English PEN
Submission to the Leveson Inquiry
30 November 2011

English PEN (registered charity no. 1125610) is the founding centre of a worldwide writers' association with 144 centres in 104 countries. English PEN's charitable objects include '*the advancement of the human rights of authors, editors, and others similarly employed, in the United Kingdom and around the world*'. Since 1960 PEN's activities have included campaigns on behalf of imprisoned and persecuted beneficiaries around the world. More recently, English PEN has launched a series of projects to enhance the public understanding of freedom of expression in the United Kingdom, including the Free Speech Café, the Free Speech Night Class and the Alternative Libel Project. Publications in this area include *Free Expression is No Offence* (2005); *Another Sky: Voices of Conscience from Around the World* (2006); *Free Speech is Not for Sale* (2009); and *Freedom to Write: The User's Guide* (2012). The annual PEN/Pinter Prize is awarded to British and international writers of courage: recent winners include the Italian author Roberto Saviano, the Mexican journalist Lydia Cacho and the Burmese poet and comedian Zargana.

In its historic Charter, drafted in the 1930s by writers including HG Wells, PEN declares its commitment to a free press. However, PEN does not take an absolutist view of this freedom and the Charter calls upon PEN members to '*oppose such evils of a free press as mendacious publication, deliberate falsehood and distortions of fact for political and personal ends.*'

The Leveson Inquiry has been asked to make recommendations for '*a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards*'. In this submission, English PEN aims to contribute to the Inquiry's work by answering the questions that Lord Justice Leveson has asked about the public interest.

The key points of this submission are as follows:

a. Whilst the press may have a special role in enabling the public to participate in the life of their society, the law governing the press should be the same as the law governing the expression of all citizens.
b. Publications are in 'the public interest' where they enhance the ability of the public to participate in the life of their society – and this will in certain circumstances outweigh the individual or social harm that they cause.
c. In order to ensure that harm and the public interest are balanced fairly and transparently there must be significant improvements in access to justice.

Q. What is the special role to be played by the press in a democracy? What 'freedom' requirements need to be in place for that role to be played? Does this role place any obligations or responsibilities on the press?

Article 10 of the European Convention on Human Rights gives all British citizens the right to hold opinions and to receive and impart information and ideas without interference – subject to certain limitations that are necessary in a democratic society. The Convention and the European Court of Human Rights recognise the fundamental importance of freedom of expression in allowing citizens to express their views about the exercise of power; to challenge received opinion; and to express and develop their identities. This includes expressions that hurt, offend, and shock. Alongside the right to freedom of expression, the internationally-recognised right to political participation (Article 25 of the International Covenant on Civil and Political Rights) allows citizens to engage in the life of their society at its most fundamental level, taking and influencing decisions about the distribution of resources and the exercise of power.

In the twentieth century, the press played a unique role in the exercise of these fundamental rights. This has been recognised in historic judgements by ECtHR and the English courts. Journalists held the powerful to account through investigations and analysis. Mass circulation newspapers brought their work to wide audiences. Newspapers represented the political opinions of large sections of the population, ensuring that government and parliament responded swiftly to public sentiment. They exposed political scandals, enabling citizens to vote out corrupt or incompetent governments, and they provided the analytical tools for citizens to decide between competing political propositions. The press also acted as a vehicle for individuals to express themselves, through letters, interviews and commentary on news stories.

Since the turn of the millennium, this unique role has been profoundly disrupted. The digital revolution has reduced the capacity of newspapers by exposing a business model that is based on dwindling consumer subscriptions and advertising revenue. It has given citizens the capability to perform many journalistic functions themselves, with tools for creating and disseminating journalistic or quasi-journalistic content at very low cost. And, in conjunction with changing attitudes towards freedom of information, it has pushed vast amounts of data into the public domain, where citizens are able, either independently or through online tools, to make their own analysis of MPs' voting records, for instance.

This divergence between journalism as practised by journalists, and journalism as practised by a very broad range of other actors, has been mirrored by a convergence of traditional media, which has seen newspapers borrowing techniques from broadcasters, and vice-versa.

So the human rights framework does not distinguish the speech rights of the press from those of individual citizens, whilst modern technology enhances the capability of individual citizens to impart and receive information and ideas, and allows new corporate players to enter the newspaper market. For these related reasons, historical definitions of the press are no longer so stable, and claims for newspapers' 'exceptional' status before the law ('the special role to be played by the press in a democracy') are increasingly hard to sustain.

There is, however, one important distinction between the press and the individual citizen – and this is precisely what is most troubling about certain media organisations: their power. Without the power of the press to intimidate governments, it is hard to be confident that, in every case, other speakers or publishers would be able to do so. Individuals do not always have sufficient resources to exercise their rights to the full. Whilst it was the lone campaigner Heather Brooke who spent years using the Freedom of Information Act to cast light on MPs' expenses, it was the Telegraph which eventually published the unredacted information, taken from illegally copied discs. Brooke – who had been subject to numerous legal threats in the course of her campaign – might well have been prosecuted for this breach of the Data Protection Act but the Telegraph published with impunity. Why? Perhaps it was because the government and the Crown Prosecution Service recognised that this publication, whilst painful, was undoubtedly in the public interest. But perhaps also because of the real and rhetorical force of an institution that could turn its dwindling but nonetheless significant firepower against politicians who sought to silence it.

So, whilst the press enjoys a freedom that should be shared with all citizens, it speaks with a voice that is collectively more powerful than the sum of its readers or users. How should the law recognise this difference? With extreme caution. Rather than granting special favours to something called 'the press', which may change beyond recognition within the next decade, this Inquiry should focus on ensuring that the law is capable of protecting freedom of expression, political participation and associated rights such as privacy for all citizens.

The press still acts as a potentially powerful conduit for the fundamental rights to freedom of expression and political participation, but it does so in a rapidly evolving landscape that makes it very hard for journalists, editors or proprietors to argue convincingly that normal rules should not apply to them. The press undoubtedly plays a special role in a democracy (it plays an even more special role in a non-democracy); but this role may now also be played by other actors. Certain 'freedom' requirements certainly need to be in place for this role to be played – but they also need to afford similar protection to these other actors. The law cannot treat newspaper journalists, editors and proprietors more favourably simply because they are responsible for sending vast amounts of paper out into the world on a daily or weekly basis. It can only treat them favourably to the extent that they perform a

useful public service; and to this extent it must also recognise the valuable contribution of non-traditional publishers, through both new and old media.

Summary: *Whilst the press may have a special role in enabling the public to participate in the life of their society, the law governing the press should be the same as the law governing the expression of all citizens.*

Q. Should acting in the public interest be a complete or partial defence in relation to unlawful or unethical activity in pursuit of journalism; and, if so, subject to what conditions?

The public interest should be a partial defence in relation to otherwise unlawful activity that engages the right to freedom of expression, the right to political participation, or other ECHR rights. It should not be a defence for activities such as harassment or intrusion which do not engage these fundamental rights on the part of the defendant. (Unethical activity does not require a legal 'defence'; if an activity has been undertaken with the public interest honestly in mind, it is not unethical.)

The public interest defence recognises the value of publications which enhance the ability of the public to participate in the life of their society. These may include publications relating to politics, the law, business, finance, the environment, international affairs, or other topics on which the public requires access to the widest possible range of information and ideas, on which to make decisions that could affect their lives or the lives of others.

Publications which merely disseminate gossip about private individuals do not come under this level of special protection. However, unless this gossip can be shown to cause serious and substantial harm, it should not be the subject of any legal action. The Joint Scrutiny Committee on the government's draft Defamation Bill has concluded that the threshold for a libel action should be 'serious and substantial' harm. This threshold should be the same in privacy and related actions such as breach of confidence.

Imagine a graph with 'public interest' on one axis and 'harm' on the other. Most newspaper stories would fall into the 'low public interest and low harm' quadrant (features journalism, celebrity interviews and most sports coverage). Some stories would fall into the 'high public interest and low harm' quadrant (parliamentary and political journalism, court reporting, international news, financial news, etc…). A few stories would fall into the 'high public interest and high harm' quadrant (exposés of political corruption, for example, that are clearly in the public interest but may nonetheless destroy a politician's career and damage their private life). And a small number of stories would fall into the 'low public interest and high harm' quadrant

(unjustifiable intrusions into the privacy of victims of crime, or prejudicial court reporting).

The law must be able to distinguish clearly between the latter two categories, to ensure that harmful publications are deterred without simultaneously chilling legitimate public interest journalism. The law should not concern itself with the prevalence of stories with low public interest value that cause little harm. Nor should the law attempt to address the decline in the quantity of high public interest, low harm journalism. It is true that parliamentary coverage in serious newspapers such as The Times and The Guardian has declined by around 95% since the mid-twentieth century. Changes in the tax and charity regime around journalism might enable new players to enter this market, with the public interest firmly in mind, and if Lord Justice Leveson's Inquiry wishes to make recommendations in this area we would be delighted to assist with detailed proposals. However, the question here is about the legal system; and we do not believe that the law can or should seek to promote particular forms of publication.

There are comprehensive definitions of 'public interest' in the BBC's code, in the Guardian's internal code, and in the guidelines published by the Office of the Information Commissioner. These codes describe not only the terms under which a story may be recognised as being of public interest; they also set out the steps that a journalist should take in order to show that they have acted responsibly. These may include notifying the subject of defamatory allegations prior to publication.

Such steps are not always relevant or appropriate to other potential defendants in libel actions. The internet has brought a large amount of specialist writing to wide audiences, leading to legal confusion and miscarriages of justice. We have seen many defendants in libel actions, including scientists, academics, bloggers, novelists, historians, and NGOs, struggling to defend themselves through mechanisms such as the 'Reynolds' defence, which were designed with print journalists in mind.

Human rights law exists to mitigate the otherwise profound imbalance of power between the individual and the state. It should not be abused by newspaper proprietors to justify harmful activities without public value; and it should not be abused by well-known individuals or corporate entities to shield themselves entirely from public scrutiny. There should be a reasonable expectation of privacy, and serious and substantial harm should be caused by the publication in order to launch a successful privacy action. This approach should be used to provide judicial regulation to breaches of privacy in the form of stories and pictures in the press or elsewhere. It should not, however, be used to silence revelations that are made by an individual concerned in a particular set of events – for instance, the memoir of a son or daughter which causes serious and substantial harm to their parent by revealing highly distasteful private habits. To silence such first-hand accounts would be an unwarranted interference with freedom of expression in the interests of

personal fulfilment. Any public interest defence should recognise the special value of first-person publication, whether this is facilitated by a book publisher, a blog or a mass-circulation newspaper.

So the public interest defence should recognise that the public interest may relate differently to different categories of publisher so long as it can be shown that the public, or a significant section of the public, has been enabled to participate in the life of their society as a result of the publication.

Summary: *Publications are in 'the public interest' where they enhance the ability of the public to participate in the life of their society – and this will in certain circumstances outweigh the individual or social harm that they cause.*

Who should be responsible for reaching decisions on whether something is in the public interest, and on what basis?

The balance between harm and public interest is an important element of the law of defamation. Parliament has recently considered the public interest defence (the 'Reynolds' defence) in libel and has recommended that it should be made available to a wider range of publishers than merely journalists. In order to ensure that the public interest is recognised comparably across all relevant areas of law, it would be advisable to convene a parliamentary committee. This need not mean that the same defence would apply in all cases. But a common outline to the public interest defence, with variants in different areas of law, would be valuable to all citizens.

There is an existing recognition of the public interest in freedom of expression in section 12 of the Human Rights Act. This could be amended to recognise that public interest publication is not a unique property of the press, to ensure that scientific, medical, academic or other forms of fictional or non-fictional publication are afforded the same protection, subject to their compliance with any relevant professional or ethical code. Further to this, reforms to the laws of defamation, privacy, confidence, official secrets, data protection, and terrorism could include explicit reference to the public interest defence.

So Parliament should set a clear but flexible framework for defining the public interest, but should then rely upon the courts to interpret this defence sensibly. The enormous problem here is of access to justice. The cost of bringing or defending a libel or privacy action is beyond the reach of most British citizens. Research has shown that the average cost of a libel action in England and Wales is 140 times greater than the European average. The more expensive cases routinely cost more than £500,000.

In order to improve access to justice, and to improve the balance between ECHR Articles 8 and 10, English PEN and Index on Censorship have conducted research into the use of Alternative Dispute Resolution in defamation. Our research has shown that in 96% of cases where it has been used, mediation has been successful in resolving defamation actions. In mediation, the decision is reached by litigants themselves, in a dialogue facilitated by a trained mediator. We recommend that mediation and Early Neutral Evaluation, which allows judges to make a fast preliminary ruling, are made available to all litigants in defamation and privacy actions, and related areas of law that engage ECHR Article 10.

In some complex cases where the public interest is engaged the parties may be unwilling or unable to reach a mutually satisfactory settlement. Furthermore, it may be in the interest of justice for such a case to be heard by a judge. So we recommend that, if the decision not to mediate or settle has been made in good faith, such cases should continue to go before a judge, subject to reforms in the costs regime in order to protect the Convention rights of all parties.

The Press Complaints Commission currently offers a form of mediation, and any future regulator should certainly offer such a service, perhaps outsourced to registered private mediators rather than conducted in-house by a body that is funded by the press. An equally simple service should be available to other citizens whose Article 10 rights have been engaged by a challenge to their publication. In all forums, the definition of public interest relied upon should be defined in law, and then applied coherently, whether the publisher/defendant is a media organisation or a scientist. And it should only be engaged where serious and substantial harm has been shown.

Summary: *In order to ensure that harm and the public interest are balanced fairly and transparently there must be significant improvements in access to justice.*

Conclusion

As stated above, the key points of this submission are as follows:

a. Whilst the press may have a special role in enabling the public to participate in the life of their society, the law governing the press should be the same as the law governing the expression of all citizens.
b. Publications are in 'the public interest' where they enhance the ability of the public to participate in the life of their society – and this will in certain circumstances outweigh the individual or social harm that they cause.
c. In order to ensure that harm and the public interest are balanced fairly and transparently there must be significant improvements in access to justice.

In short: this Inquiry must recognise the complex environment in which newspapers now operate. Its recommendations must allow the full enjoyment of the rights to freedom of expression and political participation by all citizens, not just newspaper proprietors. The Inquiry must take extreme care not to respond to '*such evils of a free press as mendacious publication, deliberate falsehood and distortions of fact for political and personal ends*', that were recognised by PEN in the 1930s, with recommendations that will serve to silence all citizens.

In the first half of 2011, the PEN International case list featured 647 cases of imprisoned and persecuted writers. Lord Justice Leveson's inquiry should be informed by this international context, for his recommendations will undoubtedly be followed closely by governments around the world. The South African government has already used the apparent failure of self-regulation in the United Kingdom to justify its new information law. The Chinese government has supported our Prime Minister's condemnation of social media as an endorsement of its own practice of online surveillance. If this inquiry fails to recognise the fundamental importance of freedom of expression and political participation, not only in democracies, but in every society, it may obstruct the advancement of human rights globally.

English PEN intends to make at least one further submission to the Leveson Inquiry setting out detailed proposals for a future regulatory regime for the British press. However, we would be happy to contribute to the Inquiry at any point. In particular, we would be delighted to facilitate submissions to the Inquiry by international authors, journalists and others with direct experience of these issues.

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