Leveson Inquiry

Statement by George Brock, Professor and Head of Journalism, City University London.

1. I am George Laurence Brock and I am Professor and Head of Journalism at City University London. I worked for more than thirty years as a newspaper journalist. My experience is outlined in my earlier statement to the Inquiry about the teaching of ethics on journalism courses[1]. The argument presented in this statement relies principally on my experience as Managing Editor of *The Times* (1997-2004). The duties of the Managing Editor include dealing with editorial standards and the handling of complaints. I outline a proposal for trying to manage the conflict between the freedom to report and publish and the responsibilities of the news media to law and regulation. While the questions raised in the Inquiry's briefing in advance of Module 4 are not all directly answered here, I hope that at least some are covered. This statement is my individual view and is not the view of either City University London or its Journalism Department. Other members of staff of the department have given evidence to the Inquiry both as individuals and as members of groups.

Managing and mediating a collision of principles

2. Irrespective of the breadth of its terms of reference, the Inquiry's most difficult task is to find a successful and sustainable resolution between a clash of rights. The freedom to report and publish with as little restraint as possible can and does collide with conflicting claims such as the right to privacy or redress for complaints about what appears in news media. Since this is a tension between basic principles, complete resolution isn't likely. But the situation made clear by the Inquiry hearings can clearly be improved. By considering legal reform as well as regulation, the Inquiry could make proposals which will both lower the risk of the wrongs which gave rise to the Inquiry and which will at the same time strengthen journalism and freedom of expression. In the age of instant, peer-to-peer, borderless digital communication, the key lies in finding the right balance between three elements: freedom of expression, independent regulation and the law. My aim is not to describe every detail of this proposal in working detail, but to make the case for a workable combination of law and self-regulation.

Basic considerations

[1] http://bit.ly/M6ukjJ

3. Three points of caution first. The publication and circulation of information in a democratic society involves the unavoidable risk of harm. It is of course legitimate to ask if the harm is justified or proportionate to any gain from disclosure. But it is impractical to suppose that in an open society, information which is judged useful or illuminating can be published without risks of damage to the interests of someone or something. The harm may be considered to be deserved or not; it may be in the form of "collateral" or unintended damage to privacy or reputation; harm may be done by journalism done in good faith but which turns out to be wrong. News and its publication have never been equally welcome to everyone and never will be.

4. Secondly, reporting involves morally unattractive activities. In the unlikely event that all reporters could be made to work only in an unimpeachably angelic fashion, news would not reach the public in the depth or breadth that it does. That is not to justify gross wrongdoing or law-breaking. It is simply to record the plain truth that everyday reporting at serious news outlets may require cunning and, sometimes, dishonesty. Interviewees are not always told the truth about why a story is being written; they would not cooperate if they were told the unvarnished truth. Sources are persuaded to break confidences to their friends or employers. Unwilling sources are made offers which the reporter hopes won't be refused: you'd be best advised to give me your side of the story because we're going to run something anyway. Good reporters will do these things sparingly. But dislodging information into the public domain often involves the use of guile, trading favours, using leverage and being – at the least – economical with the truth. That is the case on serious newspapers; I have no direct experience of popular national newspaper newsrooms. I make this point not to suggest that journalists are alone in behaving like this, but to underline that good journalism involves balancing the means to obtain information against the ends. Public interest defences which can assist journalists exist not to legitimise or excuse unethical behavior but to test claims that information so obtained could not have been disclosed by any other means.

5. Third and lastly, it is not in society's long-term interest to see journalism as a profession, from which errant members can be excluded or punished in the manner of the legal or medical professions. Quite apart from the practical problems of attempting any such organisation in the online era, the supply of information, disclosure and opinion is best calculated to help establish truth with the widest supply of sources. Significant disclosure or interpretation can be made by people who do not describe themselves (or are not described by others) as journalists.

6. Any changes to the legal and regulatory context for journalism ought to deal with identifiable and correctable issues in a proportionate way. There is no law or rule which will enforce "accuracy" to the satisfaction of all parties, even if there may be better means to improve standards of accountability, accuracy and redress. In a plural and open society, truth is best established by iteration and contest between competing versions. Nor

is there any way of confining news to the "facts" – even if this were a desirable aim (which it isn't). Sense-making is fundamental to journalism (see para 10 below) and that involves judgement about what facts mean. The idea that journalism can be published without risk of dispute is chimerical.

7. The rules and laws which affect journalism in the future must take account of the radical changes which continue to affect how people learn about the world and about news in which they are interested[2]. In the UK, somewhere between 7% and 10% of news consumers consider the internet to be their principal source of news. But this proportion is rising and can be expected to rise much further in the future. There is unmistakable evidence that young people read fewer newspapers.

8. The borders between different news media, once clear and formed by different technological platforms, are vanishing. Anyone can "publish" "news" to audiences which can become very large very quickly. News no longer has to be received in packages in print (newspapers or magazines) or broadcast (regular bulletins). The choice of news sources had massively expanded even before the arrival of the internet. That proliferation and fragmentation reduced audiences and readerships.

9. Newspapers are now only a part of the range of platforms which obtain and publish news. The world in which a small number of television channels and a handful of national newspapers set the agenda of the national conversation is long gone. The "public sphere" is now a diverse collection of overlapping spheres of fluid shape and varying size. The means to capture, distribute and exchange audio-visual has never been simpler or cheaper. The ability to distribute material considered private has been enhanced.

10. Given that journalism now takes place as a particular activity amid myriad electronic exchanges of information, it worth defining what that activity is for. My definition is this: journalism is the systematic establishing of the truth of what matters to society. There are four activities which form the "core" of journalism: verification, sense-making, eye-witness recording and investigation[3]. News publications, channels and platforms will of course contain a great deal of other material which does not fall inside these categories.

11. But given the changes brought about by digital means of communications, journalists have to be prepared to define the activities which are valuable and important enough to deserve legal latitude or protection. Journalists can only claim this priviledge in law by acknowledging that they have an obligation to serve the public interest – in the broadest sense of the term and not a particular constituency, sphere or group. The problems which

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[2] As the Inquiry will be aware, there have been major inquiries into news media, law and regulation recently in Australia, South Africa and New Zealand.

[3] This argument is more fully developed here: http://www.scribd.com/doc/28560140/George-Brock-Is-News-Over

gave rise to the Inquiry represent a blurring and mixing of three separate ideas which need to remain distinct: the public interest, freedom of expression and the freedom of media organisations. The proposals in this statement rest on the assumption that if media organisations of whatever platform or size are accountable for the extent to which they serve the public interest (see paragraphs 17-26).

Converged regulation?

12. Previous inquiries into "the press" during the last sixty years were able to assume that the press was easy to identify and define and took a dominant role in the media of the day. Neither of these assumptions is any longer secure. The question is worth asking: what justification any longer exists for a separate regulatory regime for newspapers and their websites? Are the websites part of the "press" or, with audio and video on the sites, broadcasters? Or have all news publishers converged and can be regulated with the same set of rules?

13. A basic difference exists in that broadcast regulation is enforced by the ultimate threat of licence withdrawal. It is also argued that the one-way nature, power and reach of television makes stricter regulation appropriate.

14. There is a further advantage in separate regulation, less frequently considered. Given the costs associated with meeting the requirements of broadcast rules, extending (say) Ofcom regulation to print and online media would have the negative effect of preventing small, new organisations entering the market for news and hampering innovation. In the context of the pressures on the business model for printed news, this would be a very steep opportunity cost.

15. More generally, the mixture of statutory broadcast laws and self-regulation for newspapers also preserves a wider range of routes through which controversial but important information can become public. The phone-hacking revelations themselves would not have been as "remorselessly" pursued by the BBC, as the BBC's chairman acknowledged recently[4]. This does not mean that the BBC does not do excellent and ground-breaking journalism, but that stories likely to provoke the kinds of fierce and polarised controversies which still surround the determined pursuit of stories such as phone-hacking are less likely to be considered as viable projects by public service broadcasters. The revelation of the details of MPs expenses likewise involved the newspaper concerned in taking and managing legal risks the BBC, or any other broadcaster, would be unwilling to undertake.

16. While I support separate arrangements for press regulation at present, convergence of publishing platforms is likely to weaken these arguments

[4] Speech to the annual conference of the Society of Editors, November 2011.

over time. My university has supported an attempt to work out how the various ways of regulating news media might, eventually, be converged[5]. That analysis turns on the ideas of public service and public interest. Regulation can only be made to work better if both the regulator and the law make better use of the idea of public interest and apply it to journalism.

Public interest

17. There are three schools of thought. One says that questions of public interest justifications for journalism beg inherently insoluble questions and that journalism's first and only duty is to the truth[6]. Editors may have to make publication decisions influenced by law or regulation, social or commercial considerations or those of conscience; but journalists are wasting their time in constructing elaborate arguments to demonstrate their value. The only question which matters must be: is it true?

18. The second school of thought aims to render the "public interest" issue irrelevant by taking what might be called a consumer-led approach. The pithiest version says that whatever the public is interested in is in the public interest – estimations of value are not ones for publishers, let alone lawyers or regulators, to make.

19. The third approach takes as a starting point that a democratic society functions better if well-informed. This belief, while widely held, suffers from two disadvantages. The public gain from free circulation and expression of news and opinion is diffuse and hard to measure. Works of political philosophy discussing democracy make little mention of the value of the free flow of information in a society. The second disadvantage is that the general principle begs large questions over what information is valuable and how it is best circulated. The more fragmented the beliefs and values of a society become, the harder these questions are to answer. Definitions tend also to shift over time. Because the idea of public interest is indisputably elastic and elusive, lawyers often do not welcome its use.

20. But a debate and better working definition of public interest is indispensable and unavoidable in all the issues with which this Inquiry is concerned. Not everything calling itself journalism is entitled to a "public interest" defence or protection. News publishers on any platform may distribute many kinds of material but cannot, simply by virtue of being established, claim that all they do enjoys the protections available to journalism in the public interest. The only viable way of separating what is worth protecting from what does not deserve such protection (but which may well be very popular) is a public interest test.

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[5] See "Regulating for Trust in Journalism: standards in the age of blended media" by Lara Fielden, published by City University London and RISJ, October 2011.

[6] See for example Matthew Parris in The Times, Dec 31st 2011: http://www.thetimes.co.uk/tto/opinion/columnists/matthewparris/article3272598.ece

21. Definitions of public interest tend to take the form of "shopping lists" which specify subjects or areas of inquiry which may justify intrusion, subterfuge or a degree of legal latitude. This is understandable, but unduly narrows the field. A full version of what public interest should mean in law or regulation requires a broad introduction which entrenches a preference for disclosure.

22. I would combine:

    a) Lord Denning (on fair comment): "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest."[7]
    b) Lord Nicholls: "(The press discharges vital functions as a bloodhound as well as a watchdog.) The court should be slow to conclude that a publication was not in the public interest and, therefore, that the public had no right to know, especially when the information is in the field of political discussion."[8]

23. The broad definition of public interest needs three elements:
    a) To engage the interests of a collective entity, a community small or large, beyond a single individual;
    b) The advancing of some benefit or the prevention of harm;
    c) A presumption in favour of disclosure and free flow of information and a reluctance to limit communication.

24. If those elements are in place, more specific indications are possible, but the list will always be non-exhaustive. Those that are useful are:
    a) Disclosing information which allows significantly better-informed decisions to be made;
    b) Preventing people being misled by statements or actions;
    c) Informing public debate;
    d) Promoting accountability and transparency;
    e) Exposing or detecting crime, significant anti-social behaviour, fraud or corruption.

25. These examples draw on similar lists drawn up by a number of bodies in, or dealing with, the media[9]. I'd argue against two pieces of wording which have appeared in past versions of the Press Complaints Commission public interest exceptions:

    a) "Exceptions will include journalistic activity where editors can demonstrate a reasonable belief that they were acting in the public interest." This revision of 2009 seems too wide and to amount to allowing editors flexibility to define public interest as they see fit.

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[7] *London Artists vs Littler* (1969) 2 QB 375, 391.

[8] House of Lords (28th October 1999) *Reynolds vs Times Newspapers.*

[9] Including Ofcom, the BBC, the PCC, the National Union of Journalists and the Information Commissioner's office.

b) "There is a public interest in freedom of expression itself." This seems too broad to be of practical use in this context.

26. The practical use of public interests tests and their connections to procedure in newsrooms are dealt with below (paras 29-43).

Constraint and incentive

27. The reform of press regulation turns on two questions. The second is at least as important as the first.

a) Some rules and laws will always surround news publishing. What is the best form of investigating and adjudicating alleged breaches of the rules?
b) How are incentives inside newsrooms best created to lower the likelihood of breaches of the rules?

28. Most answers to the first question involve building a better system for regulation. All suggestions of this kind that I have seen involve (or imply) the creation of statutory backing for new powers. These powers are either to compel publishers to enter or pay for a regulation regime or to provide powers to investigate possible breaches of the rules and to enforce sanctions, perhaps including fines. Most of these schemes do not amount to "government regulation of the press", but they nevertheless require statute-backed powers to be effective[10].

29. Such a scheme is quite imaginable. But I think this route is fraught with underestimated difficulties:
    i) In the online era it is extremely difficult to both define organisations which should be included and to determined which incentives would compel or encourage membership. A suggestion that publishers enjoying a VAT exemption might be threatened with the exemption's loss if they refused to take part in a regulatory body apparently falls foul of EU law. Suggestions that online publishers with a circulation over a certain size would be included risks unfairness and inconsistency. Particularly online, very small publishers can make controversial disclosures which are read or heard by very large numbers of people.
    ii) A system with investigative powers (held to be necessary as a remedy to the perceived weaknesses of the Press Complaints Commission), adjudicating and imposing sanctions including compulsory corrections and/or fines, the new arrangements taken as a whole would more closely resemble courtroom procedure than anything which currently exists. Any procedure which strays into that territory runs the risks of becoming more expensive, detailed

[10] I have seen suggestions for a Office for Press Regulation and Adjudication, a Media Standards Authority, a Press Standards and Mediation Commission, a News Tribunal, a Media Standards Board and a News Publishing Commission. The proposal for a MSA, drafted by Hugh Tomlinson QC for a group convened by the Reuters Institute for the Study of Journalism (in which I took part), is the closest to the proposals in this statement.

and complicated that at first intended. Is there not a substantial risk that such a well-intentioned reform might be an over-reaction which creates something slower and more burdensome than is actually needed?

iii) The process of hammering out the agreements necessary to make this work and, if necessary, enforcing its creation may be needlessly adversarial. A government could legislate to overcome opposition, but it would be a large disadvantage and would adversely affect the running of the system.

iv) Even if the new or revamped regulator is an independent body, this system would be imposed from outside newsrooms and rely for its effect only on the coercive power of the new institution and the enforcement of its rules. It would probably work, but without the advantage of true incentives.

A possible bargain - and privacy

30. I would like to suggest that it should be possible better to arrange the relationship between the regulators, the law and news publishers. In particular that relationship could be designed to provide a workable incentive to improved journalism standards. The reform I would suggest has two interdependent elements: revision of the law combined with incentives for all news publishers to meet higher standards.

31. Many laws which affect the news media have incomplete or inconsistent public interest defences[11]. Work is already advanced on a comprehensive revision of the defamation law and current proposals include such a rewritten defence. Serious journalism would be better served if these defences were strengthened and also clarified as outlined in paras 16-25 above.

32. In particular such a defence would be integral to a new privacy law. Such a law may worry editors, but they should reflect on potential advantages which might flow from a well-drafted one. The present law, requiring the conflicting demands of Articles 8 and 10 of the Human Rights Act 1998 to be "balanced", is too broad and vague to produce either consistent judgements or a guideline which can be readily understood by reporters and editors. It is quite possible that privacy cases not involving the media may make this more urgent in the future: concerns are growing over the capture, storage and potential misuse of digital images and information by private individuals and organisations as well as by public bodies. New risks may require new boundaries.

33. A new privacy law, which would extend and clarify the developments since the HRA, would have to define in greater detail how a justification for privacy can be established. It should allow for greater damages than in

[11] These are summarised by Alex Bailin QC here: http://www.guardian.co.uk/law/2011/nov/21/leveson-inquiry-investigative-journalism-law

present arrangements, particularly in the case of sizeable companies found liable.

34. The case made in the Calcutt reports of 1990 and 1993 is stronger today than when first made. The new tort would need to specify privacy protection (and potential redress) for individuals who had not sought public roles or publicity, children and vulnerable adults, for relatives of those in public life and from undue harassment. The public interest defence would allow a news publisher to argue that the information sought or published advanced public knowledge. If the law was more specific and the penalties higher, press behaviour would change.

35. I would further argue that the public interest defence would not protect any and all reporting of the private sexual or marital affairs of even public figures. The present requirement to balance freedom to publish and privacy does not adequately require – as a new law should – a connection to be established between private behavior and the public role. An assumption that it is or could be connected in the case of a government minister or the head of a major bank seems plain. The connection seems less clear in the case of a footballer, however prominent.

36. The competing claims of privacy, disclosure and public interest should be subject to full public debate. The best way to trigger that debate is to embark on the admittedly difficult drafting balances required. Lawyers have told me that such drafting to improve on the present state of the law would be impossible, citing divided judicial opinion in several different courts in cases such as *Campbell vs MGN Ltd*. But I cannot see a way to better protect the privacy of individuals who have neither sought nor deserved exposure which doesn't claim a public interest justification without the deterrence of a more discriminating law.

37. Revising public interest defences in civil law affecting the media (and perhaps also in criminal laws) and creating a new privacy tort would be futile unless access to legal remedies can be improved. There exists a small reform movement[12] attempting to achieve greater speed and lower cost in defamation law (and the proposed new statute makes changes in this direction); these ideas could be extended to privacy cases. There is a strong body of opinion arguing for a stronger regulator which sounds as if it will closely resemble a quicker, less costly court. In short, two sets of ideas converge. I think that overall newsroom culture will more effectively influenced by a combination of law and regulation rather than by concentrating on the latter. But access, speed and lower cost are essential to either change.

Taking editorial integrity into account

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[12] See for example: http://www.earlyresolution.co.uk/opra-a-sabre-toothed-pcc-for-press-complaints-and-libel-actions

38. These legal reforms cannot be made effective without the second element of the package. Courts asked to consider a public interest defence would be encouraged to take into account the editorial integrity of the publisher. The strength of a public interest defence should depend not merely on the justification advanced but also on the publication's ability to demonstrate the integrity and standards of its editorial operation.

39. The laws would only need to outline in broad terms what kinds of indicators were sought. The key is to provide an incentive which would encourage publishers and editors to take as much advantage as possible of (revised and extended) public interest defences by passing the tests built into those exemptions.

40. The "procedural" elements for establishing a public interest defence might be:

    a) The ability to assess the sources and evidence for the journalism (surprisingly few newspaper websites make it routine to link to disclosable sources[13]).
    b) The openness, transparency and responsiveness to complaint or correction; an independent organization supervising these agreed rules might be empowered to list and publicise infractions, corrections or details of investigations;
    c) Rules by which editors and reporters work and the ways in which they are operated and enforced. For example are these rules incorporated in contracts for either staff or contributors?[14];
    d) The quality of internal staff training;
    e) The level at which decisions are made on the use of techniques such as subterfuge and the extent to which the means used are kept proportionate to the ends sought;
    f) Records of important decisions or evidence and retention of materials;
    g) Disclosure of potential conflicts of interest.

41. This list is underpinned by the assumption that if journalism in the future is to be recognised and respected as having a useful function, its audience will need benchmarks by which to judge and trust that claim. The courts, via more comprehensive public interest defences, would be come the guardians of enforceable minimum standards designed to be – and to be seen to be - credible. This is not new territory for the courts, as the debate over the "Reynolds" principles[15] in defamation shows. Courts can only reach judgements about public interest defences based on good editorial standards if the claims are, to the largest extent possible, visible and open to be assessed. But editors and publishers would not be compelled to enter these arrangements. They could choose to run larger legal risks by not doing so.

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[13] See for example http://mediastandardstrust.org/projects/transparency-initiative/

[14] See British Journalism Review, vol 21, No 4 2010: http://bjr.sagepub.com/content/21/4/19

[15] See note 8.

42. The procedural side of public interest defences – what publishers need to be seen to do in order to qualify – should suggest editorial standards supervised by an independent third party. Publishers would support, in their own legal interests, a collective scheme to frame and check on good procedures of the kind listed above. That could quite easily be a fresh version of the PCC. It is difficult to imagine the PCC going out of existence since its mediation and adjudication machinery is so valued both by magazines and the regional press. If news publishing organization chose to enter into contracts with the regulatory body to allow supervision and sanction, so much the more effective.

43. The details of the extent to which different publications cooperated with others would probably evolve over time. An independently created and operated system of self-regulation might develop investigative powers if experience showed the need to demonstrate that the enforcement of rules was sufficient to have weight in court. Sustainable changes would be driven by the need to strengthen the newsroom's defences when facing cases in court. All editors are risks managers, sometimes taking decisions involving large risks very fast. An editor expecting to face a writ, as most newspapers do sooner or later, would have a strong incentive to ensure that the newsroom had visible rules and that they were enforced. These proposals hinge on that connection and its potential for limiting unethical behaviour.

44. Try re-imagining history as it appears to have unrolled at the *News of the World*. The newspaper was frequently testing the limits of the law and sometimes sued, sometimes over stories with strong public interest justifications. If legal action had been begun over a story with a public interest defence available, that defence could only succeed if the newsroom's internal discipline could be shown to be working. An editor and senior executives would have the strongest possible reason to make rules that would meet a court's test actually work. Would phone-hacking have flourished in that altered newsroom culture? I doubt it.

45. In discussing these ideas, I have encountered these objections: that they are too complex to be workable, that the legal reforms involved may be desirable but they are unachievable, that relying on the law is to prefer a crude instrument over subtler regulation and that the incentive to submit to tighter regulation would not be strong enough to control behavior in popular newsrooms, given the intensity of competition between them.

46. Changing newsroom culture is at least as important as framing new rules and changing a rooted culture is not a simple matter. I suspect that a revamped press regulator may turn out to be a more complex and elaborate matter than many assume. I am not trying to reform the entire British legal system, simply to encourage moves to speedier and cheaper access to law in areas where it is plainly needed. Law can be a crude instrument but it is also a powerful one and people are careful of it. Stiffer regulation alone will not persuade popular paper executives to behave differently, given that there is long tradition of ignoring such bodies. The

right changes in the law with built-in incentives to encourage effective self-regulation are more likely to be effective. No national law can be completely effective in the age or borderless technology. But that does not render law – and its reform - irrelevant to the solution of the dilemma with which the Inquiry is concerned.

47. The ideas above can be described as a bargain[16]. Journalism which can justify itself and account for its actions would be strengthened. Journalism which might be popular or profitable but which cannot pass those tests would run greater risks. The balance would have been shifted to society's advantage.

Statement of Truth

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

Signed .. [redacted] **…….....**

Date ……4th July 2012……...

[16] The idea of a "bargain" was first floated by Alan Rusbridger, Editor-in-Chief of *The Guardian*, in the James Cameron Lecture in 1997 and discussed again in his Sampson and Orwell lectures in 2011.