

<p>1 Wednesday, 1 February 2012 2 (10.00 am) 3 MR JAY: The first witness today is Lord Black, please. 4 LORD GUY VAUGHAN BLACK (sworn) 5 Questions by MR JAY 6 MR JAY: Lord Black, make yourself comfortable. Your full 7 name, please? 8 A. Guy Vaughan Black. 9 Q. In the bundle in front of you, you will find certainly 10 your first witness statement dated 16 September of last 11 year and you've also provided us with a second witness 12 statement quite recently, 25 January of this year. This 13 is your formal evidence to the Inquiry? 14 A. It is indeed, yes. 15 Q. You are and have been the chairman of PressBoF, which of 16 course is the Press Board of Finance, since September 17 2009. Your previous life, your previous career, can 18 I summarise it in these terms, a career in Conservative 19 politics until 1996, then you were director of the PCC, 20 appointed by Lord Wakeham, between 1996 and I think the 21 end of 2003; is that correct? 22 A. Correct. 23 Q. Then you worked for Michael Howard, of course then 24 leader of the Opposition, as his press secretary and 25 director of communications for the Conservative party</p> <p style="text-align: center;">Page 1</p>	<p>1 A. When members of the Commission are appointed to that 2 role, they undertake two things. One is obviously to 3 contribute £1 to the winding-up costs of the Press 4 Complaints Commission, should that prove necessary, but 5 secondly, not to agree to any changes to the articles of 6 association without the permission of PressBoF. That is 7 obviously to avoid any substantive changes being made to 8 the role of the PCC without prior consultation with the 9 industry. 10 Q. But it doesn't work the other way around. PressBoF does 11 not have power to direct the PCC to make changes to the 12 memorandum or articles of association; is that correct? 13 A. It would need to discuss those with the Press Complaints 14 Commission first. 15 Q. Thank you. In terms of the objects, it's object clause 16 3 at our page 03052. This is the general object: 17 "To collect levies [that's its primary object] for 18 the financing of the PCC or some similar body, to 19 appoint the chairman of the PCC and generally to support 20 the maintenance and preservation of press standards, 21 periodic review of the code of practice for the press or 22 any similar body, the adjudication of complaints, the 23 promotion of freedom of the British press, the provision 24 of information ..." and then similar ancillary objects. 25 So that defines your powers and objects. Can I just</p> <p style="text-align: center;">Page 3</p>
<p>1 between January 2004 and September 2005; is that right? 2 A. Correct. 3 Q. And then you left after the General Election, joined the 4 Telegraph Media Group as director of corporate affairs, 5 and then were appointed chairman of PressBoF, as we've 6 heard, in September 2009, and finally you were made 7 a life peer in May of 2010; is that correct? 8 A. Correct. 9 Q. Lord Black, your witness statement helpfully deals with 10 the objects and powers of PressBoF. May I briefly touch 11 on those? Under tab 3, please, there's a memorandum and 12 articles of association of the Press Standards Board of 13 Finance. This is a company limited by guarantee. It 14 was set up or incorporated, rather, at the same time as 15 the PCC; is that correct? 16 A. I think it was incorporated just before the PCC began 17 operation on 1 January 1991, so it was incorporated 18 a couple of months before to begin the collection of the 19 levy which was going to fund the set-up costs of the 20 Press Complaints Commission. 21 Q. Thank you. In paragraph 28 of your statement, you say 22 that: 23 "Changes to the PCC's role and remit must be 24 ratified by PressBoF before they come into effect." 25 Could you explain that to us, please?</p> <p style="text-align: center;">Page 2</p>	<p>1 draw attention to clause 5 of the article at page 03064, 2 which covers the issue of members. 3 A. Right. 4 Q. It's clause or article 5(a); is that right, Lord Black, 5 which explains how the different newspaper associations 6 and societies have the right to put up a certain number 7 of members? 8 A. Yes, indeed. As I explain in my witness statement, one 9 of those associations no longer exists, and two of them 10 have merged, but those are the core members of the 11 board. 12 Q. Right. So PressBoF is entirely comprised of -- sorry, 13 comprises press members; is that correct? 14 A. Indeed. 15 Q. Thank you. May I ask you to explain tab 5, which deals 16 with the question of levy. This is page 03110, 17 Lord Black. 18 A. Yes. 19 Q. Some of this is clear, some of this is less clear. The 20 basic principle appears to be that the national 21 newspapers pay 54 per cent, the regionals 39 per cent 22 and the magazines 7 per cent? 23 A. Correct. 24 Q. It's paragraph 3 which is less clear, which deals with 25 how the national newspapers, through the NPA, pays the</p> <p style="text-align: center;">Page 4</p>

<p>1 levy and how the levy is, as it were, allocated between 2 them. Could you assist us with that, please? 3 A. Yes. Each year PressBoF asks the national press through 4 the Newspaper Publishers Association to pay a certain 5 amount towards the entire levy. It's then for the NPA 6 to divide that up among its member companies and that is 7 done through a formula which relates to consumption of 8 news print and also the number of publications that each 9 particular publisher has. 10 The reason the NPA does that is that some of that 11 information is commercially confidential. It then 12 collects the money and passes it on to PressBoF as 13 a lump sum twice a year. 14 Q. Does PressBoF know both what the formula is and how the 15 percentages work out in a particular year? 16 A. I know the basis of the formula, but again, because I am 17 obviously part of one particular newspaper company, it 18 would not be right for me to know the details of the 19 formula, but we do always collect the full amount from 20 the NPA. 21 Q. Yes. Paragraph 15 of your statement -- 22 LORD JUSTICE LEVESON: So it's not transparent who is paying 23 what? 24 A. The membership of the Newspaper Publishers Association 25 is transparent, sir, but within that body, it is not</p> <p style="text-align: center;">Page 5</p>	<p>1 Q. If we look at one of the minutes of the Editors' Code of 2 Practice Committee, we can see that. It's under tab 8 3 at page 03167. This was before your time, Lord Black. 4 It's one of the minutes, 16 April 2009, if you have it. 5 A. Yes, indeed. 6 Q. Those attending include the PCC chair, who I think had 7 just been appointed, Baroness Buscombe, director of the 8 PCC, and the secretary -- now, Mr Beales is the 9 secretary to the committee; is that correct? 10 A. Yes, yes. 11 Q. So they have a watching role, but they cannot, as it 12 were, contribute to any decision-making; is that right? 13 A. Yes, they would attend in a simply ex officio capacity. 14 Q. It's clear from the discussions on the review of the 15 code of practice, if you look at the next page, 03168, 16 the public, as it were, has no voice, no ability to 17 contribute to a discussion on whether any particular 18 item of the code of practice should be amended; is that 19 a fair observation? 20 A. There is obviously no direct public involvement in the 21 Code Committee, except that it can come in a number of 22 ways. The Code of Practice Committee undertakes an 23 annual review of the code, and invites suggestions from 24 members, from interested parties, and indeed is open to 25 anybody -- as clearly happened in this case -- is open</p> <p style="text-align: center;">Page 7</p>
<p>1 clear how much money each of those individual publishers 2 pays, that's correct, sir. 3 LORD JUSTICE LEVESON: Although one can take a pretty good 4 stab at who would be paying the most? 5 A. You can indeed, sir, because the news print consumption 6 will weigh more heavily in favour of the mass market 7 publications. 8 LORD JUSTICE LEVESON: And that would be obvious to 9 everybody? 10 A. Yes. 11 MR JAY: Thank you. The current membership you set out in 12 paragraph 15 of your statement. 13 A. Indeed. 14 Q. The Editors' Code of Practice Committee, which we've 15 heard a lot about, constitutionally, as your statement 16 explains, that is a subcommittee of PressBoF, it is not 17 part of the PCC; is that right? 18 A. Correct. 19 Q. And it's also clear from the evidence we've heard that 20 there's no lay representation on that committee? 21 A. The only lay representation comprises the chairman and 22 the director of the PCC at any particular time who are 23 entitled to attend that committee in an ex officio 24 capacity, and as they are both lay people, there is that 25 small amount of lay input.</p> <p style="text-align: center;">Page 6</p>	<p>1 to anybody during the course of the year between the 2 annual reviews to make suggestions for potential changes 3 for the committee to consider. So there is a public 4 input in terms of the issues that are raised, but the 5 decision on the changes to the code remains with the 6 editors, that is correct. 7 Q. So one can see what happened in this particular case. 8 The annual code review for 2009, 03168, a firm of 9 solicitors made two suggestions for amendments to the 10 code, do you see that? The first suggestion under 11 "Accuracy" at the top of the page, the suggestion was -- 12 this was put forward by Schillings: 13 "The code should state that where there was an 14 intention to publish serious allegations, the relevant 15 parties should be given an opportunity to reply, and the 16 gist of their response published." 17 Now, it might be said that theme emerges from the 18 case of Burrell, which we saw reference to a day or two 19 ago, but let's see how it played out: 20 "The solicitors claim this reflected PCC policy. 21 The secretary said that in fact PCC policy was that 22 a failure to call all relevant sides of a story, if 23 unremedied, could lead to a breach. Committee members 24 agreed on the general principle of giving all relevant 25 sides of the story, but felt there were circumstances</p> <p style="text-align: center;">Page 8</p>

<p>1 where there would need to be exceptions. The chairman 2 said that these would be difficult to codify. 3 Neil Wallis said where it had always been policy for the 4 News of the World to make a 4 o'clock phone call to the 5 subject of an expose, that was now impossible because of 6 the risk of being successfully injunctioned at the hands of 7 Saturday duty judges. Mr Rusbridger said that while it 8 could not be an obligation, approaching the subject of 9 a story was usually desirable. The code book might 10 usefully make that clear." 11 Then you can see the decision: "No change". 12 So it's clear that the press voice, as it were, is 13 predominant here, isn't it? 14 A. It is an Editors' Code Committee, so the press voice is 15 bound to be predominant. 16 I would say, though, in talking about the Code of 17 Practice Committee, which I obviously attended as an 18 observer for many years up until 2003, there is a very 19 broad range of opinion within it. It has experience and 20 it is across the different parts of the industry and the 21 debate is often extremely lively. The public may not 22 have direct representation on it, but that doesn't mean 23 to say there are not a substantial range of views which 24 are aired during the course of its discussions. 25 Q. Many would say that the principle which Schillings is Page 9</p>	<p>1 LORD JUSTICE LEVESON: Well, they're entitled to take that 2 view, but that's effectively what's going on in code 3 here: our stories will be stopped by judges, trying to 4 do a different balance, and we think we're better at it. 5 A. I think that the points would have been made from 6 a number of different members about that, sir, and 7 certainly Alan Rusbridger could be expected to give the 8 contrary point of view. 9 MR JAY: Actually, that theme is one which PressBoF itself 10 espouses. If you go to tab 4, you kindly collected for 11 us here the PressBoF annual report over a 20-year 12 period, really since its inception. Obviously we're not 13 going to look at all of them, we're only going to look 14 at two. The print is very small, but we'll manage 15 somehow. It's page 03107. 16 LORD JUSTICE LEVESON: Did you say 137? 17 MR JAY: Pardon me, 107, which is the report for the year 18 before you arrived. This is the last report of 19 Mr Bowdler, who was then chairman of PressBoF, for the 20 year ended 31 March 2009. 21 A. Yes. 22 Q. This is PressBoF first of all under the heading 23 "Chairman's report" dealing with the DCMS review of 24 2008/2009. Can I pick it up in the second paragraph: 25 "The new inquiry, however, provided that opportunity Page 11</p>
<p>1 suggesting should be incorporated into the code, namely 2 as a general rule, not as an absolute rule, there should 3 be pre-notification of serious allegations, although 4 there might be exceptions to that rule, but that is 5 a fundamental principle of justice and common sense, yet 6 it's being rejected here without proper consideration 7 being given to both sides of the argument. Is that fair 8 or not? 9 A. I obviously wasn't at that meeting, and don't know how 10 much argument there was on that point. This is an issue 11 which is raised from time to time, the whole subject of 12 pre-notification. I think in subsequent Code Committee 13 minutes it's raised and it was obviously raised in the 14 wake of the Max Mosley case. 15 There are important arguments on both sides to be 16 had. I have always thought, from a personal point of 17 view, that the obligation of the code to take care to be 18 accurate does actually point to what Alan Rusbridger 19 says there, that although it's not an obligation, it's 20 certainly usually desirable. 21 LORD JUSTICE LEVESON: It's a bit more than that, isn't it, 22 Lord Black? What Mr Wallis is clearly saying is, "We 23 don't trust the judges". 24 A. That has always been a particular line from the 25 News of the World, sir. Page 10</p>	<p>1 for PressBoF and the trade associations to demonstrate 2 that the industry is fully committed to effective 3 self-regulation through the Editors' Code of Practice 4 and the jurisdiction of the independent PCC, with its 5 majority of lay members. There is no doubt that, as 6 previous enquiries of the committee have concluded, 7 standards in reporting have been raised markedly since 8 the PCC and the code were established in 1991. Change 9 has been incremental; but it has been very significant 10 on numerous issues." 11 And then they list the issues, including harassment 12 and intrusion into grief. The next paragraph: 13 "As importantly, self-regulation has inculcated 14 within our industry a culture of correcting inaccuracies 15 and other breaches of the code speedily and effectively. 16 Statistics from the PCC show more complaints than ever 17 being resolved and in record time. But very many 18 complaints never reach the PCC; instead, they are sorted 19 out by editors and publishers to the satisfaction of the 20 complainant without the need for the intervention of the 21 PCC. This is a substantial and hidden success of 22 self-regulation. The PCC itself has proved to be an 23 efficient and accessible regulator." 24 Well, a number of points there. Obviously this is 25 before your time, Lord Black, but the general message is Page 12</p>

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<p>1 extremely positive and supportive of the status quo, 2 isn't it?</p> <p>3 A. It's supportive of the changes that have taken place. 4 LORD JUSTICE LEVESON: Well, it's rather 5 self-congratulatory, which in the light of events may be 6 a little bit difficult to justify.</p> <p>7 A. I think, sir, that in the areas that are referenced 8 there, such as harassment, the treatment of children, 9 the treatment of hospital patients, there have been 10 marked improvements in standards over the years. There 11 is no doubt that recent events have shown that 12 self-regulation is not a perfect mechanism, and the 13 industry fully recognises that, but I do think it is 14 important to realise what changes the code has brought 15 about.</p> <p>16 When I first became director of the Press Complaints 17 Commission in 1996, the code was still relatively new 18 and it was still quite difficult, sometimes, to get 19 editors to correct inaccuracies. I don't believe that 20 is the case now. I think there is a hidden part of 21 self-regulation where newspapers do like to try to sort 22 issues out before they reach the PCC, and that is an 23 important part of the ecology of our system.</p> <p>24 MR JAY: Of course you weren't there in April 2009, but the 25 whole tone of this is: okay, we might need to make minor</p> <p style="text-align: center;">Page 13</p>	<p>1 self-regulatory system. Whilst such events do occur, 2 they have, over nearly two decades, been extremely rare 3 and always manageable."</p> <p>4 Okay, it was managed just about in 2008, 2009, but 5 the "always manageable" tag grates a bit if one moves 6 forward to early 2011, doesn't it?</p> <p>7 A. At that point there it was a statement of fact. I think 8 it is important to point out that in the 20 years that 9 PressBoF has been in existence, up until the point in 10 2008 when we started to have problems with 11 Northern &amp; Shell, coverage of national newspapers had 12 been universal. Support of the system from the regional 13 press had been at about 97 per cent, which, given the 14 large number of retail publishers there are, is actually 15 an exceptionally important point, and we'd had very 16 strong support from among magazines. And up until that 17 stage, the coverage of the system, the amount of money 18 it raised and the support of individual publishers had 19 been very strong. That phrase may grate in hindsight, 20 but at that time it was certainly true.</p> <p>21 LORD JUSTICE LEVESON: Do you think there's something that 22 requires systemic reflection that for reasons which are 23 readily understandable Private Eye never felt it 24 appropriate to become a member of the PCC?</p> <p>25 A. I have always been in some difficulty in considering</p> <p style="text-align: center;">Page 15</p>
<p>1 changes, but the basic system, what the PCC does in 2 terms of its constitution and its functions, is 3 fundamentally okay. That's the message which one 4 gathers from this, isn't it?</p> <p>5 A. In that having an independent Commission, an Editors' 6 Code Committee and consistent levels of industry funding 7 had managed to produce over the years some marked 8 changes in newspaper behaviour, then I think that that 9 is a perfectly valid observation of where the industry 10 sat at that point.</p> <p>11 Q. Okay. Would it have been your view in April 2009 that 12 the PCC was a regulator?</p> <p>13 A. I would never have used that word. I had never believed 14 the PCC to be a regulator.</p> <p>15 Q. Can we just look on the next column. It's the fourth 16 paragraph down, beginning:</p> <p>17 "In such a complex and large industry, it is 18 inevitable that there have been occasional disputes 19 involving individual publishers, sometimes as a result 20 of wider newspaper industry issues. It was in such 21 circumstances that Northern &amp; Shell, owners of Express 22 Newspapers, withdrew from PressBoF in 2008. A solution, 23 however, was found with the company resuming its full 24 contribution with effect from early 2009 and making 25 a public commitment to its continued support of the</p> <p style="text-align: center;">Page 14</p>	<p>1 that point, sir. Private Eye is a satirical magazine. 2 Whether a satirical magazine has a place in a system of 3 self-regulation, where the code relates to a number of 4 different factors which would not be covered in 5 a satirical magazine, I'm not sure. It's a long time 6 since that issue has been considered, but it is 7 certainly one which, as you rightly say, would require 8 mature reflection.</p> <p>9 LORD JUSTICE LEVESON: The point being his attitude is: 10 I publish a column critical of all these editors, and 11 therefore I don't really see why it would be sensible 12 for me to allow my journal to be judged by the very 13 people I'm criticising, and the fact that the particular 14 subject of a criticism might not be part of the 15 adjudicating panel makes no difference if I'm entirely 16 prepared to criticise everybody.</p> <p>17 A. I make two points, sir. First of all, I've never spoken 18 to Mr Hislop about this, but I would make the point to 19 him that he's not being -- which I think you've heard 20 from witnesses over the last few days -- he's not being 21 judged solely by his peers, they have a role in that, 22 but the Commission itself has a majority of lay members 23 who would be quite able to reach such judgments.</p> <p>24 The second thing, sir, just as a matter of 25 realpolitik, I've never met a newspaper editor or</p> <p style="text-align: center;">Page 16</p>

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<p>1 publisher who would even dream of taking Private Eye to 2 the Press Complaints Commission, so it may not be an 3 issue whichever needed to arise.</p> <p>4 But we're looking now at obviously many different 5 aspects of the way that the system works and reform of 6 it, and I'd like to talk to Mr Hislop about that at some 7 point.</p> <p>8 MR JAY: The final point on this report, the next paragraph, 9 deep concerns expressed about the development of a de 10 facto privacy law based on the Human Rights Act and the 11 use of the no win, no fee arrangements in privacy and 12 libel cases having a profound adverse impact across the 13 industry both in terms of press freedom and 14 commercially.</p> <p>15 So PressBoF, as it's entitled to do, is adopting 16 a very clear position in relation to what it sees to be 17 the burgeoning growth of a privacy law and the 18 pernicious impact of CFA arrangements; that's right, 19 isn't it?</p> <p>20 A. Correct. I've always seen the role of PressBoF, which 21 is meant to and indeed does represent all the different 22 constituent parts of the industry, to have a forceful 23 role in press freedom matters.</p> <p>24 Q. It might be said that that philosophy might feed its way 25 into the development of the code of practice. Is that</p> <p style="text-align: center;">Page 17</p>	<p>1 that self-regulation of the press is greatly preferable 2 to statutory regulation and should continue, but we 3 cannot accept its conclusion that the PCC is toothless. 4 For the industry, the PCC has real bite, which is why it 5 has done so much to raise standards of reporting since 6 it was established in 1991."</p> <p>7 Now, the toothless point includes, of course, the 8 inability to fine or otherwise sanction editors and 9 newspapers with financial penalty. Is that a statement 10 which you would still adhere to, Lord Black?</p> <p>11 A. I think the point that I was trying to refer to there 12 was that the power of adjudication which the Press 13 Complaints Commission has is a very powerful sanction in 14 its armoury, and indeed it has other sanctions in that 15 in cases of serious breaches of the code it can refer 16 a matter to a publisher. So it has real bite within the 17 industry. I don't think I was referring there to the 18 wider issues of whether the PCC should have 19 investigative powers, but merely observing that the 20 powers that it did have of adjudication and exhortation 21 on general issues of importance to the industry had 22 raised standards.</p> <p>23 Q. In the next paragraph, though, you specifically refer to 24 the committee's proposal in relation to the introduction 25 of a system of fines and you say that that would be</p> <p style="text-align: center;">Page 19</p>
<p>1 a fair point or not?</p> <p>2 A. There is nobody from the Press Standards Board of 3 Finance who sits on -- there is one member, but of the 4 17 members, I think it's 17 members of the Code of 5 Practice Committee, I don't remember ever having 6 a substantive discussion as chairman of PressBoF. The 7 editors who sit on the Code Committee will all have 8 profound feelings about press freedom in their own 9 right, so I would be surprised if there was any 10 divergence of view.</p> <p>11 Q. Okay. Your first report is the next page, 03108. This 12 is dated March 2010 --</p> <p>13 A. Yes.</p> <p>14 Q. Sorry, it must date after March 2010. We don't have the 15 exact date of this, because the financial results are 16 set out and your year ends on 31 March.</p> <p>17 A. I think this would have been the summer of 2010.</p> <p>18 Q. Thank you very much. You refer to the DCMS report, 19 February 2010, in the first two paragraphs. You say in 20 the third paragraph:</p> <p>21 "PressBoF commended the Select Committee in our 22 thoughtful report covering a large number of areas of 23 vital interest to our industry. Much of it we would 24 welcome, but there are some significant differences 25 between us. We concur with the view from the committee</p> <p style="text-align: center;">Page 18</p>	<p>1 a bad idea, don't you?</p> <p>2 A. I have always been opposed as a matter of principle to 3 the imposition of fines because I don't think they would 4 do very much -- they would have done very much in the 5 past to strengthen the PCC. I think in many ways 6 a system of fines, which would have introduced 7 a legal -- some form of legal element to the system, 8 would weaken its service because it would have made it 9 less quick and less accessible to members of the public, 10 and I don't think there has ever been evidence that 11 complainants have gone to the PCC wanting any form of 12 financial redress.</p> <p>13 It is an issue which we have kept under review. It 14 is an issue which is now very real, in view of the 15 proposals that Lord Hunt has been making, and 16 I certainly now believe that some form of fining 17 element, whether the standards body, the new system, 18 would be appropriate.</p> <p>19 Q. What has happened, Lord Black, between summer 2010, when 20 you were opposing any possibility of fines, and today's 21 date, when you're not?</p> <p>22 A. I think that we've seen in the phone-hacking scandal 23 laid bare for the first time the very real lack of 24 powers that exist within the self-regulatory system to 25 conduct investigations. And I think it probably took</p> <p style="text-align: center;">Page 20</p>

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<p>1 us -- it took a scandal like that to show us that we 2 needed a new body which could enforce the terms of the 3 code. So it is that which has led me to a change of 4 view.</p> <p>5 Q. Is it just the phone-hacking scandal then which has led 6 you to change your view, rather than any other factor?</p> <p>7 A. In terms of the architecture of the system, I think that 8 has been the most obvious example of why urgent reform 9 of the system is needed.</p> <p>10 Q. Out of interest, was this report written before or after 11 9 July -- actually, it's 9 July 2009, when the Guardian 12 wrote its first important piece on phone hacking. There 13 had been earlier pieces as well. This postdated that, 14 didn't it?</p> <p>15 A. It did indeed, yes.</p> <p>16 Q. Okay. Would it be fair to say, though, Lord Black, that 17 the overall message you were communicating in this 18 report was that the status quo should be retained, 19 albeit perhaps with certain adjustments at the edges?</p> <p>20 A. I've never believed that the system of self-regulation 21 is actually about the status quo. In the 20 years it 22 has existed, it's changed considerably. The way the PCC 23 operates has changed, the code has changed on more than 24 30 occasions, the remit of the Press Complaints 25 Commission is a very alive entity. It's taken on board</p> <p style="text-align: center;">Page 21</p>	<p>1 Commission which took place, I think, the year before, 2 made a number of suggestions about how the lay members 3 might be involved in that process, and we took that on 4 board. And we also decided that the time was right, as 5 had not happened at previous appointments, to have an 6 independent assessor throughout the process.</p> <p>7 The position was advertised in the national press in 8 August 2011, and we appointed headhunters to manage the 9 process. Applications were made to them, Korn/Ferry 10 Whitehead Mann. They produced for us a long list of 11 potential candidates of about 40 to 45 people and the 12 subcommittee of PressBoF then scrutinised those with 13 them.</p> <p>14 Is this the sort of detail you would like me to go 15 into?</p> <p>16 Q. Yes.</p> <p>17 A. And we had a very thorough discussion with the 18 independent assessor and with the headhunters on that 19 long list, and produced from that a list -- a much 20 shorter list for Korn/Ferry to go away and talk to and 21 to do due diligence on. At that point we produced 22 a shortlist of I think it was around half a dozen 23 candidates who we were going to interview. Interviews 24 took place towards the end of September 2011. The 25 subcommittee of five members who was involved in the</p> <p style="text-align: center;">Page 23</p>
<p>1 websites, changes in digital technology, the 2 introduction of audiovisual services and so forth. So 3 I've never recognised the phrase "status quo" in terms 4 of where the Press Complaints Commission has got to. 5 It's changed in every year of its existence.</p> <p>6 What we're now looking at of course is more 7 fundamental change and starting in many ways from 8 scratch, but up until this point, I've always thought 9 that the Press Complaints Commission and self-regulation 10 is a living entity which has changed dramatically in 11 response to events.</p> <p>12 Q. May we come now to constitution of the PCC and 13 PressBoF's role in appointments. The position now, 14 notwithstanding what the articles of association of the 15 PCC say, they haven't been amended since 2006, is that 16 the press members are nominated by the trade bodies, the 17 public members are now nominated by a nominations 18 committee, but PressBoF does the formal appointment. In 19 relation to the appointment of the chair, you deal with 20 this in your second statement, Lord Black. Could you 21 explain the role of PressBoF in the context of what 22 happened in relation to the appointment of Lord Hunt, 23 please?</p> <p>24 A. PressBoF's role is to appoint the chairman. The 25 independent governance review of the Press Complaints</p> <p style="text-align: center;">Page 22</p>	<p>1 interviewing, they made a recommendation to the PressBoF 2 board.</p> <p>3 During that process, I did seek to involve the lay 4 members as the governance review had suggested. 5 I offered to each of them at the start of it an 6 individual meeting where I could hear their views on the 7 sort of chairman they thought was going to be needed, 8 gave them the opportunity to put forward any names, and 9 gave them the opportunity to put themselves forward if 10 they wished to do so. That was a very useful process. 11 I think I talked to all of the lay members bar one who 12 was just leaving and thought it not appropriate for him 13 to speak to me, and at that point I then suggested that 14 the deputy chairman of the Commission, Ian Nichol, was 15 appointed to liaise with both the independent assessor 16 and the independent recruitment consultants to monitor 17 the process going forward and I believe that's what 18 happened.</p> <p>19 At the end of that, after the appointment had taken 20 place, Andrew Ramsay, who had undertaken the independent 21 assessment, recorded what was in effect an audit note of 22 the process, which I provided you with in my second 23 witness statement.</p> <p>24 Q. To what extent, aside, of course, from the personal 25 qualities of the candidate, was the process geared to</p> <p style="text-align: center;">Page 24</p>

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<p>1 looking for someone who would be committed to the</p> <p>2 principles of self-regulation, might be hostile to</p> <p>3 a privacy law -- and we see that hostility in the</p> <p>4 PressBoF chairman's reports -- and would also be an</p> <p>5 upholder of the freedom of the press? To what extent</p> <p>6 were those thought to be desirable criteria?</p> <p>7 A. A belief in self-regulation and a belief in freedom of</p> <p>8 the press were fundamental criteria and they were</p> <p>9 mentioned in the advertisement, or certainly the job</p> <p>10 specification. I think it would be impossible for</p> <p>11 anyone to do that job if they started from the point of</p> <p>12 view of complete hostility to the system of regulation</p> <p>13 that they were supervising.</p> <p>14 LORD JUSTICE LEVESON: Not hostility, of course, but what</p> <p>15 about open-minded? The vital thing for the PCC to do is</p> <p>16 to be able to judge; in other words, to say, working on</p> <p>17 the code, because the code is a given for them: does</p> <p>18 this come on the right side or the wrong side of the</p> <p>19 line?</p> <p>20 A. Mm.</p> <p>21 LORD JUSTICE LEVESON: So why isn't a willingness to be</p> <p>22 open-minded, obviously with a very real interest in</p> <p>23 freedom of expression, I understand that, but</p> <p>24 open-mindedness on the question of self-regulation,</p> <p>25 indeed, I asked Lord Hunt about this yesterday.</p> <p style="text-align: center;">Page 25</p>	<p>1 self-regulation?</p> <p>2 A. I think if any candidate who had been successful and was</p> <p>3 involved in a process of study of the system came to us</p> <p>4 with specific proposals and they might say, "We believe</p> <p>5 there needs to be statutory underpinning of the system</p> <p>6 or statutory intervention there", we would clearly have</p> <p>7 a strong debate about it, but we didn't put any brakes</p> <p>8 on what a successful candidate would come forward with,</p> <p>9 but the starting point as having a fundamental belief in</p> <p>10 self-regulation was a very important quality, sir.</p> <p>11 LORD JUSTICE LEVESON: On the basis that if somebody had</p> <p>12 said, "I'm actually open-minded", they wouldn't have got</p> <p>13 through.</p> <p>14 A. Lord Hunt was open-minded, sir.</p> <p>15 LORD JUSTICE LEVESON: Lord Hunt made it very clear that he</p> <p>16 was absolutely in favour of self-regulation and you may</p> <p>17 have seen when I asked yesterday, or Mr Jay asked about</p> <p>18 that, he was asked that question, he gave his answer,</p> <p>19 and I said, "What would have been the position if you'd</p> <p>20 said something different?" and I think he made it quite</p> <p>21 clear what he thought the position would be.</p> <p>22 A. There are, of course, many different models of</p> <p>23 self-regulation that somebody can come up with, while</p> <p>24 maintaining an inherent belief that it's right for the</p> <p>25 press to regulate itself.</p> <p style="text-align: center;">Page 27</p>
<p>1 A. When one of the -- one of the issues that we explored</p> <p>2 with each of the candidates who were before us was to</p> <p>3 say to them, "We know that this system has to change,</p> <p>4 we'd be very interested in hearing your proposals".</p> <p>5 Lord Hunt has frequently spoken about his blank sheet of</p> <p>6 paper. That's indeed what the industry gave him and</p> <p>7 said, "Please go away, look at what needs to be done,</p> <p>8 examine the possibilities, and produce proposals for</p> <p>9 change", so that is -- to the extent of that being an</p> <p>10 open mind, that was absolutely right, sir. That's what</p> <p>11 we were looking for in candidates.</p> <p>12 LORD JUSTICE LEVESON: A blank sheet of paper subject only</p> <p>13 to the absolute prerequisite that it's self-regulation.</p> <p>14 A. Indeed.</p> <p>15 LORD JUSTICE LEVESON: Because that was the definition in</p> <p>16 the job description.</p> <p>17 A. Indeed.</p> <p>18 LORD JUSTICE LEVESON: Yes.</p> <p>19 A. But the industry, sir, has a fundamental belief in</p> <p>20 self-regulation.</p> <p>21 LORD JUSTICE LEVESON: I understand that, but are you</p> <p>22 appointing somebody to try and find the best solution</p> <p>23 for the problem that undeniably last autumn you were</p> <p>24 facing, or are you trying to find somebody who is going</p> <p>25 to be first and foremost an advocate for</p> <p style="text-align: center;">Page 26</p>	<p>1 LORD JUSTICE LEVESON: But one therefore must aim off</p> <p>2 a little bit for recognising that the very important</p> <p>3 work that is being done on ways forward, which doubtless</p> <p>4 Mr Jay will come to, has to be read in the light of the</p> <p>5 fact that this is being approached from a particular</p> <p>6 perspective.</p> <p>7 A. From the importance of self-regulation.</p> <p>8 LORD JUSTICE LEVESON: Yes. I mean, I'm entirely</p> <p>9 open-minded about everything. I have certain principles</p> <p>10 which I've made no secret about as the months have</p> <p>11 passed, but it seems to me that if I'd come into this</p> <p>12 with that sort of mindset, then I would probably be</p> <p>13 wasting a lot of people's time because somebody would</p> <p>14 say, from a different perspective, "Well, we think</p> <p>15 actually the answer is very different".</p> <p>16 A. But I think, sir, as you say Mr Jay may come on to this,</p> <p>17 the proposals that Lord Hunt is putting forward is</p> <p>18 a very dramatic shift in the way that the industry would</p> <p>19 supervise self-regulation going forward. I don't think,</p> <p>20 if I'd been looking at it six months ago, I would have</p> <p>21 begun to think that we could have got to this position</p> <p>22 now. It's a tribute to him that he's actually carried</p> <p>23 the industry on a journey to a point where we are facing</p> <p>24 a very different system of regulation going forward, but</p> <p>25 I think everybody is going to start from a belief with</p> <p style="text-align: center;">Page 28</p>

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<p>1 certain fundamental principles. He has made his clear, 2 and we have operated within that context.</p> <p>3 MR JAY: Some have said under the old structure that there 4 is a lack of independence owing to the proximity of 5 PressBoF to the PCC and the control PressBoF has over 6 the PCC. In the new system, which we're going to come 7 to in a moment, how is that at least perception of lack 8 of independence, if not reality of it, going to be 9 addressed?</p> <p>10 A. I think the first point I must make is that PressBoF 11 does not seek to control the PCC. PressBoF provides the 12 funds and PressBoF promulgates the code, but the 13 decision-making powers of the Commission on individual 14 complaints are -- the independence of that process is 15 absolutely sacrosanct. So while there may be 16 a perception in some quarters that there is a degree of 17 control there, that does not exist. I only meet the 18 members of the Commission, I think, on a formal basis 19 once a year when I'm asked along to a Commission meeting 20 to talk generally about industry and to answer any 21 questions they may have, but there is absolutely no 22 formal control.</p> <p>23 Going forward, I think we need to look at where 24 PressBoF sits and where the Code Committee sits within 25 the new architecture that Lord Hunt has proposed. There</p> <p style="text-align: center;">Page 29</p>	<p>1 to some of the fundamental issues of philosophy and 2 principle we've been discussing?</p> <p>3 A. I have never seen how you can have a wholly independent 4 process which doesn't have some form of statutory or 5 government involvement in appointing those who might be 6 making the decisions and I would be opposed to that.</p> <p>7 Q. So are you saying that in order to have an independent 8 process, you'd need a statute. Because you're hostile 9 to a statute, we can't have an independent process; is 10 that right?</p> <p>11 A. It's a subject that I need to look in more detail at, 12 but I do believe that there are ways which, if you look 13 at the way that the chairman has been appointed over the 14 20 years of the Press Complaints Commission, it has 15 changed very markedly in the time. When Lord Wakeham 16 was appointed, I think it was still the -- what was 17 known as the tap on the shoulder. By the time 18 Sir Christopher Meyer was appointed, headhunters were 19 involved the first time. When Baroness Buscombe was 20 appointed, we'd moved to a position of public 21 advertisement, and the situation we had last time 22 I think was getting pretty close to what a public 23 appointments procedure would be with a form of 24 independent assessment and public advertisement. 25 So it has evolved, I've no doubt it will evolve</p> <p style="text-align: center;">Page 31</p>
<p>1 will obviously clearly always be the need for a funding 2 body there, and where precisely that fits into the 3 system, and I suspect it would be a body that works 4 alongside the trust and management board that he's 5 proposing, rather than either of the limbs, which would 6 guarantee the independence of the complaints process and 7 indeed of any standards investigations.</p> <p>8 Q. Under the new architecture, would the funding body have 9 the same ability to appoint the chair of PCC mark two?</p> <p>10 A. That's not an issue that we've looked at yet.</p> <p>11 Q. Is this right, it's not an issue which any thought has 12 been given to?</p> <p>13 A. There are only so many ways that you can appoint 14 a chairman. The industry could continue to have the 15 primary role, PressBoF could make the appointment of any 16 successor, chairman of any successor body, with 17 involvement of Commission members or public input, or 18 indeed we could look at methods of public appointments 19 procedure. We do need to give more thought to that so I 20 can't give you an answer on that today.</p> <p>21 Q. In terms of public confidence, I'm sure the public would 22 want the last option: a wholly independent body who 23 appoints members to the PCC, rather than any control 24 from PressBoF; PressBoF, as we've seen, adopting 25 a certain position, as it's entitled to do, in relation</p> <p style="text-align: center;">Page 30</p>	<p>1 further, but I can't give you a model today, I'm afraid.</p> <p>2 Q. I'm not asking this question disparagingly, it's just an 3 observation. We see a preponderance of Conservative 4 peers wherever we look, both in the PCC -- apart from 5 Sir Christopher Meyer; he, of course, is independent -- 6 and in PressBoF at the moment. That doesn't necessarily 7 create the degree of full public confidence in an 8 independent system. Would you accept that observation?</p> <p>9 A. No. I would also point out that the first chairman of 10 the Commission was a Liberal Democrat peer, 11 Lord McGregor of Durris. This is not a political 12 appointment. The chairman of the Press Complaints 13 Commission is not dealing with political matters. There 14 were people of all parties and of none who applied for 15 the job and the politics of the successful candidate had 16 absolutely no role in that whatsoever.</p> <p>17 Q. Under the new system, has any thought been given to how 18 the successors of the Code of Practice Committee, maybe 19 part of the standards arm, might operate, in particular 20 whether there would no longer be 100 per cent press 21 representation on that committee?</p> <p>22 A. The issue of whether there should be no representation 23 on the Code Committee is one that's going to be very 24 actively looked at. I do believe that in any form of 25 self-regulation system that there needs to be</p> <p style="text-align: center;">Page 32</p>

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<p>1 a preponderance of serving editors on that committee, 2 but if there are ways that can be found to introduce 3 a public element into it, that's certainly one that 4 I think we should look at.</p> <p>5 LORD JUSTICE LEVESON: So when you say "preponderance", they 6 should always be in the majority?</p> <p>7 A. That would be the norm with any self-regulatory body, 8 sir.</p> <p>9 LORD JUSTICE LEVESON: Well, it's not necessary, is it? We 10 heard -- I think we may hear that -- I think Lord Grade 11 mentioned organisations in which he'd been involved -- 12 I mean, they may have statutory backing -- where codes 13 and practices were set by independent people, by 14 obviously those who had an interest in the subject and 15 were knowledgeable, but they drew in to their 16 deliberations the benefit to be obtained from speaking 17 to serving editors or programme directors, I think he 18 was talking about.</p> <p>19 A. I think, sir, if you look at press codes across the 20 globe, because of the unique position of the press as 21 opposed to the broadcasters, which Lord Grade may well 22 have been talking about, the vast majority of -- outside 23 the totalitarian countries like Egypt or wherever it 24 might be where there is a government code, the vast 25 majority of codes are professional codes, written</p> <p style="text-align: center;">Page 33</p>	<p>1 Society Council, for senior editors, I think there was 2 either an editor or a deputy editor there from every 3 single national newspaper, some of the main regional 4 editors and the magazine editors and editors from 5 Scotland as well.</p> <p>6 Lord Hunt set out his proposals in some detail at 7 that meeting, and people there were very clearly asked, 8 "Is there anyone who objects to the direction of 9 travel?" and nobody did.</p> <p>10 Since then, the trade associations -- so that's the 11 Newspaper Publishers Association for the national press, 12 the Newspaper Society for the regional press, the 13 Scottish and the periodical publishers -- have been 14 undertaking consultations on the principles of the broad 15 architecture that Lord Hunt put forward, and the 16 response that has come back from that has been very 17 positive. I indeed, I must say, have even been 18 surprised by some of the strength of that because some 19 of the proposals that Lord Hunt puts forward, 20 particularly for the regional press, are going to be 21 painful, but there is a real desire to change and to 22 make meaningful change happen.</p> <p>23 I think, sir, your adjuration to make sure this 24 isn't just tinkering around the edges is one that's been 25 heard very clearly within newspapers.</p> <p style="text-align: center;">Page 35</p>
<p>1 sometimes by media owners, very rarely, sometimes by 2 trade unions; I think that is the case, for instance, in 3 Switzerland, but the vast majority of professional codes 4 are written by editors and journalists themselves, and 5 I think that is a very important thing. I think editors 6 are the ones who understand the real dilemmas that they 7 face in the newsroom and what the code of practice needs 8 to reflect in that.</p> <p>9 That is not to rule out some form of introduction of 10 a lay element into it. I readily accept that that would 11 be an important part of increasing public confidence and 12 we will look at that.</p> <p>13 MR JAY: The proposal which has been put forward, which is 14 based on the idea of a contract or series of contracts, 15 it doesn't matter precisely how one defines it, that on 16 the evidence we heard yesterday has the strong 17 commitment of the industry as a whole; is that correct?</p> <p>18 A. It is indeed.</p> <p>19 Q. May I test that? How do we know that it has the 20 commitment of the industry as a whole?</p> <p>21 A. Lord Hunt was appointed in October and spent a number of 22 months working on his proposals. In the middle of 23 December, I think it was the 15th, there was a meeting 24 which was hosted at the Telegraph Group for the various 25 trade associations, for members of the NPA and Newspaper</p> <p style="text-align: center;">Page 34</p>	<p>1 LORD JUSTICE LEVESON: I've made clear, and I'm happy to 2 repeat to you, that for the last four months I have been 3 saying to the industry that this is their problem and 4 they have to solve it, but they have to solve it in 5 a way that satisfies the public, and although I am not 6 the public, I am representing at least one aspect of the 7 public in the conduct of this Inquiry, so I welcome the 8 work that's being done.</p> <p>9 I make a comment, contrary to some of the press 10 reports overnight, that I don't for a moment think that 11 I can just sit back and consider myself redundant. I am 12 going to press on with the Inquiry that I'm conducting, 13 but that's not to say that you shouldn't equally press 14 on.</p> <p>15 I hope that ultimately a system can be devised that 16 works for everybody. That is my earnest wish. But so 17 that there is no doubt, I'm not going to stop looking 18 for ways that the system can be improved and I'm going 19 to wait and see whether what is delivered is what is 20 hoped will be delivered.</p> <p>21 A. Indeed, sir, and we're very grateful for that guidance. 22 We will press on with the proposals that were put to 23 you, and I'm sure we would be delighted to keep the 24 Inquiry in touch with where we've got to and any 25 difficulties that we face.</p> <p style="text-align: center;">Page 36</p>

<p>1 LORD JUSTICE LEVESON: I think that's very important, and, 2 needless to say, I will ensure that the Inquiry is 3 keeping in touch the various bodies that have given 4 evidence, so that I have the widest possible views. 5 A. Thank you, sir. 6 MR JAY: Lord Black, is it a real desire for change in the 7 positive sense or is it a realisation that unless 8 proposals are put forward, changes will be imposed? 9 A. I suspect that any changes that have been made in the 10 regulatory arrangements for the press throughout its 11 history have been a combination of both. 12 Q. So is this right, that there is a recognition that 13 something has to be done, otherwise there will be 14 coercion by Parliament or whatever? 15 A. Appetite for change is a very real one and I think, as 16 I've been trying to say, it springs from two sources. 17 First of all, as an industry we are very committed to 18 self-regulation, we are proud of our self-regulation, 19 but we have seen that it has weaknesses. We need to 20 bring forward proposals for radical change in that area 21 and we need to work with the independent chairman of the 22 PCC, and indeed whatever successor body takes place, in 23 order to deliver that. 24 But also, of course, the flipside of that coin is 25 that we do realise, as citizens, that if there isn't</p> <p style="text-align: center;">Page 37</p>	<p>1 something which may be far worse for you. But more to 2 the point, I think we do need to define important parts 3 of the new structure and this Inquiry has absolutely 4 rightly looked at the whole issue of how defamation law 5 might be changed, which would be to the benefit of 6 publishers, but only publishers who were part of the new 7 self-regulatory structure. 8 So there are a number of things that can be looked 9 at, I think, to try to propel people into the contracts. 10 Indeed, once they're there, they will be bound by the 11 terms. 12 Q. Have you had discussions with Mr Desmond on this very 13 point? 14 A. I haven't spoken to Mr Desmond recently. I obviously 15 had dealings with Mr Desmond towards the end of last 16 year. I've seen Mr Desmond on a number of occasions 17 since then, but I haven't engaged with him yet on the 18 promises for a new structure, but as you heard from 19 Lord Hunt yesterday, he has been keeping in touch with 20 him. 21 Although I would point out that the editors of the 22 Northern &amp; Shell titles and the legal representatives of 23 the Northern &amp; Shell titles were present at the meeting 24 of the Telegraph on 15 December where there was clear 25 support for the proposals that were being put forward,</p> <p style="text-align: center;">Page 39</p>
<p>1 change to the regulatory regime which delivers the sorts 2 of things that Lord Justice Leveson has just been 3 talking about, that the threat of statute is there, so 4 it is a combination of both of those. 5 Q. Is it also a recognition that the only way to save the 6 principle of self-regulation is to come up with 7 a contractual model? 8 A. Of the proposals that we've looked at, it's the most 9 effective one that I've seen so far, because it gives 10 some form of legal underpinning to the system, but does 11 so in a way which doesn't require the imposition of 12 statute. 13 Q. Fair enough. One of the aspects of a contract, 14 self-evidently, is that its participation is voluntary. 15 I don't think you're proposing that there should be any 16 statutory means of coercing people to sign on the dotted 17 line; is that correct? 18 A. Correct. 19 Q. In terms then of incentives to sign on the dotted line, 20 this might arise in the context of Northern &amp; Shell: 21 what incentives do you see there existing? 22 A. I think that it's going to be a combination of things 23 that I was talking about just now. I think that the 24 case very clearly needs to be put to them that if you 25 don't enter into this system, there is going to be</p> <p style="text-align: center;">Page 38</p>	<p>1 so I have every reason to believe that they have been 2 supportive of the process to date. 3 Q. Of course, the strength of the commitment to the new 4 structure may wax and wane over the succeeding months 5 depending on how negotiations over the detail proceed. 6 That must be right, mustn't it? 7 A. I think the next stage, bearing in mind Lord Justice 8 Leveson's advice, is for us to proceed to a model of 9 a contract, rules and regulations that might go with it 10 that would establish the new structure. At that point, 11 we would need to engage with all publishers, including 12 Northern &amp; Shell, on the detail of that. 13 Q. Apart from the principle of self-regulation, which no 14 doubt is clearly underpinning this proposal, and also 15 the principle of freedom of the press and everything 16 associated with that, will proper weight be given to the 17 principle of independence? 18 A. Independence of the adjudicating body and of the 19 standards panel? 20 Q. Yes. All aspects of the architecture you're explaining. 21 A. Yes, indeed. I think that Lord Hunt has made clear that 22 in his proposal the management and trust board that sits 23 on top of it and a panel of adjudicators and indeed a 24 panel of experts would all have very clear lay 25 majorities.</p> <p style="text-align: center;">Page 40</p>

<p>1 Q. But as you pointed out that principle hasn't yet been 2 applied to -- no thought has been given to the Code of 3 Practice Committee, or more precisely the successor body 4 to that committee; is that correct?</p> <p>5 A. The question of lay membership for the Code Committee 6 has been raised. I know it's a subject Mr Dacre has 7 been looking at. It may be something you want to talk 8 to him further about in evidence. I certainly before 9 giving a further opinion need to talk to members of the 10 committee about it. But I think there is generally 11 a widespread view that some lay membership on that 12 committee would be of benefit.</p> <p>13 Q. Has any thought been given to the issue which you touch 14 on actually in paragraph 41 of your first witness 15 statement at 03030? That's the interrelationship 16 between the code and other aspects of regulatory law, 17 whether it be criminal law or civil law.</p> <p>18 I think the point you're making here, the code was 19 never meant just to replicate the law. Rather, it's 20 a set of ethical standards which in many ways go beyond 21 the law. Obviously there's a clear overlap between 22 criminal law and the code. Are you suggesting that in 23 an area which falls within the overlap that is not 24 a matter for the PCC or the successor body but is only 25 a matter for the police or are you suggesting that there</p> <p style="text-align: center;">Page 41</p>	<p>1 compliance body would actually want to look at what had 2 happened, look at the results of the police 3 investigation, and make recommendations for the future. 4 I think that's a very important part of the new system.</p> <p>5 MR JAY: Would the new body also be interested in 6 adjudicating on breaches of the code which replicated 7 the police investigation?</p> <p>8 A. At the time the investigation was going on, I think it 9 would be difficult for that body to do it.</p> <p>10 Q. I understand that. Imagine that the investigation has 11 finished, there may have been a conviction following 12 a criminal trial, there may not have been, but would the 13 successor body say: there's prima facie evidence of a 14 breach of the code, we must investigate and if necessary 15 adjudicate on that very issue?</p> <p>16 A. I see no problem with that, and indeed I think that has 17 happened to the PCC in the past. I remember a case when 18 I was there involving a complaint which related to the 19 theft of some diaries, I think it was relating to the 20 widow of Harold Shipman. Once the trial had been 21 completed, the PCC then went on to adjudicate on the 22 complaint. So there is no objection in principle to 23 that happening.</p> <p>24 LORD JUSTICE LEVESON: What do you think about the civil 25 position, where the present stance is: well, you have</p> <p style="text-align: center;">Page 43</p>
<p>1 is a complementary role?</p> <p>2 A. I think in the new structure there would be 3 a complementary role, not that necessarily the standards 4 body which is being proposed should play a role while 5 the police investigation is going on, if it was say 6 a matter for the criminal law and the police, but one 7 which could actually help in uncovering material which 8 might be of use to the police in that investigation, and 9 indeed having a role after the events have taken place 10 in working out within a publisher why something had gone 11 wrong, how internal compliance and governance had broken 12 down, making recommendations for the future not just for 13 that publisher but which would be of relevance across 14 the industry. I know that's a subject you've touched on 15 with previous witnesses.</p> <p>16 So to that extent, they would be complementary.</p> <p>17 LORD JUSTICE LEVESON: That's very different because 18 previously the PCC has said if it's a matter for the 19 police, that's the end of it.</p> <p>20 A. I think in the structure that we're looking at now, 21 where the police -- I don't think while a police 22 investigation is going on it would probably ever be 23 right for a standards body or any other regulator to 24 take part in that investigation. But where that had 25 finished, I think the proposal now is that the standards</p> <p style="text-align: center;">Page 42</p>	<p>1 a choice. You either come down the PCC route or you go 2 to the civil courts, but you can't do both.</p> <p>3 A. In terms of privacy or libel?</p> <p>4 LORD JUSTICE LEVESON: Yes.</p> <p>5 A. I thinking that people do have to make a choice. 6 I don't think the PCC, certainly as it stands at the 7 moment, could get involved in one of those actions. 8 I would see no issue, and I have never seen any 9 issue, that once a libel or a privacy case had been 10 settled that somebody who had outstanding issues under 11 the code of practice could not come back to the Press 12 Complaints Commission as it stands and certainly not to 13 the new body to take up further issues.</p> <p>14 LORD JUSTICE LEVESON: Why can't they both run parallel? 15 They do in every other disciplinary system.</p> <p>16 A. I think in the case of the Press Complaints Commission 17 it has always been a concern about becoming actually 18 involved in the legal process.</p> <p>19 LORD JUSTICE LEVESON: But accountants face civil actions 20 while their regulatory body investigates them, 21 solicitors face civil actions while their regulatory 22 body investigates them, doctors do. I just don't see 23 why there is a difference for journalists.</p> <p>24 A. To be honest, sir, I don't actually recall an occasion 25 when somebody who was likely to bring a libel or</p> <p style="text-align: center;">Page 44</p>

<p>1 a privacy action also, just as a matter of practice, 2 wanted to bring a complaint at the same time. This is 3 not really an issue which has frequently been grappled 4 with. 5 LORD JUSTICE LEVESON: Well they had been told -- I mean 6 Sir Christopher made it quite clear, you're given 7 a choice. You either go down this route or you go down 8 that route. 9 A. That's always been the way the PCC has operated in the 10 past, sir, yes. 11 MR JAY: Has any thought been given in the context of this 12 contractual proposal and new architecture to whether 13 that would be the principle which applied in the future? 14 A. We'd need to look at that, sir. 15 Q. Clearly there's a lot of detail here which remains to be 16 considered, is that fair? 17 A. I think that we are very mindful of the structure that 18 Lord Justice Leveson has set out and of the continuing 19 role of this Inquiry. We have approached this with 20 Lord Hunt on -- as an iterative process, looking at the 21 first instance at the structure and architecture of the 22 system, which is what he wanted to talk to you about 23 yesterday. We're well aware that there is a lot of 24 detail that needs to be put on to that now, not least in 25 terms of what goes into the contract and rules and</p> <p style="text-align: center;">Page 45</p>	<p>1 clarified and being well-known before one could really 2 reach a conclusion about it. 3 A. Indeed, sir. Message received and understood. 4 LORD JUSTICE LEVESON: Thank you. Thank you very much. 5 There seems to be some general movement so I'll rise 6 for a couple of minutes. 7 (11.07 am) 8 (A short break) 9 (11.13 am) 10 MS PATRY HOSKINS: Good morning, sir. We're now moving to 11 the Ofcom witnesses, but before I ask for the witnesses 12 to be sworn in, there are three statements to be taken 13 as read. They are the statements of Mr Meek, Mr Graf 14 and Mr Suter. 15 LORD JUSTICE LEVESON: Thank you. 16 DR COLETTE BOWE (sworn) 17 MR EDWARD CHARLES RICHARDS (affirmed) 18 Questions by MS PATRY HOSKINS 19 MS PATRY HOSKINS: Thank you very much. Please make 20 yourselves comfortable. Could you please state your 21 full names to the Inquiry? I'll start with you, 22 Dr Bowe. 23 DR BOWE: I am Colette Bowe and I am the chairman of Ofcom. 24 MR RICHARDS: I'm Edward Charles Richards and I am the chief 25 executive of Ofcom.</p> <p style="text-align: center;">Page 47</p>
<p>1 regulations that go alongside it, and we would like to 2 now move to that next stage and keep you informed of how 3 that is working. 4 Q. Thank you, Lord Black. Is there anything else you would 5 like to say to the Inquiry in relation to the new 6 proposals? 7 A. No, I think that is -- 8 Q. You've covered the ground? 9 A. Yes. 10 MR JAY: Those are all the questions I have for you. 11 LORD JUSTICE LEVESON: Lord Black, thank you very much. It 12 would be a mistake if I didn't make it clear that time 13 is becoming of the essence. 14 A. (Nods head). 15 LORD JUSTICE LEVESON: You know the timetable that I'm 16 operating to, and I'm carrying on. 17 A. And if I can say, sir, the industry is very mindful of 18 that, I know that Lord Hunt is very mindful of that, and 19 on the basis of that, we will move speedily with putting 20 more flesh on the proposals or the bones of these 21 proposals. 22 LORD JUSTICE LEVESON: Yes. Also, the devil may very well 23 be, as previously has been said, in the detail, and 24 therefore it wouldn't be possible to proceed without the 25 language of the contract and the arrangement having been</p> <p style="text-align: center;">Page 46</p>	<p>1 Q. Thank you very much. You've both provided statements to 2 the Inquiry. You should find them behind tab 1 and 3 tab 2 of file 1. The statements to the Inquiry aren't 4 signed but could you please confirm that the contents of 5 your respective statements are true and accurate to the 6 best of your knowledge and belief? 7 DR BOWE: I do so affirm. 8 MR RICHARDS: I do so affirm. 9 LORD JUSTICE LEVESON: Thank you very much for all the work 10 you've put in to prepare them. 11 MS PATRY HOSKINS: The way I'm going to conduct this session 12 is I'm going to ask the questions, feel free to answer 13 them. You will decide between yourselves who is the 14 best person placed to answer the question, and if you 15 both want to answer it, that's fine as well. 16 I'm going to touch first of all on your career 17 histories, if I can. I'm going to start with you, 18 Mr Richards. In your statement which is behind tab 1, 19 you explain at 1.1 that you are Ofcom's chief executive, 20 that you were appointed in October 2006; correct? 21 MR RICHARDS: Yes. 22 Q. At 1.3 you explain that you in fact joined Ofcom in 23 2003. At that stage, you were partner, strategy and 24 market developments, before becoming its chief operating 25 officer responsible for strategy, market, research,</p> <p style="text-align: center;">Page 48</p>

<p>1 finance, HR and other functions in 2005. Prior to 2 joining Ofcom, you were senior policy adviser to the 3 Prime Minister, at that time Tony Blair, for media, 4 telecoms, the Internet and e-Government, and prior to 5 that you were controller of corporate strategy at the 6 BBC.</p> <p>7 Pause there. Is that all accurate?</p> <p>8 MR RICHARDS: Yes.</p> <p>9 Q. Thank you. Dr Bowe, you explain at paragraph 1.1 of 10 your statement that you have been chairman of the Ofcom 11 board, which is Ofcom's main decision-making body, 12 providing strategic direction for the rest of the 13 organisation, since 11 March 2009. You explain your 14 other appointments at 1.2, but you explain at 1.3 that 15 you were first appointed to the board of Ofcom on 16 1 January 2008, and then you explain that you held prior 17 to that a number of senior roles in both the public and 18 private sectors?</p> <p>19 DR BOWE: That's all correct.</p> <p>20 Q. So that we can focus our discussion today, we can't 21 possibly hope to cover everything that Ofcom does, it's 22 a very large organisation, it has a very large number of 23 functions, many different powers and duties. What we're 24 going to do is we're going to look at various aspects of 25 the Ofcom regulatory models, picking out some aspects</p> <p style="text-align: center;">Page 49</p>	<p>1 created by section 1 of the Office of Communications Act 2 2002, and all its powers and duties are statutory; 3 correct?</p> <p>4 MR RICHARDS: Mm-hm.</p> <p>5 Q. In relation to broadcasting, it's a real statutory 6 regulator, as I've described, subject to what we'll come 7 on to discuss about self-regulation in different forms. 8 Although it was created by the 2002 Act, most of the 9 functions of Ofcom are conferred on it by the 10 Communications Act 2003, that would be accurate. I'll 11 probably refer to that as the Comms Act for short and 12 we'll be looking at various of its provisions.</p> <p>13 First of all, I'd like to look at the Office of 14 Communications Act 2002, and that's behind tab 6. I'm 15 going to ask you about appointments to the board and so 16 on. If we look at section 1 of the Act, we can see that 17 Ofcom is set up thereby, and if we look first of all at 18 the appointment of the chairman, that is obviously you 19 Dr Bowe.</p> <p>20 DR BOWE: Yes.</p> <p>21 Q. Section 1(3)(a) you're appointed --</p> <p>22 LORD JUSTICE LEVESON: It's not section, I think it's in the 23 schedule, isn't it? According to my copy, in any event. 24 That's a schedule to the Act.</p> <p>25 MR RICHARDS: It is.</p> <p style="text-align: center;">Page 51</p>
<p>1 which might be particularly interesting to the chairman 2 of this Inquiry in considering his terms of reference.</p> <p>3 So, for example, we'll be looking at the fact that 4 Ofcom in some senses and some areas is a true statutory 5 regulator, various aspects of that, it's a co-regulator 6 in other areas, we'll be discussing how those roles work 7 in practice, and we'll be looking at the strengths and 8 weaknesses of different models. That's essentially how 9 we'll take it through today.</p> <p>10 I'm going to start by touching briefly on the 11 statutory basis of Ofcom and questions about 12 independence of government. I'm going to start with the 13 witness statement of Mr Richards, behind tab 1, 14 paragraphs 2.1 onwards.</p> <p>15 Before we turn to the legislation, Ofcom is the 16 central and competition regulator for the UK 17 communications industries. That covers, correct me if 18 I'm wrong, fixed and mobile phones, broadcasting, 19 wireless telegraphy and also very recently postal 20 services. But it has no regulatory role at all in 21 relation to newspaper content?</p> <p>22 MR RICHARDS: That's right.</p> <p>23 Q. And only a very narrowly defined role in relation to 24 regulation of newspapers at all, which I will come back 25 to in more detail. We know that it's a statutory body,</p> <p style="text-align: center;">Page 50</p>	<p>1 MS PATRY HOSKINS: Yes, you're absolutely right, the 2 paragraph is in the schedule.</p> <p>3 You were appointed by the Secretary of State, you 4 can see that from paragraph (a), and then there may be 5 a number of other members appointed by the Secretary of 6 State as he may determine. So you're appointed by the 7 Secretary of State, the non-executive members are 8 appointed by the Secretary of State, and we can see from 9 subparagraph (6) that Ofcom must have a majority 10 non-executive board. Accordingly, the board majority is 11 appointed by the Secretary of State. Would that be fair 12 and accurate?</p> <p>13 DR BOWE: It would.</p> <p>14 Q. You, Mr Richards, the chief executive, you're appointed 15 by the chairman, and we can see that from paragraph 5. 16 Internally it will say page 7 of 15 or 03369 at the 17 bottom. You see that?</p> <p>18 MR RICHARDS: Yes.</p> <p>19 Q. There shall be a chief executive of Ofcom. You're 20 appointed by the chairman and other non-executive 21 members with the approval of the Secretary of State?</p> <p>22 DR BOWE: Yes.</p> <p>23 Q. The executive members of the board are appointed by the 24 chairman, the chief executive and the non-executive 25 members of the board.</p> <p style="text-align: center;">Page 52</p>

13 (Pages 49 to 52)

<p>1 Now, the questions arising out of that are this:  2 given that the non-executive members of the Ofcom board  3 including the chairman are appointed by government, how  4 can they be independent? And since they're a majority  5 on the board, how can Ofcom be independent?  6 DR BOWE: Perhaps I could begin by explaining in more detail  7 the process of my appointment in particular.  8 Q. Of course.  9 DR BOWE: I, like my predecessor, was appointed after an  10 open competition. The process of the appointment was  11 conducted not by ministers but by two permanent  12 secretaries, who were advised by two people from outside  13 of Whitehall, with substantial knowledge of the sector.  14 My name, and I assume that of at least one other person,  15 was then put forward to ministers, who then announced  16 that -- and this is the important point -- subject to  17 a confirmation hearing by Parliament, they were minded  18 to appoint me.  19 I then went, as other chairmen of similar regulatory  20 bodies have been, in front of a joint committee of two  21 different parts of the Select Committee structure of the  22 House of Commons and they -- I would say they grilled me  23 for several hours in order to determine whether they  24 believed that I had the right competence, experience and  25 skills to lead this organisation.</p> <p style="text-align: center;">Page 53</p>	<p>1 All of this that I have mentioned about  2 accountability is enshrined in my contract of  3 employment, which mirrors the provisions of the  4 legislation, which in turn are now buttressed by a  5 European directive, and effectively what those documents  6 taken together say is that unless for reasons of  7 financial disaster, if I were to become bankrupt, for  8 example, unless for reasons where I was deemed to have  9 an unacceptable conflict of interest, or unless I were  10 deemed to have become unfit to do the job, which  11 I always take to mean something about a medical  12 condition, absent any of those conditions, I cannot,  13 without such cause, be removed from this position.  14 If ministers, notwithstanding that, were to decide  15 they wished to remove me or indeed any of my colleagues  16 on the Ofcom board, we have the right under European law  17 to ask for a public statement as to why we are being  18 removed from our positions.  19 Q. Can I pause you there?  20 DR BOWE: I'm sorry, I've gone on at some length but  21 I thought it was important to understand the way the  22 independence of this role is buttressed.  23 Q. I just wanted to assist you by looking at the statute.  24 If you look back at paragraph 2, which is page 5 of 15,  25 the page before the one you've been looking at, you'll</p> <p style="text-align: center;">Page 55</p>
<p>1 It was only after they had so determined that  2 ministers then announced that I would indeed be the  3 confirmed chairman of Ofcom.  4 Now, I mention that in some detail because it  5 illustrates a very important point about independence  6 and accountability. From the moment at which the House  7 of Commons said that they believed that I was the person  8 who should be appointed to this job, I regarded, and my  9 colleagues on the board so regard, our accountability  10 for the exercise of our functions as being  11 accountability to Parliament.  12 I would like to emphasise this because I think it's  13 an important spectrum to understand, the spectrum  14 between independence on the one hand and the kind of  15 accountability that may constrain, quite properly, that  16 independence.  17 That appointment having been made in that way, I now  18 appear regularly in front of committees of normally the  19 House of Commons, but sometimes the House of Lords, in  20 order to account for my stewardship of the board of  21 Ofcom. I normally do that with Mr Richards. We  22 normally do this together. But I would like the first  23 point that we make today about our independence to be  24 this one about where we regard our line of  25 accountability.</p> <p style="text-align: center;">Page 54</p>	<p>1 see that there is a section on tenure of office.  2 DR BOWE: Yes.  3 Q. Which makes just these points. The Secretary of State  4 has to be satisfied that the chairman or another  5 non-executive member of Ofcom either is an undischarged  6 bankrupt or has another financial or other interest or  7 has been guilty of misbehaviour or is otherwise  8 incapable of carrying out the functions of his office.  9 DR BOWE: Yes.  10 Q. Then it goes on to say at subparagraphs (5) and (6) that  11 the Secretary of State must give you a statement of  12 reasons for the refusal and, if so requested, publish  13 it. So that confirms the same principles that you've  14 just been explaining.  15 DR BOWE: Yes.  16 Q. That answers my question about the independence of the  17 chairman. Is there anything you would like to add about  18 the fact that since the chairman and non-executive  19 members are a majority on the board, this might lead to  20 a question mark as to whether Ofcom overall is  21 independent?  22 DR BOWE: I'm sorry, I didn't hear the very end of that.  23 Whether Ofcom is?  24 Q. As a whole, the board as a whole is independent.  25 DR BOWE: As you've seen from my witness statement, it is</p> <p style="text-align: center;">Page 56</p>

14 (Pages 53 to 56)

<p>1 the board of Ofcom that is the ultimate decision-making 2 body of the organisation, which ultimately takes 3 responsibility for all actions of the organisation. It 4 doesn't just set its strategic direction, but as I say, 5 it takes full responsibility.</p> <p>6 So I think that the important safeguards that we've 7 just discussed around the independence of the chairman 8 go to the question of the independence of the 9 organisation.</p> <p>10 Q. Shall we move on to the role --</p> <p>11 MR RICHARDS: May I add one small point, which is I would 12 say that the importance of independence in the 13 organisation is difficult to overstate. It is 14 exemplified by the approach and attitude of the board, 15 beginning with Colette, but I would say that it is 16 probably the most prized characteristic of the entire 17 organisation. Culturally, the independence of the 18 organisation is in many ways what matters more than 19 anything else, or as much as anything else, to almost 20 every employee. It is part of what they believe they 21 are there to do. It is absolutely at the heart of the 22 functioning and meaning and purpose of the organisation.</p> <p>23 Q. All right. Let's talk very briefly about the chief 24 executive. We saw earlier that you were appointed by 25 the chairman, but that the appointment must be approved</p> <p style="text-align: center;">Page 57</p>	<p>1 importance of independence, is there anything more that 2 could be done? Do you think that the independence of 3 Ofcom would be greater if government wasn't involved in 4 the appointment of the board?</p> <p>5 DR BOWE: I think there's two ways you could answer that. 6 One is in practical terms and one is in perception 7 terms. I think in practical terms, the answer is no, 8 because, as I hope I've explained, the primary 9 relationship is with Parliament once one is appointed.</p> <p>10 I have noticed, however, that at various points 11 throughout both this hearing and in other parts of life 12 where people comment on regulatory matters, there is 13 occasionally comment about whether the independence of 14 boards such as ours, and indeed the board of other 15 regulators, could be buttressed by an alternative 16 appointments mechanism. I have to say I've never been 17 able to think of one that betters this system we have of 18 Government proposes and Parliament disposes, which is 19 essentially what it is, and I and I believe my fellow 20 chairmen of economic regulators actually take a lot of 21 comfort, I would say, from the deep interest that 22 Parliament takes in our appointments and our affairs.</p> <p>23 LORD JUSTICE LEVESON: In the light of the evidence that 24 I heard yesterday, it may be that the press would not 25 take such comfort in the fact that Parliament were</p> <p style="text-align: center;">Page 59</p>
<p>1 by the Secretary of State. To your knowledge, has the 2 Secretary of State ever vetoed the appointment of 3 a chief executive? I know there's only been two --</p> <p>4 DR BOWE: I think I had better be the person that responds 5 to that, with the rather unhelpful comment that I don't 6 know, as I inherited Ed Richards. Inherited him very 7 happily, I have to say, from my predecessor, but you may 8 well have ways of discovering the answer to that 9 question from my predecessor. I would be most 10 surprised, but I don't know.</p> <p>11 Q. Do you have any understanding of what "approved" 12 actually means in practice? Do you have any 13 understanding of the basis on which someone would not be 14 approved?</p> <p>15 DR BOWE: It's never come up in my tenure as chairman, and 16 I think it would be foolish to speculate. What I do 17 know is that the structure of that approval is that the 18 Secretary of State is given one name as the proposed 19 chief executive of the organisation. The Secretary of 20 State is not given a menu of names and asked to choose.</p> <p>21 Q. I understand. So there's no choice, they either approve 22 or don't?</p> <p>23 DR BOWE: You either approve or you don't approve.</p> <p>24 Q. I understand. Given what you've said about the 25 structure, the way that you're appointed, the cultural</p> <p style="text-align: center;">Page 58</p>	<p>1 involved in the appointment of such a regulator.</p> <p>2 DR BOWE: Yes. I understand why you say that. I have to 3 say that from my point of view an active, engaged, 4 well-informed select committee, which holds me and the 5 chief executive to account for what we do on behalf of 6 our fellow citizens, seems to be not a bad model for 7 public accountability.</p> <p>8 MS PATRY HOSKINS: Does Ofcom allow board participation from 9 people who are active in the industry being regulated? 10 I'll ask you a follow-up question in a moment.</p> <p>11 DR BOWE: Sorry, the question is?</p> <p>12 Q. Does Ofcom allow board participation from people who are 13 active in the industry --</p> <p>14 DR BOWE: No. We have quite strict rules around that. And 15 if in some oblique way a board member may even 16 peripherally become involved in, let us say, a business 17 that might have some connection with a regulated firm, 18 then a judgment is made about the seriousness of that 19 connection, and very occasionally a board member who has 20 got a very peripheral connection with a regulated 21 business has stood aside from part of a discussion, but 22 we do not have people on the board who are part of the 23 regulated industry.</p> <p>24 What we do have is people who have been in various 25 ways parts of it.</p> <p style="text-align: center;">Page 60</p>

15 (Pages 57 to 60)

<p>1 Q. Right.</p> <p>2 DR BOWE: For example, as I'm sure we'll come on to discuss,</p> <p>3 the board member who leads the work on the enforcement</p> <p>4 of standards in broadcasting is himself a well-known,</p> <p>5 very distinguished broadcast journalist, formerly of the</p> <p>6 BBC and then of Channel 4, who brings a large amount of</p> <p>7 experience to that role, but we do not regard it as</p> <p>8 appropriate to have people who are engaged very actively</p> <p>9 in the industry as members of the board.</p> <p>10 Q. Why is that?</p> <p>11 DR BOWE: Because of conflicts. I'm sure you're familiar</p> <p>12 with the sorts of issues that arise, and you can manage</p> <p>13 small conflicts on boards; you can't manage large,</p> <p>14 endemic ones.</p> <p>15 Q. I understand. I think you've probably answered my next</p> <p>16 question, which was going to be: if you don't allow such</p> <p>17 participation, how do you ensure that you have the</p> <p>18 relevant expertise, but is the answer to that simply</p> <p>19 that you appoint people who have in the past had</p> <p>20 significant expertise in the area?</p> <p>21 DR BOWE: Yes. I'm sure you have in front of you the list</p> <p>22 of names of those who are on the Ofcom board and you</p> <p>23 will see that they have a range of expertise. Some in</p> <p>24 broadcasting, some in quite different parts of the other</p> <p>25 industry sectors that we regulate.</p> <p style="text-align: center;">Page 61</p>	<p>1 consolidated Wireless Telegraphy Act 2006, and</p> <p>2 concurrent competition and consumer enforcement powers</p> <p>3 under the Competition Act and the Enterprise Act 2002.</p> <p>4 But you say as time has passed, you've been given</p> <p>5 more functions under the Digital Economy Act 2010 and</p> <p>6 the Postal Services Act 2011 which I don't think we will</p> <p>7 need to look at.</p> <p>8 I said at the outset that I recognise that Ofcom had</p> <p>9 this wide range of roles, but much of the question here</p> <p>10 will focus on evidence relevant to Ofcom's broadcasting</p> <p>11 regulatory functions.</p> <p>12 I'd like to start, before we move on to specifics,</p> <p>13 with the general duties of the regulator and I will need</p> <p>14 to look at the Comms Act in order to do that. Look</p> <p>15 behind tab 8, at the Communications Act section 3. For</p> <p>16 the technician, the last five numbers will be 03405.</p> <p>17 It's internally page 26 of 879.</p> <p>18 DR BOWE: Yes.</p> <p>19 Q. I promise we won't go through all 879 pages of the</p> <p>20 contract, but I do want to look at the general duties of</p> <p>21 Ofcom under section 3. Starting with section 3(1):</p> <p>22 "It shall be the principal duty of Ofcom in carrying</p> <p>23 out their functions (a) to further the interests of</p> <p>24 citizens in relation to communication matters, and (b)</p> <p>25 to further the interests of consumers in relevant</p> <p style="text-align: center;">Page 63</p>
<p>1 Q. Thank you.</p> <p>2 LORD JUSTICE LEVESON: And you don't find it a disadvantage</p> <p>3 that they're no longer working in that capacity?</p> <p>4 DR BOWE: No. No, we don't, because these are all people</p> <p>5 who are extremely well-informed professionals, even if</p> <p>6 they are no longer actively engaged.</p> <p>7 For example, my deputy chairman, Dame Patricia</p> <p>8 Hodgson, who was formerly the chief executive of one of</p> <p>9 the previous regulators, the Independent Television</p> <p>10 commission, and until very recently a member of the BBC</p> <p>11 Trust, brings a very active, informed experience of the</p> <p>12 matters we're talking about today of a kind that does</p> <p>13 not rapidly, as it were, decay.</p> <p>14 MS PATRY HOSKINS: I'll move away from appointments to</p> <p>15 functions and duties of Ofcom. Mr Richards, again,</p> <p>16 I will look at your statement. Look, please, at 2.4 of</p> <p>17 your statement, tab 1.</p> <p>18 MR RICHARDS: Statement 1?</p> <p>19 MS PATRY HOSKINS: Statement 1. You explain in summary that</p> <p>20 Ofcom's main functions since creation have been as</p> <p>21 follows: broadcasting regulatory functions, mainly under</p> <p>22 the Broadcasting Acts 1990 and 1996, functions in</p> <p>23 relation to electronic communications, networks and</p> <p>24 services from under the Communications Act 2003,</p> <p>25 spectrum management functions, now under the</p> <p style="text-align: center;">Page 62</p>	<p>1 markets, where appropriate by promoting competition."</p> <p>2 It then goes on at subparagraph 2 to set out the</p> <p>3 things that Ofcom are required to secure in the carrying</p> <p>4 out of their functions. There's a number of them. For</p> <p>5 the purposes of this section, I simply want to</p> <p>6 concentrate on the duties to uphold standards in</p> <p>7 broadcasting. If we look at subsection (2)(e), there</p> <p>8 has to be application of standards that provide adequate</p> <p>9 protection to members of the public from the inclusion</p> <p>10 of offensive and harmful material in such services, and</p> <p>11 then (f):</p> <p>12 "The application in the case of all TV and radio</p> <p>13 assistance of standards that provide adequate protection</p> <p>14 to members of the public and all other persons from both</p> <p>15 (i) unfair treatment, and (ii) unwarranted infringements</p> <p>16 of privacy resulting from activities carried on for the</p> <p>17 purposes of such services."</p> <p>18 I'll come back to the specific standards to be</p> <p>19 applied in a moment, but I just want before we move away</p> <p>20 from this section to point out that the broadcasting</p> <p>21 duties go much wider than simply the application of</p> <p>22 standards, so in particular, you are required to secure</p> <p>23 a sufficient plurality of providers -- that's subsection</p> <p>24 (2)(d), so section 3(2)(d), maintenance of a sufficient</p> <p>25 plurality of providers, and you also have to secure, by</p> <p style="text-align: center;">Page 64</p>

<p>1 subsection (2)(c), the availability throughout the UK of 2 a wide range of TV and radio services which are both of 3 high quality and calculated to appeal to a variety of 4 tastes and interests.</p> <p>5 Before I turn back to the standards aspects of the 6 matters that you're required to secure, I want to ask 7 you about the meaning of high quality services. Is it 8 an appropriate role for a regulator to ensure high 9 quality services rather than simply services that comply 10 with published standards?</p> <p>11 MR RICHARDS: It clearly was regarded as being so by 12 Parliament, but for me, to be a bit more helpful, 13 I think the distinction to make is between what we 14 typically call negative content regulation, which are 15 standards and we'll come on to those, and what we also 16 refer to as positive content regulation. So we really 17 have two functions in this area. One is the standards 18 function; the second is to use a range of powers to 19 secure high quality content. Now, that is principally 20 associated with public service broadcasting and the 21 levers that we have at our disposal to secure certain 22 positive outcomes.</p> <p>23 So not just that a broadcaster adheres to the 24 standards side of life, but also that, for example, they 25 are investing a substantial amount of money in original</p> <p style="text-align: center;">Page 65</p>	<p>1 public's views about quality and where their interests 2 lie in relation to diversity and so on, and then also 3 finally I think also importantly in relation to the 4 commercial value of the licences, so in other words the 5 relationship between what the broadcaster is able in 6 a sustainable economic way to deliver.</p> <p>7 It's not good for us to say, "We'd like you to do 8 all of the following things", if they're economically 9 unsustainable, so the last piece in the jigsaw is 10 ensuring that this is a credible challenge or credible 11 task for the broadcaster.</p> <p>12 DR BOWE: Could I just add to that. You might be wondering 13 how it is we think we understand what the viewing public 14 wants, we undertake a large amount of research at Ofcom 15 in this and other areas, which we constantly update to 16 try to ensure that we do keep ourselves aware of how all 17 the people in the kingdom rate their broadcasting, what 18 they want, what they like to see.</p> <p>19 Q. What high quality means to them?</p> <p>20 DR BOWE: Yes, yes.</p> <p>21 Q. Before we turn away from section 3, we also need to look 22 at subparagraphs (3) and (4). These are the factors 23 that you must have regard to in performing your duties. 24 So we see subparagraph (3): in performing your duties 25 under subsection (1), those were the general duties that</p> <p style="text-align: center;">Page 67</p>
<p>1 British production, that that original British 2 production is of a wide range of genres and therefore 3 appeals to a wide range of people, that that production 4 reflects aspects of the whole of the UK, rather than 5 just London, for example.</p> <p>6 So those are some of the examples of the dimensions 7 of what we think about in terms of high quality 8 broadcasting, so it's a rather different task than the 9 standards task.</p> <p>10 Q. Who decides, who judges what that high quality is?</p> <p>11 MR RICHARDS: There is -- I think that takes place in 12 different forms. I think the first determinant of that 13 is really set out in more detail in the statute, so 14 Parliament sets out more detail later in the Act as to 15 certain aspects which are taken to be proxies for 16 quality. So, for example, your level of original 17 British production, for example the amount of production 18 outside of London. Those are some of the things I've 19 referred to already. So those are in a sense proxies.</p> <p>20 After that, there is a degree of judgment available 21 to us about how we set obligations in that context on 22 commercial broadcasters. We have to make that judgment 23 in the context of that detail set out by the statute, 24 using our own expertise built up over many years, 25 drawing on what we know from the public about the</p> <p style="text-align: center;">Page 66</p>	<p>1 we've looked at, Ofcom must have regard in all cases to 2 a number of things. The first of those is: 3 "The principles under which regulatory activities 4 should be transparent, accountable, proportionate, 5 consistent and targeted only at cases in which action is 6 needed."</p> <p>7 We'll come back to that in due course. It must also 8 have regard in all cases to any other principles 9 appearing to you to represent the best regulatory 10 practice.</p> <p>11 Then at subsection (4), you must also have regard to 12 a number of other factors if they are relevant in the 13 circumstances.</p> <p>14 We don't have to look at all of these, but I'd like 15 to look at (c) and (g). (c) is: 16 "The desirability of promoting and facilitating the 17 development and use of effective forms of 18 self-regulation." 19 Which again we will come back to, because it's 20 important. And then (g): 21 "The need to secure that the application in the case 22 of television and radio services of standards falling 23 within subsection (2)(e) and (f) is in the manner that 24 best guarantees an appropriate level of freedom of 25 expression."</p> <p style="text-align: center;">Page 68</p>

<p>1 Taking those three things together, only taking                  2 action when it is needed, best guaranteeing an                  3 appropriate level of freedom of expression, always                  4 having to have regard to the desirability of promoting                  5 and facilitating the desirability and use of                  6 self-regulation, together do these principles, these                  7 requirements, effectively mean that you are required to                  8 adopt a light touch approach as a regulator?                  9 MR RICHARDS: I think I would put it slightly differently.                  10 I think the problem with the phrase "light touch" is                  11 that it means different things to different people.                  12 I think what this is really saying needs a more precise                  13 formulation.                  14 I think it's asking to us be -- to find the least                  15 intrusive, the least burdensome mechanism of achieving                  16 the public interest objective, and that will vary. It's                  17 asking us to exercise judgment in relation to that, and                  18 sometimes, for a whole set of reasons that I'm sure we                  19 will come on to, it's possible to do that, to achieve                  20 the public interest objective in a very unintrusive way,                  21 which might involve self-regulation and a very minimal                  22 role for us. And other times, on other occasions, that                  23 is far harder, and because of conflicts of interest, the                  24 fact that the public interest is not the same as perhaps                  25 the industry interests or the interests of a particular</p> <p style="text-align: center;">Page 69</p>	<p>1 happens and if there is an issue after the broadcast,                  2 then of course they can complain and raise the issue                  3 with us, and that's what is typically happens, but we do                  4 not intervene ever in advance of broadcast.                  5 Q. Do you think there would be any merit in being able to                  6 do so?                  7 MR RICHARDS: I think the negatives way outweigh the                  8 positives, in my view. I think you are then into a very                  9 difficult territory which, not to overdramatise it,                  10 takes you potentially into the area of censorship and                  11 suppression, and I would feel extraordinarily                  12 uncomfortable having to discharge a duty of that kind.                  13 I think the way our system works is far preferable,                  14 which is that the broadcasters understand the code, they                  15 understand the approach we will take if they make an                  16 error, they understand that there are sanctions, to                  17 which they will be liable if they do make errors, and                  18 they therefore incorporate that into their judgments and                  19 then make a judgment about the broadcast. I think that                  20 is a far, far better method than having me or members --                  21 the colleagues at Ofcom seeking to exercise                  22 pre-broadcast judgment about whether something should or                  23 should not be shown.                  24 Q. I could see you nodding --                  25 DR BOWE: I'm nodding because, as you will see from my CV,</p> <p style="text-align: center;">Page 71</p>
<p>1 company, that requires much firmer and in some ways more                  2 intrusive regulation.                  3 I think it's inviting us to do that rather than                  4 adopt a phrase like "light touch", which seems to me to                  5 not actually help very much.                  6 Q. I understand.                  7 DR BOWE: If I could just add to that, my approach to this                  8 as a regulator is that our touch should be                  9 proportionate, and I think lightness or heaviness is not                  10 exactly the right dimension along which to judge that.                  11 Q. Thank you. We'll come back to discuss self-regulatory                  12 and co-regulatory models, but that leads me neatly into                  13 myth-busting. Can I ask you about prior restraint                  14 duties? I think there is still a section of people who                  15 believe that somehow there is a duty in broadcasting                  16 cases for Ofcom to watch or pre-approve programmes                  17 before they are broadcast. Is that something that                  18 happened, is that a requirement?                  19 MR RICHARDS: It's absolutely not a requirement. It is                  20 something that we never do, but it is also true that                  21 I still meet people regularly who presume that we do do                  22 that, but we don't. We're a post-broadcast regulator.                  23 We do not intervene in advance of the broadcast of any                  24 programme, and if anybody asked us to do so, we very                  25 calmly would explain to them that that's not what</p> <p style="text-align: center;">Page 70</p>	<p>1 I previously worked in -- 25 years ago in a broadcasting                  2 regulator that operated a different regime, and I would                  3 strongly agree with what Ed Richards has said, that that                  4 poses real difficulties in a sense of a danger of                  5 restrictions on freedom of speech and expression, and                  6 I lived through one particular episode, which I'm happy                  7 to say was firmly resisted by the then chairman of that                  8 regulator, when a very serious attempt was made by the                  9 government of the day to impede the broadcasting of                  10 a programme whose tenor they did not agree with, and                  11 I saw that at first hand, and I have seen the dangers of                  12 that approach, which I think take us into an area where,                  13 in this country, we do not want to be.                  14 Q. I'm going to ask you now about broadcast licensing, if                  15 I can. We know that Ofcom regulates television and                  16 video broadcasting in the UK through a statutory                  17 licensing scheme, and all TV and radio broadcasting                  18 services that you regulate must be provided under                  19 a licence issued by Ofcom. A fair and accurate summary?                  20 I'm not going to go into public service broadcasting                  21 or the different types of licence. Suffice it to say                  22 that not all TV and radio services are regulated by                  23 Ofcom. Most are, and there are a ranges of different                  24 licences available which impose different requirements.                  25 I should also probably point out that the BBC doesn't</p> <p style="text-align: center;">Page 72</p>

<p>1 need to be licensed in the same way, it's a regulator in                  2 its own right, but its charter and also the Comms Act do                  3 provide that Ofcom regulates BBC radio and TV in certain                  4 ways, importantly in relation to the privacy provisions                  5 of the Broadcasting Code, and we'll come back to that in                  6 a moment.                  7 I'm going to turn back to your statement,                  8 Mr Richards. You deal at sections 6 onwards with                  9 television and radio licensing. I appreciate that it                  10 wasn't your decision to create a licensing scheme for                  11 broadcasters, but what's your understanding, please, of                  12 the rationale for licensing broadcasters in this way?                  13 MR RICHARDS: Well, I think it's a historic rationale.                  14 I think this an extremely interesting subject.                  15 Historically it was, as I understand it, to do with                  16 spectrum scarcity. So there is a limited amount of                  17 spectrum, so it has to be licensed. Not everybody can                  18 use it. So that was the origin of it.                  19 Clearly it's now possible -- actually, that was the                  20 first origin of it, that was the technological origin.                  21 The other argument for licensing broadcasting                  22 historically was also the one that is associated with                  23 the scale and the impact and the nature of the medium,                  24 and that argument is concerned with the fact that                  25 broadcasting very quickly became an act of absolutely</p> <p style="text-align: center;">Page 73</p>	<p>1 difficulties in that area, so there's a set of reasons                  2 about convention.                  3 The fourth, which I think is in some ways now                  4 arguably the most important, is to do with audience                  5 expectations and what the viewer understands and is                  6 comfortable with, and ultimately, since we're concerned                  7 here with the public interest and what the public feels                  8 it wants and how that's expressed through Parliament,                  9 that is very important, and I would say that that aspect                  10 of this, in other words audience expectation, where                  11 viewers are comfortable, is now equally important, if                  12 not more important, than any technological justification                  13 or indeed actually the justification about the nature of                  14 the medium.                  15 So I think it's that collection of reasons that                  16 bring us to where we are today.                  17 Q. Do you have any views on whether that is fundamentally                  18 different, the rationale for the licensing system is                  19 fundamentally different from the rationale that would be                  20 applied to for example licensing of the press?                  21 MR RICHARDS: I think you have to consider all those four                  22 elements of why we are where we are in broadcasting and                  23 I think they are important. The press starts with                  24 a very, very different tradition in relation to every                  25 single one of those arguments, I think. It didn't have</p> <p style="text-align: center;">Page 75</p>
<p>1 enormous scale. It was in everybody's house and became                  2 universal, with many millions of people watching it. So                  3 that's a scale and significance argument.                  4 But it was also to do with the medium, and that is                  5 something to do with the fact that you have very vivid                  6 moving pictures being beamed into everybody's living                  7 room, and some people have called that -- have said that                  8 television is therefore an intrusive medium, it's being                  9 broadcast in -- what it's broadcasting is decided by                  10 somebody else and it's particularly graphic and vivid                  11 because of the nature of the pictures, in contrast, for                  12 example, to a still photograph.                  13 Those are the two historic reasons. Clearly today                  14 you can run a broadcasting service and you don't                  15 actually need spectrum at all. You can run it over                  16 satellite, over cable, over Internet protocol television                  17 and so on.                  18 I think there have become two other reasons which                  19 are at the heart of why the licensing model works and                  20 why we do it the way we do. They are firstly what                  21 I would call convention. It is a system which has grown                  22 up. New broadcasters have seen the system, have been                  23 comfortable with it and have therefore adopted it                  24 without any apparent objection. So a satellite                  25 broadcaster, for example, we don't come across</p> <p style="text-align: center;">Page 74</p>	<p>1 the same technological provenance. Indeed, it was the                  2 opposite. Any of us could go and publish at will, we                  3 didn't need spectrum, so I think its origins in that                  4 sense were very, very different.                  5 LORD JUSTICE LEVESON: Even more so now.                  6 MR RICHARDS: Absolutely. So I think the fact that I could                  7 go home this evening and publish a blog in about 20                  8 minutes in my bedroom, and anybody else could, is highly                  9 relevant to that fact. It is a different nature. The                  10 medium has historically been different, in the sense                  11 it's still pictures, it's not as intrusive as a medium,                  12 it's more selected by the individual. Though that is,                  13 of course, blurring, and we might come back to that.                  14 That is a less strong argument in a digital environment.                  15 That seems to me to be an argument which is weakening.                  16 But then you also have convention and audience                  17 expectations and it is self-evidently the case that the                  18 press and indeed the Internet publishing world starts                  19 from a very, very different set of conventions and                  20 orthodoxies and culture to broadcasters, and I do think                  21 that's pertinent.                  22 And finally, audience expectations, where again                  23 people I think understand that if they go and buy                  24 a newspaper they understand that it is regulated in                  25 a very different way and they understand that they</p> <p style="text-align: center;">Page 76</p>

<p>1 should expect something very different to that which                  2 they expect beamed into their television through                  3 a broadcaster.                  4 So I think saying what's different today and should                  5 there be a difference, in my view you do have to go back                  6 and really understand the underlying arguments as to why                  7 broadcasting is as it is.                  8 MS PATRY HOSKINS: Moving back to the licensing system, the                  9 Broadcasting Act 1990, part 2 of schedule 2, sets out                  10 bodies which are just disqualified from holding                  11 a licence. We could turn them up, I don't think we need                  12 to. There are a number of bodies that would be                  13 disqualified. Examples are bodies whose objects are                  14 wholly or mainly political, religious bodies, various                  15 publicly funded bodies and so on. Can you just again --                  16 I know it wasn't your decision to disqualify those                  17 bodies, but what's the rationale for excluding bodies                  18 just because of particular attributes? Some might say                  19 is it not an unjustified limitation on freedom of                  20 expression.                  21 MR RICHARDS: You certainly can mount that argument and                  22 I think any judgment of that kind needs to consider the                  23 freedom of expression argument extremely carefully.                  24 I think -- it clearly wasn't our judgment, but I think                  25 the rationale for it would go back to the argument that</p> <p style="text-align: center;">Page 77</p>	<p>1 requirements, and that takes me neatly on to the fit and                  2 proper test. Under section 3(3) of both the 1990                  3 Broadcasting Act and the 1996 Broadcasting Act, Ofcom                  4 cannot grant a licence to any person unless satisfied                  5 that the person is a fit and proper person to hold the                  6 licence. If we look at your statement, Mr Richards, at                  7 paragraph 9, 9.1, we see the provisions there. So you                  8 can't grant a licence unless the person is considered to                  9 be fit and proper, and you must also do all you can to                  10 secure that if you cease to be so satisfied in the case                  11 of a person holding a licence, that person does not                  12 remain the holder of the licence.                  13 So it's an entry requirement, but it's also                  14 a continuing obligation.                  15 MR RICHARDS: Yes, that's right.                  16 Q. The fit and proper test is imposed by statute. Again,                  17 what's your understanding of the rationale of applying                  18 a fit and proper test?                  19 MR RICHARDS: I think the rationale, again concern at the                  20 significance and role of broadcasting in our society.                  21 I think it was recognised by Parliamentarians at the                  22 time, this was a very, very powerful medium with                  23 enormous potential to influence the country and public                  24 opinion and so on, and that therefore there should be                  25 some sort of general safeguard against that power being</p> <p style="text-align: center;">Page 79</p>
<p>1 I made about the power of broadcasting. I think the                  2 judgment would have been associated with the concern                  3 that if political bodies or religious bodies could                  4 exploit the unusual ubiquity and power of broadcasting,                  5 that would be a concern for all of us as citizens, and                  6 I think in essence that is what it's about.                  7 Q. All right.                  8 DR BOWE: I do think it's worth noting as well that this is                  9 not a truth universally acknowledged. We are all aware                  10 of other countries, other jurisdictions, in which                  11 a completely different approach is taken, and I think                  12 the point you're on here is about something that is                  13 cultural to the United Kingdom, which is expressed in                  14 the views of the legislators at the time.                  15 MS PATRY HOSKINS: I understand that we may need to have                  16 a short break, and I was just wondering whether, since                  17 I'm about to move on to something else --                  18 LORD JUSTICE LEVESON: If that's convenient, that's fine.                  19 All right, we'll just give the shorthand writer a break.                  20 (12.00 pm)                  21 (A short break)                  22 (12.07 pm)                  23 MS PATRY HOSKINS: We've just been discussing the need to                  24 have a licence. In general terms, in order to broadcast                  25 you must have a licence. I now turn on to other</p> <p style="text-align: center;">Page 78</p>	<p>1 exploited by people who perhaps should not hold power.                  2 And I take that to be the original purpose of the fit                  3 and proper test, and obviously there is also a dimension                  4 in which a broadcasting licence is something that has                  5 responsibilities with it, and if you want those                  6 responsibilities to be met, then clearly you need to                  7 ensure that the people who hold those licences, you                  8 would expect to meet them.                  9 So in a sense, the other function it performs,                  10 I think, is a sense check or a guard against giving                  11 licences to people who may not actually adhere to the                  12 standards and the codes which you want all licensees to                  13 do so.                  14 Q. All right. So is there any guidance on the meaning of                  15 fit and proper?                  16 MR RICHARDS: There's no formal guidance, but the guidance                  17 really manifests itself at the inception. So whenever                  18 a licence is granted, or indeed when a licence is                  19 transferred from one party to another, we ask a series                  20 of questions and those questions essentially form the                  21 guidance against which people I think widely in                  22 broadcasting understand are the background for the fit                  23 and proper test, and those questions concern I think                  24 probably what you would expect. They concern                  25 criminality, the propriety of the directors, they</p> <p style="text-align: center;">Page 80</p>

<p>1 concern whether or not the individuals who will hold the 2 licence have breached broadcasting regulations in any 3 particular -- in previous incarnations. There is also 4 a relatively open catch-all, which enables us to 5 exercise some discretion and judgment, should that ever 6 be necessary. 7 Q. All right. 8 LORD JUSTICE LEVESON: Plurality? 9 MR RICHARDS: No. Plurality is not a test that we associate 10 with fit and proper. Plurality, in a sense, is 11 a separate standard and a separate test, which may be 12 invoked or may be relevant at the point of transfer of 13 a licence, but it's not a part of the fit and proper 14 application environment. 15 LORD JUSTICE LEVESON: So it's just focusing entirely on the 16 human being or the entity that wants the licence, 17 there's no wider consideration than that? 18 MR RICHARDS: No. I think that's right. 19 DR BOWE: Yes. 20 MS PATRY HOSKINS: We'll come back to discuss plurality 21 issues if we can, but still remaining on the fit and 22 proper test at the moment, would the decision, for 23 example, of a proprietor of a newspaper group to 24 withdraw from a different regulatory body be relevant to 25 the assessment of whether or not they are a fit and</p> <p style="text-align: center;">Page 81</p>	<p>1 fit or proper to hold it. It's the Bang Media decision. 2 If we look at tab 28, which is in file 2, I don't want 3 us to go into this in a huge amount of detail, but 4 I just want us to understand in previous terms why the 5 decision was made to revoke. 6 LORD JUSTICE LEVESON: I think you talked about this during 7 the course of the -- 8 MS PATRY HOSKINS: Yes, you did. I don't want to go into it 9 in any detail, but just give us an overview. The reason 10 I turn it up is so you can refer to parts of it, if you 11 wish. 12 MR RICHARDS: I'm struggling with my file, slightly. 13 In essence, this is really concerned with the 14 compliance regime. It's as straightforward as that, to 15 be honest. The question in our mind here was -- or we 16 were confronted by serious and repeated breaches of the 17 code. So we would not revoke a licence for a single 18 breach of the code, unless it was of such an extremity 19 that we felt that that was the right thing to do, but 20 I would say that is extremely unlikely, and I cannot 21 think of a case in which we even considered that. 22 In this case, we had repeated breaches such that we 23 concluded that there was no compliance regime in place, 24 there was no prospect of compliance, and that therefore 25 we were really left no alternative but to revoke the</p> <p style="text-align: center;">Page 83</p>
<p>1 proper person? You've probably guessed who I'm 2 referring to there. 3 MR RICHARDS: There is, as I mentioned, a general catch-all 4 which permits us some discretion. So we have a degree 5 of discretion in which we can take into account quite 6 a wide range of factors. So I think I wouldn't want to 7 say that things of that kind could never be considered, 8 because I don't think that's right, but it's not our -- 9 it wouldn't necessarily be our primary focus. Our 10 primary focus would be on the specific questions that 11 are set out, so I think in relation to something which 12 is out beyond those sorts of questions, we would be in 13 the territory of asking ourselves, well, how significant 14 is it, how pertinent is it to the holding the broadcast 15 licence, and how do we make a judgment about it? 16 So it's in the area -- something like that would be 17 in the area of that broad discretion. 18 LORD JUSTICE LEVESON: The problem is, you'd have to unpick 19 the reasons and indulge in an entirely different 20 inquiry, which is a complete siding to your primary 21 responsibility. A red herring, if you like. 22 MR RICHARDS: You would, I think that's right. 23 MS PATRY HOSKINS: Let me perhaps give you a different 24 specific example of a situation where you've decided to 25 revoke a licence on the basis that someone was no longer</p> <p style="text-align: center;">Page 82</p>	<p>1 licence. 2 In no circumstances, I should emphasise -- this is 3 not something we like doing. In some ways, we feel 4 a degree of failure, or at least disappointment, if we 5 ever reach this point, because we, as you know, I think 6 we have a gradation of sanctions. We work very hard to 7 try and ensure that licensees understand what is 8 necessary for them to be compliant. We, I would say, 9 bend over backwards to do that. We would have invited 10 the company in, we would have sought to talk to them and 11 offer guidance. 12 But in a circumstance like this, where there are 13 serious breaches and repeated breaches, and they have 14 had warnings and sanctions and there's still no 15 compliance, I think we felt that ultimately we had no 16 alternative but to revoke the licence. 17 Q. And applying the fit and proper assessment, you note at 18 1.39 of that decision, right at the end, that on that 19 basis, and that includes the repeated breaches, Ofcom 20 had ceased to be satisfied that the licensees are fit 21 and proper persons to hold licences under the Acts and 22 has decided to revoke them. 23 MR RICHARDS: That's right. 24 Q. I want to understand regulatory position from there on 25 in. Presumably Bang Media could, if they chose, set up</p> <p style="text-align: center;">Page 84</p>

<p>1 an Internet site providing the same content, so 2 revocation of a licence doesn't prevent publication of 3 the content, does it? 4 MR RICHARDS: That's absolutely right. In fact, there's 5 a number of things they could have done. They could 6 have sought to go to other platform operators and say, 7 "This is just a broadcast licence and surely we can stay 8 on your satellite platform", for example, but happily 9 the broadcast environment works rather well in that 10 case, and, for example, the satellite operator has, 11 I think, a clause in its contract which says that 12 services they carry must be compliant with the Ofcom 13 Broadcasting Code, so that dealt with that issue. 14 But certainly there is nothing to stop them, to 15 address the question directly, setting up an Internet 16 site, operating an IP TV service, locating it anywhere 17 in the world and they could carry on running the service 18 in that form, and they may well be doing that, for all 19 I know. What I do know is they are not broadcasting in 20 the UK any more. 21 Q. What effect does the revocation of a licence have then? 22 MR RICHARDS: It takes them off the broadcast platforms, and 23 that's both the terrestrial and, because of the 24 judgments made by the satellite and cable operators, off 25 the satellite and cable platforms as well. That is</p> <p style="text-align: center;">Page 85</p>	<p>1 guarantees an appropriate level of freedom of 2 expression. 3 Now, section 319 of the Comms Act, which again we 4 don't need to turn up, but that requires you to set 5 standards for the content of programming on television 6 and radio that are designed to achieve a number of 7 standards objectives which are laid down by Parliament. 8 We can turn that up if it would assist. If you look 9 on in the same tab to internally page 846 of 879, you 10 will find section 319. For the technician, it's 03611. 11 This section is headed "Programme and fairness standards 12 for television and radio" and it sets out at 319 Ofcom's 13 standards code. 14 At subparagraph (2), you'll see the relevant 15 standards objectives. Many of them will not need to be 16 read out, but we can summarise, for example, persons 17 under the age of 18 have to be protected, material 18 that's likely to encourage or incite the commission of 19 crime or lead to disorder can't be included, news has to 20 be presented with due impartiality, news also has to be 21 accurate, and there are various provisions relating to 22 religious programmes, offensive and harmful material and 23 so on. Again, it would take too long to read everything 24 out. 25 That leads us on, achieving those standards</p> <p style="text-align: center;">Page 87</p>
<p>1 very, very significant, because that means that you have 2 eliminated your route to market, your way of reaching 3 the audience, through by far the most significant 4 distribution platforms today. 5 That will change over time, but it will change very 6 gradually over time, so it does seem to me to still be 7 quite an effective sanction. 8 Q. I say that it wouldn't be regulated, but of course 9 I suppose it would depend, if an on-demand service was 10 being provided, there might be regulation through at 11 body. 12 MR RICHARDS: Yes, that's right. 13 Q. But it all depends, and you tell me they're not 14 broadcasting so we don't have to worry. 15 Moving back to standards, section 10 of your 16 statement, I said we'd come back to standards and 17 content and here we are. If we take up file 1 again. 18 If we look back at the Comms Act, please, it's behind 19 tab 8, section 3. It's just for your reference. We've 20 looked at this in some detail, and I don't want to read 21 it out again. 22 The Act confers statutory duties to Ofcom to 23 regulate the content of TV and radio services, as we've 24 seen, but as we've also seen, you must only interfere 25 where action is needed and in a manner which best</p> <p style="text-align: center;">Page 86</p>	<p>1 objectives leads us on to the Broadcasting Code, because 2 by -- not turning this up but by section 107 of the 1996 3 Broadcasting Act, you must prepare a code which gives 4 guidance on principles and practices to be followed by 5 broadcasters in connection with the avoidance of -- and 6 then I'll read out the relevant part: 7 "... unjust or unfair treatment in programmes or 8 unwarranted infringement of privacy or in connection 9 with the obtaining of material included in such 10 programmes." 11 Have I accurately summarised how we get to the code? 12 MR RICHARDS: Yes. 13 DR BOWE: Yes. 14 Q. Again we could turn the relevant provisions up but 15 I don't think it's necessary to do so, but if you at any 16 point want to look at any of the references, let me 17 know. 18 You set out the standards for the content of 19 programmes in the Broadcasting Code, which is at tab 16. 20 We will need to look at that, so we can put away file 1 21 and take up file 2, which contains the Broadcasting 22 Code. If we just turn to the first page of it and then 23 I will -- I see you have your own little copy. 24 LORD JUSTICE LEVESON: Tab 16. 25 MS PATRY HOSKINS: It's in tab 16.</p> <p style="text-align: center;">Page 88</p>

<p>1 LORD JUSTICE LEVESON: You get used to the heavy lifting of 2 these files.</p> <p>3 MS PATRY HOSKINS: We will come on to look at the fairness 4 and privacy standards. They're found in the code at 5 sections 7 and 8. But just some general questions and 6 some general points. The most recent version of the 7 code is February 2011 and it's accurate to say, isn't 8 it, that broadcasters are required as part of their 9 licence terms to observe the Broadcasting Code, breach 10 of it is a breach of the licence conditions and 11 enforcement action may be taken?</p> <p>12 MR RICHARDS: That is absolutely right, yes.</p> <p>13 Q. The first thing to note about tab 16, if you flick your 14 finger through it, is that the code is long and 15 detailed. In your view, is that an advantage or 16 a disadvantage? Can broadcasters be expected to know it 17 inside out, remember all the relevant parts?</p> <p>18 MR RICHARDS: I'm not sure how long it is, actually, in the 19 sense that if you look at your copy in the file, or 20 indeed my actual version here, a substantial body of it 21 is appendices.</p> <p>22 Q. Yes.</p> <p>23 MR RICHARDS: A very substantial body of it. And I think if 24 you concentrate on the main code, what we've tried to do 25 there is deal with principles and the main issues, and</p> <p style="text-align: center;">Page 89</p>	<p>1 MR RICHARDS: No, the way the code would work is so we 2 review it from time to time and it's right this version 3 is from last February, so it's just under a year old, so 4 we try and update it in the light of practice. It would 5 be drafted by full-time Ofcom employees, and it would 6 then go through our decision-making process for 7 approval, and in this case would be approved by our 8 content board, which is where the hub of our 9 broadcasting expertise lies.</p> <p>10 It could always, as with any Ofcom decision, be then 11 referred upwards to the main board, but as I recall, 12 I think this would have been signed off by the content 13 board in their delegated responsibilities.</p> <p>14 DR BOWE: Yes.</p> <p>15 LORD JUSTICE LEVESON: Have you found it necessary -- I'm 16 sorry, Ms Patry Hoskins -- to involve actual programme 17 makers or editors in the creation of this document?</p> <p>18 MR RICHARDS: I would say that they are involved very 19 closely in its evolution. We have a very close dialogue 20 with actual programme makers, actual journalists, 21 currently practising but also those for whom we can -- 22 those who we can draw on who are no longer practising 23 but still have a deep well of expertise, and we draw on 24 that very heavily.</p> <p>25 So just to underline the point, what does not happen</p> <p style="text-align: center;">Page 91</p>
<p>1 I don't think for working journalists, for example, or 2 working producers, it is a massive or particularly 3 highly complex document.</p> <p>4 One of the things we've tried to do over the years 5 is to simplify and to make sure that principles lie at 6 the heart of it. If people understand principles, and 7 are incentivised and inclined to adhere to the 8 principles, I think that takes you a very, very long 9 way, and in my experience that is broadly the case in 10 broadcasting, and when you look at the principles, most 11 of them are reasonably straightforward, in my view, so 12 there is a degree of complexity that lies behind in the 13 legislative scheme, in the details set out in the 14 appendices, but I think I would want to say to you that 15 we strive, and I hope we've made a reasonable job of 16 setting out the core issues in a reasonably succinct way 17 at the front end of the code.</p> <p>18 DR BOWE: And also written in plain English.</p> <p>19 Q. And in plain English.</p> <p>20 If we flick now to section 7, we'll --</p> <p>21 LORD JUSTICE LEVESON: Before we look at the detail, who is 22 responsible for compiling it?</p> <p>23 MR RICHARDS: For putting it together? We are.</p> <p>24 LORD JUSTICE LEVESON: Yes, but do you have a committee that 25 does that?</p> <p style="text-align: center;">Page 90</p>	<p>1 is that half a dozen people in Ofcom hide in a room and 2 write a code. What actually happens is that those 3 people talk on an open way over an extended period, test 4 ideas, examine them, review them, and that process would 5 involve working journalists, working producers, working 6 editors, as well as those of -- with previous 7 experience, but the decision on the code would then be 8 ours, and the decision would be made by the content 9 board, so it's incorporating, understanding latest 10 practice and things of that nature, but the decision 11 absolutely remains with us.</p> <p>12 MS PATRY HOSKINS: I was coming on to ask you about section 13 7. I was going to ask you the same question about who 14 is involved in writing this section, but is that the 15 same as the answer that you've already just given?</p> <p>16 MR RICHARDS: Section 7, fairness?</p> <p>17 Q. Sections 7 and 8.</p> <p>18 MR RICHARDS: Absolutely.</p> <p>19 Q. Can we start, please, with the foreword to section 7, 20 because it says this:</p> <p>21 "This section and the following section on privacy 22 are different from other sections of the code. They 23 apply to how broadcasters treat the individuals or 24 organisations directly affected by programmes rather 25 than to what the general public sees and/or hears as</p> <p style="text-align: center;">Page 92</p>

<p>1 viewers and listeners."</p> <p>2 In that sense, it is rather different.</p> <p>3 MR RICHARDS: Yes, it is subtly different, that's right.</p> <p>4 Q. In relation to fairness, if we look at the general</p> <p>5 principle just under the foreword:</p> <p>6 "The general principle is to ensure that</p> <p>7 broadcasters avoid unjust or unfair treatment of</p> <p>8 individuals or organisations in programmes."</p> <p>9 And then it sets out practices -- well, there's</p> <p>10 a rule and then it sets out various practices to be</p> <p>11 followed. That's set out right through to 7.14.</p> <p>12 There's essentially some guidance on how to ensure that</p> <p>13 you avoid unjust or unfair treatment of individuals or</p> <p>14 organisations.</p> <p>15 MR RICHARDS: Can I just make one quick observation?</p> <p>16 Q. Of course.</p> <p>17 MR RICHARDS: Because that is -- in a sense, there we are,</p> <p>18 that is fairness in one, two, three, four short pages.</p> <p>19 What of course also lies behind this is substantial, in</p> <p>20 a sense our caselaw of judgments made in relation to</p> <p>21 fairness cases, and you will find that the broadcasters</p> <p>22 are highly familiar with those judgments. So the two</p> <p>23 sources for them understanding and making their own</p> <p>24 judgments on this are not only four pages here with the</p> <p>25 appendices, but also all the caselaw and the judgments</p> <p style="text-align: center;">Page 93</p>	<p>1 LORD JUSTICE LEVESON: -- you can still be in breach, but if</p> <p>2 you don't follow, you won't be in breach if there's no</p> <p>3 unfairness. So actually you've put it both ways. You</p> <p>4 are seeking to identify a way of working and, if you</p> <p>5 like, a culture of fairness, making the point that,</p> <p>6 unlike legislation, we're not trying to set it down in</p> <p>7 such black and white rigid terms that you can say, "Oh,</p> <p>8 well, I actually did this", and still not be in breach.</p> <p>9 MR RICHARDS: I think that's a very important point.</p> <p>10 DR BOWE: Yes, it's trying to get away from ever having</p> <p>11 a sort of box-ticking compliance culture that doesn't</p> <p>12 really go to the heart of what people do, and we've</p> <p>13 tried to express this in a way that encourages people to</p> <p>14 think about what they actually do, rather than "Have</p> <p>15 I ticked a box?"</p> <p>16 LORD JUSTICE LEVESON: Mm.</p> <p>17 MS PATRY HOSKINS: Turn to section 8, which has a very</p> <p>18 similar provision halfway down the first page:</p> <p>19 "Following these practices will not necessarily</p> <p>20 avoid a breach of this section of the code."</p> <p>21 If we look at the general principle in section 8, it</p> <p>22 is:</p> <p>23 "To ensure that broadcasters avoid any unwarranted</p> <p>24 infringement of privacy in programmes and in connection</p> <p>25 with obtaining material included in the programme."</p> <p style="text-align: center;">Page 95</p>
<p>1 that we've developed over some years.</p> <p>2 Q. How would they be aware? You said they would be very</p> <p>3 aware of those.</p> <p>4 MR RICHARDS: Those judgments are published and any judgment</p> <p>5 we make carries a reasoned decision and they are</p> <p>6 transparently available to everybody.</p> <p>7 Q. All right. Thank you. I don't want to read out this</p> <p>8 section, I'm sure that the chairman can read it at his</p> <p>9 leisure. Is there anything that you particularly want</p> <p>10 to draw out from this before I turn to the privacy</p> <p>11 section?</p> <p>12 MR RICHARDS: I don't think so, no. Probably merely to</p> <p>13 highlight again the point I began with, which is if you</p> <p>14 look at the principle, it's very simple, and so long as</p> <p>15 it is backed by the organisations involved understanding</p> <p>16 that if they don't adhere to it there will be sanctions</p> <p>17 and enforcement, it takes you a very long way.</p> <p>18 LORD JUSTICE LEVESON: Actually, it's rather more than that,</p> <p>19 because what you say in the foreword is:</p> <p>20 "If you follow the letter of this but not the</p> <p>21 spirit, you can still be in breach."</p> <p>22 DR BOWE: Yes.</p> <p>23 LORD JUSTICE LEVESON: And even if you follow every</p> <p>24 letter --</p> <p>25 MR RICHARDS: That's absolutely right.</p> <p style="text-align: center;">Page 94</p>	<p>1 I want to explore, please, what "warranted" or</p> <p>2 "unwarranted" means. It appears there within the</p> <p>3 general principle. It's defined just below it, the</p> <p>4 meaning of "warranted". It has a particular meaning.</p> <p>5 I will read it out, it's important:</p> <p>6 "It means that where broadcasters wish to justify an</p> <p>7 infringement of privacy as warranted, they should be</p> <p>8 able to demonstrate why in the particular circumstances</p> <p>9 of the case it is warranted. If the reason is that it</p> <p>10 is in the public interest, then the broadcaster should</p> <p>11 be able to demonstrate that the public interest</p> <p>12 outweighs the right to privacy. Examples of public</p> <p>13 interest would include revealing or detecting crime,</p> <p>14 protecting public health or safety, exposing misleading</p> <p>15 claims made by individuals or organisations or</p> <p>16 disclosing incompetence that affects the public."</p> <p>17 No further guidance on what "in the public interest"</p> <p>18 means, but what is clear, I hope you'll agree, is that</p> <p>19 "warranted" is wider than "in the public interest".</p> <p>20 DR BOWE: Oh yes.</p> <p>21 Q. Because it specifically says if the reason is that it's</p> <p>22 in the public interest, then X.</p> <p>23 What other reasons could there be, other than it is</p> <p>24 in the public interest? Can you help us with that?</p> <p>25 DR BOWE: I'm sorry, I'm slightly struggling here. I don't</p> <p style="text-align: center;">Page 96</p>

24 (Pages 93 to 96)

<p>1 think either of us really understood the question.  2 Q. Sorry if I haven't made it clear. There's a definition  3 of "warranted", and an infringement of privacy would  4 have to be, or must be, warranted, right?  5 DR BOWE: Yes.  6 Q. One of the reasons it might be warranted would be  7 because it was in the public interest. What other  8 reasons other than being in the public interest would  9 mean that an infringement of privacy was warranted?  10 What other kinds of reasons have you seen advanced?  11 MR RICHARDS: I think the direct answer to that is very few,  12 and I think we may be inferring more than is intended.  13 I think our primary expectation of a broadcaster in this  14 area, if they are infringing privacy, is that it has to  15 be warranted, and our typical expectation of that would  16 be that there is a clear public interest justification.  17 So I don't think there is a significant area here which  18 is in some way obscured or hidden.  19 The typical justifications that we receive we deal  20 with a fair number of these cases, as you can imagine,  21 and I would say they are overwhelmingly concerned with  22 the items on that list.  23 LORD JUSTICE LEVESON: And the language is identical to the  24 language that we've been looking at in relation to the  25 public interest in the code.</p> <p style="text-align: center;">Page 97</p>	<p>1 expectation of privacy". Again I'll read it out because  2 I have a question to ask you about this:  3 "Legitimate expectations of privacy will vary  4 according to the place and nature of the information,  5 activity or condition in question, the extent to which  6 it is in the public domain (if at all) and whether the  7 individual concerned is already in the public eye."  8 Then it goes on to say a number of other things  9 which I don't need to ask you about.  10 Why is it a relevant consideration that the  11 individual concerned may already be in the public eye  12 when determining whether they have a legitimate  13 expectation of privacy?  14 MR RICHARDS: I think it's probably connected to the last  15 element, or at least in part, and really significantly  16 connects to the last part of the meaning of "warranted".  17 So in my mind there is a connection between, for  18 example, the disclosure of incompetence which affects  19 the public, and I think the connection to somebody in  20 the public eye is that there could be or we might expect  21 there to be some sort of connection to a position of  22 power or influence, which might -- through which they  23 could influence the public more generally. So I think  24 that's the key connection that's being made there.  25 Q. And in absolute fairness, we should read out the final  Page 99</p>
<p>1 MR RICHARDS: It's --  2 LORD JUSTICE LEVESON: I'm not trying to test you on that.  3 MS PATRY HOSKINS: I'm simply seeking to understand whether  4 "unwarranted" or "warranted" would be a better, more  5 inclusive term than "public interest", but it sounds to  6 me from what you say that by and large the reasons  7 advanced usually are that it's in the public interest.  8 DR BOWE: I think actually we're talking about this in  9 slightly different ways. I think why we're using the  10 word "warranted" is we're trying to convey the necessity  11 for making a judgment, where you on the one hand have,  12 let us say, the exposure of crime or independence,  13 versus the right to privacy, and we are using the word  14 "warranted" to describe that process of making  15 a defensible -- and I emphasise defensible -- judgment  16 about how that balance has been struck in the  17 journalistic decision-making. In other words, warranted  18 isn't the end of the argument, it's a description of how  19 you've made the judgment.  20 Q. All right. That's very clear.  21 If we look underneath the definition of "warranted",  22 we can see that there are various practices to be  23 followed. There's a heading, "Private lives, public  24 places and legitimate expectation of privacy", and then  25 the code goes on to define the meaning of "legitimate  Page 98</p>	<p>1 part of the definition of legitimate expectation of  2 privacy which is that you recognise that people under  3 investigation are in the public eye and their immediate  4 family and friends retain the right to a private life  5 although private behaviour can raise issues of  6 legitimate public interest.  7 DR BOWE: Yes.  8 MR RICHARDS: Absolutely.  9 Q. So you don't simply say someone's in the public eye,  10 that might warrant --  11 DR BOWE: Fair game.  12 Q. Yes.  13 MR RICHARDS: I think that's very important to us. So there  14 is -- if you are in the public eye, you're taking  15 decisions of that kind which affect the public, you are  16 in a different category to an ordinary private citizen,  17 but it does not mean that you have no rights to privacy  18 at all. I don't think it could possibly mean that.  19 Q. I don't want to go through all the practices to be  20 followed. I want to alight on two, and the first is at  21 8.11, "Doorstepping":  22 "Doorstepping for factual programmes should not take  23 place unless a request for an interview has been refused  24 or it has not been possible to request an interview, or  25 if there is good reason to believe that an investigation  Page 100</p>

25 (Pages 97 to 100)

<p>1 will be frustrated if the subject is approached openly 2 and it is warranted to doorstep. However, normally 3 broadcasters may, without prior warning, interview, film 4 or record people in the news when in public places." 5 And then there's a definition of the meaning of 6 "doorstepping". 7 Is that something that you have to consider -- 8 I appreciate that you may not individually have to deal 9 with this on a regular basis. Is this something that 10 Ofcom has experience with that it could share with us? 11 MR RICHARDS: The origin of this is interesting. I don't 12 have an encyclopaedic memory of all previous 13 broadcasting codes, but I suspect this is something that 14 would not have been in the original code. This is one 15 of the things that has emerged as the evolution of media 16 practice has changed, and doorstepping became 17 a phenomenon, and therefore the code had to adapt to 18 deal with it. 19 That would have been some years ago, but you can see 20 here its latest manifestation. 21 We can come back to you and provide some information 22 on the extent to which doorstepping is a problem with 23 which we're dealing at the moment. I don't recall off 24 the top of my head many recent instances. 25 DR BOWE: No.</p> <p style="text-align: center;">Page 101</p>	<p>1 they know that the media are interested in them, they 2 know if they walk down Oxford Street there is going to 3 be interest in photographing them. There is 4 a difference between that and the more aggressive form 5 of surprise doorstepping, on the doorstep of someone at 6 7 am or 6.30 am with a microphone thrust into the face 7 and things of that nature. That seems to me to be 8 a quite different approach. 9 LORD JUSTICE LEVESON: Which side of the line would it fall 10 if somebody in the news -- and we could take an example 11 from today without identifying it -- would it be 12 appropriate and within the rules to knock on his door 13 because he's in the news? 14 MR RICHARDS: I hesitate to answer -- 15 LORD JUSTICE LEVESON: Because you might have to, that's 16 fair enough. 17 MR RICHARDS: Absolutely. I think it is all about judgment, 18 and I think that is a possibility that we might have -- 19 it's conceivable we could deal with it. 20 LORD JUSTICE LEVESON: You're entirely right, Mr Richards. 21 I see the point. But before I forget on this 22 doorstepping issue, the PCC have developed this 23 anti-harassment policy. Are you involved in that? 24 MR RICHARDS: We are. This was a -- I think a fairly 25 straightforward positive step by the PCC with our</p> <p style="text-align: center;">Page 103</p>
<p>1 MR RICHARDS: But we can provide the Inquiry with a precise 2 answer to that. 3 Generally speaking I think the code here is 4 relatively clear and I think I would be right in saying 5 that generally speaking broadcasters understand it and 6 adhere to it. 7 Q. I only raise it because in some circumstances some 8 witnesses to this Inquiry have come and said, especially 9 when they're being asked about photographs taken in 10 a doorstepping situation, "It wasn't just us, the TV 11 cameras were there as well". So I want to understand 12 what the requirement is here. It seems to be that 13 doorstepping shouldn't take place unless one of these 14 situations arises and it is warranted to doorstep, so we 15 come back again to a requirement that it be warranted. 16 MR RICHARDS: I think there are variants of doorstepping. 17 You notice the final line of 8.11, where we say: 18 "However, normally broadcasters may, without prior 19 warning, interview, film or record people in the news 20 when in public places." 21 I think that kind of context is quite different to 22 some of the incidences of doorstepping which I have 23 seen, which is a far more aggressive and surprising 24 intervention in relation to someone who is not at that 25 point in the news. I think if somebody is in the news,</p> <p style="text-align: center;">Page 102</p>	<p>1 agreement. Media scrums had become a problem. We were 2 aware of that. We could have done something and were 3 indeed, I think, considering doing something about it 4 under our powers. The PCC succeeded in securing the 5 commitment to an approach in this area amongst the 6 newspapers, and there was a discussion or a proposal at 7 some point about could the broadcasters join as well and 8 we were very happy to support that. 9 LORD JUSTICE LEVESON: Is that in the code or not? 10 MR RICHARDS: It's not set out in the code, but it's well 11 understood and as far as I'm aware, it works reasonably 12 well. 13 LORD JUSTICE LEVESON: Does it mean you have to get involved 14 to notify? 15 MR RICHARDS: I think the system is that an email is sent 16 around by the PCC, the broadcasters we have encouraged 17 to be recipients of that email, and therefore the system 18 works in that way, and we're perfectly content for that 19 to be the case. 20 LORD JUSTICE LEVESON: You don't have to send it on, it goes 21 to everybody? 22 MR RICHARDS: No, I think it goes to everybody. 23 DR BOWE: It does. 24 MR RICHARDS: It's a constructive step forward. 25 DR BOWE: It goes back a bit to the question we were on much</p> <p style="text-align: center;">Page 104</p>

<p>1 earlier about proportionality. In this case, if another 2 regulator or another organisation has got a perfectly 3 good approach that you can hook onto, that seems to us 4 to be a good way to develop. 5 LORD JUSTICE LEVESON: Yes. 6 MS PATRY HOSKINS: The second practice I wanted to look at 7 is contained at 8.13 onwards; it's about surreptitious 8 filming or recording. Again, it should only be used 9 where it's warranted and normally it will only be 10 warranted in certain circumstances, so again there needs 11 to be some evidence of a story in the public interest, 12 reasonable grounds to suspect that further material 13 evidence could be obtained, and it's necessary to the 14 credibility and authenticity of the programme. That 15 could seem to rule out fishing expeditions; is that 16 right? 17 MR RICHARDS: It is intended to rule out fishing expedition. 18 The first bullet point of 8.13 is intended to be the 19 spirit of ruling out fishing expeditions, so you can't 20 just go and have a look. Prima facie evidence of 21 a story on public interest seems to me to be reasonably 22 clear in relation to that. 23 Q. All right, I don't think we need to say anything more. 24 I want to move on to your adjudication role in fairness 25 and privacy cases. Just so we understand where we are,</p> <p style="text-align: center;">Page 105</p>	<p>1 on this basis. You explain in your statement, 2 Mr Richards, that you are limited in your capacity to 3 entertain privacy and fairness complaints. If we look 4 back at your witness statement in file one, you'll find 5 this at section 12.3. I say first witness statement; 6 I know there are three. 7 I forgot to check at the outset, sir, that you have 8 all three statements? 9 LORD JUSTICE LEVESON: I'm not sure I do. 10 MS PATRY HOSKINS: We'll have a tiny pause while I see what 11 you're missing. 12 LORD JUSTICE LEVESON: I'm not sure I have more than one 13 statement. 14 MS PATRY HOSKINS: Oh, okay. I'll hand up a copy of the 15 second statement, which is important, because I'll be 16 asking questions about it. It's very brief and I won't 17 be covering it before lunch. 18 LORD JUSTICE LEVESON: That's good. I need reading 19 material, yes. 20 MS PATRY HOSKINS: You don't need to read it -- 21 LORD JUSTICE LEVESON: No, I will read it, don't worry. 22 MS PATRY HOSKINS: The third statement was received 23 yesterday and it was a response to some questions which 24 had been put to Ofcom at rather a late stage, so it's no 25 fault of theirs that it was received very late in the</p> <p style="text-align: center;">Page 107</p>
<p>1 I'll summarise it in this way: obviously a member of the 2 public can view a programme and then complain about what 3 they see in standards terms, so they can complain about 4 accuracy, harm, that sort of thing. That's clear. But 5 there's also a specific duty that Ofcom has to consider 6 and adjudicate on complaints that relate to unjust or 7 unfair treatment, or unwarranted infringements of 8 privacy. Have I accurately summarised the two routes of 9 complaint, if I can put it that way? 10 MR RICHARDS: Yes. 11 Q. Section 10 of the 1996 Broadcasting Act, which we don't 12 need to turn up, gives you that specific duty to 13 consider and adjudicate on such complaints, so unfair or 14 unjust treatment or privacy. But you can also consider 15 and adjudicate on complaints which relate to the 16 obtaining of material included in such programmes. Is 17 that fair and accurate? 18 DR BOWE: Yes. 19 Q. Okay. So you're not limited to considering whether the 20 content of a programme was an unwarranted infringement 21 of privacy, for example, but you can also investigate 22 whether the manner in which the material was obtained 23 amounted to such a breach, would that be fair? 24 DR BOWE: (Nods head). 25 Q. Okay. What I want to understand now is who can complain</p> <p style="text-align: center;">Page 106</p>	<p>1 day, but again I don't think we will need -- I will 2 provide you with a copy, of course, over lunchtime. 3 LORD JUSTICE LEVESON: Yes, thank you. 4 MS PATRY HOSKINS: But we may not need to refer to it. 5 LORD JUSTICE LEVESON: I certainly want to read it. 6 MS PATRY HOSKINS: Of course, we'll provide it. 7 LORD JUSTICE LEVESON: Yes, thank you. 8 MS PATRY HOSKINS: 12.3 of the first witness statement. You 9 explain that by sections 111 to 114 and 130 of the 1996 10 act, they provide for certain statutory criteria which 11 must be satisfied before you're entitled to proceed to 12 consider a fairness or privacy complaint. In summary 13 terms, so that we don't have to turn it up, you explain 14 that fairness and/or privacy complaints may be made by 15 an individual or by a body of persons, but you are 16 normally under a duty not to entertain such a complaint 17 unless it is either made by the person affected or by 18 a person authorised by him or her to make a complaint on 19 their behalf. And in relation to privacy, "the person 20 affected" means a person whose privacy was infringed. 21 Although there are other provisions, for example, if 22 someone has died, a complaint can be made on their 23 behalf -- 24 MR RICHARDS: Up to five years after the death. 25 Q. Exactly. So those are the limitations in the act on who</p> <p style="text-align: center;">Page 108</p>

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<p>1 can bring a complaint. That's in direct contrast, as                  2 I understand it, to the right of a viewer of a TV                  3 programme to complain about harm or accuracy; is that                  4 correct?                  5 MR RICHARDS: That is correct, and that's because harm and                  6 offence is primarily concerned with viewers, so the                  7 receiving parties, and fairness and privacy is about                  8 those affected by the making or broadcast of the                  9 programmes.                  10 Q. Exactly. So we can see it's a matter of general                  11 principle why that might be. A person who's been                  12 unfairly treated or a person whose privacy is being                  13 invaded may well be the person who should bring the                  14 complaint on that basis.                  15 MR RICHARDS: Yes.                  16 Q. But that would mean that the technical statutory                  17 interpretation would be that even where a broadcast                  18 contained a really egregious invasion of privacy, Ofcom                  19 would be unable to consider any privacy complaints                  20 unless the person affected had made a complaint. Is                  21 that how Ofcom interprets those provisions?                  22 MR RICHARDS: No, not quite. We regard the central locus of                  23 our responsibility here as to concern with those                  24 affected, hence the primary expectation is that                  25 a complaint would be made by the individual or</p> <p style="text-align: center;">Page 109</p>	<p>1 other words there are some broadcasters I know -- and                  2 I'm talking about individual practitioners rather than                  3 a corporate position here -- there are certainly some                  4 people who would argue that it should be absolutely                  5 restricted to complaints made by the individuals                  6 affected. We have not taken that view. We have taken                  7 the view that there is a degree of latitude, it's not                  8 a huge degree of latitude, we wouldn't embark upon                  9 a case of this kind without very careful consideration,                  10 but that there is a degree of latitude which would                  11 permit us to take action of that kind, and in one                  12 notable case we have, and I am sure I can think of one                  13 or two other cases where we weren't sure if a complaint                  14 would be forthcoming, and where we would certainly have                  15 considered using that power as well, if a complaint had                  16 not been forthcoming. In those cases that I can recall,                  17 a complaint was forthcoming and we ended up addressing                  18 it --                  19 LORD JUSTICE LEVESON: So it might be one of two ways. It                  20 might be that somebody else, who is not the aggrieved                  21 person, complains; a viewer.                  22 MR RICHARDS: Yes.                  23 LORD JUSTICE LEVESON: Or might it also be you've seen                  24 something which you feel breaches your standards and                  25 without anybody saying, "I complain about this", you</p> <p style="text-align: center;">Page 111</p>
<p>1 organisation affected or someone acting on their behalf,                  2 but we also interpret the statute to include a degree of                  3 latitude, through which, under what we describe in our                  4 procedures, I think, as exceptional circumstances, where                  5 the general duty to provide adequate protection to the                  6 public at large in relation to unfairness and                  7 infringement of privacy would permit us to initiate an                  8 investigation or consider a case without a complaint                  9 from the individual.                  10 Q. Pause there. That's going back to the general                  11 principles in section 3 of the Comms Act?                  12 MR RICHARDS: Yes, that's right.                  13 Q. So you would interpret section 3 and your general duty                  14 to secure the application of standards that provide                  15 adequate protection, et cetera, you consider that to                  16 mean that you can, in exceptional circumstances,                  17 consider a complaint even when the person affected has                  18 not complained?                  19 MR RICHARDS: That's right, yes.                  20 Q. Is that a contentious application of the section or --                  21 MR RICHARDS: Yes. Well, "contentious", I would say, is                  22 slightly too strong. It is not an application with                  23 which everybody wholeheartedly agrees. There are --                  24 there is a body of opinion amongst the broadcasters that                  25 that is an extension beyond which we should go, so in</p> <p style="text-align: center;">Page 110</p>	<p>1 could initiate a complaint? Is that right or does that                  2 go too far?                  3 MR RICHARDS: No, that is right, but the threshold in both                  4 cases is high.                  5 LORD JUSTICE LEVESON: Yes.                  6 MR RICHARDS: It's considerable. So these are exceptional                  7 cases. I don't want to give you the impression that                  8 because we had a flurry of complaints whipped up by                  9 media interest that somehow that would lead us to making                  10 a judgment of that kind. I think that would be                  11 extremely unlikely. I think the cases we're talking                  12 about are where we have particular evidence before us                  13 which would make us consider it, even though there were                  14 no specific complaint, or where the case appeared to be                  15 so egregious or extreme that we felt it did place                  16 a question against our fulfilment of the more general                  17 duty.                  18 LORD JUSTICE LEVESON: Although, presumably, somebody would                  19 have had to have brought your attention to the                  20 programme. You've not got people monitoring every                  21 programme.                  22 DR BOWE: No.                  23 LORD JUSTICE LEVESON: Somebody has to have seen it.                  24 MR RICHARDS: Yes, and typically where something is                  25 particularly egregious, someone will be making a noise</p> <p style="text-align: center;">Page 112</p>

<p>1 somewhere, we obviously monitor what's happening and 2 therefore we would expect to have noticed it. 3 MS PATRY HOSKINS: All right. But you say to me exceptional 4 circumstances would not necessarily simply arise because 5 there was a media frenzy about a particular issue. Let 6 me give you a specific example. The Russell 7 Brand/Jonathan Ross example. As I understand that, 8 there was no complaint by Andrew Sachs or Georgina 9 Bailey in that case, but nevertheless there were 10 a number of -- clearly something that the press took an 11 interest in. What was the application of exceptional 12 circumstances in that case? 13 MR RICHARDS: Particularly interesting case because there 14 was a huge media outrage about it, and therefore that 15 was taking place, but that was absolutely not the reason 16 that we took that case forward. 17 There were two sets of reasons for invoking the 18 exceptional circumstances for that case. The first was 19 the particularly extreme nature of the offence, so 20 Andrew Sachs and Georgina Bailey, very, very serious 21 infringement of their privacy. They did not seek to be 22 on the programme, they did not seek to be subject of the 23 broadcast, and that's a big distinction with some other 24 cases. The infringement was repeated more than once, 25 and it was then indeed underscored or amplified by the</p> <p style="text-align: center;">Page 113</p>	<p>1 was wholly unacceptable. 2 MS PATRY HOSKINS: Yes. My next question was going to be 3 some may say that this duty or this power to act 4 independently of complaints is what strengthens your 5 position as a regulator. Would you agree with that 6 sentiment? 7 MR RICHARDS: I think it's very important that we have the 8 power, for the reasons that I think we've just been 9 describing. It's obviously also important that we 10 exercise it very carefully and in light of the facts. 11 I say that because I'm not in favour of us having such 12 latitude and such unqualified power that we would be 13 exercising that power in an undue or incautious way, so 14 I think it's important that it's pitched appropriately, 15 but the general point you're asking me about: is it 16 important that we have, in a sense, an own initiative 17 power? 18 Q. Yes. 19 MR RICHARDS: I think yes, it's extremely important. 20 Q. My last question before lunch is this, and it touches on 21 what you've just said: why is there a need to limit the 22 exercise of such powers to exceptional circumstances? 23 MR RICHARDS: I think because everybody needs to know -- 24 everybody needs to know where they stand, and you don't 25 want to take the risk of a regulatory authority or any</p> <p style="text-align: center;">Page 115</p>
<p>1 apology, which, of course, was largely sarcastic. So 2 you had a particularly egregious case. 3 You also had a situation in which the BBC themselves 4 said relatively quickly that there was substantial 5 editorial compliance failure, there was editorial 6 misjudgment, and there were compliance -- procedural 7 compliance issues weaknesses as well, in addition to the 8 fact that the BBC Trust then said, quite openly, this 9 was a wholly unacceptable breach of privacy. 10 So we had both the facts of the case in front of us 11 already, we then also had concrete evidence of the 12 significance of the case accepted by the broadcaster, 13 and in those circumstances, we took the view that this 14 was an exceptional case, Andrew Sachs and Georgina 15 Bailey did not complain, but we invoked the exceptional 16 circumstances when confronted with that body of 17 evidence. 18 LORD JUSTICE LEVESON: And you would argue that was 19 absolutely in the public interest? 20 MR RICHARDS: I absolutely would argue that was in the 21 public interest. I think it was entirely the right 22 thing to do and I think it was extremely important for 23 not only the BBC Trust but then ourselves as the 24 statutory regulator for all of broadcasting to send 25 a very, very clear signal that this kind of behaviour</p> <p style="text-align: center;">Page 114</p>	<p>1 public authority that has power that is unchecked or 2 unqualified. I think that's wise in all circumstances. 3 It's particularly important in these circumstances, 4 because of the risks of such overweening power in 5 relation to freedom of expression, so it's always 6 important, but I think particularly important in this 7 context. 8 MS PATRY HOSKINS: Right. Thank you. 9 LORD JUSTICE LEVESON: Very good. Well, we'll resume at 10 2 o'clock. Is that right? Thank you. 11 (1.01 pm) 12 (The luncheon adjournment) 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 116</p>

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