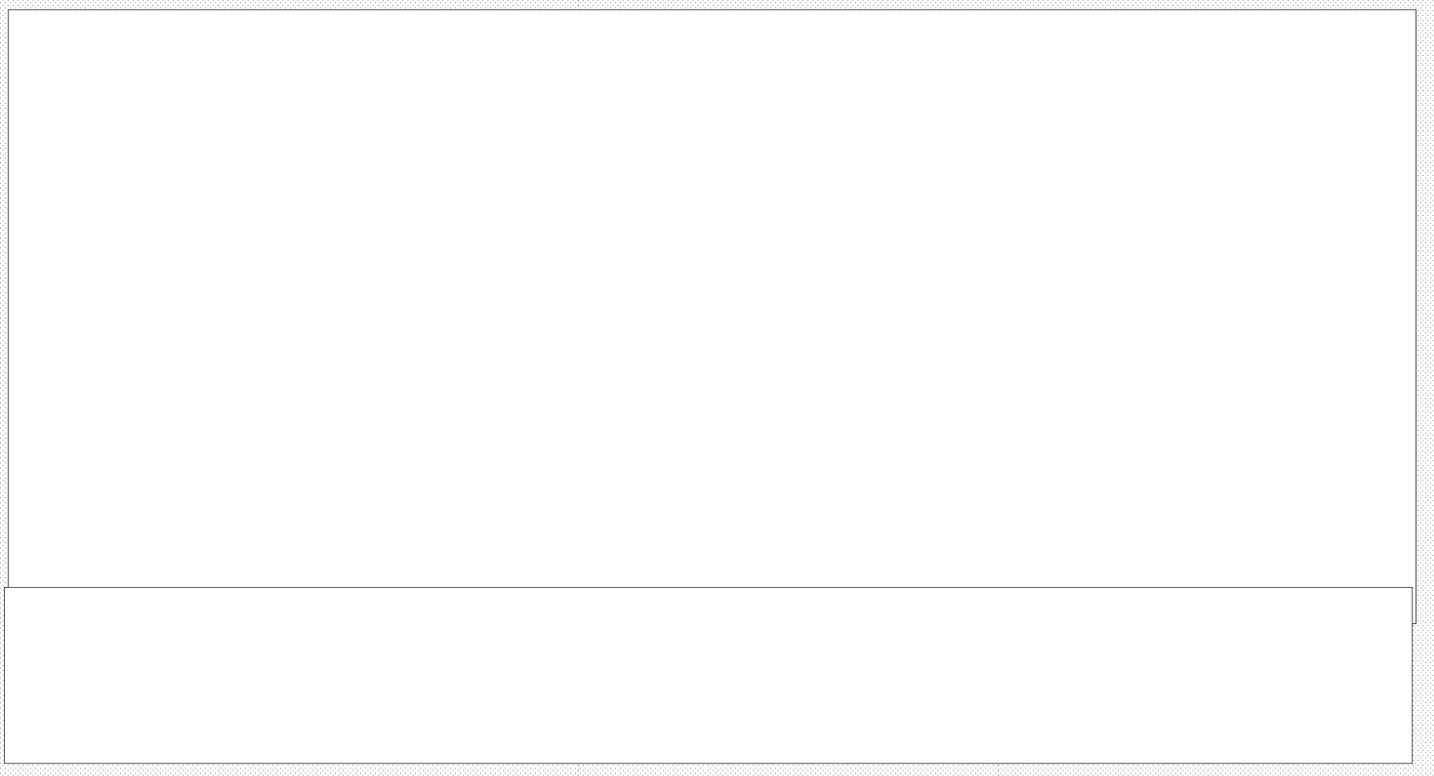

SUBMISSION TO THE LEVESON INQUIRY, FIRST PHASE

Stephen Sedley

Introductory

1. Until March 2011 I served as a judge, from 1992 in the Queen's Bench Division of the High Court and from 1999 as a Lord Justice of Appeal. During that time I also sat as a judge *ad hoc* of the European Court of Human Rights and on the Judicial Committee of the Privy Council. Before going on the bench I practised for 28 years at the bar, largely in the field of civil liberties. Since my retirement I have been appointed a visiting professor of law at Oxford University and have continued to sit part-time and to act as a mediator. For fuller information, if it is required, I attach a CV.

2. In the course of my working life, both as a barrister and as a judge, I have had a fair amount of contact with the printed and broadcast media[1], often as a commentator but occasionally as a subject of comment. In the first of these roles I have been impressed by the desire of most of the broadcast media to inform their audiences and to explore serious issues seriously. I have not found the same to be generally true of the tabloid media, much of whose reportage is agenda-driven, with consequences to which I will return. Both these generalisations of course carry many exceptions.

3. Before I go further I should declare what some will regard as an interest and others as relevant experience. I have on a number of occasions been the subject of press accounts of my decisions (and on occasion of myself) which have been biased and damaging to a point which made it unfair to the bench and to myself to ignore them. In consequence I have had more than once to go to the Press Complaints Commission. In each case the paper concerned has climbed down without an adjudication; but some of what I say below is consequently based on direct experience. I have also twice had to issue libel proceedings against newspapers, in each case resulting in an immediate withdrawal and apology.

4. My concerns about freedom of expression arise not only from my work as a barrister (which included the Little Red Schoolbook case, *Handyside*) and as a judge (which included the pre-Human Rights Act case of *Redmond-Bate* on the right of evangelists to preach in the streets,

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[1] At the risk of being accused of pedantry, I will use "media" as a plural word.

and the recent leading case of *British Chiropractic Association v Singh*), but from my own work as a writer and lecturer which I have combined with my day job for many years.

5. I set out below my submissions on the Inquiry's present remit in as short a form as possible, but I am taking the liberty of adding two essays which reflect more fully my thinking about these issues. Perhaps I could invite the panel to have a look at these if time and patience allow because, as the Prime Minister suggested recently to the parliamentary liaison committee, it would be unfortunate if regulation of the press were to be seen as the politicians' revenge for the expenses scandal. These essays[2] antedate the crisis which has led to your appointment. One, *Sex, Libels and Video-Surveillance*, is the Blackstone Lecture which I gave in Oxford in 2006. The other, *The Right to Know*, was a contribution to a 1999 festschrift for Professor Sir David Williams.

The problem

6. Britain can boast some of the best investigative journalism in the world. Some papers, notably the Guardian, have displayed great courage in standing up to the threat of ruinous litigation in order to expose serious wrongdoing by public figures. We also have some of the most intrusive and foul-mouthed newspapers in the world. Where else would a major daily run the headline "Up yours, Delors" or protest loudly about its freedom to publish humiliating stories which have no news value and are of interest only for their salacity?

7. The problem is how to keep the plums and curb the duff. By duff I mean not the tasteless, trivial or debased matter which fills much of the tabloids and a fair amount of television, and with which – as I stressed in my judgment in the *Redmond-Bate* case - a free society has to live, but material which has no proper place in a society which respects truth and recognises the rule of law: material which illegitimately invades individual privacy, which depraves and corrupts, or which is simply mendacious.

8. I have singled out these three vices (I do not believe that a responsible journalist would call them anything else) because they occupy three distinct legal categories. An illegitimate invasion of privacy is now, by virtue of the Human Rights Act, a justiciable civil wrong. Publishing matter which tends to deprave and corrupt its readers is a criminal offence, though one whose premises are heavily contested and which is now rarely prosecuted. Simply lying - arguably the most morally reprehensible of the three – carries neither civil nor criminal penalties: yet it is possible, at present without fear of redress, to publish untruths which, although neither libellous nor invasive of privacy, can do serious personal or public harm.

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[2] Published in *Ashes and Sparks* (CUP, 2011).

9. The law is not omnicompetent and should not try to be. But it has certain obligations to citizens which change and develop over time. The development of a civil law of privacy as a protection less against the state than against the media is a prime modern example. The retreat of the criminal law of obscenity is another. And I would argue that the law's abstention from the regulation of truth-telling, despite the temptation offered in particular by libel law, is both principled and wholesome. If there is one prospect worse than an unbridled power to distort or disregard facts, it is that of a state entity, whether a court of law (except where case-specific facts have to be found) or a ministry of truth, being handed the power to determine bindingly what is true and what is false. But this is not the same thing as tolerating public mendacity.

10. I will not spend time on the Press Complaints Commission. It is widely and rightly regarded as a body lacking both perceptible independence and any worthwhile disciplinary power over those papers which choose to subscribe to it. Even if it had been seized of the series of scandals which have brought this inquiry into being, the PCC could have done nothing useful about them. The reason why it can claim so many mediated settlements is that its powers are so modest that complainants have to settle for very little.

11. Ofcom is of course both a licenser and a regulator, making any idea of simple assimilation of the control of print and broadcast media inapt for the present, although eventual legislation could bring them together. This submission assumes that, for this and other reasons, the inquiry will be concentrating on the written media alone.

A modest proposal

12. Regulation is not licensing, despite editorial attempts to conflate the two. There is no tenable case for prior censorship. Newspapers and broadcasters should continue to have the responsibility, preferably with competent legal advice, for deciding what to publish. But if they decide to publish and be damned, then some form of meaningful condemnation ought to be available. Given the extent of justified and necessary regulation in other key parts of our society, there is nothing egregious in the notion that this should be done by an independent statutory regulator. It is the media who in this respect are out of step with society.

13. Regulation need not be a one-way street. As I suggested in my Blackstone lecture in 2006, regulation offers a balanced resolution of the (so far) intractable problem of how to avoid awards of windfall damages to claimants without making the publication of libels or invasions of privacy a simple cost-benefit exercise for an aggressive newspaper. There can be a sensible trade-off between the limitation of damages to a level commensurate with personal injury awards and exposure of the publisher, where the violation has been

deliberately committed for gain, to a condign regulatory penalty. This will be so whatever the eventual impact of the Jackson review on conditional fee agreements.

14. What I would therefore commend for consideration is, in outline, the setting up of a statutory printed media regulator, governed by rules authorised by Parliament and designed to ensure a fair inquisitorial, rather than adversarial, procedure. Such a procedure will place the responsibility for the initiation and conduct of an inquiry on the regulator rather than the complainant, but will afford the respondent a right to full notice and disclosure and a right to be heard at every stage. Judicial review should be available where a failure of due process is credibly alleged.

15. The standards by which the regulator is required to judge media conduct could perfectly well be those set out in the PCC's code (at present a poignant instance of the triumph of hope over experience, but markedly better as a template than Ofcom's verbose code). I return to this in paragraph 20 below.

16. The critical element of a statutory regulator will be its powers. If these simply replicate those of the PCC they will not be worth enacting. But they must equally not be such as to chill the expression of legitimate news and views, however unpopular or risky. The solution, I would suggest, is not prescription but invigilation. The regulator needs as its primary tool an uncapped power to impose fines. Uncapped is, of course, not unlimited: a fine must be tailored to the gravity of the offence and means of the offender. Regulatory penalties should accordingly be open to appeal or review if they go beyond (or for that matter fall below) a fair range. Fines, of course, will go to public funds; the regulator's budget cannot depend on them in any way.

17. A regulator will need powers to dispose summarily of complaints which are merely querulous or vindictive, as well as of those which, however understandable, are seeking to penalise fair comment or responsible journalism. There is no reason why a publisher should be expected to spend time and resources on a complaint that is going nowhere.

18. There is no need for the subject-matter of a complaint to be pigeonholed by legal category — privacy, libel and so forth. Nor is there any reason why civil rights of action should be traded off against the regulator's investigation of a complaint. On the contrary, the tenability or untenability of any pending civil claim is likely to become clear in the course of a regulatory investigation, making litigation an unlikely sequel. Equally, however, there may be cases where court action has to precede a reference to the regulator. In that event regulation should follow the law. Likewise, if what the regulator's investigation establishes is an unjustifiable invasion of privacy or a libellous untruth, it ought not to be open to the regulator to dismiss the complaint.

19. More problematical will be cases in which publication of a possibly untrue statement is defended on grounds of responsible journalism; but it is arguable that a specialist and impartial regulator is at least as well placed as a court to decide such a question. A principle

of priority will accordingly be needed to prevent the same issue from being decided twice, and possibly inconsistently, in co-ordinate forums.

20. As I have suggested above and in my essay 'The right to know', there is a chasm between the fundamentality of people's entitlement to be told the truth and the absence of any sanction against powerful public organs which lie to them. The first clause of the PCC's code says: "The Press must take care not to publish inaccurate, misleading or distorted information…". There is no reason why the media should not continue to accept this obligation, nor therefore why the regulator's remit should not include it. But a cut-off will be needed which distinguishes falsehoods which do public or personal harm from inconsequential untruths and sloppy journalism.

21. Perhaps the most difficult question is who should be subject to regulation. The daily printed media are the obvious candidates; but how about periodicals – weeklies, monthlies, annuals; how about books; how, above all, about the internet?

22. Nobody yet knows how to control what is put on the internet, even though some of it is libellous and a good deal of it cannot be true. But the problem, although it requires international cooperation, is not insoluble, and the present want of a solution cannot be an excuse for doing nothing meanwhile about the mainstream media.

23. As to non-mainstream media, a range of solutions is possible. One is to set criteria by which the regulator is to list those media which it will supervise. The problem with this is not only that whatever list is drawn up will create controversy and look arbitrary, but that media which are not listed will instantly become vehicles for what the mainstream now finds it too risky to publish.

24. Another solution is to recognise that publication can take an infinite variety of forms and to give the regulator a remit which allows it to investigate any written publication within the United Kingdom. This, I accept, will add another tier to the phalanx of worries already facing small and often courageous publishers, not least because their antagonists are likely to use any legal weapon at their disposal. The answer has to be caution and good sense on the regulator's part in deciding what complaints to take up, and in particular a determination not to allow regulation to become the conduct of controversy by other means.

25. Attempts to enact an enforceable right of reply have foundered in other democratic countries. The reasons have not always been respectable, but for my part I would accept that there is something unwholesome about a newspaper having to print under duress something which it does not accept. The solution, however, is not problematical: the press should remain free to refuse to publish a required correction or retraction following an adverse adjudication, but if it does so any regulatory fine should rise steeply.

Conclusion

26. The foregoing is a long way from a complete scheme. It is designed simply to suggest that there is now a powerful case for independent statutory regulation of the mainstream media; that regulation can solve a number of problems for which neither litigation nor self-regulation is proving adequate; and that it can be done fairly and effectively without either licensing the press or giving the regulator a monopoly of the truth.

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