A Rusbridger

January 2012

LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

SUPPLEMENTARY STATEMENT OF ALAN RUSBRIDGER

I, Alan Rusbridger, of Guardian News and Media Limited ("GNM"), Kings Place, 90 York Way London, N1 9GU, WILL SAY as follows:

1. During Inquiry proceedings on November 16th 2011, Leveson LJ asked me a series of questions regarding regulation and other matters to which he invited a response from The Guardian and other core participants. On January 9th 2011, Leveson LJ invited all core participants to submit written responses to these questions by February 9th. However, given I was asked the questions directly some time ago, and my forthcoming oral evidence next week, I am submitting a provisional response now to those questions in the hope that the Inquiry will find this helpful.

2. These build upon oral answers given by me in November but go somewhat further in several key areas. However I do not make detailed recommendations, conscious of other discussions ongoing between publishers and stakeholders, as well as Leveson LJ's suggestion that this be done in Module 4, in response to publication of emerging findings. No doubt further refinement and review will be needed.

3. I have structured this evidence against the questions put by Leveson LJ on November 16th 2011, as transcribed.

Question 1. Provision of anonymous evidence to the Inquiry

[from transcript] How am I going to get to the bottom of the culture which is hinted at, which is spoken of this morning, unless people are prepared to say it? And how am I going to help those that are concerned about the potential impact that that will have upon them, and their livelihood, which is not at all an ignoble concern, to try and expose what needs to be exposed so that we can get an idea of the corners of the problem.

Response

I have nothing further to add beyond the points raised previously in Court outlining the rationale for anonymous evidence in the face of the threat of intimidation, the fear of retribution and the possibility of self-incrimination. We are mindful that this is now potentially a matter for judicial review by the Divisional Court.

Question 2. Privacy

[from transcript] Nobody has suggested that the ethics of those that are mass market newspapers should be different to those which are rather more targeted, and that seems to me to be right, but there is no doubt, it seems to me, that concepts of privacy about which you spoke are differently perceived by different titles, and I need to know how to address that. I need to know how I should be thinking about the concept of privacy ... and where the balance is.

Response

While there is a reasonable consensus about both the disproportionate costs of dealing with defamation complaints and the need for some reform of the substantive law, there is much less agreement about the threat posed by current privacy law, or about what might justify what degree of intrusion on personal privacy in the context of both investigation and eventual publication. Nevertheless, newspapers are – through their membership of the PCC - necessarily committed to a respect for privacy, and the PCC Code of Conduct broadly mirrors the language of the Human Rights Act.

In practice it is probably true to say that the so-called broadsheet newspapers are less concerned about the threat to their journalism from privacy law than from defamation, and vice-versa. It is true however that the broadsheet end of the market is significantly affected by the role of public interest in justifying the publication of otherwise confidential information in the traditional sense.

In evidence to the Joint Committee on Privacy and Injunctions in October 2011, John Witherow, Ian Hislop and myself were in broad agreement that the balance struck between privacy and freedom of expression was currently broadly right. ["Not too bad" – JW: "outbreak of sanity" – IH: "period of calm" – AR]. It is probable that the editors of red-top and mid-market tabloids would be less sanguine. The cases involving privacy injunctions are overwhelmingly directed at tabloid newspapers, though, of course, they frequently bind all mainstream media outlets.

In their oral evidence to the same Joint Committee the majority of newspaper editors and proprietors (including tabloids) appear to have conceded that striking a balance between the two competing rights – Articles 8 and 10 of the HRA – is not an easy one. None was in favour of Parliament legislating. The press would therefore appear to have two choices: either allowing judges to continue to strike the balance, or establishing a convincing alternative to the courts as part of a future system of independent regulation.

GNM is strongly of the view that it is worth exploring how this alternative system might work. It seems to us that: a) there would have to be a common standard as between all newspapers as to the test for the engagement of privacy rights and as to the proper approach to the public interest at the balancing stage; and b) the standards applied by any regulatory body would have to be consistent with those applied by the Courts.

There is sometimes an argument advanced that "popular newspapers" either a) have more legitimacy in arguments over such matters because they are read by more people; or b) they must be allowed some leeway in order to be "commercial." It is however striking that, in many recent cases involving privacy injunctions, popular media defendants did not argue that the public interest clause of the PCC Code was engaged. We recognise the importance of the popular market and the interest there is in celebrity 'private life' stories. However we do not accept that the right to be commercial could justify an intrusion, which would otherwise be unlawful.

In addition, it is worth noting that as the industry moves into the digital era, an argument based on size of readership is no longer convincing statistically. In November the Guardian was the UK's second most popular newspaper source, with 63.5m monthly users – behind the Mail with 84.9m. That, for instance, made us nearly four times the size of the Daily Mirror (16.3m) and well over twice as "popular" as the Sun (24.2m). All newspapers online are also dwarfed in user numbers by news aggregators and other sources of information and entertainment. In the end, all of us have an equal obligation in balancing free expression and privacy.

Question 3. Moral Choices

[from transcript] You mention what safeguards can be built into news organisations so that journalists can exercise moral choices. That echoed something that Ms Stanistreet said about the conscience clause, but is it appropriate for me to be requiring that? Is that a way forward?

Response

GNM has a whistleblowers policy, available on our intranet site, which we attach as an appendix to this statement. Policies such as these are commonplace now in organisational life and there appears to be no good reason why newspaper groups should be different. The GNM policy states that all employees need to feel able to come forward if they have serious concerns about malpractice or wrongdoing at work without the fear of accusations of disloyalty, harassment or victimisation. It notes that the Public Interest Disclosure Act 1998 specifically provides for the protection of workers who are concerned that malpractice or wrongdoing has occurred. GNM has established Dedicated Assessors for dealing with employee representations. The policy sets out procedures these Assessors use in dealing with matters raised including confidentiality and complaint escalation. GNM's HR team is now planning to update the policy following the Bribery Act, to include a confidential and anonymous hotline for broad categories of wrongdoing.

We at GNM think you should give serious consideration to a so-called "conscience clause". It has been proposed by the NUJ and has been backed by senior former newspaper figures such as Bill Hagerty, a former editor of the People, and deputy editor of the Mirror, who argued for a "conscience clause" in a 2003 editorial (http://www.bjr.org.uk/data/2003/no3_hagerty) in the British Journalism Review: *"the introduction of a conscience clause into the Press Complaints Commission code of conduct would be a welcome improvement, not only to reporters' working lives but also to the standards of newspapers in general. It would be a useful task for the PCC."* The same is argued by a number of media academics (http://jonslattery.blogspot.com/2012/01/how-conscience-clause-for-journalists.html).

Question 4. Public interest

[from transcript] If there is to be a public benefit test, as I believe there should be, then it obviously has to be subjective if the journalist and the editor has to believe it, but secondly, is there place for some objective criteria and a demonstration of oversight that establishes that's been thought about? ... it must recognise, mustn't it, that different newspapers have different audiences who are interested in different things?

Response

I believe the current public interest test in the PCC Code is broadly adequate and commands general support within the industry. I think it would be improved by adding a positive criterion based on improving the quality of public debate. This potential addition is supported by several academics including in evidence to the inquiry from Professors Steve Barnett and Brian Cathcart. In addition, I recommend a sensible academic paper by Glenda Cooper, whose experience includes Associated Newspapers and Stephen Whittle, a former BBC Controller of editorial policy which also endorses this approach[1]. Perhaps the crispest articulation of the addition comes in the last of the BBC's guidelines:

> *"disclosing information that assists people to better comprehend or make decisions on matters of public importance"*

As I argue in (2) above there must be one definition for all newspapers, regardless of the tastes of their respective audiences.

I do believe it would be good and timely to engage the public on this question. The last time this was done, to my knowledge, was in 2001-2002 by Professor

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[1] *Privacy, probity and public interest. Whittle & Cooper. Reuters Institute for the Study of Journalism 2009.* Their definition of public interest includes exposing or detecting crime or significantly anti-social behaviour; preventing people from being misled by some statement or action of an organisation; disclosing information that allows people to make a significantly more informed decision about matters of public importance or incompetence that affects the public; informing debate on key issues; promoting accountability and transparency for decisions and public spending; tackling fraud and corruption; promoting probity, competition and value for money; helping people understand and challenge decisions that affect them

David E Morrison and Michael Svennevig in a report for broadcast regulators and the IPPR published in March 2002. The public was surveyed, using qualitative and quantitative methods, about their views on the public interest and privacy. It would surely be helpful in the light of the events of 2011 and the formation of this Inquiry, for us to consult the public once more on an appropriate public interest test. This is something the Inquiry could recommend and the PCC could take up.

As to subjective and objective tests, I agree that a blend is required. Courts will often make objective assessments of whether the public interest is being served, but I believe society is best served when an element of subjectivity is considered. This is the pathway to "responsible journalism" or, in your terms, improved culture, practice and ethics. In libel law, we have the Reynolds test (as interpreted by the House of Lords in Jameel) in relation to qualified privilege at common law for the coverage of public interest issues. Reporters know that in this context they will have to address their judgments made at the time on such matters as the nature and motive of sources; and whether the subject was given a chance to respond. These principles are intended to allow journalists to defend stories where they can demonstrate that proper procedures have been followed and where the public interest is engaged. The Joint Committee on Defamation has recommended reform to the Reynolds test, which permits regard to be had to the reasonable judgment of the editor on the tone and timing of the publication.

In privacy, we believe the so-called "Omand" principles to which I referred in my initial witness statement set out a not dissimilar framework for deciding such matters as how to weigh up the possible harm involved in intrusion versus the public good; proportionality of methods; and to what extent fishing expeditions are legitimate.

Finally on the public interest, we would like to see the public interest available as a defence generally in laws affecting the media. This question may merit more discussion in future modules.

Question 5. Public interest and the pre-publication gathering of

[redacted]

Response

We at GNM strongly believe there is presently, an overriding public interest in internet freedom. We do not believe that a new system of regulation therefore must extend to all internet based publishing which is already subject to the laws of the land. The internet has brought an unprecedented level of free expression to our society and that should be embraced. In addition, internet

out to some on the web in breaking stories first. That is now a fact of life. However, the greater prize is the reinforcement of the idea of a body of people who share a common set of standards and ethics.

Indeed, we believe that the new regulatory system could and should be constructed to incentivise significant web publishers to join. In so doing, they will get access to the carrots of participation and be part of this so-called ethical 'walled garden'. This will be self-selecting and likely to attract the most substantial and influential publishers on the web.

On practical grounds, regulating web publishing as a whole appears to be too complicated a task. Any attempt to distinguish between different internet services (beyond the obvious mainstream media) would pose serious definitional difficulties.

Question 10. Statute & Press Freedom

[from transcript] You pick up the point about teeth, and my concern about the binary issue, [between self regulation and statutory regulation] and I'm sure that the approach -- no, I can't say I'm sure. I feel it's likely that the approach is going to require something rather more nuanced than one or the other, but how can that work in a way that doesn't -- and if I say this once a day, I hope people will believe me -- doesn't impact on the freedom of the press and the freedom of the expression, both of which I believe are absolutely fundamental to our society

Response

As I said in my opening statement, if a "statutory" response implies some form of state control, or licensing of journalists, we would oppose it.

However opposing statutory regulation does not necessarily mean opposing any use of law to make an independent system work. The industry need not take an emotive view of the use of statute, conscious that as well as the great risks involved with this there are also opportunities. However clearly given the sensitivities it is vital that the debate is held around specific measures that either protect press freedom or make independent regulation work better without harming press freedom.

I am not a lawyer, but it appears to me that there are four possible uses of statute beyond direct statutory regulation. These are:

- statutory recognition of a new independent system of regulation – this would embed independent regulation in statute, thereby protecting the integrity of it and all parties' commitment to it. This seems to be what was intended in Ireland. This could indicate seriousness without incurring harmful consequences

- statutory backstop – this would give an independent regulator some kind of enforcement either through direct powers or through co-regulation as per the ASA. This would make enforcement easier than using, say, contract law between the regulator and its members. However we are not convinced this is necessary and may have unintended consequences. If we can avoid the state pursuing newspapers to pay fines with threats of prosecution, we should surely do so

- statutory mechanisms that aid regulation – this would include putting in statute some of the carrots and sticks essential to voluntary and independent regulation e.g. VAT registration or formalising the regulator role in alternative dispute resolution. This may be necessary to make the system work and if so, provided potential unintended consequences are properly thought through, we would support this

- statutory press freedom measures – as stated above we believe there should be greater consistency in the approach to public interest in both the civil and criminal law.

Question 11. Plurality

[from transcript] The word plurality came into my terms of reference quite late in the day and raised monumental problems, but how is one to do that?

Response

Like several core participants, we have submitted consultation responses to Ofcom on new proposals for measuring media plurality. They have pledged to make recommendations on this to your Inquiry by June. However we believe that it is vital that the Inquiry consider the impact of ownership and plurality on the culture, practices and ethics of the press. Ofcom will not do this and it is our strong belief that a lack of plurality diminishes all three.

This is most clearly and explicitly seen in the events of July 2011. As I indicated in my opening statement and you have explicitly acknowledged, this inquiry was borne in the wake of a press scandal that touched on, or involved, the public, police and politicians. It has become clear that people, both internally and externally, felt a fear of News International and that its influence across many aspects of British political and cultural life was simply too dominant. Both the police and politicians (including prime ministers past and present) acknowledged their relationship with News International, by virtue of being the largest player in the press, was unacceptably close. We have learnt a lot about the culture, ethics and practices that flowed from that and no doubt we will learn more.

While this may be most immediately pertinent to News International, the wider question of how concentration of ownership impacts on culture practice and ethics is a generic question which will only grow in importance if the industry consolidates in the coming years.

We hope the Inquiry will take evidence on this question before Module 4 therefore, when recommendations are due on plurality including reaction to Ofcom's proposals. It would seem natural to do this in Module 3, given that plurality law explicitly *"is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda."* [DTI Guidance on the Enterprise Act 2002]

13 January 2012

Alan Rusbridger

Date

APPENDIX: GNM WHISTLEBLOWERS POLICY

Whistleblowers/Public interest disclosure

All employees need to feel able to come forward if they have serious concerns about malpractice or wrongdoing at work without the fear of accusations of disloyalty, harassment or victimisation. The Public Interest Disclosure Act 1998 specifically provides for the protection of workers who are concerned that malpractice or wrongdoing has occurred; "workers" includes employees, agency workers, contractors, the self-employed and home workers. Provided that the procedural steps in this policy are followed, such workers who make "qualified disclosures" cannot be victimised or dismissed. GNM sees Public Disclosure as important and any concerns raised will be taken seriously. Failure to follow this policy may lead to disciplinary action.

Malpractice

Some examples of matters regarded as "malpractice" for the purposes of this policy are:

Fraud or financial irregularity

Corruption, bribery or blackmail

Criminal offences

Failure to comply with a legal or statutory obligation

Miscarriage of justice

Endangering the health and safety of any individual

Damage to the environment

Concealment of any of the above

Procedure

The Company's primary aim is to prevent workplace malpractice from occurring in the first place. If it happens, the Company's objective is to prevent it recurring. If appropriate, every effort will be made to resolve the situation on an informal basis in the first instance. If this is not possible, the Company will take formal action to investigate and take whatever steps are necessary.

The First Step

If a worker has a concern about workplace malpractice, he/she should initially contact a Designated Assessor (DAs). GNM will appoint DAs throughout the Company. They will have appropriate standing in the company to command the respect that is needed to fulfil the function and they will receive training. Workers will be made aware who the DAs are. If a worker is dissatisfied with the action taken in respect of their concerns, they should raise their concerns in writing to the Managing Director, who will either deal with the matter or designate an appropriate senior Manager, as appropriate.

Further Steps

A worker should be aware that their concerns will, as far as possible, be dealt with in confidence. There may be circumstances, however, where it will not be practicable for the Company to pursue a complaint or to deal with an alleged wrongdoer without the identity of the complainant becoming known and this is something which the worker must recognise when raising their concerns. The person responsible for hearing a worker's concerns (usually the DA) will normally arrange a meeting with them. The worker may be required to set out their concerns in writing in advance of the meeting. The worker's concerns will then be discussed in full at the meeting and the person hearing the complaint will decide if any further action needs to be taken and, if so, what the appropriate action will be. This may include requiring the worker to attend a further meeting with a higher level of management or asking him/her to provide any further evidence which is considered necessary. The worker will, unless circumstances do not permit it, be told what action the Company has decided to take and must treat any such information with the strictest confidence.

Further Action

If the concern raised is found to be valid then the Company may decide that one or more of the following steps (which is a non-exhaustive list) is appropriate:

referral of the matter to the Company's board of directors with a view to an internal investigation being carried out;

referral of the matter to the appropriate external regulatory body for further investigation;

referral of the matter to the police;

referral of the worker to the grievance procedure.

As stated above, a worker will normally be informed of any decision taken and is required to keep this decision strictly confidential.

External Disclosure

If, after having followed the procedural steps set out above, a worker remains genuinely and reasonably dissatisfied with the outcome, he/she may raise their concern, on a confidential basis, with the Company's regulatory authority. The worker must inform the HR Department at least 7 working days before taking such action.

Protection from Victimisation

Provided a worker raises any concerns in good faith and not out of malice or with a view to personal gain on their part and has reasonable grounds for believing their concerns to be true and has complied in full with the spirit of the policy and procedural steps set out above, the following will apply:

so far as possible the worker's identity will not be disclosed at any time by the Company unless necessary for the purposes of its investigations or to comply with a legal obligation;

the worker will not be subjected to any harassment, victimisation or disciplinary action by the Company as a result of raising the concern;

so far as possible any supporting evidence relating to the worker's concerns will be kept secure at all times.

Disclosures outside this Policy

If at any time it is discovered that a worker has raised a concern maliciously, vexatiously, in bad faith or with a view to personal gain or that he/she has failed to follow the Company's policy for disclosure, set out above, he/she will lose the protection provided to them under this policy. In addition, he/she may be subject to the Company's disciplinary procedure, including dismissal.

Note

This policy is not designed to replace the normal procedures whereby a manager is informed when there are concerns about an individual's behaviour. For instance, if colleagues feel that an individual is bullying another member of staff then this should be reported immediately to the appropriate manager or the HR Department. **For more information please contact the head of HR on ext. 3536 or a member of the HR Department on ext. 8840 or 4637**

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