidence). The website provides information about the role and remit of those bodies: http://www.presscouncil.ie. To the best of my understanding, that system does not provide for complaints about content to be considered before publication and does not confer any power to prevent publication. Complaints about content must be made within 3 months of publication, by someone personally affected:

http://www.presscouncil.ie/making-a-complaint.24.html. There is a power to consider complaints about the behaviour of a journalist, if that contravenes the Code (such as harassment); that does not appear to depend on whether or not publication takes place. Otherwise, as with the Press Complaints Commission, any pre-publication involvement is on a voluntary and consensual basis on the part of the publisher.

12. It would be a drastic step (and wholly undesirable) to give a regulatory body power to require a publisher to provide it with a draft of what it might wish to publish. Ofcom has no power to look at footage (or a draft programme) prior to broadcast and there is no question of it having a compulsory power to require a proposed broadcast to be produced to it. Nor does the court have power to impose such a requirement: if an application is made to court by someone seeking an injunction, there is a well-established principle (I am told by our lawyers) that the court will not require a defendant to produce to the court a proposed programme or article. The leading textbook, Tugendhat & Christie *Law of Privacy and the Media* (2nd ed) says at 14.126 (page 725) (my emphasis):

> "A media defendant is **entitled** to withhold the detail of any intended publication and this is often done.....".

The footnote to this sentence refers to *Re Roddy (A Minor)* [2004] EMLR 127 at [88] and *BKM Limited v BBC* [2009] EWCH 3151 (Ch) at [29]. I am told that the principle is longstanding: see, eg, *Leary v BBC* (29 September 1989) CA (unreported); *Re B (A Child) (Disclosure)* [2004] 2 FLR 142 (Munby J) at [145-146]; and *A v B* [2005] EMLR 851 at [12-13] (Eady J). There is no good reason to depart from this important principle. To require a publisher to produce, in advance, what it might want to publish would be censorship.

13. As the Inquiry will be aware, the grant by a court of an injunction between parties to an application can have the effect of binding third parties who are given notice of the order – this is referred to as the "*Spycatcher* principle" (I am told that this was mentioned in the judgment of the Court of Appeal on 19 December 2011 in *Hutcheson v News Group* [2011] EWCA Civ 1580, see [19], [20], [26(iv)]) - and there are circumstances in which the court has been willing to grant an order binding everyone, with an "against the world" or "contra mundum" order. These orders have far-reaching effects, with the potential for committal for contempt of court for breach. To give an arbitral, or regulatory, body power to make such orders would be to give it far too much power: these are matters which raise important

issues of principle, which require careful and close scrutiny on the facts of each case, and they should be dealt with by the courts.

**Review of decision by the court**

14. If there were to be a new arbitral or regulatory body with power to prohibit publication, its decision to exercise that power (or to decline to do so) would be subject to review by the court. Both the PCC and Ofcom are subject to such review. I understand that there has been no court decision on this, so far as the PCC is concerned, but in *R (Ford) v Press Complaints Commission* [2002] EMLR 5 at [11] Silber J said that the PCC had "correctly" accepted for the purposes of that application that it was amenable to judicial review and, also, that it was a "public authority" for the purpose of section 6 of the Human Rights Act 1998; see also *R v Press Complaints Commission, ex p Stewart Brady ("Stewart Brady")* [1997] EMLR 185 CA at 188-189.

15. I assume that the Inquiry would not wish to give the new body power to make a final binding decision, without being subject to any judicial supervision. If the new body decided to refuse an application to prohibit publication (as the judge decided in the *Napier* case), would the court not "hold the ring", as the DCMS put it (see [5.1] above) at least until the court had ruled? In other words, as I have said, the matter ends up in court anyway.

16. I am told that the Court of Appeal recently reviewed an Ofcom decision under the Broadcasting Code in *R (Gaunt) v Ofcom* [2011] 1 WLR 2355 CA, [2011] EWCA Civ 692 (the Supreme Court refused permission to appeal, 1 November 2011, UKSC 2011/0155). Having reviewed domestic law and Strasbourg cases, the Court of Appeal at [31] identified the test for the court as follows (my emphasis):

> "the **court's task is to decide for itself** whether the ... finding disproportionately infringed [Mr Gaunt's] article 10 right to freedom of expression[, and in] doing so, [the court must] have due regard to the judgment of the statutory regulator which proceeded on correct legal principles."

At [47], the judgment included that the question whether Ofcom's decision infringed Article 10 was "ultimately one for the court". A decision to prevent or permit publication would be amenable to such review.

17. From my understanding of how the courts work, I believe that the Queen's Bench Division (or Chancery Division) are set up to deal with urgent applications, including those relating to

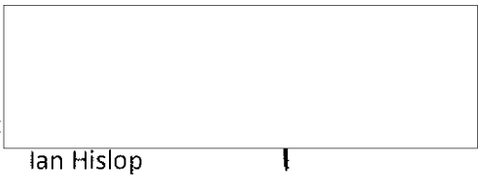
publication; and I doubt that it would make matters quicker or better if such decisions had to be dealt with in the context of judicial review in the Administrative Court. Besides, the question of grant or refusal of an injunction should be a question for the court *itself* to assess directly, rather than by way of review of the decision of another body.

18. The Ministry of Justice has been collecting data on applications for publication injunctions since 1 August 2011. The Inquiry could seek information from the MoJ as to how matters are working in court, since the Neuberger Report.

**Conclusion**

19. I understand the Inquiry's wish to consider the "speed and efficacy" of a remedy (see the reference to my evidence on Day 30, **35/13 – 35/20**, during John Kampfner's evidence). Having reflected on the matter since I gave evidence, I am convinced that the *Napier* case does not demonstrate that there should be a new regulator or arbitral system with power to deal with pre-publication applications, contrary to the suggestion made to me at **31/2-31/6**. In fact, *Napier* illustrates the need to ensure that the court process works, but there is every reason to believe that it can do so satisfactorily. That should be the way forward.

I believe that the facts stated in this statement are true.

Signed: 

Ian Hislop

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