The Leveson Inquiry

culture, practices and ethics of the press

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

REPORT

The Right Honourable Lord Justice Leveson

November 2012

4 volumes not to be sold separately
Volume III

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

The Right Honourable Lord Justice Leveson

November 2012

Volume III

Presented to Parliament pursuant to Section 26 of the Inquiries Act 2005

Ordered by the House of Commons to be printed on 29 November 2012

HC 780-III London: The Stationery Office £250.00

4 volumes not to be sold separately

Any enquiries regarding this publication should be sent to us at generalenquiries@levesoninquiry.org.uk

This publication is available for download at www.official-documents.gov.uk

ISBN: 9780102981063

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P002525215 11/12 22930 19585

Printed on paper containing 75% recycled fibre content minimum.

CONTENTS

Volume I

Page

PART A: THE INQUIRY **1**

Chapter 1: The Announcement **3**

1 Introduction 3
2 Role of the Assessors 6
3 Visits 9

Chapter 2: The approach **10**

1 Setting up and preliminaries 10
2 The gathering and presentation of evidence 19
3 Challenging the evidence 31
4 Other material 35
5 Submissions 36
6 Engagement with the public: the website 37

Chapter 3: Further issues of law **38**

1 Rule 13 of the Inquiry Rules 2006: the approach 38
2 Rule 13 of the Inquiry Rules 2006: the practice 42
3 The nature and standard of proof 43

Chapter 4: The Report **49**

1 Scope 49
2 Purpose 49
3 Timing and content 50

PART B: THE PRESS AND THE PUBLIC INTEREST **53**

Chapter 1: Introduction **55**

Chapter 2: The freedom of the press and democracy **56**

1 Context 56
2 A brief history of press freedom in the United Kingdom 58
3 The importance of a free press: free communication 61
4 The importance of a free press: public debate and holding power to account 63
5 Press freedom within the rule of law and the role of statute 65
6 The protection of sources and other legal privileges of the press 68

Chapter 3: Competing public interests **69**

1 Context 69
2 Freedom of expression 71
3 Personal autonomy and civil liberties 73
4 Other public goods 75

Chapter 4: The responsibilities of the press 76

1 Context 76
2 Press power and the impact on society 76
3 Communication: truth, comment and 'assessability' 78
4 Press ethics and the role of a code of ethics 81

PART C: THE PRESS 91

Chapter 1: Context 93

1 Introduction 93
2 Commercial pressure on the press 93

Chapter 2: The press: history, governance structures and finances 99

1 Introduction 99
2 News Corporation 99
3 Associated Newspapers Ltd 114
4 Northern and Shell Media Group Ltd 120
5 Trinity Mirror plc 125
6 The Telegraph Media Group 130
7 The Guardian Media Group 134
8 The Independent Group 139
9 The Financial Times 145
10 The regional press 148
11 Magazines and periodicals 152

Chapter 3: Alternative news providers 156

1 Introduction 156
2 Broadcasters 156
3 The World Wide Web 164
4 Blogs and other web-based commentary 168
5 Social networking sites 173
6 Other providers 176
7 Enforcement 177
8 Press photographers 179

Chapter 4: Plurality 180

1 What is plurality and why does it matter? 180
2 Approaches to securing plurality 181
3 The history of media ownership rules in the UK from the 1990s 183
4 History of the newspaper ownership regime 190

PART D: STANDARDS 193

Chapter 1: The historical background 195

1 Introduction 195
2 The Royal Commission into the Press 1947 196
3 The Royal Commission of 1962 and the Younger Committee into privacy 200
4 The Royal Commission of 1974 203
5 The first Report of Sir David Calcutt QC 205
6 The second Report of Sir David Calcutt QC 210
7 The death of Diana, Princess of Wales 214
8 Conclusions 216

Chapter 2: Self-regulation of the press 219

1 Introduction 219
2 The establishment of the PCC 219
3 Current powers, operation and standards 221
4 PressBoF 228
5 Benefits of self-regulation 235
6 Anti-harassment policy 236
7 Complaints 241

PART E: CROSSING LEGAL BOUNDARIES: THE CRIMINAL AND CIVIL LAW 247

Chapter 1: The legal framework 249

Chapter 2: Police investigations start 251

1 Operation Reproof 251
2 Operation Glade 251

Chapter 3: Operation Motorman 257

1 Introduction 257
2 The genesis of Operation Motorman 257
3 The search 258
4 Prosecutions arising from Operation Motorman 264
5 Publication of Parliamentary Reports in 2006 265
6 Conclusions 268

Chapter 4: Phone hacking: the expanding impact of Operation Caryatid 270

1 Introduction 270
2 The collection of evidence 273
3 The prosecution strategy 294
4 The outcome to the prosecution 307
5 Subsequent operational decisions 308
6 Police strategy for the aftermath 325

7 The reaction of the News of the World 337
8 July 2009: The Guardian 350
9 September 2010: The New York Times 401
10 December 2010: The Guardian article and the aftermath 408
11 The past unravels 412
12 Conclusions: the police and the CPS 425

Chapter 5: A new approach to the allegations 421
1 Police Inquiries: Operations Weeting, Elveden and Tuleta 421
2 The Management and Standards Committee 424

Volume II

PART F: THE CULTURE, PRACTICES AND ETHICS OF THE PRESS: THE PRESS AND THE PUBLIC 437

Chapter 1: Introduction 439
1 Overview 439
2 Module One and the Terms of Reference 440
3 Evidence in Module One of the Inquiry 442
4 The structure of Part F of the Report 449

Chapter 2: Good practice 451
1 The value and virtues of the UK press 451
2 Some case studies 454

Chapter 3: Complaints of an unethical press 471
1 Overview 471
2 The complaints 473
3 The harm 483

Chapter 4: Some practices at the News of the World 493
1 Introduction 493
2 Influence on culture at the News of the World 494
3 Attitude towards individuals 504
4 Intrusion 509
5 Investigative journalism 526
6 Approach to compliance 528
7 Credibility of witnesses 537

Chapter 5: Some case studies 539
1 Introduction 539
2 The Dowlers 542
3 Kate and Gerry McCann 547
4 Christopher Jefferies 558

5 The Rt Hon Gordon Brown MP and his son's illness 564
6 Hugh Grant and 'the mendacious smear' 572
7 Sebastian Bowles 576
8 Recent events: Royal photographs 579

Chapter 6: Criticisms of the culture, practices and ethics of the press 592
1 Introduction 592
2 Lack of respect for privacy and dignity 593
3 Unlawful or unethical acquisition of private information 610
4 Breach of confidence and misuse of confidential and/or sensitive information 640
5 Harassment 645
6 Intrusion into grief and shock 655
7 Treatment of children 658
8 Representation of women and minorities 660
9 Inaccuracy 673
10 Financial controls and payments for stories 694
11 Treatment of critics 704
12 Complaints handling 709

Chapter 7: Conclusion 717
1 Introduction 717
2 Possible causes 719
3 The relevance of the internet 736
4 The press response to this Inquiry 737

PART G: THE PRESS AND THE POLICE: THE RELATIONSHIP 741

Chapter 1: Policing with Consent: the role of the press 743
1 Introduction 743
2 The purpose of the relationship and public confidence 745
3 Tensions in the relationship between the media and the police 748

Chapter 2: The History of the Relationship: Different Approaches 751
1 Metropolitan Police Service: the Commissioners 751
2 Other police forces 756
3 Press departments 763

Chapter 3: Press and the Police: the harm and the response 780
1 Introduction 780
2 The use and abuse of information 780
3 Entertainment: an overview 830
4 The perception of influence 851
5 The problems of friendship 898
6 Calibrating the harm: the views of Commissioners 928

7 The question of corruption 933
8 Independent Police Complaints Commission (IPCC) 943
9 HMIC report: 'Without Fear or Favour' 948
10 Elizabeth Filkin's review of the relationship between the MPs and the media 960
11 Association of Chief Police Officers (ACPO) 966

Chapter 4: The press and the police: conclusions and recommendations 980
1 Introduction 980
2 Tip offs 983
3 Involvement of the press on operations 984
4 Off-the-record briefings 985
5 Leaks of information 987
6 Gifts, hospitality and entertainment 988
7 Media employment 990
8 Corruption, whistleblowing and related matters 991
9 Conclusion 994

Volume III

PART H: THE PRESS AND DATA PROTECTION 997

Chapter 1: Introduction 999
1 Background 999
2 The ICO: structure, governance and approach 1000

Chapter 2: Operation Motorman 1003
1 The investigation 1003
2 The ICO response: leadership 1008
3 The approach to the PCC 1011
4 *What Price Privacy?* The political campaign 1020
5 *What Price Privacy?* The reaction of the PCC and the editors 1025

Chapter 3: Other possible regulatory options 1031
1 Criminal proceedings in respect of journalists 1033
2 The use of regulatory powers 1040
3 Engagement with the industry: guidance and promoting good practice 1042
4 Engagement with victims 1045
5 Conclusions and the questions raised by Operation Motorman 1050

Chapter 4: The ICO and the press today 1054
1 Introduction 1054
2 Personal information privacy and press practices 1056
3 Following up Operation Motorman 1058

4 Following up the political campaign 1058
5 Phone hacking and the ICO 1059

Chapter 5: Issues about the legal framework 1062
1 The current views of the ICO 1062
2 A different perspective on the legal framework 1065

Chapter 6: The relationship: the ICO and the press 1097
1 "Too big for us?" 1097
2 The struggle for a profile: political campaigning and the power of the press 1104
3 Independent regulation of the press: lessons learned 1106
4 Powers, governance and capability of the ICO: reflections of the future 1108

Chapter 7: Summary of Recommendations 1111

PART I: THE PRESS AND POLITICIANS 1115

Chapter 1: Introduction 1117

Chapter 2: The Conservative years 1121
1 Prime Minister Thatcher: 1979-1990 1121
2 Prime Minister Major: 1990-1997 1126

Chapter 3: New Labour 1134
1 The 1992 general election 1134
2 The 1997 general election 1139
3 Prime Minister Blair: 1997-2007 1143
4 Prime Minister Brown: 2007-2010 1150
5 Political news management 1155

Chapter 4: The Conservative revival and the coalition 1164
1 Introduction and background 1164
2 Mr Cameron's relations with the press whilst Leader of the Opposition 1165
3 Prime Minister Cameron: 2010-present 1209
4 Reflections 1231

Chapter 5: Media policy: examples from recent history 1233
1 Purchase of The Times and The Sunday Times 1233
2 Response to the reports of Sir David Calcutt QC 1246
3 Human Rights Act 1998 1262
4 Data Protection Act 1998 1270
5 Communications Act 2003 1278

Chapter 6: Media policy: The BSkyB bid 1299
1 Introduction 1299
2 The plurality test and quasi-judicial procedure 1303

3 June 2010 – December 2010: The Rt Hon Dr Vince Cable MP and the Department for Business, Innovation and Skills 1309
4 21 December 2010: Dr Cable's comments and the transfer of function 1335
5 December 2010 – July 2011: The Rt Hon Jeremy Hunt and the Department for Culture, Media and Sport 1351
6 News Corp and the Rt Hon Alex Salmond MSP 1407

Chapter 7: Further political perspectives on relationships with the press 1414
1 Introduction 1414
2 The Deputy Prime Minister, the Rt Hon Nick Clegg MP 1414
3 The Leader of the Opposition, the Rt Hon Ed Miliband MP 1416
4 The First Minister of Scotland, the Rt Hon Alex Salmond MSP 1418
5 The Rt Hon Kenneth Clarke QC MP 1423
6 The Rt Hon Michael Gove MP 1425
7 The Rt Hon George Osborne MP 1427

Chapter 8: Conclusions and Recommendations 1428
1 Introduction 1428
2 The proprietors 1430
3 'Too close' a relationship 1438
4 Existing regulatory framework 1446
5 Recommendations for future relations between politicians and the press 1451

Chapter 9: Plurality and media ownership: conclusions and recommendations 1461
1 Introduction 1461
2 Scope 1462
3 Measuring plurality 1465
4 Limits and remedies 1466
5 What should trigger a review? 1471
6 Who should be responsible for the decisions? 1473

Volume IV

PART J : ASPECTS OF REGULATION: THE LAW AND THE PRESS COMPLAINTS COMMISSION 1477

Chapter 1: Introduction 1479

Chapter 2: The criminal law 1480
1 Introduction 1480
2 The investigation of crime: complaints to the police 1482
3 The Investigation of crime: gathering evidence 1485
4 A failure of policing 1486
5 Police resources 1488

6 Public interest: a defence to crime 1489
7 Public interest: the decision to prosecute 1491
8 Public interest: other safeguards in the criminal process 1494
9 The future 1496

Chapter 3: The civil law 1499
1 Introduction 1499
2 Civil proceedings: the present risk of litigation 1499
3 Litigation against the press 1504
4 The substantive civil law 1508
5 Damages 1508
6 Costs 1512

Chapter 4: The Press Complaints Commission and its effectiveness 1515
1 Introduction 1515
2 What the PCC did well 1518
3 Independence from the industry 1520
4 The alignment with industry 1530
5 The PCC as regulator 1541
6 Structural problems with the PCC 1544
7 Investigatory failures 1561
8 Conclusions 1576

PART K: REGULATORY MODELS FOR THE FUTURE 1581

Chapter 1: Criteria for a regulatory solution 1583
1 Introduction 1583
2 Effectiveness 1584
3 Fairness and objectivity of standards 1588
4 Independence and transparency of enforcement and compliance 1590
5 Powers and remedies 1591
6 Cost 1593
7 Accountability 1594

Chapter 2: The self-regulatory model proposed by the PCC and PressBoF 1595
1 Industry acceptance of the need for reform 1595
2 The proposal: overview 1596
3 Governance and structures 1597
4 Complaints 1601
5 Standards and compliance 1603
6 Potential for growth 1608
7 Funding 1609
8 The Code and the Code Committee 1610

9 The Industry Funding Body 1610
10 Incentives to membership 1611

Chapter 3: Analysis of the model proposed by the PCC and PressBoF 1614

1 Introduction 1614
2 Effectiveness 1614
3 Fairness and objectivity of standards 1623
4 Independence and transparency of enforcement and compliance 1625
5 Powers and remedies 1632
6 Cost 1638
7 Response of editors and proprietors to the PCC and PressBoF proposals 1641
8 Summary and conclusions 1648

Chapter 4: Other proposals submitted to the Inquiry 1651

1 Introduction 1651
2 A new regulatory body 1651
3 Functions and structures 1651
4 Should coverage be voluntary or mandatory? 1655
5 Incentives for membership 1659
6 Statutory recognition 1671
7 Statutory provision 1673
8 The Code 1680
9 Complaint handling 1686
10 Remedies and redress 1692
11 Sanctions 1694
12 Dispute resolution 1696
13 The role of the courts 1698
14 Costs and funding 1699
15 Protection and promotion of freedom of expression 1703
16 Protection of journalists 1705

Chapter 5: International comparators 1708

1 The Press Council of Ireland and the Press Ombudsman 1708
2 Other models of press regulation: Europe and beyond 1717
3 Review of press regulation: Australia and New Zealand 1727

Chapter 6: Techniques of regulation 1734

1 Introduction 1734
2 Regulatory options 1734
3 Regulatory tools 1742

Chapter 7: Conclusions and recommendations for future regulation of the press 1748

1 Introduction 1748
2 Options put forward 1750
3 A new system must include everyone 1751
4 Voluntary independent self-regulation 1758
5 Encouraging membership 1769
6 Giving effect to the incentives 1771
7 Summary of recommendations 1781

Chapter 8: The alternatives 1783

1 The issue 1783
2 The questions 1783
3 What standards should be complied with? 1784
4 What consequences should apply for breach? 1786
5 How should any consequences be applied? 1788
6 To whom should any provision apply? 1790
7 My views 1793

Chapter 9: Recommendations for a self-regulatory body 1795

1 Introduction 1795
2 Recommendations to a new regulatory body 1795

PART L: SUMMARY OF RECOMMENDATIONS 1801

APPENDICES 1819

Appendix 1: Counsel to the Inquiry and the Inquiry Team 1821
Appendix 2: Submissions and correspondence statistics 1823
Appendix 3: Witnesses to the Inquiry 1827
Appendix 4: Legal materials 1843
Appendix 5: Evidence relevant to the generic conclusions on the relationship between politicians and the press: Part I, Chapter 8 1955
Appendix 6: Bibliography 1985

PART H

THE PRESS AND DATA PROTECTION

CHAPTER 1
INTRODUCTION

1. Background

1.1 As part of an inquiry into the culture, practices and ethics of the press, the Terms of Reference extend to a consideration of the extent to which the current policy and regulatory framework has failed, including in relation to data protection. It also requires a review of the extent to which there was a failure to act on previous warnings of media misconduct which undeniably includes the performance of the data protection regime. Data protection, with its origins in European and international law, is currently contained in the Data Protection Act 1998 (DPA) and is summarised elsewhere in the Report.[1]

1.2 The UK data protection regime suffers from an unenviable reputation, perhaps not wholly merited, but nevertheless important to understand at the outset. To say that it is little known or understood by the public, regarded as a regulatory inconvenience in the business world, and viewed as marginal and technical among legal practitioners (including by our higher courts), might be regarded as a little unfair by the more well-informed, but is perhaps not so far from the truth. And yet the subject-matter of the data protection regime, how personal information about individuals is acquired, used and traded for business purposes, could hardly be more fundamental to issues of personal integrity, particularly in a world of ever-accelerating information technology capability, nor, on the face of it, more central to the concerns of this Inquiry.

1.3 It has the following features:

(a) The law identifies broad principles requiring businesses acquiring and using personal information to do so lawfully, fairly, accurately, for specific purposes and to the limited extent necessary for those purposes; the information must be kept safely and individuals have legally enforceable rights to know what information is held about them, to see it, and to ensure that it is accurate.

(b) There are a number of specific exceptions to those rights and principles, including exemptions designed to balance those rights with other individual rights, such as freedom of expression, and other public interests such as crime prevention.

(c) The regime (along with the regime for freedom of information) is the responsibility of the Information Commissioner who has statutory power to investigate and rule on breaches, and enforce compliance (including by court action and prosecution). The Commissioner also has a wide-ranging function to promote awareness, compliance, and good practice over and above the basic legal requirements, including by education, guidance, publications and reporting to Parliament.

1.4 Successive Information Commissioners have worked hard and tirelessly to raise the profile of data protection within businesses, and to support public awareness, including by tackling 'myths' and unnecessarily risk-averse behaviour, and promoting straightforward and common-sense business practices.

1.5 The Information Commissioner operates through an office (the ICO) and it was in the execution of these responsibilities that the ICO became involved in Operation Motorman. The public

[1] Appendix 4

facing narrative is described as part of the history[2] in this Report but the way in which the ICO considered it appropriate to discharge its functions is far more complex than that narrative reveals. Having uncovered what appeared to be extensive unlawful or unethical practices of the press in the acquisition and subsequent use of private personal information from corrupt officials and private sector employees and through the medium of unscrupulous third-party 'blaggers', a regulatory response was essential. How these challenges were approached, the political campaign that has followed and the extent to which insights can be learnt for the future is at the heart of this Chapter.

1.6 Also looking to the future, it is appropriate to move from a consideration of the specific to consider the way in which the ICO operates in relation to the press and, in particular, to review the relevant parts of the legal framework along with its powers and governance.

1.7 Different parts of this Report have dealt with single systems. In relation to the activities of the press, the focus has been on the operation of the criminal law and the approach of the Press Complaints Commission (PCC) to press conduct. The relationship between the press and the police has been examined through the operational decisions of the police and their interaction with the press. For politicians, the issue has been the different dynamics of the way in which they react with the press and the extent of any impact on public life. For the ICO, all these different elements are engaged. This part of the Report deals with the criminal law, the regulatory regime of the ICO and the way in which it sought to engage the PCC, other regulatory options open to the ICO, and the political sphere (in relation to the amendment to the DPA). It is thus somewhat more complex and, given the wide ranging recommendations about the operation of this statutory regulator with an extensive remit, has required a greater degree of analysis than other aspects of the Report: to that extent it is also different in approach.

1.8 Having been directed by the Terms of Reference to consider the press and the data protection regime together, I have been conscious that the Report would be addressing matters relatively little noticed or debated in the public discussion of the Inquiry.[3] I am also conscious that this subject matter has had relatively little scrutiny more generally. In this respect, as with many independent public inquiries, the task is to shine a light on an unfamiliar landscape. It is worth emphasising because so much of the rest of the material considered in this Report has been extremely fully ventilated, including editorially, as the Inquiry has gone along. The extent to which the relevance of data protection is and has been minimised is part of the background to this Part of the Report, as is the question of some of the reasons and motivations for it. I am also conscious that the discussion of this relatively unfamiliar territory throws aspects of it into relief in a way which may be a matter of surprise even to those more familiar with it. A fresh and independent perspective, by definition, is an opportunity for a different way of looking at things and perhaps of questioning some assumptions.

2. The ICO: structure, governance and approach

2.1 The Information Commissioner is a 'corporation sole' appointed by Her Majesty The Queen and independent of Government who (like the senior judiciary) can only be dismissed pursuant to an Address from both Houses of Parliament. He is funded by fees and grant-in-

[2] Part E, Chapter 3

[3] Although the evidence from the two Information Commissioners and two members of staff was heard over a comparatively short time (occupying one full day and less than three half days) the ripples flowing from Operation Motorman were felt throughout the Inquiry and were the subject both of evidence and legal argument. Detailed and comprehensive expert evidence was also called. The extent of this analysis has meant that particular care has been taken to address subsequent submissions by the two Commissioners which dealt with more wide ranging considerations

aid voted by Parliament and supported through the Lord Chancellor and Ministry of Justice. Operationally independent, the full functions of the Office are exercised personally though the office holder who appoints staff who work by direct delegation from him. Between 2002 and 2009, the Commissioner was Richard Thomas, a solicitor by training. He was based in offices in Wilmslow and had two deputies and the office now has over 300 staff (including lawyers and investigators). The operational investigations department reported to him via one of the Deputies. Francis Aldhouse, also a solicitor, fulfilled this Deputy role from 1984 (in the precursor organisations) until his retirement in 2006.

2.2 Mr Thomas described his approach in this way:[4]

(a) As an overview, his role was "*partly a regulator, partly an ombudsman, partly an educator and partly a policy adviser*" the cornerstone being the duty to promote good practice including, *but not limited to*, compliance with the minimum legal obligations under the regime.[5]

(b) The ICO was *"primarily* not *a prosecuting authority. That was almost on the side"*.[6] The main formal power in the event of non-compliance was the 'enforcement notice', which could specify and require compliance action subject to the back-up sanctions of court enforcement, although this was not frequently used.

(c) The principal power of investigation was the ability to serve an 'information notice' on an organisation to ascertain whether it was complying with the regime. This also was 'very, very rarely' used because, in most cases, asking a business to co-operate and supply information usually sufficed.

(d) Prosecution powers were limited to s55 of the DPA and did not extend, for example, to other offences such as phone hacking (although this might also technically involve a s55 DPA breach).

(e) Mr Thomas linked the application of the statutory 'public interest' defence provided by s55 to the core function of the ICO in freedom of information, in virtually every difficult case, in balancing public interest considerations for and against disclosure (on which it had published a great deal of guidance).[7]

2.3 Mr Thomas did not regard the ICO as *"a regulator of the press as such"* although the data protection regime applied to each media organisation which, therefore, was regulated and fee paying. He considered the exemption contained in s32 DPA (covering personal information being used for the 'special purposes' of journalism, literature or art) as severely circumscribing and limiting the powers of the ICO in relation to the press, disapplying most of its enforcement powers where data is used for journalistic purposes while at the same time being 'incredibly complicated'. He had rarely had to engage with the issue (because it 'didn't arise') and did not consider it particularly relevant to the Inquiry.[8] He considered that any journalist seeking to rely on the 'public interest' provision to disapply s55 would be expected

[4] p5 onwards, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[5] p75, Richard Thomas, *ibid*
[6] p75, line 13, Richard Thomas, *ibid*, emphasis added. Mr Thomas suggested, however, that s55 of the DPA which founded the prosecution powers was most likely to be the most relevant provision of the regime to the terms of reference: p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[7] p53, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[8] When questioned by Mr Rhodri Davies QC for NI, Mr Thomas was reluctant to attempt a definitive explanation of s32: p75, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

to be very scrupulous about checking and recording the aspects of the public interest on which he or she was proposing to rely, in order to be able to take any available advantage of that provision.

2.4 From this short summary, it appeared that the ICO relied, in the main, on an informal means of doing business. That is usual regulatory practice. The 'cornerstone' function of promoting good practice was largely discharged through co-operation with and encouragement of businesses; although little touched on in evidence, it appears that this was also the case with the ICO's complaint resolution or ombudsman function. It was not an organisation by its own account which regularly used its principal legal powers; prosecutions, in particular, were not its main business, but neither, it would appear, was direct regulatory enforcement. The main concern was prevention of poor practice and promotion of good practice. The Inquiry explored the extent to which the ICO was familiar with the press as an industry dealing in personal information, and with the specific aspects of the data protection regime applying to the press, and how it saw its role in relation to commercial journalism.

CHAPTER 2
OPERATION MOTORMAN

1. The investigation

1.1 The background and history of Operation Motorman is fully described above[1] and does not need repetition. When Alex Owens[2] attended the search in Operation Reproof, he was well aware that the data protection regime fastens on the acquisition, use and disclosure of personal data by public authorities under compulsive powers. As well as the application of the criminal law, the principles and rights of the regime are designed to ensure that individual civil liberties are respected and safeguarded when individuals' personal information is taken into the hands of public bodies, and that public bodies are strictly limited in terms of what can be done with that information and who can see it. Thus, although the focus of the police was the question of the corruption of public officials entrusted with people's confidential information, the primary interest of the Information Commissioner's Office (ICO) was the information itself, and the consequences of the unlawful access and disclosure for the people whose information it was and for the organisation whose responsibility it was to take care of it.

1.2 Having identified Steve Whittamore as a self-employed private detective who had been requesting details from the DVLA in relation to a protected vehicle registration number, the ICO undertook the initiative to obtain a search warrant under its own powers. When it was executed, what was seized (over five-six hours) came to be referred to within the office as a 'treasure trove' or Aladdin's cave in the form of a substantial quantity of documentation together with four colour-coded notebooks ('the Motorman material'). These contained a very large amount of personal information, evidently acquired without the knowledge or consent of the people in question.

1.3 Mr Owens was concerned about a number of features. First was the sheer quantity of the information and how extensive and specific it was. Second, there was the fact that it appeared to have been obtained in the course of an investigative business spanning a period of years and earning considerable sums. Third, the evidence suggested that the material had been specifically requested and paid for by journalists writing for a significant range of newspapers and periodicals and related to a large number of well-known people (or those close to them), including household names from the world of entertainment, sport, politics and other arenas of public life. Finally, Mr Owens was struck by the nature of the information, including personal details from restricted databases, clearly obtained in ways which were inconsistent with good data protection practice, with the legal rights and principles set down in the data protection regime, and even in some cases with the criminal law. During the course of the search Mr Whittamore was present and although not formally interviewed, Mr Owens reported (albeit speculatively) that:[3]

> *"Whittamore made it very [clear] to me that whilst he would admit to his own wrong doing, under no circumstances would he say anything which would incriminate any*

[1] Part E, Chapter 3

[2] Mr Owens was the senior investigating officer in the ICO having previously spent 30 years as a police officer reaching the rank of Detective Inspector. He described having *"special responsibility for the investigation of high profile or complicated investigations relating to breaches of the [then] new [Data Protection] Act."*: p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

[3] pp4-5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

member of the press. I was undecided as to whether this was because he feared the press or whether he anticipated some financial recompense in return for his silence."

1.4 Mr Owens reported back to the senior management, briefing both Mr Thomas and Mr Aldhouse. There are different recollections of discussions about the future handling of the material (which are discussed below). In the meantime, he began the laborious task of sifting the material and arranging for it to be placed on an electronic database. Although the lead came from a criminal investigation, the data protection aspects were apparent to the ICO with the 'treasure trove' they came upon taking them into a dimension of data misuse going far wider than specific issues of corruption which concerned the police. In fact, it appeared that the ICO had come upon an organised and systemic disregard for the data protection regime of a scale, duration and seriousness going beyond poor practice, beyond breach of the principles and rights of the regime, and into the realms of criminality in its own right.

1.5 There was thus no doubt that the ICO, through Mr Owens, was preparing the Motorman material to form the basis of a prosecution under s55 DPA: they planned to prepare some 25-30 of the more egregious cases for detailed investigation and selective interviews in order to found specimen charges against a number of persons who could include (a) corrupt officials and employees who were providing the information to Mr Whittamore directly for money; (b) blaggers, who were obtaining the information for him by deceit; and (c) the press, who were commissioning (or 'procuring' in the language of s55) the information in the first place. In that regard, counsel subsequently advised:[4]

"Having regard to the sustained and serious nature of the journalistic involvement in the overall picture, there can be little doubt that many, perhaps all, of the journalists have committed offences.

The inference, overwhelming it seems to me, is that several editors must have been well aware of what their staff were up to and therefore party to it."

1.6 When it came to Operation Motorman, Mr Aldhouse had responsibilities which included providing direction to the head of investigations at the time (and so was formally answerable to Mr Thomas for the conduct of Operation Motorman). He said that it was not his role to direct investigations himself; rather, he had to supervise the person running the investigations department.[5] His own focus was on policy work, not least on the significant European dimension to data protection, which often took him to Brussels.

1.7 Asked specifically about the operational issues which the discovery of the Motorman material raised for the ICO, Mr Aldhouse had no recollection of when he first heard about the case, nor of any internal meetings to discuss it (including those meetings at which the investigator Alex Owens alleged that decisive policy positions on the operational conduct of Motorman were taken by senior management). Mr Aldhouse himself said he never looked at the original Motorman material, nor the legal advice obtained by the office about it. When asked by Counsel to the Inquiry whether there was anything in the office at the time which was as big or as important as Operation Motorman, Mr Aldhouse accepted that, from an operational investigations point of view, it probably was the largest investigation.[6] However, he firmly

[4] p32, lines 1-25, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[5] p39, lines 20-23, Francis Aldhouse, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[6] pp41-42, lines 25-3, Francis Aldhouse, *ibid*

maintained a position of non-involvement and, hence, non-accountability. That exchange included this:[7]

> *Q: "I think all I'm gently suggesting, Mr Aldhouse, is this - and it's probably fairly obvious now: we have possibly the most important investigation involving your office, Operation Motorman. It has very serious ramifications. It was clearly being ramped up at this stage. Mr Thomas had it in mind to make a report to Parliament shortly afterwards and he did. Surely you were involved, even in informal discussions with Mr Thomas, as to the direction your office was taking, weren't you?*
>
> *A: "Well, I think they would only have been casual ones..."*

1.8 These answers were consistent with his brief witness statement which suggested little in the way of senior oversight of operational matters at all. He said:[8]

> *"I am unable to comment on the detailed history of the Operation Motorman inquiry in the direction of which I was not involved. I believe that the investigators conducted the matter together with the Commissioner's lawyers....I regret that because of my limited role in the Operation I am unable to help the Inquiry further."*

1.9 Mr Aldhouse was also asked about the senior structure in the ICO. He described a 'management team' comprising the Commissioner, two Deputies, a handful of Assistant Commissioners: 'perhaps ten or a dozen very senior people'[9]. But this team does not seem to have been engaged in any decision-making about the Motorman case, either operationally or strategically. Was it not surprising that neither the responsible Deputy personally, nor the organisation's senior management team, was consulted or engaged? Mr Aldhouse's response was:[10]

> *"Am I surprised? I'm disappointed. Not necessarily surprised. ... well, yes, I'm sure in retrospect it would have been - one could well say: wasn't this big enough for the whole of the management team to be involved? ... I certainly had views, anyway, yes."*

1.10 As will be clear, despite being organisationally and functionally responsible for the investigations team, Mr Aldhouse placed himself at a considerable distance even from personal knowledge of the Motorman material. As Mr Thomas put it, with what appears to be a degree of understatement, *"Francis was somewhat disengaged on these matters."*[11] Mr Thomas himself, however, appeared to have grasped the implications, appreciated that it was very serious and congratulated Mr Owens and the team.[12] He explained that, in what was the first year of his appointment:[13]

H

[7] p49, lines 11-21, Francis Aldhouse, *ibid*
[8] p2, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Francis-Aldhouse.pdf
[9] p33, line 13, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[10] pp55-56, Francis Aldhouse, www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[11] p30, lines 5-6, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[12] pp30-32, *ibid*; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf
[13] pp4-5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf It is, perhaps, worthy of note that Mr Thomas appears to focus on the profile of s55 DPA rather than the underlying issue of the practices of the press

> *"I was told about a "treasure trove" of evidence which the team had obtained under a search warrant as part of 'Operation Motorman' … There was a feeling that the material was of sufficient quality and quantity to make this a major case which would bring home the seriousness of the [s55] offence."*

1.11 The assessment made by Mr Thomas of the Motorman material was that he saw it as "*hard prima facie evidence ... of offences*",[14] on a scale that could hardly have been greater for the data protection regime. He said:[15]

> *"So my understanding, I think, remains the case that this was a far more serious matter than a breach of section 55."*

1.12 Specifically, Mr Thomas apprehended that it was likely that that the journalists' involvement in the acquisition and use of this information took them within the sphere of conduct so seriously at fault as to be *prima facie* criminal. Criminal conduct by journalists was the ICO's 'very, very strong hypothesis'. This understanding was tested during his evidence,[16] from which it appears that the following aspects of the Motorman material were particularly striking:

(a) Some of the material from the protected public databases could not have been obtained by lawful means at all, and appeared very likely to have breached specific statutory bars on disclosure.

(b) It was known that Mr Whittamore did have corrupt sources in both the public and private sectors: these had been identified.

(c) The pricing structure for the commissions was indicative of criminality because they were either too low to suggest that it had been obtained lawfully (because of the effort and time which would have been involved) or high enough positively to suggest a premium relating either to incentivising legal risk or corruption (with some cases, concerning very well known individuals) involving very large sums.

(d) The circumstances suggested that it was highly likely that the journalists were knowing or reckless as to the unlawfulness of the means by which the commissioned material was acquired and that, on the face of it, it was unlikely that the s55 defence relating to the public interest would be available in the generality of cases.

1.13 It must, of course, be appreciated that criminal proceedings are complex to mount and involve a high standard of proof but, quite apart from criminality, Mr Thomas understood that serious questions were raised by the Motorman material and there were causes for real concern. In his fifth witness statement, he outlined the way in which the ICO had classified the 13,343 transactions recorded as follows:[17]

> *"(a) 5,025 identified 'as transactions that were (of a type) actively investigated in the Motorman enquiry and ....positively known to constitute a breach of the DPA 1998.'*
>
> *(b) A further 6,330 representing 'transactions that are thought to have been information obtained from telephone service providers and are likely breaches of the DPA. However, the nature of these is not fully understood and it is for this reason that they are considered to be probable illicit transactions'.*

[14] pp79-80, lines 25-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[15] p84, lines 23-25, Richard Thomas, *ibid*
[16] pp93-109, Richard Thomas, *ibid*
[17] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fifth-Witness-Statement-of-Richard-Thomas-CBE.pdf

(c) The balance of 1988 lacking sufficient identification and/or understanding of their nature to determine whether they represent illicit transactions or otherwise."

1.14 Mr Thomas then put the matter in this way:[18]

"The classification of the transactions related to the apparent commission of offences … But I suggest that there must be at the very least ethical questions where a journalist is the regular customer of an investigator who commits an offence to obtain the information, whether or not the journalist has also committed a procuring offence in relation to that transaction. Such ethical questions are even more pertinent where … the investigator could obtain the information "more quickly and reliably than they [the journalists] were able to", at least some of the information was of a confidential nature and Mr Whittamore was pressing to sell other pieces of information obtained for other clients."

1.15 Mr Thomas was in no doubt that a significant proportion of the Motorman material did indeed constitute evidence of criminality, particularly in contravening specific bars on the disclosure of material from databases under the control of public authorities. As for the possibility of a defence under s55 DPA, he said, for example, that *"I haven't seen a whiff of public interest. It was tittle-tattle. It was fishing. There may be one or two examples, but they would be exceptional."*[19]

1.16 He also made two further points. First, the theoretical availability of material by lawful and fair means did not by itself render innocuous the acquisition of material by other means which did, in fact, constitute breaches of the data protection regime. Secondly, at the very least, most of the material in question was not reasonably to be regarded as in the public domain, and therefore had a quality of confidentiality.

1.17 I have no doubt that this analysis is both important and valid. It was for that reason that I took the view that it was both appropriate and correct that Mr Owens should produce the Motorman material to the Inquiry but that (given the privacy of those whose records had been mined), it should be seen by the core participants under strict confidentiality and should remain in redacted form.[20] Having said that, I summarised the effect of the evidence in this way:[21]

"It's abundantly clear, looking at the electronic records, which you've checked against the actual documents, that Mr Whittamore had collected together a vast amount of personal data. The documents identify the names of titles and specific journalists at the titles apparently or inferentially making the request. It identifies the names of people from a wide range of public life and in the public eye, and provides addresses, telephone numbers, mobile telephone numbers and charging details for that information. It's not necessary to go into the identity of the individuals, … it's not necessary otherwise to identify titles or names and certainly not necessary to identify the persons who were the targets of enquiry. In relation to some of them, it is absolutely right that there may well be a public interest justification in the enquiry. In relation to others, however, it

[18] p2, *ibid*

[19] p65, lines 8-10, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

[20] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Order-of-2-December-2011.pdf Following an application, I issued a further ruling: http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Ruling-In-Relation-to-Operation-Motorman-Evidence-11-June-20123.pdf

[21] pp25-26, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf

is difficult, if not impossible, to see what public interest justification there could be."

1.18 A further point that Mr Thomas made was to recognise the possibility that the Motorman material was representative in nature. He said:[22]

> *"I have always recognised that the material seized in Operation Motorman came only from one group of investigators and may have been entirely isolated. Equally, many other private investigators were known to be active and it is difficult to believe the investigators raided by the ICO were the only ones with press clients. This view is strengthened by the quite separate Goodman / Mulcaire prosecutions which came to light after the first ICO report and which had parallels with the section 55 offences and reinforced the evidence gathered during Operation Motorman."*

1.19 This identifies the general awareness of, and concern about, the security of confidential databases in both the public and private sectors, the sensitivity of the concentration in those databases of very large amounts of personal data, and the risks of that getting into the wrong hands.[23] Albeit retrospectively, Mr Thomas also made the connection between the Motorman material and the subsequent evidence of phone hacking undertaken within the press[24] as did Mr Owens.[25] In any event, however, there was a clear apprehension of a general problem concerning unlawful and unethical trading in personal information, including, but not limited to, the press.[26]

1.20 In sum, therefore, Mr Thomas, and the ICO more generally, was aware that the Motorman evidence was an indication, in relation to the culture, practices and ethics of the press and beyond, of conduct that was likely to be criminal, probably constituted systematic breaches of confidentiality, privacy and the principles and rights of the data protection regime, was certainly unethical, and was *"quite outrageous in policy terms"*.[27] As summarised in the ICO's report to Parliament, it amounted to evidence of *"a flourishing and unlawful trade in confidential personal information by unscrupulous tracing agents and corrupt employees with access to personal information"*.[28] The Culture, Media and Sport Select Committee in 2003 described it as a *"depressing catalogue of deplorable practices"*.[29] The modus operandi, and the harm done, was well understood.[30] How it was addressed by the ICO now falls to be considered.

2. The ICO response: leadership

2.1 As the office holder, Mr Thomas was in a unique position to influence the culture and priorities of the office and to determine the nature and degree of his own personal priorities. In that

[22] pp11-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[23] pp23-24, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[24] See also the connection made in *What Price Privacy Now?,* pp7-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-2.pdf
[25] pp40-41, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf – this is discussed further below
[26] p97, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; pp50-51, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[27] p96, line 7, Richard Thomas, *ibid*
[28] p29, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-1.pdf
[29] pp14-15, Richard Thomas, *ibid*
[30] pp23-26, Richard Thomas, *ibid*

regard, it is noteworthy that he was at pains in his evidence to the Inquiry to distance himself from the operational decisions made about Motorman; effectively, he disclaimed significant contemporaneous knowledge of the operational management of the case. It is also striking that, as Mr Thomas was aware, his Deputy, Mr Aldhouse, also distanced himself from the operational management of the case.

2.2 Although aware that a wealth of material had been recovered, Mr Thomas had little recollection of the briefing or of discussing the detail. He emphasised that the question of investigating the role of journalists and newspapers in the events "*was not a matter with which in any way I was engaged*";[31] at the time "*I can't really say that I was giving very active consideration to these matters*";[32] and "*I personally did not give any serious consideration to that matter, and I cannot recall any conversation or discussion when that particular issue was being discussed*".[33] He said, for example, that it was only as a result of being asked to assist the Inquiry that he had latterly become aware that the MPS had investigated journalists as part of Operation Glade, of the note made by his office of their meeting with Counsel on 3 October 2003 advising that there were grounds in the Motorman evidence for proceeding against journalists,[34] or that the judge hearing the Motorman prosecutions at Blackfriars had questioned the lack of proceedings against any journalist.[35]

2.3 I must admit to being surprised about the extent to which Mr Thomas distanced himself from the practical details of the operation that was later to take up so much of his attention politically. By his own account he did not direct the operational strategy, involve himself in key decisions or, it would seem, keep himself especially closely briefed. One of the earliest notes of his reaction was a handwritten entry in a personal notebook[36] written between 3 and 10 March 2003[37] recording: *"Francis – Newspapers/s55"*. Unable to recall any conversation with Mr Aldhouse, Mr Thomas was pressed as to whether this did not suggest a personal interest in the press dimension to Operation Motorman. But he remained firm: he personally did not give any serious consideration to the operational dimension. He 'assumed' that an operational decision would be taken at the level of Mr Owens and the in-house legal team, about whether and to what extent to pursue action against the press. Put to him that he must at least have been aware that no journalist was being prosecuted, that he must at least have been alert to the criminal process, he replied that that was only in very general terms. There were, he pointed out, 'many, many other matters going on at that time'.[38]

2.4 The 'Newspapers/s55' note might, at least, be thought to suggest that Mr Thomas was concerned with the *criminal* process. It is to that issue that most if not all references to his assumptions about the operational management of Motorman are made in his evidence.[39] He stated, for example, that:[40]

H

[31] p33, lines 15-16, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[32] p40, lines 8-10, Richard Thomas, *ibid*
[33] p45, lines 8-11, Richard Thomas, *ibid*
[34] p52, lines 16-19, Richard Thomas, *ibid*
[35] p82, lines 14-23, Richard Thomas, *ibid*
[36] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-512.pdf
[37] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Sixth-Witness-Statement-of-Richard-Thomas.pdf
[38] pp44-46, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[39] More than once Mr Thomas explained that the reason for his operational distance was that he was not himself a criminal lawyer
[40] p1, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf

> *"It was my understanding that the case would be pursued in line with established Office practice – prosecutions led by the in-house legal team, advising and acting upon the evidence obtained by the Investigations Unit. I was subsequently kept broadly abreast of developments, notably that the CPS were taking over the prosecutions [this is, of the private investigators] and then that trial had resulted in major disappointment. The ICO lawyer with lead responsibility was Phil Taylor."*

2.5 The Motorman material had emerged in the course of a criminal investigation, but its implications for the data protection regime were much broader than that. There is no indication, however, that aspects other than prosecution were actively being considered within the ICO. It is difficult on the face of it to understand why not: that question is considered in some detail below.

2.6 Both in law and in terms of the reputation of the ICO, operational decisions, especially any involving the press, would have been complex and significant, and Mr Thomas was ultimately accountable for them. Motorman was not a simple operational issue: it was an indication of data protection breaches and poor practice on an unprecedentedly large scale and driven by the newspaper industry. It obviously engaged the ICO functionally and could have reputational consequences. In addition to criminal proceedings, there was a spectrum of powers and functions which, at any rate potentially, could be engaged, in different combinations. These are considered in more detail below. Given the inherent risks in criminal proceedings, contingency planning was also in question. In other words, there were *strategic* decisions to be taken in considering the *operational* response to Motorman which could only be taken effectively at the level of strategic overview. However those in a position to take that strategic overview of operations emphasised to the Inquiry that they were not doing so.

2.7 In addition to operational responses there were political possibilities and it is these that Mr Thomas focused on. His strategy was to take a twin-track approach, consisting of initiating a dialogue with the Press Complaints Commission and undertaking a campaign to persuade the government to change the law to introduce custodial sentence maxima for s55 of the Act. In some ways, Mr Thomas characterised this as in itself an operational response:[41]

> *"I think we were using our powers to promote good practice. That was a far more general power, and you know, that was the justification, the rationale – the statutory foundation for much of what we did was promoting good practice. I would describe pretty well everything we did in this area as promoting good practice."*

2.8 There were, however, risks in the extent to which the most senior staff were at a distance from the specifics of the operational response to Motorman. The first was that the strategic approach adopted would be insufficiently informed by detailed operational knowledge and understanding of the problem revealed. The Motorman material was a very rich resource of empirical evidence of the nature and scale of the presenting problem, and any strategic solution was likely to have been importantly enriched by expert analysis of that information in the context of the industry in question. The second risk was that the political and operational responses would be insufficiently well co-ordinated for the maximisation of the effectiveness of each. Decisions made in one context might well be capable of affecting the other at least at a handling level. Mutual knowledge and understanding would be important resources for both. Finally, the third risk was that if the top of the office did not sufficiently communicate with or engage the operational part of the office about the political strategy,

[41] p25, lines 3-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

operational decisions might be taken on the basis of weak knowledge or assumptions about the operational implications of the political strategy.

2.9 As for the distance that Mr Thomas kept from operational decision-making in Motorman, he put his own frame of mind in embarking on his twin-track political strategy in this way:[42]

> *"My speculation is when I was told some time in October or November [of 2003] that it was going to be too expensive or too difficult to pursue the journalists, that's when I went off to the Press Complaints Commission. But throughout that period from March to October, as far as I was concerned, it was being handled in what I can broadly call the normal way by those who were charged with enforcing Section 55."*

2.10 This speculation does not seem to be strictly accurate. At the time, with the assistance of Counsel, the investigations officers evidently continued actively to consider the possibility of criminal proceedings in relation to the press. The availability of civil investigation and enforcement powers also fell to be considered in the alternative in any event. In other words, Motorman, remained a live operational issue for the ICO at the time Mr Thomas embarked on his political strategy; there were therefore risks both to it and to his own plans.

3. The approach to the PCC

3.1 Mr Thomas was clear that it was his personal decision to approach the PCC;[43] this was reinforced by his Deputy, Mr Aldhouse. In oral evidence to the Inquiry, Mr Aldhouse said:[44]

> *"I do recall that Richard Thomas decided that he wanted to pursue the route of going to the Press Complaints Commission and writing to Sir Christopher Meyer, but I have to say I think that was Richard Thomas's decision rather than the result of some discussion."*

3.2 Pressed as to whether he would not have expected, as Deputy, to have been involved, he said he would, but he was 'otherwise engaged', including in Brussels. Although Mr Aldhouse saw his own role as somewhat dissociated, given the policy ramifications that the Motorman case might throw up and the potential cost implications for the ICO, when asked whether it was strange that he was not at least involved quite closely in discussions with Mr Thomas, his response was:[45]

> *"What can I say? It's for the Commissioner to decide how he runs the office. If - and it is worth bearing in mind, of course, that it is - that the Commissioner is a one-man band and if the Commissioner decides to take a route, so be it."*

3.3 In the event, on 4 November 2003, Mr Thomas wrote personally to the Chairman of the PCC, then Sir Christopher Meyer.[46] He explained that his idea had been to 'go collectively'

[42] p45, lines 12-20, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[43] p2, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf
[44] p42, lines 8-13, Francis Aldhouse, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[45] p43, lines 19-23, Francis Aldhouse, *ibid*
[46] In evidence, it is somewhat surprising that he sought to distance himself from the drafting of the letter: p64, lines 9-18, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

rather than individually to the press.[47] This gives rise to a number of issues. First, what his understanding of the role and functions of the PCC was (and how that developed); second, to what extent he understood the PCC to be a representative of the press collectively and to what extent a regulator of the press (two very different propositions); and third, how he judged the ICO and PCC would relate to each other functionally and how he managed that relationship. The resolution of these leads to the overarching question about the objectives in approaching the PCC, whether they were appropriate and how effectively were they achieved.

3.4 In relation to his approach and objectives, Mr Thomas was looking at these at a high level and generic nature which was some distance from the immediate operational issues faced by the ICO. He did not have it in mind to ask the PCC to investigate the specifics of the Motorman material or the conduct of the press (although he does not appear to have resolved how an investigation would be handled if at all within the ICO). He wanted a general, forward-looking exercise, conducted across the industry as a whole, with a view to putting a halt to the practice of commissioning unscrupulous private investigators to obtain confidential personal information without regard to whether means such as blagging and corruption were used. He considered that this would principally be achieved by issuing a prominent and general condemnation of the practice and securing appropriate changes to the Editors' Code.[48] There is, however, no clear indication of how Mr Thomas thought condemnation by the PCC and changes to the Code would definitively terminate the practice, nor of what, if any, complementary action would be necessary or desirable on the ICO's part to achieve that result.

3.5 Mr Thomas was also concerned about the tone of his approach. He wanted to make a 'constructive and friendly'[49] overture to the senior leadership of the PCC. He evidently had in mind that a 'good relationship'[50] would be important. There was to be an element of outreach and informality, so lunch meetings were contemplated, Mr Thomas would attend on the PCC so far as location was concerned (a concession inevitably constrained by the location of his premises in Cheshire), and formal or agreed notes were not expected. In other words, Mr Thomas intended to conduct the relationship himself, at a personal level and in a personal manner.

3.6 The letter[51] drew attention to a recommendation of the Parliamentary Culture, Media and Sport Select Committee that the Editors' Code should be amended to include explicit bans on payments to the police for information and on the use and payment of intermediaries such as private detectives. The letter outlined the Motorman findings and the Metropolitan Police investigations. It stressed the considerable volume of material uncovered; the indication that journalists from most newspapers and many periodicals were customers of Mr Whittamore; and that numerous journalists routinely obtained confidential information that 'they should have no access to'. It suggested that this material was being obtained in the service of celebrity gossip, not to expose wrong-doing, and that the sums involved and the nature of the documentation made it 'difficult to believe that senior managers were not aware of what was going on, and were therefore at least tacitly condoning it'.

[47] p111, lines 5-8, Richard Thomas, *ibid*
[48] pp7-9, lines 25-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[49] p114, lines 19-20, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[50] p2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[51] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-3.pdf

3.7 The letter also indicated that the ICO was considering whether to take action under the DPA against individual journalists and/or newspapers. It was put to Mr Thomas by the Inquiry that this was an empty threat; he resisted the idea that it was a threat of any sort, on the basis that he intended the letter to be a 'constructive and friendly opening in my engagement with the Press Complaints Commission' but he did accept that 'it may have been somewhat overstating the case'.[52] It suggested however that the ICO had provisionally concluded that it would be appropriate first to give the PCC and its Code Committee the prior opportunity to 'deal with' the issue in a way which would put a stop to the 'deplorable' practices across the media as a whole. It envisaged that the ICO would provide some of the Motorman material to the PCC and that the PCC would respond with a suitable change to the Code; this could provide a more satisfactory outcome than 'legal proceedings' and would also, it was suggested, be consistent with Sir Christopher Meyer's wish expressed to the Select Committee to demonstrate the effectiveness of the PCC.

3.8 In the light of all that has been said about the PCC, it is significant that the letter addresses the relationship between the ICO and the PCC as Mr Thomas saw it. Intending to discuss the relationship, he said:[53]

> *"I believe it would be to our mutual advantage to meet at an early opportunity to discuss the matters raised in this letter and, more generally, our respective roles and the relationship between our organisations."*

He also indicated that:

> *"though I do not wish to usurp your role as the regulator of the press - newspapers, and their employees, are subject to the Data Protection Act 1998."*[54]

3.9 Mr Thomas was surely correct to suggest that the respective roles and responsibilities of the two organisations, namely the statutory data protection regulator and the industry's voluntary body, would be an important issue. The obvious asymmetry made it so. The ICO had legal functions and duties to be discharged in relation to the matter of how businesses acquired and used individuals' information; the PCC did not. It is inevitable therefore that Mr Thomas's approach would have had to have been at the level of seeking to elicit the voluntary cooperation of the PCC rather than making a claim on any complementary or overlapping formal legal jurisdiction.

3.10 Mr Thomas's letter suggested a meeting within days at the offices of the PCC; he approached that meeting in a structured way, preparing a speaking note[55] setting out his evident hope that the PCC would respond with a 'general condemnation' and changes to the Editors' Code. The meeting took place on 27 November 2003, Sir Christopher was accompanied by Guy Black (then the Director of the PCC, now Lord Black of Brentwood).

3.11 Mr Thomas said that, initially, the PCC had at first not really known why the ICO had approached them, but that the atmosphere changed as he set the matter out and he convinced them a serious matter was in issue and that the two organisations would work together to deal with the problem.[56] His subsequent written notes stated:[57]

[52] pp114-115, lines 24-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[53] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-3.pdf
[54] *ibid*
[55] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT5.pdf
[56] pp5-7, lines 1-11, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[57] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT61.pdf

> *"The PCC would like time to consider their response. They were clearly surprised by the scale and nature of the material we have collected and see this as a 'watershed' in terms of this sort of activity.*
>
> *"Although this was not suggested by us, they would be resistant to 'taking over' individual cases and taking action in each case instead of us. Their starting point was that statutory bodies should enforce the law, not them. But they seemed to be increasingly ready as the meeting progressed to work with us as 'fellow regulators' with a strategic response. This might lead to some sort of general condemnation and – though there are some difficulties – an amendment to the Code.*
>
> *"It is for them to identify precisely what they might do, and they recognise this. They want a second meeting before Christmas."*

3.12 It is somewhat surprising that Mr Thomas appears to have seen a measure of equivalence between the roles of the ICO and the PCC, if not actually of deference to the latter. In oral evidence he explained that *"I think we were both very proud of independence, I'm sure"*,[58] and he noted to himself after that first meeting that it had been *"constructive – 'fellow regulators'"*. In the circumstances, I felt driven to ask:[59]

> *"What are you relying on as concluding that the Press Complaints Commission was a regulator? You're a regulator, but you've concluded here that they're a regulator, or asserted that they're a regulator. I'm just interested to investigate your understanding of that."*

3.13 The response from Mr Thomas was that the PCC called themselves a 'self-regulatory body' and confirmed that at that point he certainly saw them as such; and therefore as likely to be 'intelligence-driven, proactive, mainly focused on either prevention or punishment'. He had drawn parallels with the Advertising Standards Authority and the banking and insurance ombudsman schemes with which he was familiar from his previous career, and saw the PCC as, like the ASA, able to intervene and take action to prevent unacceptable behaviour. It was with that expectation that he had approached Sir Christopher. The PCC was 'supposed to be in charge of the press, they ought to know what's going on'[60] and, indeed, to stop it.

3.14 Mr Thomas accepts now that this was a misconception. In oral evidence to the Inquiry he confirmed that:[61]

> *"I did see them and they held themselves out as a regulator and I think experience showed that they were not a regulator in the conventional sense."*

He went so far as to suggest that the inadequacy of the PCC to the task he had envisaged for it formed a part of the dialogue:[62]

> *"I can recall saying, you know, 'Why can't you transform and change the Press Complaints Commission to make it look more like the effective self-regulation models I've encountered elsewhere?'"*

[58] p3, lines 3-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[59] p115, line 23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[60] p119, lines 3-4, Richard Thomas, *ibid*
[61] p118, lines 16-19, Richard Thomas, *ibid*
[62] p118, lines 7-10, Richard Thomas, *ibid*

3.15 His current understanding was that the PCC was essentially a complaints handler, with functions focused on the investigation of complaints from the public. That leads to the question of the steps he might have taken to ascertain the position at the outset, or as his understanding of the PCC developed over time, not least bearing in mind his express placing the question of the relationship between the two bodies on the agenda at that original meeting. This is important because the assumption of equivalence (or deference) with which he mistakenly embarked on the initiative with the PCC could have had direct implications for decisions the ICO might otherwise have made about the exercise of its own powers and functions. That, as well as Mr Thomas' personal distance from the operational issues raised for his office by the Motorman data, put him in an unsatisfactory position in embarking on this enterprise.

3.16 Furthermore, although the initial letter expressly put the question of respective roles and relationships on the agenda for discussion with the PCC, it is evident that the opportunity was not in fact taken to clarify that fundamental question. Mr Thomas was specifically asked whether the role of the PCC was described and his perception discussed and corrected.[63] His response was that over the course of his interactions with Sir Christopher 'we've probably touched on some of these matters'. Given the significance that Mr Thomas attached to this approach that cannot, in the circumstances, be considered a satisfactory basis on which the ICO, as a statutory regulator, ought to have made any decisions about respective roles and responsibilities. The likely explanation for (and consequences of) this is considered below.

3.17 Sir Christopher's own account of that first meeting was more highly coloured. He was evidently interested in what he heard about Motorman: he characterised the ICO as describing a 'fairly apocalyptic situation',[64] leading them to expect court action in relation to the press (which did not materialise), but principally in getting to the data underlying the issue:[65]

> *"I wanted beef. I wanted red meat, Mr Jay, and he didn't give it to me."*

This, on his account, would have enabled the PCC to 'have gone into some kind of action with the newspapers in question' and to sharpen and hone their guidance to the press. In the light of the way in which Sir Christopher dealt with Operation Caryatid, it is not obvious what might have been done but, although his letter had held out the prospect of some limited disclosure of material, Mr Thomas was clear in his own mind that his purpose was not to ask the PCC to investigate individual cases. In any event, the PCC was equally clear that they could not look at cases from unidentified victims: this could have been a clue as to the PCC's quintessentially complaint-handling function.

3.18 Sir Christopher's appetite for beef, therefore, was evidently related at least in part to seeing the proof of the message he was being given. Pressed as to whether the PCC could not simply have taken on trust the ICO's indication of the extent of the problem without the underlying data, Sir Christopher's answer was that while of course it could be assumed Mr Thomas would not have made the allegations without some substance, they never saw the substance or the expected litigation.

[63] p117, lines 21-24, Richard Thomas, *ibid*
[64] p118, lines 6-9, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[65] p111, lines 22-24, Sir Christopher Meyer, *ibid*

3.19 Sir Christopher also describes telling Mr Thomas that he was the Information Commissioner and should *"get on with it. Prosecute these guys"*, noting that *"And prosecutions came around none, ever, in my time, anyway."*[66] This reaction is echoed in Mr Thomas's own note where he records the PCC as emphasising 'not our role to enforce law, not arm of ICO'.[67]

3.20 The refusal of the PCC to take any action while criminal proceedings were pending or possible was also made plain;[68] this was a position which Mr Thomas on his part made very clear he did not accept, but from which the PCC refused to move. The message from Sir Christopher, in other words, was that the Motorman evidence was ICO business rather than for the PCC; they were prepared to help as far as they could, but needed more to go on.[69]

3.21 The reaction (that the PCC wanted details of the underlying data and decisive action from the ICO before it could act) continued to set the tone and might be viewed as an early warning of the extent to which the PCC was either unwilling or unable to deliver what Mr Thomas hoped to achieve. It might (but did not) cause a reconsideration of his investment in the twin-track strategy of approaching the PCC and the government, but without at the same time attending closely to the operational response itself.

3.22 A year passed with little progress. Mr Thomas described the joint effort to produce a guidance note as seeming to *"sort of grind to a halt in April of 2004"*.[70] He wrote to the PCC on 8 December of that year expressing concern that the work had 'run into the sand',[71] and that there was consequently a real risk that the problematic practices would continue unabated. This comment is particularly significant because if the ICO apprehended that there was a real risk of continuing unlawful conduct after the Motorman seizure there was again no indication that this was the subject of any reassessment, either of the PCC strategy itself or of the operational response and options within the ICO. A whole year had elapsed since the first approach to the PCC, two years since the seizure of the Motorman material. These were potentially very serious matters, and the PCC strategy had yet to bear any fruit. Mr Thomas explained that he did not 'lose all faith'.[72] In the circumstances, the basis of that faith and his continued reliance on it are increasingly hard to understand.

3.23 Both sides appear to have thought that the matter had become bogged down in legal details, including over the matter of the effect of the public interest exemption in s55 of the DPA in relation to actual or potential criminal liability of journalists. Mr Thomas put it to the PCC in his letter that he was strongly of the view that inaction on their part would show the 'principles of self-regulation in a poor light'.[73] If his intention was to suggest either that the PCC risked its own credibility politically, or that the industry risked direct regulatory action from the ICO, there is no evidence that Mr Thomas had any particular basis for making such a suggestion.

H

[66] p114, lines 20-22, Sir Christopher Meyer, *ibid*
[67] p3, line 17, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[68] p4, lines 18-25, Richard Thomas, *ibid*
[69] pp117-118, lines 23-2, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[70] pp10-11, lines 23-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[71] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-7.pdf
[72] p12, lines 16-17, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[73] p13, lines 12-14, Richard Thomas, *ibid*

3.24 On 15 December 2004, Sir Christopher replied[74] indicating that he was going to *"resurrect"* the project with a view to approving a note the following February. He made it clear, however, that the key objective of the note from the point of view of the PCC was to assist journalists in understanding how to comply with the DPA: that would be 'most welcome'. A very brief was issued ('probably in the spring of 2005')[75] but evidently with little impact; it contained no reference to Operation Motorman and no warning to journalists.[76]

3.25 In evidence, Tim Toulmin (then the Director of the PCC) agreed that *"there was no attempt by the PCC in 2005, through its guidance, specifically to warn the press of what they should do in the future by reference to what they might have done in the past."*[77] His view was that, given that the PCC was 'a complaints body looking at breaches of the code of practice rather than the Data Protection Act', there was some question about whether it should even have issued the note it did, but 'it did want to be helpful'. The PCC had regarded it as 'pretty much outside its remit' and required a specific decision from its board to proceed with the matter at all. Mr Toulmin also agreed with the proposition that the PCC's view was: *"Well, there isn't a specific complaint here, therefore our powers aren't engaged and we're only going to take second place to the Information Commissioner, who is the real regulator in this area"*.[78]

3.26 Mr Toulmin also said:[79]

> *"The question was, I think, where the different responsibilities lay. The PCC, as a platform for discussing the behaviour of journalists and so on in another context, which was about the application of the code of practice, was happy also to say, "By the way, Richard Thomas has this campaign about the Data Protection Act and he's right to do so", but beyond that, it was difficult really to know what the PCC could do."*

His conclusion was that Mr Thomas should have engaged directly with the industry, the trade bodies or straight to the Code Committee (as being 'more representative of the industry') and not to the PCC at all: it did not have the right remit.[80] Throughout this period, however, there was still no evidence that the ICO was either successfully managing the relationship with the PCC towards its stated objectives, or assessing the alternatives.

3.27 The next step was the publication by the ICO of *What Price Privacy*[81]on 10 May 2006; the ICO included the PCC in its distribution list. A response (described with conscious understatement by Mr Thomas as "disappointing") came on 31 May in a form acknowledged by Sir Christopher as a bit "sneering". It was in these terms:[82]

> *"Thank you for sending me a copy of your report, What Price Privacy? It was an interesting read. I am sending you a copy of our annual report, which we have just published, along with the text of a speech I gave last week in which I refer to your remarks about the PCC.*

H

[74] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-8.pdf
[75] p14, lines 9-13,Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[76] pp83-84, lines 22-3, Timothy Toulmin, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-30-January-2012.pdf
[77] p84, lines 10-17, Timothy Toulmin, *ibid*
[78] p86, lines 5-15, Timothy Toulmin, *ibid*
[79] p88, lines 7-15, Timothy Toulmin, *ibid*
[80] p89, lines 7-20, Timothy Toulmin, *ibid*
[81] More fully discussed below
[82] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-12.pdf

I think that, as a next step, it would be helpful if we organised a meeting so that we can explore what more it is that you think the PCC can do. You will appreciate that your call for us to act came rather out of the blue, and we have no material to work with other than what you put into the public domain in your report.

Perhaps someone in your office could be in touch ... to arrange a suitable time."

3.28 The enclosed speech was largely a celebration of the achievements of the PCC, and immediately before closing with the claim that '15 years of the PCC has changed the culture of an entire industry', dealt with the ICO in two short paragraphs which strongly suggested that it had reached the limits of the action it was prepared to take:[83]

"There is one issue not touched on in the Report which merits an observation. Recently, the Information Commissioner, Richard Thomas, wrote to me, as he did to members of the newspaper and magazine industries, about the suborning of people by agencies paid by publications to obtain confidential information. This is something that I have intermittently discussed with Mr. Thomas over the last two years or so. It was as a result of our exchanges that the PCC published last year, in collaboration with the Information Commissioner's office, an advice note to journalists about the Data Protection Act and how it impinged on their profession.

"Part of the purpose of the note was to remind journalists that offering money for confidential information, either directly or through third parties, was illegal. Mr. Thomas is clearly concerned that this is a practice which continues. He would like the PCC to do something more about it. I intend to tell him once again that we can and do urge on journalists respect for the law – bribery has no place in journalism. I will go on urging. And I look forward to discussions with Mr. Thomas about what more he thinks the PCC can do about this within the self-regulatory framework. But clearly it would not be viable simply to duplicate the criminal law in the Code of Practice."

3.29 This did not prompt a reassessment of the strategy, but, on 13 July, a further meeting between Mr Thomas and Sir Christopher took place. The ICO note of the meeting[84] identified as key issues the PCC response to *What Price Privacy?*, support so far and next steps, along with 'the respective roles and responsibilities of the PCC and the code of practice committee of editors'. Sir Christopher was reported to have said that 'the PCC is not able to act as a general regulator. He believes that what is needed is a strong stance from the ICO including prosecutions. He queried what more the PCC could do.' The ICO considered that the PCC's role was to come up with proposals on raising awareness to help prevent misconduct, and seemed to consider in turn that there was little more that the ICO could be expected to do. Sir Christopher encouraged the ICO *"to engage directly with the industry"* and Tim Toulmin stressed the need for the PCC to act 'with the consent from industry' in the matter of issuing guidance, and also recommended direct engagement with the industry.

3.30 A number of action points were recorded for the meeting. These were:

(a) the Code of Practice Committee of Editors was to be engaged by the ICO and the PCC to discuss the possibility of changes to the Code and production of guidance;

(b) the PCC was to give thought to the production of question and answer style guidance separate of the Code;

(c) the PCC was to continue to condemn the illegal obtaining of confidential personal information by journalists; and

[83] pp10-11, Richard Thomas, *ibid*

[84] pp1-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT132.pdf

(d) the PCC was to provide the ICO with a formal response to the recommendations in the report.

3.31 The disappointment felt by Mr Thomas with the response of the PCC remains keenly felt in his oral testimony.[85] He was exasperated with the PCC's line:[86]

> *"[…]Coming back all the time: "What do you want us to do? Tell us exactly what to do." My line was: "Well, you are the self-regulators. You're the ones supposed to be working out what is needed to stop the press getting into unacceptable territory. It's not my job to tell you what your job is."*

3.32 Sir Christopher's account of this meeting also evinced a certain amount of exasperation also:[87]

> *"I was sort of repeating the same message like a parrot: where's the beef? For Pete's sake – you know, we can do general exhortation, we can do guidance, we can do this stuff, but if you really want me to home in on miscreants, I must have some evidence of who has been procuring enquiry agents – or hiring enquiry agents to procure information illegally, and he was unwilling to do that."*

Asked what he might have meant by saying that the PCC was unable to act as a general regulator, Sir Christopher said this:[88]

> *"I think what I had in mind there was a notion that we should in some way take on the work of the Information Commissioner by virtue of being a Press Complaints Commission, and this is what I wanted to reject. The point I always made to Mr Thomas, apart from my insistent demands on beef, was to suggest that we had to work in a complementary way. He did his thing, but there were things that we could do to help him, and I've described them..."*

3.33 It is not the function of this part of the Report to analyse the response of the PCC on its own account;[89] rightly or wrongly, however, the PCC had unmistakably demonstrated that it was unwilling or unable to take action of a sort which could or should have convinced the ICO that the problems with the culture, practices and ethics of the press evidenced in the Motorman material had been definitively addressed by the industry for the future. It had also demonstrated a challenge back to the ICO to address the situation through the discharge of its own powers and functions, and specifically by direct engagement with the industry.

3.34 The result is that it was evident that the strategy adopted by Mr Thomas (dialogue with the PCC, and distance from both from the operational choices of his office and from direct engagement with the regulated members of the industry) was becoming increasingly unlikely to achieve its aims. Whether Mr Thomas considered himself to be dealing with an ineffective industry regulator, or with a recalcitrant representative body of the industry itself, the onus was clearly firmly on the ICO to reflect further on the direction that it wished to take with the Motorman evidence. No such reconsideration appears to have taken place. Nor is it clear that the ICO explained to the PCC either its position or its operational approach.

[85] pp15-17, lines 12-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[86] pp16-17, lines 21-17, Richard Thomas, *ibid*
[87] p108, lines 11-19, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-31-January-2012.pdf
[88] p2, lines 5-13, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[89] Part J, Chapter 4

3.35 Doubtless in the hope of making progress, in accordance with the action points from the meeting, Mr Thomas wrote to the Code Committee on 19 July 2006 and a meeting was fixed for 21 September. In the meantime, there was a 'formal response' from the PCC to the effect that the ICO should take up the question of Code amendment directly with the Code Committee and that the PCC would await the outcome of that process before turning its mind back to the issue of guidance[90]. Mr Thomas later described himself as having been "fobbed off" to the Code Committee by Sir Christopher.[91]

3.36 Notably, the question of a response by the PCC was now 'complicated' by the fact that the then Department for Constitutional Affairs, had issued a consultation paper (picking up from *What Price Privacy?*) relating to the introduction of custodial penalties for conviction under s55 of the DPA. In other words, at this point, if not earlier, the strategy around the approach to the PCC became inextricably entwined with the political campaign which was the second limb of the ICO response to the Motorman material. In relation to this campaign, the PCC unambiguously positioned itself not as a regulator of the industry but as a champion of the view opposing any legislative change: it did so by active political lobbying (not least through Guy Black). The twin tracks of Mr Thomas's approach effectively became one. It is to the political campaign that it is now appropriate to turn.

4. *What Price Privacy?* The political campaign

4.1 Any new statutory regime can take time to bed down in practice and a regulator created by statute will be in the best position to report on its practical operation. In relation to the DPA, the ICO had two channels for doing so. The first was to do so informally to the sponsoring government department with policy responsibility,[92] the second was to do so formally by reporting directly to Parliament either generally on the exercise of its functions under the Act or on specific aspects of those functions.[93] It was this second channel which had been used in the case of the *What Price Privacy?* Reports.

4.2 Reporting on effectiveness of legislation is not the same as campaigning to change it. The duties of the ICO under the DPA focus on performance of statutory functions[94] and do not themselves very obviously provide the platform from which to mount such a campaign. Clearly, the general desirability of a statutory regulator undertaking such a role is a matter of judgment on which I do not express an opinion but a number of issues do fall to be considered.

4.3 The first is the risk that a political campaign might impact on the principal function of a regulator such as the ICO, that is to say, the discharge of regulatory obligations which must be undertaken independently, impartially, fairly and objectively, and many of them in a quasi-judicial fashion. As a matter of law, therefore, any campaign should raise no issue, whether as a matter of fact or of perception, which could cast any doubt on the proper conduct of those functions. In that regard, it is relevant that the ICO exercises regulatory functions in relation to the Government itself both as users of personal information and therefore subject to the ordinary data protection regime but also of course as the single largest collective subject of the freedom of information regime. The Information Commissioner would obviously have to be circumspect in relation to any campaign for change in data protection law and, when

[90] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-17.pdf
[91] p22, lines 17-21, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[92] In this case, the Department of Constitutional Affairs (DCA), later to become the Ministry of Justice
[93] http://www.legislation.gov.uk/ukpga/1998/29/section/52
[94] http://www.legislation.gov.uk/ukpga/1998/29/section/51

personally identifying himself with it, have regard to its effects on the reputation of the office and the enhancement of its role and functions.

4.4 The second issue relates to the choice of the topic on which to campaign. S55 creates a criminal offence with statutory defences and a maximum sentence on conviction of a fine.[95] Yet Mr Thomas had said that the ICO was not principally a prosecuting authority. In most regulatory regimes, criminal provisions usually constitute a measure of last resort, dealing with situations either of egregious breach for which no other response is appropriate, or for persistent and escalating breach where other, stepped, interventions have been tried without success. Criminal prosecution is complex and expensive. The deterrent effect of differential maximum sentences is not straightforward (and, as discussed below, of potential relevance at all only if there is a realistic prospect of apprehension and conviction).

4.5 The importance of s55 to the data protection regime did not therefore lie in its centrality to the operation of the regime, any functional dependence on it of other powers, the regularity with which it was likely to be deployed or its operational visibility to the senior leadership of the office. Nor, of course, is s55 a provision of inherent particular relevance to the press: it is a provision of complete generality, the offence able to be committed by 'any person', whether or not they are formally subject themselves to regulation by any of the other provisions of the data protection regime.

4.6 In his first witness statement, Mr Thomas suggested that s55 was likely to be the most relevant provision of the Act to the Inquiry's terms of reference.[96] Doubtless, he did so because of the prominence that he had given the issue in his strategic response to the Motorman evidence and the role of the press. It was on 15 April 2005, with the conviction and conditional discharge of Mr Whittamore for s55 offences arising out of Motorman, that Mr Thomas records, *"When I heard this, I can recall personally and strongly sharing my team's feelings of frustration."*[97] He understood Counsel to have advised as a result that further prosecutions would not be in the public interest. *"It was then my personal decision to commission a report to be presented to Parliament…"*

4.7 It will be necessary to consider the sentencing remarks of the judge and the reasons for the sentencing decision but they are, obviously, fact-specific, not least in relation to the personal circumstances of Mr Whittamore and his inability to meet the obligations of a financial penalty. The disappointment in the office at the Whittamore result is understandable, but consideration must also be given to the extent to which the disappointment was, in any event, the direct result of the choices that had been made within the ICO about the extent of its own engagement with the criminal process, and about pursuing alternative or additional operational options more generally.

4.8 The outcome of the prosecution may have been a blow to the ICO principally because, in the first place, it had represented the majority of its investment in an operational response to the Motorman material. It is beyond question, however, that there was an entirely justifiable and genuine sense that it would have been a travesty for matters to have been left there, given the sheer extent of the evidence uncovered. It is not entirely clear why the approach adopted was seen as the principal way forward.

[95] Appendix 4 and http://www.legislation.gov.uk/ukpga/1998/29/section/60
[96] p3, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[97] p5, para 13, *ibid*

4.9 *What Price Privacy? The unlawful trade in confidential information*[98] was the report to Parliament on the Motorman affair and its implications by the ICO issued pursuant to its powers under s52(2) of the Act.[99] The foreword provided by Mr Thomas introduced the report as being essentially about the evidence of a "pervasive and widespread 'industry' devoted to the illegal buying and selling" of information contrary to s55, and about the need for change to the law. He put it this way:[100]

> *"The crime at present carries no custodial sentence. When cases involving the unlawful procurement or sale of confidential personal information come before the courts, convictions often bring no more than a derisory fine or a conditional discharge. Low penalties devalue the data protection offence in the public mind and mask the true seriousness of the crime, even within the judicial system. They likewise do little to deter those who seek to buy or supply confidential information that should rightly remain private. The remedy I am proposing is to introduce a custodial sentence of up to two years for persons convicted on indictment, and up to six months for summary convictions. The aim is not to send more people to prison but to discourage all who might be tempted to engage in this unlawful trade."*

Operation Motorman is cited as one of the major cases providing evidence for this trade, but a range of other cases are cited also.

4.10 What is striking about this analysis, and indeed about *What Price Privacy?* more generally, is the absence of any context within which s55 sits in the wider data protection regime. Even ignoring the unexamined assumption that different sentence maxima would have a definitive impact on the problem, no attention is given to the obvious question of what other operational means were available to the ICO to address the problem it had diagnosed. On the contrary, the entire thrust of the report is directed to legislative change on criminal penalties. As the foreword concludes:[101]

> *"These concerns, and the need for increased penalties, have been raised with the Department for Constitutional Affairs. The positive response that I have received so far is encouraging. These are early and welcome indications of progress on the possibility of Government action."*

What Price Privacy? set out the problem. Government action (and of course action by the PCC) was expressed to be the answer to the problem. To focus continued attention on the issue, the ICO was to publish a follow up report after six months to monitor progress on the answer.

4.11 Putting to one side the important argument that breach of the criminal law should not simply be seen as a cost of doing business, the most important deterrent the criminal justice system can provide is the likelihood of being caught. In the analysis of the perspective provided by the criminal law,[102] the first problem in relation to data protection is that those whose personal information is being illegally traded are unlikely to know about it with the result that no complaint will ever be made. Thus, the critical aspect of Operation Motorman was the *unexpected* discovery of the 'treasure trove' (as was equally the case in relation to Operation

[98] pp1-43, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-1.pdf
[99] http://www.legislation.gov.uk/ukpga/1998/29/section/52
[100] p4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-1.pdf
[101] p4, Richard Thomas, *ibid*
[102] Part J, Chapter 2

Caryatid).[103] This is particularly so in relation to cases involving the press because of the complications that will flow from the legal protection afforded to journalistic materials and to sources. In truth, without victim complaints, the only systemic way of identifying criminality of this sort is by the exercise of regulatory investigative powers. If there is a measure of confidence that crime will not be detected, the possibility of a custodial sentence may not be sufficient to discourage the behaviour: it was not sufficient, for example, to prevent the phone hacking exposed by Operation Caryatid.

4.12 Mr Thomas explained the objective behind his focus on increasing the maximum available sentence for s55 in this way:[104]

> *"I think I had quite a long list of objectives by the end of the day, by the time we got to publishing this report. The first objective was to tell the world what was going on. The primary stated objective was to get the recommendations taken seriously, particularly to get the government to increase the penalty, because we felt the penalty was the main problem. But I also felt – and I'm not sure this was articulated, but in my own mind – the more noise we could make about this, even if not successful in getting the law changed, the more that was likely to have a beneficial result. I wanted to get people on the back foot."*

Although the significance of a maximum which was financial (so that any penalty would have to be linked to means to pay) is important, it is difficult to see it as the 'main problem' facing a regulator armed with other means of enforcing the law and driving up standards. It had, however, attained a more symbolic quality.

4.13 It is possible to sympathise with the description of the problem in the introduction to *What Price Privacy?* that low penalties devalued the data protection offence in the public mind and masked the true seriousness of the crime, but it is possible to argue about the degree to which the sentence maxima stood proxy for the regime as a whole. In the perennial struggle to get data protection (and, thus, the ICO) taken seriously, whether by regulated business, by the public, by the courts, by politicians, or by the press, the ICO quite understandably needed to make a public example of the Motorman find. The outcome of the Whittamore prosecution could be thought to reveal that the wider objective had been set back and that failure was in turn symptomatic of the lack of seriousness with which the courts seemed to consider data protection. The sentence maxima contributed to that lack of seriousness, and were in turn a sign of a lack of legislative seriousness: a failure at the political level to take data protection seriously. The s55 campaign was to that extent a test of political commitment, and as such existential for the ICO. The Motorman evidence, and the other evidence referred to in *What Price Privacy?,* gave the ICO an impressive platform from which to make its case for data protection.

4.14 Mr Thomas put it this way:[105]

> *"The ICO put heavy effort into promoting the two reports. The main aim was to secure implementation of our recommendations – especially custodial sentences which were primarily seen in terms of deterrence – but also to raise awareness about the nature*

[103] Had either Mr Whittamore (in relation to Operation Motorman) or Mr Mulcaire (in relation to Operation Caryatid) not retained the records that were seized, none of the material which has proved so important in these investigations would ever have been seen

[104] pp28-29, lines 17-5, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

[105] p8, para 18, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf

and scale of the illegal trade and get it taken much more seriously. The technique of announcing the intention to produce a second (progress) report was deliberately part of this strategy.

I was personally involved in this promotional activity to a very considerable extent. The Commissioner - as the personification and leader of the ICO - is obviously expected to be a visible part of all major activity. In this case, I attached particular priority to the issue and also viewed promoting the reports as a tangible way of fulfilling a wider ambition to get data protection taken more seriously."

4.15 Operation Motorman triggered the political campaign on s55 although that campaign was neither a specific response to the evidence uncovered by Motorman, nor was it addressed specifically to the culture, practices and ethics of the press. At its heart, although it was much more general and, in the mind of Mr Thomas, symbolic of the struggle to get data protection taken seriously by a wider political audience, it very quickly acquired totemic resonances of a very different kind in the political arena into which *What Price Privacy?* had ventured.

4.16 It is important to appreciate that the ICO campaign on s55 was not targeted specifically at journalists although the campaign against it was championed by the press.[106] The publication of *What Price Privacy?* marked the emergence into the public arena of what had until then been low-key policy discussions with the Department for Constitutional Affairs about law reform. It also coincided with a point in the protracted and frustrating dialogue between Mr Thomas and the PCC at which the latter had formed a view that there was little it was able or willing to contribute to the nominally jointly-espoused aim of effecting culture change in the press, without direct regulatory engagement by the ICO with the industry.

4.17 The arrival of *What Price Privacy?* proclaimed the introduction of custodial penalties as 'the solution' to the problem the ICO had been describing to the PCC. This could reasonably have been expected to have been interpreted by the industry as 'the solution' directed to the culture, practices and ethics of the press in relation to the acquisition and use of personal information. It was a solution the press entirely rejected for itself. Two results predictably followed. The first was the mobilisation of a political lobbying effort by the press against the campaign, directed to the heart of government. The second was a hardening of the attitude of the press (now unmistakably represented by the PCC) towards the ICO.

4.18 As Mr Thomas described, his political campaign was both elaborate and extensive; on any basis, it was a major undertaking and a substantial investment of his personal time and attention. In the end it involved him engaging at the highest levels in Government and extensively in Parliament, including by giving evidence to no fewer than four Select Committees.[107] By December 2006 (the time of the promised follow-up report *What Price Privacy Now? The first six months progress in halting the unlawful trade in confidential personal information*),[108] the campaign had, at least in its own terms, achieved a measure of success. On 24 July 2006, the DCA had published its public consultation paper on increasing the sentencing maxima for s55 to include custodial penalties.[109] There had been a degree of public attention and media coverage (*What Price Privacy Now?* had included four pages of headline press cuttings) and

[106] p43, lines 1-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[107] pp9-10, para 23, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf; pp30-31, lines 12-19, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[108] pp1-30, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-2.pdf
[109] http://www.dfpni.gov.uk/consultation_misue_of_personal_data.pdf

the report claimed an encouraging response from the investigations industry, and raised awareness among (at any rate intermediary) media organisations.

4.19 The follow-up report expressed disappointment with the opposition from within the press (both by editors and proprietors) to the s55 campaign and considered it misconceived in underestimating the existing protections in the law and the commitment of the ICO itself to freedom of expression. Its conclusion was that:[110]

> *"There is still further work to be done to reduce the demand for illegally obtained confidential information. This work will be ongoing. We will continue to track down and prosecute offenders. We will continue to press the Government to introduce the option of a prison sentence and see this progress report as supporting that goal. We will continue to raise awareness and we will encourage and work with any organisation that wants to raise standards or produce clear guidance on data protection obligations. In particular we will be working closely with the media on the development of relevant guidance and standards for journalists."*

5. *What Price Privacy?* The reaction of the PCC and the editors

5.1 At this point it is appropriate to return to the dialogue between Mr Thomas and the PCC whose 'formal response' had been to direct the ICO to the Editors' Code Committee while noting that the issue had become 'complicated' by the publication of the DCA consultation on s55.

5.2 On 21 September 2006, Mr Thomas met Ian Beales, Secretary of the Editors' Code of Practice Committee. Mr Thomas described the meeting in his internal note as 'interesting and intelligent'.[111] In addition to the established themes of louder condemnation of unacceptable practices and suitable amendments to the Code, Mr Thomas was explicitly now also looking for 'better awareness of s55' from the industry. S55 was evidently the dominant theme in the event, Mr Thomas with a degree of understatement indicating that *"support for the prison sentence would be welcome, but I did not expect that"* and Mr Beales dismissive of the DCA paper and stressing the 'chilling effect' of the proposal. Mr Thomas had proffered some proposed Code changes of his own but came away from the meeting largely empty handed.

5.3 On Mr Thomas's account, Mr Beales's position was simple: *"his main difficulty is that there is not much incentive to improve the Code unless the threat of increased penalties disappears at the same time"*. If accurately represented, this is a somewhat remarkable position to adopt: the offence contained within s55 was the law and contained within it a defence for journalists acting in the public interest. A Code of Conduct should surely provide the very best guidance it can and it is difficult to see why there needs to be an incentive to improve it.

5.4 In any event, the press had fully subsumed the dialogue between the ICO and the PCC into its own political campaign in opposition to reform of s55 and it may be legitimate to infer the extent to which Mr Thomas had accepted that reconstitution of the agenda: his note suggests that the talk of producing joint guidance was now explicitly in terms of 'better section 55 guidance' rather than anything more generally addressed to the culture, practices and ethics of the press in the handling of personal information.

[110] p29, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-2.pdf
[111] p1, para 1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-18.pdf

5.5 On 27 October 2006, there was a follow-up meeting (at NI's Wapping premises): the Committee Chairman Les Hinton, and Stephen Abell from the PCC also attended. The note of that meeting suggests that Mr Hinton made plain from the outset that the Code Committee had no mandate to take a position at that point but was considering its response to *What Price Privacy?*.[112] The conversation appears to have amounted to a further turn around the familiar course but with Mr Thomas now leading on s55. Dealing with the 'illegal trade' needed tougher sentences, but these were not targeted at journalists (who in any event had the protection of special exemptions), he was seeking co-operation with guidance and code revisions as a means of addressing journalism's contribution to the demand side of that illegal trade. Mr Thomas had evidently responded to the industry's elision of the PCC dialogue and the s55 campaign, not by attempting to return the dialogue to its original broader purpose but by accepting the redrawn terms of reference and trying to argue his side of that debate.

5.6 Mr Hinton's response, however, is illuminative of the distance this dialogue had shifted from the original sceptical but pragmatic tone of the PCC in the opening stages of the encounter. Not only did he deploy the familiar challenge back to the ICO on the question of regulatory inaction, and the clear statement of objection to the s55 campaign, cast in the language of the chilling effect on journalism, but he moved the counter-attack on to the territory of the principles of press self-regulation. Mr Thomas records the Committee representatives as having:[113]

> *"expressed the view that a prison sentence would undermine the effective operation of the PCC as legal advice is likely to result in journalists not cooperating with PCC investigations in case they incriminate themselves. In addition explicit inclusion of offences in the code would need to be investigated by the prosecuting authority not the PCC effectively taking that provision outside of and therefore undermining the self regulatory model."*

This ignores the fact that the criminal offence existed and was hardly the constructive dialogue of fellow regulators; this was taking the political battle on to definitive territory with an open challenge to the ICO to retreat from PCC (that is to say industry) territory.

5.7 In a contemporaneous handwritten note by Mr Thomas,[114] the words 'last chance saloon' appear. At one stage earlier in the dialogue, Mr Thomas appears to have deployed an intimation that the credibility of the PCC as a 'self-regulator' was at stake in response to the action he sought from them in the aftermath of Motorman. If he was seeking to deploy it again in the highly-charged context of the s55 debate that was undoubtedly a high-risk political strategy, and Mr Hinton's response would be to a degree less startling. Needless to say, Mr Thomas emerged from that meeting empty handed again. Mr Hinton's follow-up letter of 17 November was more positive in tone, but non-committal as regards further industry action.[115]

5.8 It was now fully three years since Mr Thomas had moved to open a dialogue with the PCC, during which period he had identified himself very personally with the conduct of that relationship. The return on that significant personal investment was not evident. But even now, at a point which might be described as open antagonism, there was no evidence that he sought to reappraise his approach. It is possible that one effect of the elision of the PCC and s55 strands of his strategy had been to reframe the former not as a practical end in itself but,

[112] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT211.pdf
[113] p2, Richard Thomas, *ibid*
[114] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT221.pdf
[115] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-251.pdf

by keeping open a channel of communication, as a means of furthering (or at least seeking to manage opposition to) the latter. At any rate, Mr Thomas persisted in it.

5.9 *What Price Privacy Now?* provided some public comment on the interaction between the ICO and the PCC, thereby to some extent setting the agenda for its future interaction. It also records an understanding that the PCC 'monitors and adjudicates on disputes about breaches of the Editors' Code of Practice, which sets out the conduct the press have agreed to follow as part of a self regulatory system'.[116] The progress recorded was, however, relatively modest and is in these terms:

(a) The PCC had confirmed publicly and in writing that journalists must act within the law.

(b) It had agreed to keep repeating that message – and the ICO *"hopes that this will be done as loudly and actively as possible"*.

(c) There had been discussion about Code amendment relating to the acquisition of personal information – *"unfortunately, however, no concrete proposals have so far been brought forward"*.

(d) The Code Committee had rejected the ICO's own suggested amendments, but had agreed to keep the matter under review.

(e) There was agreement in principle to the issue of *"guidance for journalists"* by the PCC with ICO assistance.

5.10 On 4 January 2007, there was a further meeting with Murdoch MacLennan (then Chief Executive Officer of Telegraph Media Group) and Guy Black, both by this stage leading actors in the s55 counter-campaign. On Mr Thomas' account,[117] the agreed action points were that the ICO should prepare guidance on s55 and the public interest defence with a view to helping journalists to navigate it. It is notable, first, that the focus appears to have swung fully around from the industry representatives being asked to take action to change the culture, practices and ethics of the press, to the regulator being asked to clarify the law and his approach to regulation. Secondly, this appears, in itself, to have become part of what was, by now, a three-way negotiation on s55 between the press, the government and Mr Thomas.

5.11 The course of that negotiation is set out more fully in that part of the Report that deals with the relationship between the press and politicians.[118] It culminated in a compromise arrangement whereby a custodial penalty for s55 was finally introduced by the Criminal Justice and Immigration Act 2008,[119] together with an enhanced, more subjective defence for journalists, but neither provision was commenced as operative law; commencement relies on the exercise of an Order-making power which has not to date been exercised. At the same time, further desultory exchanges were continuing between Mr Thomas and the PCC. By letter of 27 March 2007, the Code Committee eventually rejected the amendments to the Code that he had proposed, but suggested some alternatives.[120] The ICO responded on 16 April, accepting the changes on the basis of a

> *"hope that they will be introduced with maximum publicity and advice to the media. Otherwise, the 'burial' of the changes within the existing Code, and the absence of a section explicitly prohibiting the obtaining of any private information without consent or a public interest justification, may present the risk that unacceptable activity will continue."*

[116] p20, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-2.pdf
[117] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-281.pdf
[118] Part I, Chapter 5
[119] pp1-11, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG4.pdf
[120] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-311.pdf

There is no indication that the ICO saw itself as playing a direct role in publicity and advice to the media. The letter reaffirmed the ICO's commitment to the s55 campaign and to producing guidance on s55 for journalists.[121]

5.12 On 25 April 2007, there was a further meeting with Guy Black and colleagues from press representative bodies to discuss 'stakeholder engagement' and the preparation of the guidance. It seems to have been inconclusive. The press representatives saw their role in relation to the guidance as 'supporting and commenting and they do not envisage a jointly badged product'; the ICO undertook to shorten and simplify the latest draft of the s.55 guidance.[122] A new version was worked on over the late spring and summer of 2007. Work also began within the ICO on a draft statement of prosecution policy on s55, designed to provide a measure of reassurance to the press as the ICO continued its campaign for custodial penalties over the first half of 2008.

5.13 An insight into the extent to which Mr Thomas had become very personally engaged in the politics of the passage of the relevant provisions of the Criminal Justice and Immigration Bill can be gained from some of the contemporary documentation which he provided to the Inquiry. In February 2008, the ICO prepared a draft report to Parliament in response to its apprehension that the amendment would be withdrawn by the Government in the face of press-sponsored opposition[123] as well as briefing for Ministers and recommendations for Parliamentary handling.[124] It also shows Mr Thomas directly lobbying the Government against withdrawal of the amendment in terms which included:

(a) urging that 'withdrawal would damage the reinvigorated credibility and authority of data protection law and the Information Commissioner's Office';

(b) an intimation that withdrawal would 'sit strangely' with the Government's legislation on identity cards;

(c) the anticipation of support in a number of outstanding Select Committee Reports;

(d) ripostes to the press campaigning;

(e) averring a determination on his own part to stop the pernicious, largely hidden and illegal market in personal data; and

(f) a conclusion, 'with considerable reluctance' that he would respond to withdrawal by laying a further specific report before Parliament.[125]

In due course, Mr Thomas met the Prime Minister, preparing for an agreed role in the continuing political negotiations between the Government and the press. He said that *'the PM started by saying that I had the most difficult job in the country*'.[126]

5.14 It is noteworthy that Mr Thomas was placing no (other) operational action by the ICO into this political arena. There was no proffered action plan for the means by which the ICO would structure its priorities and operations so as to ensure that the legislative change would, indeed, stop the trafficking of confidential personal information. The assumption appeared to remain that the change in its own right, and the accompanying publicity for the role of the ICO in promoting that change, would be effective in themselves. An internal note of a

[121] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-321.pdf
[122] pp1-2, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RTJ-Exhibit-33.pdf
[123] pp1-5, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-37-RTJ.pdf
[124] pp1-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-38-RJT.pdf
[125] p3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-39.pdf
[126] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-40.pdf

meeting that Mr Thomas had with senior officials from the Ministry of Justice (the successor department to the DCA) is illustrative of the way he was thinking.[127] As well as offering an assessment of the party politics of the Bill's provisions, he described his likely public reaction to a then-current possibility to change its provisions significantly in favour of the press. It would, he said, be *"nuclear"*:

> *"I said it would be very noisy and very messy. We will publicly denounce any such attempt. If we lost, we would publish a third report to Parliament, documenting how this state of affairs had come about."*

5.15 Suggestions that the press might finally take steps of their own (such as amendment to the Code, training and guidance) to address the extent to which their own culture, practices and ethics were in issue were now dismissed as 'too little, too late'. Only a change in the law would do. To that end, Mr Thomas wrote to selected high profile opposition politicians (including the Conservative and Liberal Democrat leaders) as 'a warning shot across the bows of those who might be wavering and as an encouragement to potential supporters' and planned press releases and a public media initiative.

5.16 This was not a regulator simply enhancing public debate from an expert point of view. Mr Thomas himself described it as 'playing hard ball'[128] or, in other words, full-blooded political campaigning. As noted above, the issue was settled for the time being by the compromise solution of legislation for custodial penalties (along with an improved defence) which was not then and has not since been commenced. At the same time, correspondence continued with industry representatives over the summer of 2008 about the publication of guidance and the promotion of awareness.

5.17 About the compromise solution on s55, Mr Thomas himself said this:[129]

> *"This was clearly the end of this particular road. I saw the compromise in "half a loaf" terms and – although very disappointed – recognised that it would still serve some deterrent and awareness-raising purpose, though less direct or powerful than originally envisaged."*

5.18 Reflecting more generally on his interaction with the PCC, Mr Thomas referred many times to an overall sense of disappointment. This is important commentary and it is worth setting some of them out in full.

> *(a) "I think over time I was somewhat disappointed. Although I don't decry everything they did, it fell short of what I'd hoped they might be doing."*[130]
>
> *(b) "The evidence shows that I went back a number of times to the PCC throughout 2005, 2006 and 2007, and tried to keep – engage their interest with it. But it is true to say that I thought their response was less strident and I think I used the word "disappointing" more than once in this context. I thought they could and should have done more."*[131]

[127] pp1-6, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-42.pdf
[128] p46, line 23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[129] p11, para 28, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[130] p117, lines 13-15, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[131] p12, lines 17-23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

(c) *"We thought and had some hopes that the PCC would be a better way of addressing the problem than anything to do with [pur]suing the prosecutions, which we were, at that time, recognising was going to be very expensive and demanding for the office. Now, with hindsight, I think I would have been more aggressive and more assertive with the PCC and with the Code at the outset, and they did disappoint me, as I said, in terms of their response."*[132]

(d) *"Overall – with only the limited progress recorded on page 19 of What Price Privacy Now? – I was disappointed by the response from the PCC and the Editors' Code of Practice Committee before and during 2006. I had hoped for much stronger and louder condemnation of wholly unacceptable misconduct, an explicit change to the Code, and more focussed guidance. Instead, there seemed to be a "Catch-22" view that the conduct was already illegal and that therefore not much – if anything – could be done by way of self-regulation. The exchanges did lead to guidance (with which the ICO assisted) on data protection law at large and some discussion about possible changes to the Code, but this increasingly seemed directed as much as heading off tougher sentences."*[133]

5.19 Notwithstanding all of this, Mr Thomas made clear his view that his strategy (that is to say, the continuing dialogue with the PCC, publication of his two reports to Parliament, and getting the law changed, despite the non-commencement of the changes) had proved to be very effective, at any rate in relation to the press.[134] His grounds for saying so come down to what he claimed was the lack of evidence of criminal conduct within the press postdating 2006:[135]

> *"I am not saying it's been eliminated altogether – this is under the surface, clearly – but I am saying – and my successor has said this to Parliament very recently, in October of this year [2011] – that it appears that the press are now behaving themselves in this particular area."*

5.20 Such empirical evidence as Mr Thomas offers for this conclusion appears to amount to accepting the word of the industry.[136] Without asserting the contrary, absence of evidence that undermines that assertion is not the same as saying that there is evidence that it is so. In the circumstances, it is necessary to consider the claims made by Mr Thomas for his strategy in general and to examine the paths that the ICO chose not to follow in parallel and, from there, to review whether, in more recent times, the press has, in fact, ceased to be any real source of interest to the ICO.

[132] pp23-24, lines 19-2, Richard Thomas, *ibid*
[133] p14, para 41, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[134] pp69-70, lines 18-10, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[135] p70, lines 1-7, Richard Thomas, *ibid*
[136] pp14-15, paras 43-46, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf

CHAPTER 3
OTHER POSSIBLE REGULATORY OPTIONS

1. Criminal proceedings in respect of journalists

1.1 No journalist was ever subject to prosecution as a result of Operation Motorman. Indeed, the ICO never got as far even as interviewing any journalist in connection with examining the possibility of criminal proceedings (however limited the value of doing so might have been). There is considerable dispute as to why that happened.

1.2 The account provided by Alex Owens is that, within weeks of the commencement of work on the electronic discs of the Motorman material, they were:[1]

> *"informed that we were not to make contact with any of the newspapers identified and we were not to speak to, let alone, interview any journalists. Despite our protests we were told this was the decision of Richard Thomas and that he would deal with the press involvement by way of the Press Complaints Council. It was at this moment we knew no journalist could or ever would be prosecuted in relation to our investigation. No journalist or Newspaper Group was ever spoken to by anyone from the Information Commissioner's Investigations Unit in relation to Operation Motorman. We also now knew that one of the major questions that needed to be asked but could never be asked, let alone answered was 'Why did you want all these ex-directory / mobile / family and friend telephone numbers and most importantly what were you doing with them?'"*

He was, he said, given to understand that the focus of continuing criminal investigation was to be exclusively on the private investigators, the blaggers and the corrupt officials and employees:[2]

> *"Basically they'd drawn a red line, with the press and the reporters above that line and we dealt with anything below that line."*

1.3 He described the way in which the team continued to prepare papers for conspiracy charges in respect of the remaining defendants (specimen charges relating to breach of s55 of the Act), interviewed some 50 to 60 victims and (under caution) all persons suspected of the unlawful obtaining, disclosing or blagging on behalf of Mr Whittamore. This material was passed to the ICO legal department for action and, by February 2004, the work was completed. He described having attended a conference with external counsel, in October 2003, in order to consider the weight of the evidence, and the written advice received that December which supported taking forward the conspiracy charges. counsel also directly addressed the question of criminal proceedings against journalists, advising:[3]

> *"Having regard to the sustained and serious nature of the journalistic involvement in the overall picture, there can be little doubt that many, perhaps all, of the journalists involved have committed offences.*

[1] pp8-9, para 4.9, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf
[2] pp30-31, lines 24-1, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf
[3] pp32-33, lines 4-22, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf

> *"The inference, overwhelming, it seems to me, is that several editors must have been well aware of what their staff were up to and therefore party to it. I understand that policy considerations have led to the view that enforcement of some sort rather than prosecution is the way forward in respect of the journalists/newspapers.*
>
> *"I understand and sympathise with that approach. This is, I believe, the first occasion upon which the scale of the problem has come to light and it may not be unreasonable to give the Press Complaints Commission the chance to put their house in order."*

1.4 On the basis of that policy, counsel considered whether journalists or editors should be cautioned in the light of the evidence of the extent of their involvement and the 'often unpleasant' nature of the offending. He also registered a measure of anxiety about taking forward the conspiracy charges to the exclusion of press defendants:[4]

> *"Those defending in the prosecution might seek to make capital from the fact that the journalists are not being prosecuted. The judge might also comment on the basis that the journalists are the ones (it seems) who created the demand for this offending. With this in mind, it is a sensible precaution to equip me at some point before trial with the detail of the reasoning not to prosecute. I may need to explain or even defend the decision to the judge."*

There is no evidence that a detailed statement was in fact produced.

1.5 After completing work on the files, on Mr Owens's account:[5]

> *"we received no feed back whatsoever as to what action was being taken in relation to the press's involvement. On those occasions we did ask the question the only response we received was that 'Richard [the Commissioner] was dealing with it'."*

The prosecution was ultimately conducted by the CPS and he describes how the ICO was neither formally aware of or involved in the prosecution of Mr Whittamore; the next they heard, in April 2005, was that he had been conditionally discharged by the Crown Court at Blackfriars. Mr Owens left the ICO at around this time, with, he said, unanswered questions about what if any action had been taken in respect of the press, and why such prosecution as had proceeded seemed to have involved Mr Whittamore but none of the other conspirators. He concluded that 'something had gone drastically wrong with the prosecution case', producing an outcome which did not begin to do justice to the Motorman material. [6]

1.6 On Mr Owens's account, therefore, the suggestion within the Motorman material of *prima facie* criminality within the press could and should have been taken forward to prosecution. He said *"we were in a position to prosecute everyone in the chain from the 'blagger' right up to the journalists and possibly even the newspaper groups"*.[7] However, he said that the intervention of a policy decision by Mr Thomas to proceed with the matter himself and exclusively in dialogue with the PCC as a result of, or additionally because of, a reluctance to engage directly in enforcement action in relation to the press prevented this from happening.

1.7 This account was vigorously disputed by both Mr Aldhouse and Mr Thomas. The evidence of Mr Aldhouse was that there was no policy, or none that he was aware of, of holding back from the prosecution of journalists. He was clear that he was not involved in the operational decision-making at all; however, if he had been asked, he would have considered that there

[4] p34, lines 16-24, Alexander Owens,*ibid*
[5] p10, para 4.14, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf
[6] pp11-12, paras 4.18-4.19, Alexander Owens, *ibid*
[7] p7, para 4.5, Alexander Owens, *ibid*

was indeed a case for taking the involvement of journalists and newspapers in criminal behaviour further. Nor would he have thought resourcing problems a conclusive argument against doing so: he thought that it would have been possible to have discussed the possibility of supplementary funding with the sponsoring government department. But he did not apply his mind to such considerations at the time; it was not his place to do so. He was aware of a measure of frustration in the investigations team that no action had been taken in relation to the press, and of some discussion about the disappointing criminal process in the office, but could recall no detail.[8]

1.8 Mr Thomas also denied any positive policy decision or instruction being given not to proceed with criminal investigations into press conduct. This denial was emphatic and can be enumerated:

(a) *"there was no such policy decision, certainly not at the early stage";*[9]

(b) *"[it] is possible that Mr Owens has somehow confused or conflated all the dates and interpreted that [Mr Thomas going to the PCC] as some sort of policy or some sort of instruction, but that was not the case";*[10]

(c) *"[if] there was a policy, it was not one which I had any hand in, one which I knew about, which I made or which I was told about";*[11]

(d) *"as far as I'm aware, there was absolutely no such policy and I can't think why there would have been such a policy";*[12]

(e) *"what I'm trying to say – and I hope I'm coming across very clearly – is that there was no policy from the outset that we weren't going to go against the press";*[13]

(f) *"Q: Your evidence is that the policy steer didn't come from you?*
A: Absolutely not";[14]

(g) *"there is clear evidence that there was not a policy conclusion even at that point [the approach to the PCC]";*[15]

(h) *"I don't accept that there was a policy decision. I don't accept that we abandoned the possibility of prosecuting journalists."*[16]

1.9 Indeed, Mr Thomas was insistent in his evidence that there was no 'conscious decision' at all not to prosecute journalists.[17] He explained that in two different ways although, on the face of it, these are not entirely straightforward to reconcile. He said both that he assumed that in fact the office was making progress with the prosecution of journalists as they would with any other criminal investigation,[18] and also that there was an active plan to keep the option of prosecution alive but to wait and see first how the conspiracy prosecutions being undertaken by the CPS fared, and in due course, if all went well, to activate them.[19]

H

[8] pp44-52, Francis Aldhouse, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[9] p37, lines 23-24, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[10] p38, lines 3-6, Richard Thomas, *ibid*
[11] p47, lines 14-16, Richard Thomas, *ibid*
[12] p54, lines 16-18, Richard Thomas, *ibid*
[13] p55, lines 3-6, Richard Thomas, *ibid*
[14] p57, lines 14-16, Richard Thomas, *ibid*
[15] p60, lines 23-25, Richard Thomas, *ibid*
[16] p74, lines 19-21, Richard Thomas, *ibid*
[17] p70, lines 21-22, Richard Thomas, *ibid*
[18] p50, lines 17-23, Richard Thomas, *ibid*
[19] pp46-47, 70, lines 24-2, 8-25, Richard Thomas, *ibid*

1.10 Taking the second of these first, the problem with any 'wait and see' strategy was articulated by Mr Owens. He described his response to the way in which the discontinuance of the criminal proceedings for conspiracy was described in *What Price Privacy?* in the following terms:[20]

> *"This was a great disappointment to the ICO, especially at it seemed to underplay the seriousness of section 55 offences. It also meant that it was not in the public interest to proceed with the ICO's own prosecutions, nor could the Information Commissioner contemplate bringing prosecutions against the journalists or others to whom confidential information had been supplied."*

1.11 As Mr Owens explained:[21]

> *"It may be correct in relation to the others, you know, the blaggers and the thing, but you could never go back after three years and contemplate prosecuting journalists. They'd never even been investigated. And I – there's enough legal people here to know if I – I kept evidence – you can't put – if you have a conspiracy, you can't put five people on the back-burner and wait and see how you got on with the same five people in the front that's getting prosecuted, because you got a good result, right, we'll go and prosecute them as well. Well, they're all part of one conspiracy. You either investigate them all, or those five you have to say we're not going to investigate them which means we're not going to prosecute them. I don't know whether that would be - is the correct word abuse of the justice system?"*

1.12 In my judgment, as a matter of criminal process, the proposition that the journalists were not investigated because there was a deliberate strategy which had been thought through (in the light of evidence that was known about and understood) simply to see how the prosecutions against the 'middle men' went before proceeding against the press is neither credible nor sustainable. In any event, there is no contemporaneous evidence that this was indeed the strategy. This is very different from a decision not to proceed for good operational reasons, followed by a later re-evaluation.

1.13 The other argument advanced by Mr Thomas was that there was indeed an active policy to pursue criminal inquiries into the activities of the press, but that they ran their operational course to no effect. He suggested a number of operational reasons for the ICO not, in the end, proceeding with criminal proceedings in respect of the press. They included:

(a) the inevitability that severe and disproportionate logistical difficulties would be faced, including the commitment of significant resources;[22]

(b) legal uncertainty about the difficulty of proving 'procuring' of disclosure by the press (which would require establishing knowledge or recklessness about the lack of the individual's consent) and about the possible deployment of public interest defences by journalists;[23]

[20] p28, para 6.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-1.pdf

[21] pp38-39, lines 13-39, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf

[22] pp54-55, lines 25-6, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf

[23] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Second-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Third-Witness-Statement-of-Richard-Thomas-CBE1.pdf

(c) an understanding that Mr Owens's extended sick leave and anxieties about his reliability as a witness, influencing legal advice to withdraw from prosecution action;[24]

(d) a strategic view that it would be preferable to defer conclusively to the CPS prosecution of the corruption cases, *"giving precedence"* to the corruption proceedings because they were *"more serious"* and carried higher sentence maxima than the cases which the ICO could prosecute;[25]

(e) a strategic preference for proceeding against the 'middle-men', at the heart of the organised trade in confidential personal information;[26]

(f) the 'perversity' of the outcome in the Whittamore prosecution: the conditional discharge was a reason any further prosecutions would not be in the public interest, and in particular *"completely extinguished any possibility whatsoever of prosecuting journalists"*;[27] and

(g) a sense that *"any formal action, particularly a prosecution, was likely to be, if you like, that much more difficult because there will be less sympathy for the celebrity."* This is a jury point, perhaps, about the unattractiveness of bringing cases in respect of celebrity victims who might, however unfairly, be considered to have compromised their own data protection entitlements.[28]

1.14 The difficulty with any or all of these explanations is that, on Mr Thomas's own account, the Inquiry saw no evidence that at the time the ICO went through a strategic decision-making process which actively considered any of these points and reached a conclusion on them. There clearly would have been the need for major decisions to have been taken one way or the other about the allocation of resources, significant operational planning and close liaison with the police and the CPS. There is no evidence that any of this happened. On the contrary, the best evidence available to the Inquiry suggests that:

(a) there was prima facie evidence of criminal behaviour by journalists;

(b) this was investigated up to a point within the ICO by paper analysis and by interviewing a selected group of victims;

(c) external counsel encouraged the view that the evidence of criminal conduct by journalists was persuasive and that there were merits in taking the matter further; but

(d) the matter was not taken any further by the ICO in relation to data protection offences, not even to the stage of approaching a single journalist either to be interviewed or for a statement.

H

[24] p2, *ibid*

[25] p70, lines 13-25, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Second-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Third-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf

[26] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Second-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Third-Witness-Statement-of-Richard-Thomas-CBE1.pdf

[27] pp73-76, lines 24-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; pp3-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Second-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Third-Witness-Statement-of-Richard-Thomas-CBE1.pdf; p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf

[28] pp73-74, lines 20-22, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

1.15 Mr Thomas was either unaware that the matter was not proceeding within his office, or aware of it without challenging that state of affairs. Either is problematic. The first suggests a disconnection from one of the biggest operational cases the ICO ever dealt with to a degree which is difficult to understand. After all, this was a case on which he himself spent many years pursuing at a strategic and political level. There was this exchange:[29]

> *"Q: When the prosecution started, there were no journalists there. Did you not think about that?*
>
> *A: I wasn't involved in these meetings.*
>
> *Q: No … not the meetings, but you were alert as to what was going on with the prosecution process?*
>
> *A. Only in very general terms and I have no recollection."*

At the very least, the second explanation raises questions about the extent of the interest that Mr Thomas had in this aspect of the enforcement of the data protection regime notwithstanding the extent of the abuse revealed by Operation Motorman.

1.16 This important matter was directly put in this way by Robert Jay QC to Mr Thomas when he gave evidence:[30]

> *"May I try and sum up the position in this way? Given two facts which we know, Mr Thomas – the first fact is that the journalists were never interviewed by your office and the second fact is that such an interview would be a sine qua non to a prosecution, out of fairness to the journalists on the one hand, in order to obtain further evidence - does it not follow that either there was a policy decision not to pursue that course or, alternatively, there were operational failures or decisions by the investigators not to carry out an elementary step, namely to interview?"*

1.17 Mr Thomas challenged that dichotomy, but only by way of suggesting that an alternative was the 'wait and see' policy which is not, itself, obviously compatible with an omission to interview any journalist in a timely fashion. Mr Jay therefore put the analysis to him even more directly:[31]

> *Q. "So at the moment I am thrashing around mentally to see what other alternative there might be beyond a policy decision on the one hand or incompetence in your investigation officers on the other."*
>
> *A. "Well, if you want to put it in those terms, I have to put it to the latter, but I am absolutely – you know, absolutely clear because I wouldn't have done any of the things I had done right through 2005, 2006, 2007 if I had thought at any time that I or anybody else had said: 'Back off the journalists'."*

1.18 This is an answer which has difficulties at many levels and, in fairness to Mr Thomas, may not bear too close an analysis. As between a policy or an operational failure there are perhaps levels of intermediate gradation. It is, however, necessary to take stock of the issue of non-prosecution of journalists by the ICO.

[29] p53, lines 5-12, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[30] p47, lines 3-13, Richard Thomas, *ibid*
[31] pp48-49, lines 19-3, Richard Thomas, *ibid*

1.19 In the first place, it does not seem that there need have been any reason from the outset for the ICO not to have proceeded down the path towards active pursuit of prosecution. Mr Jay put it this way:[32]

> *"But if all one needed to do: "Let's cherry pick the best cases of illegality. The friends and family cases, the one or two police national computer cases. We'll interview the journalists in those cases. We might interview the editors." That is a fairly narrow exercise. You can then assess how strong the case is. After all, if the evidence is strong enough, you might even get guilty pleas. Who knows?"*

1.20 A lot of evidence was available, and a good deal of work was done in the early stages. Mr Owens took the point that it might not have required a huge amount of delving and interrogation by him in relation to the relevant journalists to get the answers he needed to the questions in his mind (which principally concerned why they wanted the material). Some might have declined to answer; of those who answered, some answers might have incriminated journalists, others might have exonerated them.[33] But the questions were never asked. It would not have been operationally impossible, and ought perhaps to have been operationally rather attractive, to have proceeded in the way Mr Jay hypothesised. But there was no indication that this was ever contemplated, far less attempted.

1.21 In the second place, although I recognise that the conditional discharge imposed on Mr Whittamore meant that there was little practical prospect of resuming criminal investigations in relation to the press for the reasons outlined above, such an outcome was hardly possible to foresee. The record that the ICO made of the hearing before His Honour Judge Samuels QC in the Crown Court at Blackfriars in April 2005 (including his sentencing remarks)[34] does not on the face of it even support the proposition that the prosecution of journalists was out of the question following the conditional discharge of Mr Whittamore.

1.22 From this note, it is possible to derive the following propositions:

(a) The sentence in this case was clearly to a degree based on the particular position of a co-defendant (previously sentenced in ignorance of this prosecution) and the unchallenged personal circumstances of Mr Whittamore who was described as of previous good character; in a state of depression; 'reclusive'; 'probably a broken man' of limited means, unemployed and effectively unemployable in his previous line of work.

(b) There were procedural considerations militating strongly in favour of a swift disposal of the case.

(c) There is no indication at all that the sentencing judge considered the offending behaviour not to be serious in nature; on the contrary, he observed: *"The vice of the primary conspiracy was to make known to the press information which on any view ought to have been confidential … I refer to the vice and I do so again as a warning to others; others cannot expect leniency as seen today."*

1.23 To be fair to Mr Thomas and the ICO, it is right to record that there were some issues about the nature and extent of the co-operation between the ICO on the one hand and the police on the other. Mr Owens said of the prosecution:[35]

[32] p56, lines 8-16, Richard Thomas, *ibid*
[33] pp43-44, lines 15-2, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf
[34] pp1-22, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT-49.pdf
[35] pp10-11, para 4.16, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

"We had never been advised that the matter was due before the courts. We were never given the opportunity to attend even though we had been the investigating officers and were never given any details of what had happened in relation to all the other defendants we had anticipated would be jointly charged with Whittamore for conspiracy… we did hear that there had been some conflict between the ICO legal team and the Crown Prosecution Service/Metropolitan Police…"

1.24 Mr Thomas put the matter in this way:[36]

"I also understand that there was a feeling that the prosecutor had not accurately conveyed some of the material to the court vis-a-vis the journalistic aspect, and I can't turn it up straight away now, but some of the notes you've had from the ICO's legal file indicated that the barrister for the CPS had not perhaps conveyed the full picture. We'd sort of – if you like, were not actively engaged or involved in that."

1.25 It is neither possible nor necessary to reach any conclusion about the extent to which a failure of liaison impacted on this prosecution, although a close and mutually supportive relationship between ICO, police and CPS in this type of case is clearly important.

1.26 Putting to one side the issues which flow from a consideration of the result of the prosecution, and reverting to the initial decisions, the conflict between the investigator, Mr Owens, and Mr Thomas remains real. Mr Owens bluntly put the matter in this way:[37]

"In conclusion I would summarize by saying it is my opinion that:

- *ICO's decision not to investigate any journalist in relation to Operation Motorman was a wrong decision.*
- *This decision was certainly not based on any advice given by counsel or on any lack of evidence, as ICO would have everyone believe. The decision had been made long before the involvement of any Counsel or opinions being requested and there was overwhelming evidence that many of the journalists did know or at least should have known the information they were requesting could only be obtained illegally and what they were requesting was not for a purpose which would carry any form of 'public interest' defence.*
- *The decision not to pursue any journalist was based solely on fear - fear of the power, wealth and influence of the Press and the fear of the backlash that could follow if the press turned against ICO.*
- *The publication in May 2006 of 'What price privacy' was no more than an attempt to lock the stable door after the horse had bolted in an effort to cover up the fact that ICO had failed in its duty to conduct a full and proper investigation into the conduct of journalists at the time when they could and should have.*

"Throughout the whole of the time the Motorman investigation was on going there was never any mention or suggestion of any report being commissioned for Parliament. I feel it was no coincidence that this report was not published until May 2006, only a few weeks before the Mulcaire scandal broke. It is my belief that when ICO became aware that the Metropolitan Police were conducting yet another investigation involving more

[36] p83, lines 18-25, http://www. levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-morning-Hearing-9-December-2011.pdf
[37] pp18-19, para 5.18, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

wrong doings by the Press, they decided to pre-empt and deflect any criticism which was bound to be directed towards them in relation to their lack of action against the Press in Operation Motorman.

"All the evidence published in this report had been gathered and had been available since March 2003, so if as David Smith stated, again in the Panorama Report, ICO wanted to send "an effective and final warning" then why did it take over three years to prepare it, and not publish it until 13 months after the prosecution against Whittamore had concluded."

1.27 These are stark allegations, which Mr Thomas firmly invited the Inquiry to reject. One of his reasons was that Mr Owens' evidence must be regarded as unreliable as he had parted from the ICO on unhappy terms and that must be taken to have clouded his judgment on this matter. However, insofar as this Report comes to any conclusions on these issues it does so on their own merits rather than on the basis of speculation by Mr Owens on matters not within his personal knowledge. On the other hand there is no reason to doubt that Mr Owens' evidence was, at least, an authentic description of his own perspective. Furthermore, it cannot be overlooked that, by their own accounts, the senior management of the ICO had placed Mr Owens and his immediate superior in a position in which their perspectives were operationally determinative: it was a matter for them.

1.28 I start from this proposition. The evidential 'treasure trove' of the Motorman material, the questions of public interest and of the integrity of the data protection regime, the seriousness of the breaches of trust evidently involved and the potential harm occasioned to a very large number of individuals all make it very hard to reconcile the evident lack of analysis or a discernible action plan in the ICO for consideration of criminal investigations into press misconduct. Whether, in the end, the decision was taken to pursue those investigations or not, the matter should have been consciously and conscientiously considered and decided upon from an operational and strategic point of view. The decisions should have been reasoned and recorded. The evidence is that this did not happen. It is possible (although I do not say more) that a significant opportunity was thereby lost to challenge and check elements in the culture, practices and ethics of the press that were insufficiently mindful of the law, the rights and entitlements of individuals, the public interest and the obligations of good practice.

1.29 Before reaching any firm conclusions, however, it is also necessary to provide the context of the alternatives available to the ICO, the choices made and the outcomes in practice. Mr Thomas said:[38]

"it's important to record that prosecution is not the only way to deal with a particular problem."

Operation Motorman was clear evidence of a problem in the culture, practices and ethics of the press. It was not dealt with by criminal investigation and prosecution. The ICO was, on its own account, not primarily a prosecuting authority; it was a statutory regulator, provided with a range of standard regulatory powers and had a range of other powers and operational choices available.

1.30 Mr Thomas shared with the Inquiry the thought that there might even have been a causative relationship between his understanding from his staff that the prosecution of journalists was not a plausible option, and his decision to take the matter to the PCC. He accepted that thought was to a degree *ex post facto* rationalisation, and it is not certain from the chronology

[38] p70, lines 8-10, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

that it can have been the case (he also said elsewhere that the reason he refused to go into operational detail with the PCC was that the prosecutions were still *"under way."*)[39] But, in the light of the eclipse of the prosecution option, the way he put the position of the ICO in relation to what the evidence discovered in Operation Motorman revealed about the culture, practices and ethics of the press must surely be regarded as authentic:[40]

> *"We can't leave it there. We must do something."*

The 'something' in Mr Thomas's mind was his twin-track political strategy. But the question also has powerful operational resonance. If the ICO was not to tackle the press by the route of criminal investigation, the 'something' else must be considered.

2. The use of regulatory powers

2.1 One of the striking features of the narrative that started with Operation Motorman is that neither during the criminal investigation nor at any time thereafter does it appear that there was any evaluation of alternative operational steps which remained available. On the contrary, the ICO appears to have put faith only in prosecution and the twin track strategy championed personally by Mr Thomas. However, the 'treasure trove' of material gave rise to a number of important operational issues and permitted a variety of regulatory responses.

2.2 There was certainly the question of future deterrence, which featured so prominently in Mr Thomas' campaign. There was also the wider operational question already noted: it was unlikely that Mr Whittamore was the sole operator in this evidently lucrative market, so how big, in fact, was the problem? This was something to which *only* the press, as drivers of the market as evidenced by the Motorman material, were likely to be able to provide a clear answer.

2.3 There were issues at a more specific level as well. The Motorman material suggested that the press was in possession of a quantity of material in breach of the data protection principles and of the rights of the individuals involved. If their acquisition of that material was unlawful, then their continuing holding and use of the material was likely to be unlawful and unfair also. Motorman raised questions not merely of past illegality (obtaining the information) but of present and continuing illegality.

2.4 That, indeed, was the distinguishing feature of the role of the press in the narrative. The blaggers and the corrupt officials and employees could be identified and their practices terminated. But, unless they had taken active steps (which might include destruction) in relation to the personal information, the press were likely to be persisting in conduct unlawful under the data protection regime on a daily basis. Even holding information unlawfully and unfairly is a potential breach, whether or not accompanied by further breaches, intended breaches, or indeed any further plans or actions at all. Every day which passed raised acute practical and operational issues in relation to the press. How much personal information were they holding unlawfully, and how should the situation be remedied and lawfulness assured? These issues were live and acute, and not even prosecution of the press would have been a complete answer to them. Although criminal investigation would have got to the bottom of the specimen cases pursued and no doubt would have had a salutary chilling effect of some sort on unlawful practice, it could never have been the thorough-going systemic look at the Motorman material in the hands of the press, nor the systemic rectification of any continuing unlawfulness, which the evidence required.

[39] p119, lines 5-6, Richard Thomas, *ibid*
[40] p62, lines 15-16, Richard Thomas, *ibid*

2.5 The seizure of the Motorman material was, in other words, a very major case of the sort which statutory regulators are created (and given practical powers) to deal with. The press were under continuing legal obligations to consider what steps were needed to clean up their own operations from the products of the unlawful trade in personal information. Even if defences may have been available in some cases to criminal charges, a significant number of questions would have been outstanding as to the extent to which the press had complied with their civil legal obligations and with standards of good practice under the data protection regime.

2.6 It is therefore significant that Mr Thomas confirmed that the ICO did not, at any point, come close to considering the use of the civil enforcement powers at their disposal either to seek further information from the press or to require them to comply with the data protection regime. Evidently, *"some sort of passing thought was given to it but nothing materialised"*. That was for two principal reasons. The first was that these powers were, in any event, rarely used. The second was that *"everybody knew that to a very large extent the powers of the office were very constrained indeed when it came to dealing with the media"*.[41]

2.7 It is evident, as considered at the outset of this Part of the Report, that there were questions about the operational experience in the ICO at the time of the deployment of its formal regulatory powers, and particularly so in relation to the press. That is further considered below, as is the question whether the investigative and enforcement powers of the ICO in relation to the press were, indeed, as a matter of law insufficient to allow the questions raised for the press by Motorman to be effectively tackled by the regulator.

2.8 At this stage, it is sufficient to articulate the following concerns:

(a) The Inquiry saw no evidence that any of these matters were the subject of serious consideration within the ICO.

(b) The Inquiry received a quantity of evidence as to how far the Motorman material could be considered *prima facie* evidence of criminality on the part of journalists (not least because of the question of intent), but it is not credible to argue otherwise than that it was *prima facie* evidence of extensive unlawful and unethical data protection practice.

(c) Whether the press would have had an answer to that *prima facie* unlawfulness certainly fell to be considered and, to such extent as it did, so the evidence is that the ICO was of the view that that was highly unlikely to be the case.[42] The substantive exemptions from the principles and rights of the data protection regime in favour of the press may have been extensive, but they were not limitless. It was not open to the ICO on the evidence of the Motorman material to conclude with any confidence that the press had been acting within its rights so far as personal information privacy was concerned.

(d) The procedural hurdles standing in the way of formal proceedings by the ICO against the press may have been daunting – but it is not credible that Parliament intended them to be insuperable. If ever an operational data protection issue arose where active contemplation of regulatory action in respect of the press presented itself (I put it no higher), Motorman was surely that case.

H

[41] pp25, lines 20-23, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

[42] That much is apparent from the way in which the ICO analysed the Motorman entries into those 'positively known to constitute a breach of the DPA 1998' [5,025], those 'considered to be probable illicit transactions' [6,330] and the balance 'lacking sufficient identification or information … to determine whether they represent illicit transactions or otherwise' [1988]: pp1-2, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fifth-Witness-Statement-of-Richard-Thomas-CBE.pdf

(e) Not only was there no evidence that serious operational attention was given to these issues, either at the time or at any point since, it is noteworthy that at no stage since the Motorman material was found has the ICO raised as an issue the sufficiency of its powers to tackle breach of the data protection regime by the press.

2.9 In relation to this last point, at no point during his long campaign on custodial penalties did Mr Thomas seek reform of the provisions applying the civil law to the press. The present Information Commissioner, Christopher Graham, does not do so today. That left the Inquiry with the question of whether the powers available to the ICO were in fact adequate for the task of pursuing with the press the continuing operational issues raised by Motorman, but were neglected by the ICO; or whether they were inadequate, and the ICO has chosen, for whatever reason, not to draw attention to their inadequacy. Both Commissioners have strongly argued on these points that they have other priorities and that, whatever the legal position, it would not have been right for them to place the practices of the press among those priorities. I reflect on that in due course.

2.10 Not for the last time in this Report, a haunting question asked by Mr Owens arises. He described himself musing on the operational implications for the press of the Motorman material in this way:[43]

> *"It's our job to take them or indeed anyone else on, that's what we are paid to do. If we do not do it, then who does?"*

The question is even more pertinent in relation to civil law enforcement under the data protection regime than it was to the question of prosecution. The CPS can always take prosecution decisions (including in relation to s55) and consider the matter from the perspective of the totality of any apparent criminality. Only the ICO is able to take regulatory enforcement action. If anything, the pertinence of this question has only increased over time.

2.11 None of this is to suggest that the ICO *should* have had recourse to testing its formal investigatory and enforcement powers in practice in this case, but simply that it might have been expected to give the question urgent and detailed consideration. No regulator would expect as a matter of routine to make the formal assertion of its powers its first reaction, although in an egregious or systemic case (and Motorman was surely such a case) that may be appropriate. To the extent that criminal proceedings remained in active contemplation there would in any event have been a need for detailed consideration of the potential interactions between criminal and civil investigations. However, if not formal action, possibly as a prelude to the active consideration of formal action, the operational imperative to 'do something' about the Motorman problem with the press might at least have been expected to direct the mind of the ICO to the possible effectiveness of a range of informal steps.

3. Engagement with the industry: guidance and promoting good practice

3.1 Under the DPA, the ICO has a general legal obligation to:[44]

> *"promote the following of good practice by data controllers and, in particular, so to perform his functions under this Act as to promote the observance of the requirements of this Act by data controllers".*

[43] p7, para 4.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf
[44] http://www.legislation.gov.uk/ukpga/1998/29/section/51

The press organisations involved in the Motorman case were undoubtedly data controllers for these purposes and 'good practice' can refer to standards over and above the strict legal requirements of the data protection regime. Therefore, even assuming that the ICO had considered that, in the case of the press, its own powers were too restricted or restrictive for formal regulatory action to be the best way to proceed, its duty to promote good practice would still have been engaged. Mr Thomas described his entire twin-track strategy to have been undertaken in furtherance of his duty to promote good practice but the duty was also relevant to the operational imperative. That imperative was to tackle the questions raised by the fact that, so far as the ICO had reason to believe, the Motorman material remained in the hands of the press in circumstances which, at the very least, raised specific and systemic questions of good practice, standards and ethics.

3.2 The first recourse of a regulator is not usually to formal proceedings. In those circumstances, it is more usual to make informal contact in order to follow up an apparent problem (which is any practice falling short of desirable standards), hear the other side of the case, and seek to engage in a detailed dialogue about the nature and extent of the problem and the steps which might be taken to address it satisfactorily. At the very least, the Motorman material revealed to the ICO that the press had engaged in questionable practice in relation to individuals' information, that it remained in possession of that information in circumstances which, again at the very least, raised questions about their conformity with good practice, and that good practice would require some contemplation from the individuals' point of view as to whether steps were needed to improve the situation. But the Inquiry saw no evidence that any of these matters, any informal approach to the press data controllers or any assessment of the immediate practical steps suggested by good practice, were actively contemplated let alone put into effect.

3.3 Mr Thomas said that he did, indeed, have it in mind to write to the various journalists and editors involved, drawing attention to the fact that they were 'incredibly lucky' not to have been prosecuted (or, it might have been added, not to have been made the subject of formal investigatory or regulatory action).[45] Pressed as to why no attempt was in fact ever made to engage with the individual newspapers, his answer was that, in going to the PCC, he had *"dealt with them all collectively"*.[46] Apart from the identified concern that this suggests a lack of understanding of the role and responsibilities of the PCC, it implies that these were mutually exclusive approaches. It also suggests that there was no imperative to deal with the problem in the short term and in a practical way: that is to say, to address the issue not just of the press ceasing to commission further unlawful trade in personal information but also of what it was doing with the information already in its possession as a result of that trade. As noted above, the PCC itself urged Mr Thomas to engage directly with the industry and, in any event, showed little appetite to take the responsibility that Mr Thomas wished to pass on.

3.4 It is also significant that there seems to have been no attempt to engage directly with the press (even indirectly, through the PCC) in the run up to the publication of *What Price Privacy?*[47] That report was of course conceived principally from the perspective of a policy decision to the effect that the introduction of custodial penalties for s55 was to be the principal means of impacting on the unlawful trade in personal data. Considered, however, from an operational point of view, the lack of engagement with the press or any part of it on either the text or the

[45] p72, lines 2-11, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[46] pp110-111, lines 23-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[47] pp111-112, lines 14-7, Richard Thomas, *ibid*

data tables is both striking and surprising. It afforded the industry no possibility of verifying the data (the consequences of which, in at least one case, are considered further below). It also missed what might very well have been the prime opportunity to discuss with the industry what practical lessons could be learned and what steps they ought to have taken or be taking not only to remedy any persistent problems, but also to secure good practice for the future. A not insignificant 'carrot' might have been a willingness to include an account on that exchange in the report to Parliament, thereby demonstrating that the press were taking the issue seriously.

3.5 Mr Thomas, however, said that he simply relied on the publications of his reports to Parliament to engender awareness amongst proprietors and editors at the national level of the ICO's concerns.[48] In relation to *What Price Privacy?* he reported:[49]

> *"I would say that was promoting good practice, and sending it to a hundred organisations with specific personalised letters saying 'this is not acceptable' … I would say this is very much promoting good practice."*

3.6 In reality, however, this was all rather late. It was three years after the event by which time the audit trail in relation to the Motorman material in the hands of the press was likely to have gone very cold indeed. Three aspects of the conduct of the ICO are difficult to understand. The first is that if it was possible to prepare a large individual awareness exercise, complete with personalised letters in order to draw attention to *What Price Privacy?*, and if that was seen as an effective way to discharge the duty of the ICO to promote good practice, there is no reason why similar attempts could not have been made at the time to contact the industry directly. Second, while making every allowance for the decision to approach the PCC as a form of collective engagement with the press, the ICO did not recommend specific good practice steps to be promulgated to the industry as well as 'general condemnation'. Third, when it was becoming increasingly clear that the PCC was not going to act as an effective interlocutor with the industry on behalf of the ICO's operational concerns, even then, the ICO did not seek to communicate directly with the industry itself.

3.7 Even after the publication of *What Price Privacy?* the process of preparing and issuing effective good practice guidance to the press was faltering and inconclusive. Of the document eventually produced, Mr Thomas said:[50]

> *"It was a useful guidance note but I suppose I was a little concerned that it buried the section 55 warnings into a wider context of talking about the Data Protection Act and its application to the media more generally, and I think even now I would say that it was a shame it didn't just focus on section 55 in the way that our own note, which we produced, I think, in 2006 or 2007, what we call a good practice note, that was a very, very clear one and a half pager as to how the press should take seriously section 55."*

3.8 In reality, the ICO did not direct the press towards the practical steps it needed to take, not least in the maintenance of proper audit trails in relation to its handling of personal information (especially, as Mr Thomas had noted, in the event of an intention to rely on the public interest as a defence to s55). Rather, the process had become absorbed into managing the defensive stance of the press in response to the s55 campaign. A part of that response was the alleged discomfort of the press with applying legal public interest tests, notwithstanding the obvious centrality of judgments on the public interest to the routine

[48] p51, lines 10-12, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[49] p27, lines 14-21, Richard Thomas, *ibid*
[50] p14, lines 14-23, Richard Thomas, *ibid*

standards and ethics issues with which the press is inevitably concerned on a day to day basis. Public interest judgements were also the daily bread and butter of the FOI regime which also fell within the ICO's regulatory remit and on which extensive and detailed guidance has been published. Rather than pursuing the idea that the PCC would guide the press on this matter operationally, along with the other possible lines of approach, it was eminently feasible for the ICO simply to grip the issue both efficiently and expeditiously.

3.9 Furthermore, the ICO was under a continuing legal obligation to promote good practice, including by considering the issue of guidance, either specific or general. It is not easy to understand why the ICO persisted for years in trying to force the hand of the PCC to issue guidance when it had statutory powers of its own to do so; moreover, these were statutory powers which it was under a legal obligation to keep under constant review. Having diagnosed a need for guidance, and in the absence of a satisfactory and timely response from the PCC, it could have propelled the process forward with a comprehensive draft of its own, if necessary in direct consultation with the industry. There is no evidence that it contemplated doing so.

3.10 As noted above, one of the issues of contention between the ICO and the PCC over the course of its dialogue was the demand of the PCC for access to the *detail* of the Motorman material before it would consider itself able to take direct action on any matter with the press (this was Sir Christopher Meyer's request for 'beef'). The DPA includes a number of provisions inhibiting disclosure by the ICO of confidential material it has acquired in the exercise of its functions;[51] this is a very standard feature of regulatory regimes. Those provisions would have inhibited the public disclosure of the Motorman material, and were an operative reason for the presentation of the material in the *What Price Privacy?* reports in summarised form only. Those provisions might also have rightly restrained the ICO from detailed disclosure to the PCC. But they would *not* have restrained discussion by the ICO of the relevant parts of the Motorman material with the individual press organisations (data controllers) concerned for the purposes of furthering their compliance with the legal or good practice requirements of the regime. At the point at which Mr Thomas declined to share the detail of the Motorman material with the PCC, he effectively acknowledged that detailed and specific discussions could only ever have taken place directly between the ICO and the individual press organisations.

3.11 On his own account, Mr Thomas was emphatic about the lack of engagement directly by the ICO with the press. When giving evidence, he told the Inquiry that "*I don't think I've ever had a conversation to this day with an editor*"[52] (although when prompted he recalled that he had, of course, spoken to editors, including Mr Dacre, in the context of his interactions with the Editors' Code Committee). But again, it was only the ICO that could have conversations with individual press organisations about their continued retention of the Motorman material; there was nobody else.

4. Engagement with victims

4.1 The Motorman material was evidence in the hands of the ICO that a very large number of people appeared to have been the victims of unlawful use of their personal information. Those individuals had rights and entitlements under the DPA, and in the civil law more generally, including rights in relation to confidence and privacy. The data protection regime, in common with very many other regulatory regimes, provides for two routes of law enforcement. These are the exercise of investigatory and enforcement powers by the regulator and the availability of rights of action by individuals for the enforcement of the law in their own cases.

[51] http://www.legislation.gov.uk/ukpga/1998/29/section/59

[52] p112, lines 11-12, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

4.2 One of the defining features of contravention of information privacy law is that, characteristically, the victim may not be aware that it has happened or, if aware, may have no means to find out how it happened, who was responsible, or indeed to move beyond the realms of speculation.[53] This feature was both obvious and commonplace when consideration was directed to the Motorman material, and was equally a very real concern which was underlined in the evidence of a number of Core Participants who complain about press intrusion.[54] The ignorance of victims of the nature, or even existence, of the wrong done to them is, indeed, a principal reason for the existence of a regulatory authority with investigative legal powers.

4.3 The two approaches to law enforcement are not, of course, mutually exclusive. Christopher Graham expressed the connection by describing what he saw as a core element of the ICO's job: *'to arm the consumer, to educate and empower the consumer to exercise their information rights and to help them to assert them*.'[55] That role operates at both the general, educative level, and at the level of assisting individuals who have concerns, including for example by helping them to make subject access requests.[56] Where the ICO comes upon evidence of unlawful activity of which the victim is not aware, it has some important operational choices to make. Matters to be taken into account will include the quality of the evidence, the nature and extent of the apparent breach, whether or not it is continuing, the practicalities of contacting victims, and so on. These were considerations which were brought to bear, for example, in the operation the ICO undertook in the wake of the loss by HMRC in late 2007 of discs containing large quantities of personal information relating to the recipients of child benefit. In part, at least, that was for the purposes of alerting the victims to the potential need to take security measures against the possibility of the information falling into the wrong hands and being used for fraudulent or other unlawful purposes in the future.

4.4 No such exercise appears to have been contemplated in the Motorman case, a matter which was directly raised in the Inquiry by potentially affected Core Participants. As noted above, Mr Owens' team did approach some 30 to 40 victims for the purposes of their criminal investigation, and obtained witness statements. But engaging victims on the footing of a criminal investigation is a specific and limited kind of exercise and there is no evidence that the ICO engaged even those victims it approached for any broader purpose.

4.5 Aside from the primacy given to the criminal investigation at the time, Mr Thomas suggested that there were two principal reasons for failing to engage with the victims. The first was logistics, given the large number involved. The second was considerations of privacy, on the basis that alerting victims could raise questions about possible further invasions of their privacy, as might occur, for example, if third parties (including the victims' family members) came to be aware of information about them which the victim had been at pains to conceal.[57]

4.6 Neither of these explanations fully accounts for the failure to take any operational hold of the situation affecting the Motorman victims, although both concerns are certainly important and relevant. The former is a strategic challenge of a sort which the ICO has addressed on other occasions. The latter is a matter of process, and of a nature which the ICO was well-placed to address. Neither points to complete inaction; neither would be insuperable given case by case consideration.

[53] This feature is noted and explained in Part F, Chapter 6
[54] *ibid*
[55] p15, lines 13-15, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[56] p17, lines 14-23, Christopher Graham, *ibid*
[57] pp1-2, lines 9-11, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

4.7 The consequences of the failure to alert the victims were much debated before the Inquiry. The ICO had placed considerable faith in the success of the political measures they took in response to Motorman to ensure that there was an effective stop to further victimisation for the future. It is, however, hard to avoid the conclusion that the position from the point of view of the victims was insufficiently taken into account, not merely operationally for the ICO, but also as a matter of respect for their rights and entitlements and so that they could properly consider their own law enforcement options, and take measures to deal with the risks of further victimisation to which they could be subjected. That conclusion was also part of Mr Owens' reflections:[58]

> *"We also had the unanswered outstanding question relating to the remaining thousands of people who had never been told they had been a victim of crime having had their car checked, their ex directory telephone number unlawfully obtained, their private lists of family and friends sold to the Press and so on…. I also felt very strongly that the thousands of victims identified in Operation Motorman also had a right to know they had been victims."*

4.8 The extent to which the perspective of the victims was overlooked may be connected with the fact that the seriousness of the wrongdoing suggested by the Motorman material led the ICO in two directions (prosecution and the campaign on s55) which were both in the criminal domain. Exclusive focus on the criminal aspects of what had been discovered, without consideration of the wider regulatory context, carried a potential (if not an inevitable) risk that the victims would be left out of the picture. That risk is evident in both the operational and political reaction of the ICO to Motorman.

4.9 The obvious question arising from the failure to alert the victims has come to the fore in relation to all of the paths not taken by the ICO in response to Motorman: why, given the obvious operational magnitude and seriousness of this case, was action evidently given such a low priority? This is not a theoretical or historical question. The position of the victims was a contemporary issue for the Inquiry. While the prospects, in practical reality, of the ICO taking criminal or regulatory action in relation to Motorman may be regarded (absent further, fresher, evidence) as long since extinguished, individual victims expressed their concerns in terms of whether their involvement in Motorman might not have been part of a much wider context of their treatment at the hands of the press. There remained alive in their minds that question which Mr Owens said he had wanted to pursue: why did the press want their information? And the follow-up questions also arose, including what did they do with it and where was it now? This was the subject of a further ruling.[59]

4.10 Of all of the questions which arose before the Inquiry about the operational steps which the ICO could have taken in response to the Motorman material, this question of alerting the victims has clearly remained the most acute, notwithstanding the intervening years. For individuals, the question of what information a business holds about them, and what that business is doing with that information, is one of the core entitlements afforded by the data protection regime. The affected Core Participants indeed felt sufficiently strongly about this issue that they pressed the Inquiry itself to undertake a disclosure exercise in relation to the Motorman material. For reasons set out in a further ruling the Inquiry concluded that that

[58] pp11-14, paras 4.17-5.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf
[59] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Ruling-In-Relation-to-Operation-Motorman-Evidence-11-June-20123.pdf

was not an appropriate focus of its own attention.[60] But it clearly remains a live issue for at least some of the victims; and of course in referring to victims, only a very small proportion of those who were the subjects of material acquired by the press via Mr Whittamore, have had that fact confirmed to them to this day.

4.11 In the circumstances, the Inquiry considered it appropriate to seek the views of the current Information Commissioner, Mr Graham, on the position of the Motorman victims from the perspective of the present day. The relevant Core Participants are also understood to have approached him with a general inquiry. In his oral evidence, Mr Graham responded in this way:[61]

> *"I had a letter last night, and no doubt this will be coming up later in the evidence, saying why have I not made contact with every individual whose name is mentioned in the Motorman file? And part of the answer to that is going to be I would have to take on a veritable army of extra people. I'm also going to say I don't think it's necessary, but this isn't practical. All regulators have to pick their battles, prioritise their resources, and I just need some evidence of there being a problem before I divert resources to do it."*

4.12 Mr Graham was not here necessarily disputing that there was evidence of a problem at the time of the discovery of the Motorman material, but was questioning whether there was still a problem today. That line in his thinking, and the question of the prioritisation of operational resources, are considered more fully below. But Mr Graham also suggested that there were two further practical problems.

4.13 In the first place, he reiterated Mr Thomas's anxiety about occasioning further invasions of privacy:[62]

> *"I think Richard Thomas put the point very well in his response to you on this matter, when he said: if, having established the identity of the individual and their address, we wrote to them to say simply, "Your details appear in the Motorman file, we can't tell you why", that might be an even greater breach of privacy than the original offence, because there would be a suggestion that there's no smoke without fire. Other members of the family might see the letter and say, "Hey, what's going on?" and I couldn't tell them any more than a name appears in a file."*

The Inquiry is not persuaded that what is a perfectly fair concern about further invasions of privacy provides a reason for declining to contemplate alerting victims, nor that the risk of alerting third parties is one which could not, and cannot, reasonably be managed both through the means of communication and through the content.

4.14 Mr Graham advanced a second practical problem:[63]

> *"The difficulty about simply contacting everybody lies in the nature of the dossiers themselves. Mr Jay, you've seen them. I don't know whether all the core participants are in that position, but these are notebooks, and sometimes the information contained in them is deeply obscure. I said in my witness statement that the individual who made*

[60] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Ruling-In-Relation-to-Operation-Motorman-Evidence-11-June-20123.pdf
[61] p39, lines 12-21, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[62] pp45-46, lines 19-4, Christopher Graham, *ibid*
[63] pp44-46, lines 25-10, Christopher Graham, *ibid*

> *the notes must have had a perfect understanding of what he was intending, but it isn't always clear. That partly explains why there's sometimes a discrepancy between the spreadsheets that we've compiled and the notebooks. If you said to me, "You ought to notify everybody whose name appears in the Motorman files", I'd be hard pressed to do that. It isn't just a question of resources, it's it isn't immediately clear who is being referred to, because it isn't just celebrities, it's all sorts of people who may or may not be part of a story concerning a celebrity or whatever it is; it's just a name. Sometimes it's just a surname….It would be a phenomenal undertaking. Just because there's a name, John Smith, I would then have to work out which John Smith. The example I gave to the Select Committee was Ziggy Stardust, that's a bit easier to do, but there are an awful lot of very anonymous names and it simply isn't practical."*

That may be a convincing explanation for the impossibility of contacting *everyone* involved in the Motorman material. It is not a convincing explanation for not contacting anyone.

4.15 There can be no doubt that a serious piece of work would be required for the ICO to undertake a wholesale review of the Motorman victims, and legitimate questions do arise about resources and priority. Mr Graham had his own suggestion about the way ahead:[64]

> *"So far as the individuals are concerned, I'm still very ready for subject access requests by those who may be concerned….if Hacked Off and their lawyers are representing particular individuals, then that's what we're here for; subject access requests, off we go."*

Subject access requests allow individuals to exercise their entitlement under the data protection regime to know from any business whether it holds information about them and, if so, what. They are not a straightforward answer to the problem. Unless individuals are already aware that a given title holds their information, the right could be exercised only by a speculative correspondence across a range of newspapers and periodicals, at some inconvenience and expense to both the person requesting and the subject of the request. This therefore appears to be a paradigm case in which a statutory regulator could be expected actively to consider providing assistance.

4.16 There is, no doubt, a range of practical solutions to this issue which both the ICO and the industry could have offered to the Motorman victims at any point up to and including the present. One possible way forward would be for concerned individuals to be able to apply to the ICO seeking to obtain confirmation (in so far as the ICO is able to offer it) as to whether they can be identified among the Motorman victims and, if so, information as to the title or titles concerned and assistance, if necessary, in making a suitable request to those titles.

4.17 If interest in exercising that right reached proportions beyond the capability of the ICO, then perhaps the press organisations could be directed or encouraged each to undertake its own victim contact exercise under the ICO's supervision.[65] So far as the ICO is concerned, at any rate, this suggests a course of action within its easily accessible knowledge and, subject to reasonable prioritisation, within its capability. This could have discharged its general functions to satisfactory effect. There is no evidence that it was willing to turn its mind to any such possibility, either at the time or since.

[64] pp44-46, lines 23-13, Christopher Graham, *ibid*

[65] The Core Participants (including press Core Participants) have had access to the Motorman material under strict conditions of confidentiality and only for the duration of the Inquiry. There is no reason that has been suggested, however, why the Information Commissioner should not engage with the press and facilitate some mechanism whereby this process could be put in place

5. Conclusions and the questions raised by Operation Motorman

5.1 Operation Motorman was *prima facie* evidence of systemic and serious malpractice by the press in relation to the acquisition and use of personal information. It was also one of the biggest cases of deliberate and systemic data abuse of any sort to come to the attention of the ICO. In the view of the ICO itself the journalistic practices it disclosed on the face of it:

(a) were widespread and systemic;

(b) were probably criminal;

(c) suggested extensive and continuing breaches of the data protection principles;

(d) suggested large-scale and continuing breach of individual rights;

(e) at the least raised serious questions about standards and proper practices by the press;

(f) were unlikely to be an isolated example; and

(g) had implications for the integrity of personal information, a number of public and private databases, and the data protection regime as a whole.

Additionally, it was apparent to the ICO that the industry was not (at any rate at the time) denying that there was a problem.[66]

5.2 This called for a commensurate response from the ICO which dealt with all aspects of the problem and included challenging the practices and safeguarding both the information and the position of the victims involved. It also presented a clear opportunity for a regulatory body to demonstrate publicly the importance and effectiveness of the data protection regime in safeguarding the public interest in information privacy. The ICO was the best-placed organisation to grasp the implications of the Motorman material as a whole and to take a decisive lead, working with other public authorities including the police and with the industry itself, to ensure that a comprehensive and effective response was made to the evidence that it disclosed of problems in the culture, practices and ethics of the press.

5.3 From an operational point of view, the ICO's response to the Motorman material was not commensurate with the scale of the problem disclosed. The Information Commissioner ultimately considered that the problem was big enough for it to trouble Parliament and Government at the highest levels, including the Prime Minister. The contrast with the insufficiency of its operational response is all the more obvious. The ICO is principally an operational regulator, endowed with legal powers and functions to be exercised in the public interest. Its principal role is not to act as a political campaigning body but to discharge its regulatory functions at a practical level.

5.4 In particular, from an operational perspective, it appears that:

(a) there was an insufficiently strategic grasp of the operational issues and options facing the organisation as a result of the material for fully informed decisions to be taken, or for the results to be followed through;

(b) the senior management of the ICO in practice gave insufficient priority to the operational dimension of the Motorman material;

[66] pp111-112, lines 20-7, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; pp11-13, paras 30-38, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf

(c) the course of conduct of the criminal investigations was unsatisfactorily managed, with the result that opportunities were missed to address potential criminality in the culture, practices and ethics of the press;

(d) insufficient consideration was given to alternative operational strategies, both formal and informal, for addressing the matter;

(e) in particular, the failure to give serious contemplation to engaging directly with either the data controllers in the press or the data subject victims is difficult to reconcile with the general duties of the ICO or with a recognisably considered approach to weighing up its operational priorities.

5.5 It also appears that there was insufficient connection between the operational work of the ICO on the Motorman case and the strategic or political choices made by the Information Commissioner to respond to the issue at a higher level, that is to say, by engaging in dialogue with the PCC and campaigning on s55. As a result, those choices were insufficiently well-informed and effective, and not appropriately targeted at the issues about the culture, practices and ethics of the press disclosed by the Motorman material.

5.6 In particular, while it was not unreasonable to think it worth exploring the contribution the PCC could make to addressing the problem presented by the Motorman material, the strategy lacked from the outset:

(a) clearly-defined objectives and outcomes; putting a stop to the practice, condemnation and Code changes were propositions at too high a level of generality to be capable of generating a timetable or plan of action measurable in terms of identifiable changes in the culture, practices and ethics of the press;

(b) a clear, informed and realistic apprehension of the nature, role and functions of the PCC and the contribution it might be expected to make (which is a point that Mr Thomas accepted); it was not satisfactory for the ICO to seek to discharge its own functions to any extent through an organisation such as the PCC without being very clear about its ability to take on and deliver that charge satisfactorily, and there is insufficient evidence that this was properly researched;

(c) a detailed plan for how the ICO's own functions would have to be brought to bear to ensure that the two organisations' contributions would work together to produce the desired regulatory outcome;

(d) a thought-through analysis of how the strategy of trying to engage the PCC on the one hand, and the political campaign on s55 on the other were likely to interact, particularly given the personalities involved, and plans for dealing with the potential (which might be thought obvious) for the objectives of each to conflict.

5.7 These problems were compounded by persistence in the dialogue with the PCC in a way which failed to be sufficiently focused and realistic, proportionate to its likely effect and effectiveness, failed to keep in view the ICO's own role and responsibilities. In particular, as it became apparent that the response of the PCC was falling short of what ICO hoped, opportunities were missed to reappraise the strategy which could have been replaced or supplemented by the direct exercise of its own powers and functions, including by way of issuing good practice guidance or otherwise engaging directly with the industry.

5.8 Both Mr Thomas and, latterly, Mr Graham are to be commended for the extent to which they have robustly sought, in the face of sustained hostility and lobbying from the press, to make the case publicly for better standards and to encourage rational consideration of the merits of the argument for increasing the sentencing maxima for s55 offences. To the extent that the s55 campaign can be regarded as a response to the Motorman case (and I recognise that it had other motivations also), it is arguable that it was problematic in:

(a) the extent to which it drew the ICO into the contested political arena and away from its primary regulatory obligations under the DPA;

(b) the extent to which it focused exclusively on the criminal law as a potential solution, and its lack of practical engagement with the limitations on the effectiveness of such solutions; and

(c) not identifying the context, either within the wider role and functions of the ICO or in any plan for realising any benefits that it might have been capable of yielding.

5.9 In the light of the analysis of the response to the Motorman material, it is appropriate to conclude that ICO did not effectively grasp the full implications, and indeed opportunities, of the case. As a result:

(a) previous misconduct was inadequately brought to justice and was not otherwise addressed as a matter of law enforcement;

(b) the risk of continuing breaches of law and standards was not effectively addressed;

(c) the interests of the victims were inadequately protected; and

(d) an important opportunity was missed to address problems in the culture, practices and ethics of the press in relation to the acquisition and use of personal information, which could have had an impact beyond the facts of the Motorman case.

In the circumstances, a real question must remain as to whether these missed opportunities contributed, either at a general or a specific level, to later manifestations of disregard for the rights of others in relation to information privacy which were subsequently exhibited by certain parts of the press, of which phone hacking was the most serious.

5.10 I should make very clear that there is no evidence to suggest, as Mr Owens invited the Inquiry to do, that the political campaign and the publication of the *What Price Privacy?* reports were a deliberate attempt to deflect attention from the ICO's operational inactivity. To the extent that they drew public and political attention to the problem, they did themselves perform a function of acting as a warning to others in positions of authority to take action. To that extent, Mr Graham's description of the role of the ICO in the Motorman story (*"we are the good guys"*) may fairly be endorsed.

5.11 The principal outstanding questions, therefore, to which the remainder of this Part of the Report is addressed, are these:

(a) Is there any reason to think that there are still causes for concern about the culture, practices and ethics of the press in relation to personal information, whether as a matter of law or as a matter of good practice?

(b) To what extent do issues persist about the perception of the ICO that its role and powers are inadequate or inappropriate to address evidence of any such problems?

(c) To what extent, on an objective analysis, are there genuine shortcomings in the legal framework, and are there any changes which could be made to improve the situation?

(d) Are there any other impediments to the ICO making a more effective contribution to supporting law enforcement and good practice in relation to the press which it is necessary or desirable to remove?

CHAPTER 4
THE ICO AND THE PRESS TODAY

1. Introduction

1.1 The current Information Commissioner, Christopher Graham, took over from Mr Thomas in the summer of 2009. In the context of this Inquiry, it is of interest that his previous career was in journalism, broadcasting and regulation (he was a former Director General of the Advertising Standards Authority), rather than in law.

1.2 He told the Inquiry that the culture, practices and ethics of the press were not drawn to his attention on handover as an issue of top priority. He was, however, aware that commencement of the legislative changes to s55 was outstanding and he made a connection between legislative change and press conduct saying that there was:[1]

> *"a sword of Damocles hanging over the press. If there was any repetition of the behaviour that Operation Motorman had uncovered that would be accessed pretty quickly."*

1.3 In the event, he had what he described as a 'wake up call' a few weeks after taking up his appointment when the story by Nick Davies about phone hacking was published in the Guardian. His principal focus thereafter was not, however, operational but political: he had to prepare for his appearance on 2 September 2009 before the Culture Media and Sport Select Committee[2] which was then taking evidence specifically as a result of the emergence of the Goodman/Mulcaire case and the coverage in the Guardian, but linking it also with the history of Operation Motorman. This was therefore an opportunity for Mr Graham to take stock of the history of Motorman, the role of the ICO, and the signs from the emerging hacking scandal that the story of press abuse of personal information was taking a new direction.

1.4 His evidence to the Select Committee was that:

(a) phone hacking was a matter for the police and the ICO had 'no involvement whatsoever';

(b) any operational steps the ICO could have taken in relation to Motorman (including criminal investigations into journalists) would have been too difficult practically and legally and were not a priority call on resources at the time;

(c) the priority of the ICO in relation to Motorman was to 'sound the alarm, to warn the industry, to talk to the PCC, to urge the provision of a custodial penalty' and the latter remained the priority;

(d) there was little more that could now be done in relation to the Motorman material without more, not least because it was old and not straightforward to interpret; and

(e) he had no intention at this point of proactively reviewing the Motorman evidence, because it would serve little purpose and the ICO had many other priorities.

1.5 The question of priorities was a matter of some concern to the Committee at the time. Mr Graham was pressed particularly hard on the position of the victims, some of whom were

[1] p4, line 19-22, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

[2] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9090205.htm

expressing anger at not having been notified by the ICO of their appearance in the Motorman material. Mr Graham indicated that he would treat approaches from individuals inquiring about their possible appearance in the Motorman material on a case by case basis. He was also pressed on whether the ICO had worked with the organisations, both public and private sector, whose information had been wrongly disclosed in the Motorman case; a certain amount of work had been done but various factors had limited the extent of the engagement. These included the increasing general insecurity of information of all sorts, the flourishing illegal trade in information procurement, and the risk that any investigation would itself present a risk of the further dissemination of the personal information in question

1.6 It is not necessary to consider Mr Graham's evidence to the Select Committee in detail, because the same ground was explored in the course of his evidence to the Inquiry. His general update to the Committee on the work of the ICO work with the press at that time is, however, interesting. He said:[3]

> *"We started off by a general call to the industry which, indeed, was heeded to some extent in that the Editors' Code Committee eventually amended clause 10 of the Code, made it much tougher, and we have done a lot of work with the PCC in training editors. We have done a couple of seminars, one in London and one in Scotland, to make sure that journalists understand that this is serious. I saw a copy of the Editors' Code Handbook the other day and it makes it very clear that you mix with the Data Protection Act at your peril and you had better have a very solid public interest story very well documented, in order to do that. Chairman, the interesting question is why did not any of those titles that were listed in What Price Privacy Now? contact the Information Commissioner's Office and say, "This is terrible, 45 of our journalists apparently have been doing this thing which we utterly condemn, tell us who they are", and we then might have been able to talk turkey. Interestingly, of 305 journalists, and we listed the total in the document, we have not had a single inquiry from a journalist saying, "Am I on that list? Was I doing something wrong?"*

1.7 The Inquiry has also had to consider the question of the lack of press interest in pursuing the Motorman evidence but it is also important to look at the position from the perspective of the ICO. Its own stocktake, at the end of 2009, was that it was aware that Mr Thomas' political campaign had at best been only partially successful, and had also established a hostile response from the press. It knew that neither the ICO itself, nor evidently the press, had followed up the Motorman evidence operationally, either in relation to the particulars of the state and use of the information itself, the conduct of individual journalists, or its own practices. Finally, it was on notice of the emergence of the phone hacking scandal.

1.8 Notwithstanding this assessment, the ICO had concluded that there was no imperative for it to engage further with the culture, practices and ethics of the press. In particular, Mr Graham expressed the view to the Select Committee in relation to the PCC that *"We do not have any formal relationship with them, but I just accept that they do press standards and we do data protection and, where those two things cross over, then we probably need to talk."*

1.9 The two things clearly do cross over. In concluding this Part of the Report, assessing the current state of the role and functions of the ICO, and making recommendations for the future, the focus returns to the key themes of the Motorman case, but viewed now from the contemporary perspective. Those themes are:

[3] Q1807, Christopher Graham, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9090206.htm

(a) the extent to which there are problematic issues today which fall within the purview of the Information Commissioner and concern the culture, practices and ethics of the press in relation to personal information;

(b) the powers available to the ICO to tackle any such problematic issues, and whether they are sufficient to the task; and

(c) the governance, capability and priorities of the ICO and whether they too are sufficient and appropriate to the task.

2. Personal information privacy and press practices

2.1 Mr Graham's evidence to the Inquiry was that he did not believe that the press was significantly involved in breaches of the Data Protection Act since the publication of the *What Price Privacy?* reports, and that therefore, by implication, they had learned the lessons of those reports. This evidence is at the heart of the Inquiry's terms of reference, and, given the way in which the phone hacking scandal developed, is not entirely obvious. It thus requires close analysis.

2.2 Mr Graham put the matter in this way:[4]

> *"I can only speak of what's in my own knowledge, and I can only speak of those aspects of press conduct that fall within the responsibilities of my office, and that's primarily Section 55. I know that the Inquiry was triggered by concerns about hacking of phones and hacking of emails, these are criminal offences that don't come under the Information Commissioner's office, but Section 55 certainly does. I can't prove a negative. All I can say is I've seen no further evidence beyond what we published in 2006, and that of course was about behaviour before when Mr Whittamore's office was raided, and much of it related to activity between 1999 and 2003. I simply offer a view that this is an issue of such high salience, many investigative journalists working in the area, great rivalry between newspaper groups, lots of campaigners, that if there was evidence of further breaches of Section 55 by the press, it would have been drawn to my attention, and it hasn't been."*

2.3 The latter point was one on which he expanded:[5]

> *"…there's been so much feverish activity over the past two years in relation to this with the various newspaper groups, with the journalists, with the books written on the subject, with the campaigning groups. If the best that critics can do is to turn up further evidence of what was going on between 1999 and 2003, it doesn't amount to much."*

2.4 The questions raised by this evidence were many, and included:

(a) why s55 (the criminal offence of unlawfully obtaining information) was being used as the benchmark for contravention of the regime rather than the wider scheme of principles and rights created by the regime;

(b) why Mr Graham would have expected investigative journalists or other campaigners to have been likely to excavate issues about the press and personal information which the ICO, charged with legal responsibilities in that respect, was not itself minded to pursue;

[4] pp6-7, lines 10-3, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

[5] p27, lines 6-12, Christopher Graham, *ibid*

(c) why the ICO did not appear to consider that the phone hacking scandal itself and the wider issues of the culture, practices and ethics of the press before the Inquiry were a cause of acute concern within its own sphere;

(d) why the ICO was able to conclude that the Motorman evidence was of no continuing interest or relevance in relation to the data protection regime; and

(e) if the ICO was unaware of any problems in relation to the press, to what extent that was a reasonable conclusion based on due diligence.

2.5 The due diligence point had particularly exercised Tom Watson MP in putting the following questions to Mr Graham (and his ICO colleague Mr Clancy) on behalf of the Select Committee:[6]

> *"Q. What I am trying to do is ascertain responsibility in the system for getting this right. … Are you convinced that these practices have now ended in newsrooms up and down the country?" A: "I am not in a position to know."*
>
> *Q. "What I am trying to understand is that the decision you took, which, by the way, I think was the right decision, to blow this open, bring it into the public domain and try and effect massive change in the way journalists run about their work, I can understand why in a resource-sensitive area that is what you did, but what I cannot understand is why you have not gone back to see whether that has been successful or not or what gauge of success there is." A: "How can we measure it? Do we go to editors and say, 'Have you come across any examples of journalists that have stepped over the line?'"*
>
> *Q. "Is there anyone in this country who would know whether these practices are still going on other than editors and journalists in the newsrooms?" A: "Well, editors and journalists must know; it is a self-regulatory system."*
>
> *Q. "So, when they tell us that they think that they have thoroughly investigated the matter and they have put it right, do you think they could possibly have done that if they do not know the list of journalists that you have got on your files?" A: "I think there might be information which would identify some of those journalists because some of the invoices quite clearly indicate that there have been blags in relation to particular stories and invoice numbers. Surely, their records should be able to cross-reference that to a particular journalist, and sometimes the invoices cross-reference the stories, so editors could examine their business and perhaps identify which journalists were or were not."*
>
> *" Q: " I think you could perhaps be a little proactive just to ensure that they have certainly done that or that they certainly have the information about the people who were at it?" A: "I understand what the Committee is saying, but you are not dealing with a regulator who is not proactive; we are proactive on a very wide front. … There are lots of ways we could spend our time."*

2.6 The due diligence point itself resolved itself into a number of sub-issues relating to the question of specific follow-up to Motorman; the strategic follow-up to Mr Thomas's political campaign, the response to the phone hacking scandal, and the position of the ICO in relation to the press today. These will be discussed in turn.

[6] Q1844-Q1851, Christopher Graham, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9090208.htm

3. Following up Operation Motorman

3.1 As is frequently repeated, Operation Motorman was the single biggest case of deliberate and systemic interference with personal information with which the ICO had had to deal since its inception. The ICO had taken no operational measures in respect of the case since handing over the Whittamore prosecution to the CPS. There had been modest progress in issuing general guidance to the industry after years of discussion with the PCC. A custodial penalty for s55 offences had been provisionally introduced but not activated. This fell short of the steps Mr Thomas had wanted to see in order to put a stop to Motorman-type practices in the press for the future. The ICO remained very concerned about the evidence it continued to encounter of an extensive illegal market in personal information beyond the activities of the press. It had no reason to believe that private investigators similar to Mr Whittamore were not operating in the market. It is therefore necessary to consider whether there was (or should have been) a question mark in the mind of the ICO as to whether or not the objective of putting a stop to the engagement by the press in the illegal market in personal information had in fact been achieved.

3.2 That general question might resolve itself into a number of specific questions. Firstly, what had happened to the information which the press had acquired *prima facie* in breach of the data protection regime from Mr Whittamore? Secondly, what effect had the *What Price Privacy?* reports and the guidance had on the industry? Finally, what steps had the newspaper titles involved taken (particularly in relation to the journalists who had been identified as customers of Mr Whittamore) to eliminate this sort of conduct from their culture, practices and ethics?

3.3 On the follow-up to the question of press conduct in relation to blagging and related activities, Mr Graham confirmed to the Inquiry the position he had taken in front of the Select Committee. The ICO had made no active investigations of any nature in relation to the Motorman material itself. No material had been brought to its attention suggesting that there was any problem. In the absence of that, it was not its role to pursue enquiries. It had other current priorities.[7]

3.4 There was also, in his view, no case for a proactive approach to the victims. But he did say that "*so far as the individuals are concerned, I'm still very ready for subject access requests by those who may be concerned.*"[8]

H

4. Following up the political campaign

4.1 Before the Select Committee, Mr Graham appeared to be continuing to connect the s55 campaign with the issue of press misconduct. This exchange with Mr Watson was interesting in that context:[9]

> *Q. "But the evidence you have in front of you shows that there was law-breaking on an industrial scale from the newsrooms of some of the major newspapers in the United Kingdom.*

[7] pp8, lines 13-19, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[8] p44, lines 23-25, Christopher Graham, *ibid*
[9] Q1843 and Q1859, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9090208.htm

> *A. "I am afraid I am going to become repetitive. You simply cannot run regulatory bodies on the basis that you go chasing after every detail that a particular investigative journalist decides should be the agenda for the day when you have got other very big and important questions. I am not pleading poverty here, I am just saying that you can only do what you can do. We thought, possibly naively, that, by telling Parliament about this back in 2006 and calling for the custodial sentence, we could close the thing down. I think they still can, but it is taking too long."*

4.2 As noted above, the ICO has continued to press for the activation of the custodial penalties for s55 offences, but no longer apparently with any direct focus on making an impact on the press. Although not directly a matter for the Inquiry, no account has been offered of how the case for the activation of those penalties has been affected by the more recent availability of civil penalties. In any event, however, the case for the activation of the s55 penalties in so far as it has a bearing on the matters before the Inquiry is considered on its own merits below.

4.3 If the ICO has yet to realise the benefits of the s55 campaign (and there remains no evidence of any active planning within the office for doing so – the effect still appears to be considered to be self-activating), it seems to be continuing to reap the dividend of general press hostility. That too requires consideration.

5. Phone hacking and the ICO

5.1 The *What Price Privacy Now?* follow-up report to Parliament noted the arrest and charging of Clive Goodman and Glenn Mulcaire in these terms:[10]

> *"the circumstances appear to have parallels with the Section 55 offence and to reinforce the evidence gathered during Operation Motorman".*

In terms of pure personal information, the parallels between phone hacking and the Motorman activities are very clear. Shorn of the labels provided by the criminal law, both come down to the press employing unscrupulous external agents to obtain confidential personal information about other people. Further, that information is provided without their knowledge or consent and obtained by unlawful means whether by deceit, corruption, or the exploitation of technology. In respect of any individual piece of information, the journalists may or may not have had good reasons or formal defences for doing so. But *prima facie* these were the sort of invasive practices from which the data protection regime (along with its principles and rights) was designed to protect people.

5.2 There were on the face of it two reasons why the ICO might have taken a keen interest in the Goodman/Mulcaire developments In the first place, there was the indication that even in the post-Motorman environment, sections of the press were still involved in the unlawful trade in personal information. This was a clear warning signal in its own right that all might not be well in the approach and practice of the press regarding personal information, and raised a question mark against the efficacy of the strategy of the ICO for responding to Motorman.

5.3 In the second place, there was the concern whether there could be any direct relationship between Motorman and Goodman/Mulcaire. This was the question which had occurred to Mr Owens:[11] was it possible that the private phone numbers obtained by the press via

[10] pp8-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-2.pdf

[11] pp40-41, lines 12-3, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf; pp13-14, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

Mr Whittamore (not just the ex-directory numbers of the 'targets' but the multiplicity of 'friends and family' numbers), had been used to hack their phones? Were these precisely the private lines most likely to have been used by the 'targets' for the purposes of confidential conversations, texts or voicemails? Mr Owens told the Inquiry that he took these questions and thoughts to Nick Davies of the Guardian. He also told the Inquiry that there seemed to be considerable overlap between the target names in the Motorman material and in the Mulcaire material.

5.4 If the connection was made in the mind of the ICO, whether at either the general or the specific levels, the Inquiry had no evidence of it beyond the reference in *What Price Privacy Now?* Mr Thomas told the Inquiry, somewhat obliquely, that notwithstanding the connection made in its own report, the ICO thought that *"the Goodman-Mulcaire case appeared to be a completely separate group"*.[12] For his part, Mr Graham maintained in his evidence to the Inquiry the position he had taken in front of the Select Committee two years previously, namely that hacking and blagging were separate activities and that the ICO had no formal role in relation to the former because it had no prosecution or criminal investigation powers in relation to hacking, which was a police matter.[13] He had put it bluntly to the Select Committee:[14]

> *"We were not involved, so far as I know and I cannot think of any reason why we would be, in the most recent PCC investigation which was into the Goodman case which, I will repeat, was about hacking and not about blagging, so I would have been surprised if they had come to us and, if they had, I would have had to say, 'Can't help you, chum'."*

5.5 Counsel to the Inquiry pressed Mr Graham on the broader question; the newspaper industry had claimed, and the ICO appear to have accepted that claim, that after the ICO's 2006 reports, it had cleaned up its act. How could we know that was true, given that we did know it hadn't cleaned up its act in relation to phone hacking? Mr Graham's answer was that they were different things.

The ICO's current stance

5.6 Mr Graham's position that the ICO had no particular reason to take an interest in the press was challenged in the course of his oral evidence to the Inquiry. His response was that it was a matter for the politicians, the PCC or indeed for the Inquiry itself to find out whether there was a problem with the press' approach to personal information.[15] Furthermore, the ICO had many other current priorities.[16]

5.7 Mr Graham explained that he had no present intention of using his powers, or taking any other step formally or informally, to consider the culture, practices and ethics of the press in relation to personal information. Put to him that he had positive responsibilities to promote compliance and good practice, that he had appropriate investigatory powers to take proactive steps to consider the position of the press in this regard, and that it would not on the face of it involve any great exercise to do so, he remained clear that he had other competing demands

[12] p50, lines 10-12, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[13] pp22-23, lines 23-6, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[14] Q1884, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9090210.htm
[15] pp24-26, lines 12-4, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[16] pp26-27, 34, 38, 40-41, lines 21-12, 10-15, 3-12, 17-1, Christopher Graham, *ibid*

on his time. He did conclude, however, that should the Inquiry recommend that he consider deploying his resources in this way, that view would be something the ICO would have to take very seriously.[17] I return to this.

5.8 As an independent statutory regulator, the ICO has a prerogative to set its own priorities within the overall scheme of the powers and duties entrusted to it by Parliament. For the behaviour of the press to have no part in those priorities is not, on the face of it however, easy to understand. The ICO was created to have custody of the issue of the law and practice of information privacy as articulated in the data protection regime. This Inquiry was established to address arguably the greatest crisis in public confidence in information privacy since the creation of the data protection regime. A great deal of the evidence received by the Inquiry about press misconduct related to personal information privacy (including inaccuracy). The persistence of the ICO, even in the face of the commissioning of the Inquiry and the evidence received by it, in seeking to recuse itself from any proactive engagement in addressing the crisis in public confidence was troubling. Even allowing for the inevitably particular perspective that the Inquiry has, I do not find it easy to accept the proposition that the lack of priority which the ICO accorded to the press issue is obviously reconcilable with its overall public responsibilities.

5.9 Before reaching a final conclusion on that point, however, it is necessary to reflect on whether there were in fact other, possibly structural, explanations for its unwillingness to put itself forward as a significant part of the answer to the concerns before the Inquiry.

[17] pp40-41, lines 23-1, Christopher Graham, *ibid*

CHAPTER 5
ISSUES ABOUT THE LEGAL FRAMEWORK

1. The current views of the ICO

1.1 The account that Mr Graham himself provided of the role, functions and powers of the ICO drew attention to the way in which they had more recently developed:[1]

> *"The Information Commissioner's role in regulating the use of personal data has evolved over the years. The role was originally intended primarily as an educator, ensuring data protection compliance by promoting good practice. Significant enforcement powers of the Commissioner, such as civil monetary penalties, have been introduced by amendment over the last few years, partly in response to high profile data losses. Section 51 [of the Data Protection Act 1998] sets out the general functions of the Information Commissioner. These are generally about promoting good practice rather than punishing poor practice. This educator function is still central to how I approach my role as Information Commissioner."*

1.2 The power to impose civil monetary penalties of up to half a million pounds was introduced in April 2010. Mr Graham described it as:[2]

> *"beginning to have a very salutary effect, both on public authorities and on commercial companies. They realise that the Information Commissioner has teeth."*

1.3 He also explained his view that the way in which the Data Protection Act (DPA) bore on the press was complex; it was not easy to explain in clear and simple terms to individuals what their rights were, what the role of the ICO was in enforcing those rights, and what its relationship was to other organisations with functions in the area of law enforcement and good practice. This, in his view, meant that individuals sometimes expected more of the DPA than it was capable of doing in this area.[3] That might be thought likely to suggest two consequences in particular. These are an increased emphasis on the explanatory and educational role of the ICO which Mr Graham had previously emphasised, and an increased burden on the ICO itself to give a clear lead in relation to compliance and good practice by the press, since individuals were evidently relatively less well placed to proactively enforce their own rights.

1.4 The conclusion reached by Mr Graham was different. He put it that, had Parliament intended to give the Information Commissioner a significant role in overseeing the use of personal information for journalistic purposes, *"it would have provided him with a very different and much simpler legal framework within which to do so"*.[4] He was clear that the ICO was never intended to play a major role in the regulation of the press and that while the data protection regime was designed to protect information privacy it was not intended to impinge on the use of personal information for the purposes of journalism. The enforcement role of the ICO in this context was intended to be very limited; there was to be no challenge available

[1] p5, para 2.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[2] p18, lines 2-5, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[3] p26, para 6.10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[4] p14, para 3.21, *ibid*

on data protection grounds to the use of personal information for journalism, and certainly none prior to publication. The principal effect of the DPA on journalism therefore was in the application of the criminal offence created by s55.[5]

1.5 However, Mr Graham's more detailed consideration of the scheme of the DPA in relation to the press necessarily qualifies that very general proposition.[6] In this, he set out the significant restrictions placed by the exemption provisions of s32 on the enforcement powers of the ICO in relation to journalists' use of private information, concluding that therefore the Act largely leaves it to individuals to pursue court action after publication if they want to assert their rights: this is, of course, a problem if the legislation makes it hard for them to understand what those rights are.

1.6 He also drew attention to the fact that the exemption is made to turn on the reasonable belief of the journalist that publication would be in the public interest. In considering whether a journalist's belief about the public interest is reasonable, the DPA provides that regard may be had to his or her compliance with any relevant Code which has been designated for that purpose by the Secretary of State: the Codes so far designated are the PCC Editors' Code, the Ofcom Broadcasting Code and the BBC Producers' Guidelines.

1.7 It was Mr Graham's view that the role given to journalists' reasonable belief in the public interest meant that:[7]

> *"it is not the Information Commissioner's judgment about where the public interest lies or whether the provisions of the Act are compatible with journalism that counts and he has limited power to investigate or challenge the [journalist] data controller's opinion."*

1.8 He did accept, however, that the Information Commissioner has powers, albeit 'specific and limited', to challenge *whether* the press exemption is being properly relied on. They are specific and limited because the DPA inserts a lot of procedural hurdles to their use, including the restriction that action cannot generally be taken unless the ICO is invited to do so by an individual or a court (irrespective of the fact that individuals may not be well-placed to issue such an invitation). But the powers do confer a function on the ICO of, in effect, policing the boundary between proper and improper claims on the journalism exemption:[8]

> *"In essence the investigative and enforcement powers at the Information Commissioner's disposal exist to enable me to ascertain whether personal data are being processed for purposes other than journalism and to act in relation to those other purposes, rather than enabling me to regulate the actual processing of personal data for journalistic purposes."*

1.9 To the extent, therefore, that there is any issue that journalists were, for example, seeking and using personal information for a range of unethical purposes other than with a view to publication, a regulatory question does arise. An example might be to threaten publication for collateral purposes or otherwise to put pressure on individuals to act or refrain from acting in certain ways. That, he recognised, would be expected directly to engage the functions of the ICO.

[5] pp22-24, paras 6.1-6.7, *ibid*
[6] pp6-16, para 3.3-3.26, *ibid*
[7] p9, para 3.10, *ibid*
[8] p13, para 3.20, *ibid*

1.10 Mr Graham also acknowledged that ss32 and 55 did not exhaust the application of the DPA to the press. Quite apart from specific provisions (for example, the express provision that individuals have *enhanced* rights to damages for breaches of the legal requirements of the regime by the press),[9] the general duty of the ICO to promote compliance and good practice applies in relation to the press. About that general duty, Mr Graham observed:[10]

> *"I also have a duty under section 51 of the Act to issue guidance and promote good practice. This duty is not specific to the press, journalism or other special purposes. I am aware that during my predecessor's time in office significant efforts were made to provide advice to the PCC in relation to guidance we were encouraging the PCC to produce for journalists, focusing on the section 55 offence. So far as I am aware, the PCC did not go any further than producing general, high level guidance on journalism and the Act at the time and we have not received any further approaches to discuss such guidance during my time in office."*

Of course, the general duty to promote compliance and good practice, and the power to issue guidance, is free-standing and not dependent on the receipt of an approach.

1.11 Mr Graham's perspective on the role of the ICO in relation to the press also included an important acknowledgement that the correct approach to its more specific regulatory functions had to be on a case by case basis and not on the basis of generalised assumptions about the exclusion of journalism from the purview of the regime. What Mr Graham said in this respect is set out in full here because I am content to adopt it for the purposes of this Report as an accurate and succinct summary of the legal and practical position, and one on the basis of which the outstanding questions about the detail of the regime in its application to the press should be considered:[11]

> *"The fact that there is a public interest in a free press being able to go about its business is reflected in the treatment of the "special purposes" under the Act. However, it cannot be the case that any and every activity carried out in the name of journalism should be regarded as exempt from the provisions of the Act. Indeed, I do not believe that that extreme position is seriously advanced by any significant strand of opinion within the journalistic profession. There will, in certain circumstances, always need to be a judgment around the public interest in particular stories. This point is explicitly provided for in the various journalistic codes, for example the PCC Editors' Code, Ofcom Code, BBC Producers' Guidelines, and so on. This is also the position reflected in the recitals to the Directive itself. The balance to be struck between Article 8 and Article 10 of the Human Rights Act 1998 has to be considered on a case by case basis. The inevitable tension between "the right to privacy" and "freedom of expression" demands that the issues at stake in each situation are properly evaluated. I observe in passing that making judgments on where the balance of the public interest lies on the facts of each case is something that the information Commissioner is called upon to do under both the Act and the FOIA."*

1.12 The last point is particularly significant. Although it is the journalist's honest belief that he or she is working towards a publication in the public interest that counts, a challenge as to whether that belief is a reasonable one in all the circumstances is a matter for the Information Commissioner to consider on a case by case basis, and a matter on which the ICO has a general measure of experience and expertise.

[9] http://www.legislation.gov.uk/ukpga/1998/29/section/13

[10] p15, para 3.26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf

[11] p25, para 6.8, *ibid*

1.13 In my judgment, on the face of it, a combination of this kind of case by case approach to the ICO's law enforcement function in relation to the press, and the application to the press of the ICO's general duties to promote compliance and good practice, do add up to a significant potential role in guaranteeing public confidence in the culture, practices and ethics of the press in relation to personal information. However, the Inquiry saw little evidence of the realisation of that potential, or, in practice, of that role having been fulfilled. It was particularly hard to reconcile this potential with Mr Graham's resistance to the suggestion that the ICO should be actively making a connection between its role and functions and the activities of the press in relation to personal information privacy.

1.14 In looking for any possible explanation for that within the legal framework itself, the question which has to be considered is whether there are features of the current data protection regime in relation to the press (including perhaps the needless complexity cited by the Information Commissioner himself) which were themselves inhibiting that role and which are capable of improvement.

2. A different perspective on the legal framework

2.1 The Inquiry was greatly assisted by the evidence of Philip Coppel QC who reflected on the history and substance of the provisions of the DPA with a particular bearing on journalism.[12] By way of introduction, Mr Coppel pointed out that the predecessor legislation to the DPA, that is to say the Data Protection Act 1984 (which was not the product of a European Directive), had no exemption provisions for the press equivalent to those in the modern legislation. It was the EU Data Protection Directive of 1995[13] which required Member States to introduce measures into domestic law to:

> *"provide for exemptions or derogations … for processing personal data carried out solely for journalistic purposes only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression"*

2.2 As Mr Coppel explained, in this way the Directive itself represents the balance that has been struck in relation to personal information privacy, between the individual right to privacy and the individual right to freedom of expression found, respectively, in Article 8 and Article 10 of the European Convention on Human Rights (now incorporated into UK law by the Human Rights Act 1998).

2.3 Mr Coppel explained that the Data Protection Act 1998 in turn gives effect to the required balance in three main ways:[14]

> *"(1) Through the s32 exemption. This relieves a data controller from all obligations under the DPA to an individual (and correspondingly removes protection conferred by the DPA on an individual – §§37-45 above) where the data controller is processing that individual's data only for purposes of journalism, for artistic purposes or for literary purposes, and then only provided that three conditions are satisfied."*

[12] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf; without reproducing it in full here, his general introduction to the history and substance of the Act is a commendably lucid and concise overview which should recommend itself to the general reader and which I am pleased to be able to adopt for the purposes of this Report: see pp2-12. This was also covered in his oral evidence: pp1-20, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf

[13] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

[14] pp12-13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

"The three conditions that must be satisfied in order for personal information processed for the special purposes to enjoy the s 32 exemption are:

i. the processing is being undertaken with a view to the publication by any person of journalistic, literary or artistic material;

ii. the data controller reasonably believes that, having regard to the special importance of the public interest in freedom of expression, publication would be in the public interest; and

iii. the data controller reasonably believes that, in all the circumstances, compliance with the data subject's rights is incompatible with the special purposes."

"(2) By the procedural relief conferred by s 32(4)-(5). Proceedings against a data controller must be stayed where the data controller claims that the data are being processed only for the special purposes and with a view to publishing by any person of journalistic etc material. The stay remains in place until the Commissioner has made a determination under s 45 that the data is not being so processed.

"(3) By creating a special enforcement regime (see §§54-55 above), which largely displaces the ordinary enforcement regime."

Civil law enforcement: the exemptions in s32 of the Data Protection Act

Legal analysis and suggestions for reform

2.4 The first thing to note about s32, as Mr Coppel explained, is the extent to which it disapplies the protection for individuals which is effected by the Act itself.[15] Mr Coppel's analysis of s32 began by highlighting the notable features of the exemption:[16]

"(1) It exempts the data controller from compliance with the great majority of obligations under the DPA owed to a data subject …, rather than just the limited group of obligations termed "the subject information provisions" or "the non-disclosure provisions". This includes compliance with the data protection principles.

"(2) The processing by the data controller must be both:

– "only for the special purposes"; and

– with a view to the publication by any person (i.e. not just the data controller) of any journalistic, literary or artistic material (i.e. it need not be the data being processed nor need it be related to the data being processed).

"(3) The second and third limbs needed to engage the exemption turn on the reasonable belief of the data controller, rather than on fact. The only matter identified by the section as inform that belief when assessing its reasonableness are various press codes of conduct, prepared by the press."

2.5 Mr Coppel described the legislative and caselaw history of the s32 provision; this is important context and is therefore set out as follows in full:

"Parliamentary history of s.32 exemption

[15] p24, lines 8-10, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf

[16] pp13-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

"The s 32 exemption originated as clause 31 in the Data Protection Bill. In giving the Bill its second reading speech in the House of Lords, Lord Williams of Mostyn recorded the paramountcy which the clause was intended to give to freedom of expression:

> *"The Government believe that both privacy and freedom of expression are important rights and that the directive is not intended to alter the balance..."*

This view was endorsed by Lord Wakeham, chairman of the Press Complaints Commission, who commended the Bill for:

> *"...steer[ing] a sensible path which avoids the perils of a privacy law and achieves the crucial balancing act - of privacy and freedom of expression - in a clever and constructive way....The Data Protection Bill does not introduce a back-door privacy regime. The Human Rights Bill does. The Data Protection Bill safeguards the position of effective self-regulation. The Human Rights Bill may end up undermining it."*

The Solicitor-General (Lord Falconer of Thoroton) then endorsed Lord Wakeham's view:

> *"No one could have expressed the arguments in favour [of cl 31] more eloquently."*

"Disquiet was expressed in the House by others:

– that, as a result of cl 31, the Bill failed to protect privacy,

– that cl 31 was too wide and significantly undermined the function of

the legislation, and

– that the notion of the public interest was too wide and vague a basis

upon which to disapply the protection conferred by the Bill.

Amendments were unsuccessfully introduced to address these misgivings. In supporting the amendments, Lord Lester of Herne Hill warned at length that, as drafted and because of cl 31, the DPA failed to implement the Directive and authorised interference by the press with the right to privacy in breach of Art 8 of the ECHR.

"The authorities

"Judicial pronouncements have acknowledged that the DPA is concerned with the protection of an individual's ECHR rights to privacy.

"The principal judicial authority on the s 32 exemption is the Court of Appeal's judgment in Campbell v MGN Ltd. The claimant had claimed against a newspaper for its having published articles which disclosed details of the therapy the claimant was receiving for her drug addiction. These included covertly taken photographs of her leaving a therapy group meeting. The claimant alleged that these amounted to a breach of confidence (based on her right to privacy under ECHR arts 8 and 10) and a breach of the data protection principles (entitling her to claim a breach of the s 4(4) DPA statutory duty).

"In the High Court, judgment was entered for the claimant on both claims. In relation to the DPA claim, the newspaper agreed that publishing the articles it had processed sensitive personal data relating to the claimant. The court held: –

that the published information (i.e. the nature and details of her therapy) constituted sensitive personal data relating to the claimant;

that that was not lawful since it constituted a breach of confidence;

that that processing was not fair as the information was acquired surreptitiously;

that that processing did not satisfy any of the conditions in Schedule 2;

that that processing did not satisfy any of the conditions in Schedule 3; and

that the exemption in s 32 only applied to processing out "with a view to publication" and not to the processing involved in the publication itself.

The court assessed damages at £2,500 and aggravated damages at £1,000.

"The Court of Appeal allowed the newspaper's appeal on both the confidentiality claim and the DPA claim. The Court of Appeal accepted that "processing" included publication in print. However, the Court, reversing the High Court, extended the duration of s 32 exemption to cover processing on and after publication. This division between processing before and after publication had limited s 32's disapplication of the DPA's protection up until, but not including, the most invasive activity - publication. In construing the section to give press freedom paramountcy throughout and with no opportunity to balance the individual's interest in maintaining privacy, the judgment renders the DPA unlikely to be compliant with the Directive.

"The claimant appealed to the House of Lords. The claimant put the breach of confidence claim at the forefront of the appeal, with the parties agreeing that the DPA claim "stands or falls with the outcome of the main claim" and that it "add[ed] nothing to the claim for breach of confidence." In this way, protection of privacy in personal information came to be secured through the adaptation of the action for breach of confidence. In so doing, the House of Lords absorbed into the action the competition between freedom of expression as protected by Art 10 and respect for an individual's privacy as protected by Art 8 – the very balancing exercise which the Directive articulates and which the DPA is supposed to implement.

"On one analysis, the House of Lord's judgment appears to leave untouched the Court of Appeal's treatment of the DPA. This would be unfortunate. The misgivings which had been expressed in Parliament during the passage of the Bill (see above) materialised with the Court of Appeal's judgment. The better analysis is that, given the parties' agreement that the DPA claim stood or fell with the breach of confidence claim, the latter's success means that the DPA claim enjoyed equal, if unspoken, success in the House of Lords.

"Personal privacy protection since Campbell v MGN

"The practical effect of the Campbell litigation has been that breach of privacy claims are now principally brought under the HRA, rather than under the DPA. This is borne out by the treatment of privacy in the main media law practitioner text, which recognises that the DPA:

> *"contains the most comprehensive privacy provisions now affecting the media"*

but goes on to comment that "misuse of private information" (i.e. the evolved breach of confidence action):

> *"...will be of most relevance in the majority of privacy cases involving the media"*

and that:

> *"..the other [action], much less significant in practice, is reliance on statutory rights such as those afforded by the Data Protection Act 1998."*

The explanation offered for this is that:

"Data protection law is technical and unfamiliar to most judges. Claims under this legislation will rarely offer tangible advantages over a claim for breach of confidence or misuse of private information. Given the paucity of current authority on how the Data Protection Act 1998 is to be interpreted and applied, applications for summary judgment on such claims are 'for the moment at least, unlikely to find favour."

"Given that the stated objective of the Directive was to protect personal privacy in information in a way which reconciled Arts 8 and 10 of the ECHR, this practical result suggests a shortfall in the implementation of the Directive."

2.6 Mr Coppel concluded by summarising the current position with the following propositions:[17]

(a) "The DPA provides a code to protect the privacy of an individual's personal information, in whatever form recorded other than in ad hoc manual records.

(b) The protection required by the Directive and provided by the DPA begins from the moment a person handling personal information acquires it and only ends once that person no longer holds it.

(c) The Directive – to which the DPA is intended to give effect – permits Member States to relieve the press of obligations otherwise applicable to the processing of personal information where that it required to reconcile the ECHR right of privacy with the ECHR right to freedom of expression.

(d) Freed of judge-made authority, the DPA provides an individual with a measure of protection against press invasions of personal information privacy, but, because the s 32 exemption does not provide for any balancing of the fundamental right to privacy against the fundamental right to freedom of expression, the measure of protection is less than that provided under Art 8 of the ECHR.

(e) The DPA, in articulating:

i. degrees of sensitivity of personal information;

ii. the uses of that information against which protection is provided;

iii. the purposes for which those uses will be relieved of obligations securing the protection,

iv. and in adjusting the protection according the sensitivity of the information,

offers a sophistication and predictability which is unmatched by the jurisprudence on ECHR-based privacy claims.

(f) In reported practice, press invasions of an individual's personal information privacy have mostly been remedied through ECHR-based privacy claims.

(g) Judge-made law has substantially reduced the efficacy of the DPA as a means of remedying press invasions of an individual's personal information privacy, possibly to the point that the DPA, so construed, no longer gives full effect to the Directive."

[17] p17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

2.7 The result, in Mr Coppel's view, is that where journalism is concerned:[18]

> *"undoubtedly, once you're in section 32 territory, then the protection which is given to an individual's privacy almost entirely falls away. All you have to do is touch section 32 in some way, shape or form and the contest which the Act is supposed to embody between the right of expression, freedom of [expression], and an individual's personal privacy has all been tilted one way."*

2.8 In other words, the journalist is made arbiter of the balance, and the balance in turn falls to be made on the basis of matters exclusively within the knowledge of the journalist, including matters inaccessible because of the extensive protection provided for journalists' sources. He goes on to argue that s32:[19]

> *"does not recognise any right to privacy. It's there, its sole objective is to cut away at the right of privacy, and at the end of it, certainly after the decisions of the court, there is nothing left of that right."*

2.9 In practical terms, the argument goes, the approach of the courts to the substantive law, coupled with the procedural inhibitions provided in other parts of the DPA (considered below) together with the very low level of damages which the courts have awarded have, between them, atrophied the principles and individual rights in their practical application to the press.

2.10 As a matter of law, there is more than one way to reflect on the tenor of Mr Coppel's arguments. Put at its highest, his case would be that on the current state of the UK authorities, s32 fails to implement the Directive from which it derives, and is inconsistent with the relevant parts of the ECHR to which it is intended to give effect, because the relationship between privacy and expression rights has got out of balance. A proper balance is a fundamental obligation. The UK is therefore positively *required* to change the law to restore the balance. That is indeed Mr Coppel's own contention: that UK data protection law currently fails to implement our obligations, and that Lord Lester's concerns had proved to be prescient.[20]

2.11 Without going so far as that, even if the current balance were within the spectrum permitted by our international obligations, the argument could be expressed in terms that it is at an extreme end of that spectrum, and the UK can as a matter of law, and should as a matter of policy, restore a more even-handed approach, not least given the asymmetry of risks and harms as between the individual and the press.

2.12 Put at its very lowest, the point could be made that the effect of the development of the case law has been to push personal privacy law in media cases out of the data protection regime and into the more open seas of the Human Rights Act. This has happened for no better reason than the slowness of the legal profession to assimilate data protection law and, in the case of the judiciary, its greater familiarity with (and, he suggests, perhaps a preference for) the latitude afforded by the human rights regime over the specificity of data protection.[21] But this, the argument goes, is undesirable because the data protection regime is much more predictable, detailed and sophisticated in the way it protects and balances rights, and significantly reduces the risks, uncertainties and expense of litigation concomitant on more open-textured law dependent on a court's discretion.[22] Where the law has provided specific

[18] pp24-25, lines 24-7, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf
[19] p29, lines 3-7, Philip Coppel, *ibid*
[20] pp29-30, lines 21-7, Philip Coppel, *ibid*
[21] pp36-37, lines 25-7, Philip Coppel, *ibid*
[22] p39, lines 3-22, Philip Coppel, *ibid*

answers, the fine-nibbed pen should be grasped and not the broad brush. The balancing of competing rights in a free democracy is a highly sophisticated exercise; appropriate tools have been provided for the job and should be used.

2.13 Mr Coppel suggested that the opportunity should be taken to redraft s32 in order better to reflect the balance between freedom of expression and the protection of privacy envisaged both in the Directive and in the ECHR. He suggested two changes in particular. The first is to modify the test for reliance on s32 so that it will be available only where:

> *(a) "the acquisition or use of the information is necessary for publication rather than simply being in fact undertaken with a view to publication;*
>
> *(b) "there is a reasonable belief that publication would be in the public interest, with no special weighting of the balance between the public interest in freedom of information and in privacy; and*
>
> *(c) "objectively, that the likely interference with privacy is outweighed by the public interest in freedom of information."*

2.14 The second change is to amend s32 so that it gives exemption from fewer rights and principles, and in particular no longer allows for exemption from:

> *(a) "the requirement to obtain and use information in accordance with statute law;*
>
> *(b) "the requirement to obtain the information only for specific purposes and not to use it in any way incompatible with those purposes;*
>
> *(c) "the requirement for information to be accurate and up to date;*
>
> *(d) "the rights of individuals under the Act; and*
>
> *(e) "restrictions on exporting the information."*

2.15 Mr Coppel provided the Inquiry with an illustrative revised version of s32 to indicate the sort of changes which would need to be made.[23] I should make it clear at once that I do not express any view on the drafting suggestions that Mr Coppel makes, nor is it appropriate for this Report to frame recommendations in the form of draft legislation. For that reason, the Report's consideration is strictly limited to the policy objectives underlying Mr Coppel's suggestions which are not simply to be inferred from the drafting but as explained by Mr Coppel in his evidence; it would of course be a matter for Parliamentary Counsel in due course to reflect on how any policy recommendations of this nature would best be captured in drafting terms.

2.16 Considered purely in terms of what it might be desirable to achieve in terms of outcomes by any changes in the law, the underlying rationale of Mr Coppel's analysis and conclusions can be stated relatively simply. Firstly, it is to express more clearly the even-handed approach required by human rights law to the balance between individual civil liberties on the one hand, and the public interest in the liberties of the press on the other. Secondly, it is to improve the prospects of law enforcement and the restoration of that balance where the press goes too far in transgressing individual civil liberties.

2.17 The suggested reforms would seek to achieve these objectives by focusing the mind of the journalist much more explicitly on the balanced judgment he or she has to make in the first place, with a reminder that the journalist is not above the law, and cannot be the sole arbiter

[23] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

in the end of whether the public has been well-served by his or her actions. In other words, the changes are designed to promote conscious awareness in journalism and accountability to the public. Furthermore, they are intended to do so without imposing any burdens on honest and reasonably conscientious journalism[24] beyond what is practicable and workable as a matter of day to day practice. The question is whether these intentions, from which it is hard to dissent, were indeed likely to be achievable along the lines Mr Coppel was proposing.

News International's objections to Mr Coppel's proposals

2.18 News International (NI) made submissions to the Inquiry to the effect that what Mr Coppel suggested was misconceived.[25] This part of the Report considers these objections in turn.

(a) The 'fundamental objection'

2.19 In the first place, NI raised what it described as a 'fundamental objection'.[26] This relates to the proposed narrowing of the exemption in s32 on the basis of its divergence from the broad interpretation given to s32 by the Court of Appeal in *Campbell v MGN Ltd.*[27] It was further argued that the effect of *Campbell* is that the existing provisions of s32, provided they are widely interpreted, strike the appropriate balance between Article 8 and Article 10.

2.20 As a matter of law, I do not see that this concern constitutes a 'fundamental objection' to the policy. Mr Coppel's submission is precisely that *Campbell,* in its interpretation of s32, unduly widened an already excessively wide s32 as enacted in the DPA 1998. His argument is that the current s32 is framed in a way that effectively means journalism nearly always trumps privacy and therefore fails properly to implement the Directive. On that basis, the narrowing of the s32 exemption is better understood as returning s32 to its intended remit. It is of course open to Parliament to amend the wording of the exemption in s32 irrespective of the terms of the judgment of the Court of Appeal in *Campbell,* provided that any amended s32 does not conflict with the underlying Directive to which it is intended to give effect, nor is incompatible with Article 10 or other provisions of EU law. The issue is not whether the policy of the proposed amendments conflict with *Campbell*, but whether they are necessarily incompatible with Article 10.

2.21 It is not apparent to me that there is a necessary incompatibility, or that s32 as currently drafted is the least generous formulation from journalism's point of view which is conceivably consistent with the ECHR if, indeed, it is consistent at all. Article 10 is a qualified right, inherently requiring a balance with other rights (including the right to privacy). I do not consider that *Campbell* can be read in the way that NI appears to contend, namely that a wide interpretation of s32 is *necessarily* required to give effect to Article 10 and that any narrowing of the scope of s32(1) is *necessarily* incompatible with Article 10. It must be remembered that the wide construction in *Campbell* concerned the temporal element of the exemption, i.e. whether it was confined to pre-publication activity or included publication itself. *Campbell* itself is entirely silent on the need to strike a balance between privacy and Article 10.

[24] On the application of s32 to 'new media' journalism, see para 99, Tugendhat J, *The Law Society & Ors –v– Kordowski* [2011] EWHC 3185
[25] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/News-International-Addendum-to-Privacy-Law-Submission.pdf
[26] page 4-5, *ibid*
[27] [2003] QB 633

(b) The objection to a necessity test

2.22 It is argued by NI that the proposed replacement of the test of processing "*undertaken with a view to publication*", with a test of processing *"necessary for the publication"* would be inconsistent with authority and unworkable in practice. NI makes the point that it is self-evident that for the s32 exemption to work it must cover, as it does at present, the processing of information which a journalist or editor ultimately decides to leave out of a published article.[28] This point was, in fact, squarely addressed by Mr Coppel in oral evidence to the Inquiry.[29] The exchange between Counsel to the Inquiry and Mr Coppel went like this:

> *Q. "Can we just look at a paradigm case of investigative journalism, that there's a lot of preparatory work … before publication. If the journalist can show that all the work is necessary for the publication, then he or she is protected both in relation to the preparatory work and to the publication itself."*
>
> *A. "Correct."*
>
> *Q. "Is that the correct analysis?"*
>
> *A. "It recognises that particularly for investigative journalism, in which there may be a long trail leading up to the publication itself – and some of those sub-trails may turn out to be fruitless in themselves but are nevertheless necessary in order to explore all the avenues to produce the article itself. That will be captured by my proposed 32(1) paragraph (a)."*

2.23 The policy intention here would be to tighten the nexus, or causal link, which the legislation requires between the acquisition and handling of the personal information and the ultimate publication but certainly not to the (obviously unworkable) extent that the exemption would apply only to material actually published. The idea would be to protect bona fide research or investigatory work without which publication could not happen, and that would have to apply from the point of view of the work at the time and not with hindsight. But it would not protect dealing in personal information unless it was properly necessary for research and publication. I do not see that that policy aim is either legally repugnant or necessarily unachievable in law and practice. As currently drafted, s32 of the Act requires the Court (or Commissioner) to consider whether the processing is undertaken with a view to publication, and that requires the Court (or the Commissioner) to consider the link between the processing and its ultimate purpose and the publication. Exactly the same conceptual process would be required under Mr Coppel's proposals, but more would be being asked of the journalist to demonstrate the necessary link.

(c) Replacing the requirement in s32(1)(b) to have particular regard to the 'special importance of the public interest in the freedom of expression' with a more neutral balance, and an explicit balancing test

2.24 The NI submission[30] suggests that this would be inconsistent both with Article 10 and s12(4) of the Human Rights Act. Dealing with the latter point first, I do not think that there is any arguable technical inconsistency with s12(4), which is essentially a procedural mechanism,

[28] page 5-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/News-International-Addendum-to-Privacy-Law-Submission.pdf
[29] pp43-44, lines 16-7, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf
[30] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/News-International-Addendum-to-Privacy-Law-Submission.pdf

directing a court when proceedings before it concern journalistic material to have particular regard to the importance of freedom of expression. In the event that a DPA claim engaging s12(4) were before the court, it would operate as a free standing provision and there is no need for the further incorporation of an equivalent provision in s32 in order to give effect to it. Where there are no proceedings before a court, for example where a journalist is considering whether s32 is met, s12(4) has no direct application.

2.25 It may be asked whether the recognition given in s12(4) to the importance of freedom of expression is not a reflection of the more fundamental point in the NI submission, namely that as a matter of ECHR law there is in fact special importance attached to freedom of expression, and beyond that to a lack of constraint on journalism, to which the removal of the formulation in s32 is repugnant. Undoubtedly, there is a very special public interest in freedom of expression, as formulated in Article 10. But it certainly puts the argument very high to say that the existing language of s32 is a minimum imperative required by the ECHR. Indeed, as is apparent, during the passage of the Data Protection Bill, some anxiety was expressed by expert opinion in Parliament to the effect that the pull it exerted on the scales balancing the public interest in freedom of expression as against other public interests (including privacy) was itself not compatible with the language of the Convention.

2.26 I do not consider, as the NI submission seems to suggest, that the current drafting of s32 can be held up as the only and immutable expression of the balance between personal information privacy and the value in a free society of journalistic (or artistic or literary) endeavour. An expression of that balance in UK data protection law, which occupies a more central zone of the margin of appreciation, and which is expressed in language more close to that of Articles 8 and 10 themselves and which encourages those exercising precious freedoms to be mindful in doing so of other people's precious freedoms is something which it seems to me to be both possible and desirable to achieve. None of the provisions of s32 at present contains any explicit recognition of the wider context of public interest within which journalism must fairly operate. Mr Coppel's suggestion of introducing an explicit balancing test seems to me to be both truer to the letter and spirit of the Convention, and an important and necessary encouragement to mindfulness where journalism handles, as it often must, private information.

H

(d) Taking individual subject access rights out of the automatic exemption provision

2.27 The NI submission describes this as *"perhaps the most worrying of Mr Coppel's proposals"*.[31] The right of individuals to know what information is held about them is of course at the heart of the data protection regime, and a very fundamental privacy entitlement in its own right. But its application in the modern world of journalism would be a change of some significance, and it is right that the idea should be considered with great care. The NI submission makes a number of points about the idea, some of which certainly need to be taken very seriously.

2.28 It is, for example, argued that it would seriously undermine the protection of sources. Journalists' sources enjoy a considerable degree of legal protection, not least under Article 10 of the Convention.[32] Any change to that protection would have to be considered most carefully, and in its own right rather than simply as the by-product of another policy. Sources (although not in a way specifically addressed to journalism) are, however, given considerable general protection by the data protection regime. That is because where access to one's own data would necessarily involve the disclosure of information about a third party (including a

[31] page 6-8, *ibid*
[32] Appendix 4

source), the privacy entitlements of that third party have to be respected as well as one's own. In conferring the right of access to one's own information, s7 of the existing DPA, therefore, makes this further specific provision:

> *"(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—*
>
> *(a) the other individual has consented to the disclosure of the information to the person making the request, or*
>
> *(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.*
>
> *(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.*
>
> *(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—*
>
> *(a any duty of confidentiality owed to the other individual,*
>
> *(b) any steps taken by the data controller with a view to seeking the consent of the other individual,*
>
> *(c) whether the other individual is capable of giving consent, and*
>
> *(d) any express refusal of consent by the other individual."*

2.29 It is an important, if technical, point to note that the subject access right is a compound right, including not just a right of access to the information, but a right to know whether *information is held at all* about one. So if even to confirm whether information is held would disclose a source, s7 makes provision for an answer which will neither confirm nor deny it.

2.30 I do not express a concluded view as to whether the existing provisions of the DPA are a complete answer to the challenge that introducing at least the possibility of a right of subject access has to be reconciled with the need to protect journalists' sources. I simply observe that it is not apparent to me that the importance of protecting journalists' sources cannot be captured in suitable amendment to these provisions, should any be needed. The more fundamental point is that there does not seem to me to be an argument from first principles that the protection of journalists' sources necessitates a complete and blanket dis-application of the subject access right in all circumstances. And if it is not necessary to disapply a fundamental privacy right in all circumstances, it is necessary not to.

2.31 It is further argued by NI that there are other reasons why it would be necessary to take a blanket approach to this right in the world of journalism. These are:

> *(a) "the need for legitimate investigative journalism to be able to operate covertly, and over a period of time, without the object of the investigations being able to find out that the press are interested in them;*

(b) "the burden on newspapers' resources, particularly given the motivation of individuals to find out what is being held about them at regular intervals;

(c) "'it would spell the end of the exclusive' if individuals could get hold of a possible story and provide it on their own terms to another newspaper – or indeed take to the internet with their own pre-emptive version; and

(d) "that it fails to respect the balance required between Article 10 and 8 more generally."

2.32 Care must be taken in this context to avoid rhetorical elision between matters of commercial convenience or profit, on the one hand, and a challenge to the current business model of the newspapers so fundamental as to amount to an abridgement of free speech, on the other. With the first of the four points noted above, it is possible to readily to agree. With the second and third, there are issues of degree. With the third in particular in relation to the question of exclusive stories, the business model may well be under rather more acute threat from the internet generally and the highly ephemeral nature of exclusivity once any publication takes place, than from any legislative change relating to the entitlement of individuals to know whether information is held about them. Similarly, the issue is to a degree less concerned with the exercise of freedom of expression than with the abridgement of the rights of others to receive and impart information. In reality, the key question, therefore, is the fourth, of which the first is an aspect. Does a fair balance between Articles 10 and 8 prohibit any possibility of subject access to journalistic material in all circumstances?

2.33 I am not persuaded that it does. It is evident that a fair balance would require an entitlement for a subject access request to be refused to any degree where to comply with it would compromise the protections envisaged by Article 10. But I am inclined to think that this could properly be done on a case by case basis rather than by wholesale ouster of the right. This point needs to be borne in mind: a significant aspect of the importance of the subject access right lies in the ability it gives individuals to test for themselves whether their information is being dealt with lawfully and in accordance with the data protection regime (including, of course, whether the information is accurate). That includes being able to test whether any exemptions are being properly claimed (although not to the extent that properly claimed exemptions are themselves thereby compromised). The complete exclusion of subject access from all journalistic activity removes a principal check on its lawfulness. Who then is to perform that function? The obvious answer would be the Information Commissioner, but that answer in itself takes us to a second area which Mr Coppel has identified as problematic.

Civil law enforcement: journalism, access to justice and the powers of the Information Commissioner

2.34 As well as the substantive exemptions provided by s32, the DPA creates a number of special procedural provisions which apply whenever it is claimed that personal information is being acquired or used for journalism. Their effects are both very significant for the purposes of the Inquiry and also very complicated. Their very complexity adds to their impact. It is necessary to engage with and unravel the detail of these provisions in order properly to understand and address their effect.

2.35 The relevant provisions are identified in this way by Mr Coppel:[33]

> *"Once a data controller claims that the personal data are being processed for a "special purpose" (i.e. journalism, artistic or literary purposes) or with a view to the publication by any person of any journalistic, literary or artistic material:*
>
> *(a) the Commissioner cannot ordinarily serve an enforcement notice or an information notice (s 46); and*
>
> *(b) where a person has brought a claim under the DPA seeking a remedy for breach of any of the data subject's rights (see §§37-45 above), the Court must stay the proceedings until there has been a determination under s 45 of the data controller's claim (s 32(4)).*
>
> *Where the proceedings are so stayed or the Commissioner has received a s 42 request for assessment, he may serve a "special information notice" (s 44). The object of the notice is to enable the Commissioner to carry out the s 45 determination. A data controller has a right of appeal against a special information notice (s 48).*
>
> *"Under s 45(1), where it appears to the Commissioner that the personal data are not being processed only for a special purpose or are not being processed with a view to the publication by any person of any journalistic, literary or artistic material, the Commissioner may make a determination to that effect. A data controller has a right of appeal against the determination. Once the determination takes effect, the Commissioner may serve an information notice. And, if a court gives leave, the Commissioner may serve an enforcement notice. If the Commissioner decides otherwise, proceedings for breach of the DPA may be stayed indefinitely…"*

2.36 Broadly speaking then, the Information Commissioner cannot exercise his regulatory powers in relation to the press (and a court cannot decide an action brought by an individual for breach by the press of the rights contained within the data protection regime) unless the Information Commissioner has first made a formal determination that the newspaper is not, in relation to given personal information, using it wholly for the purposes of journalism. The only power he can use to help him make that determination is the power to issue a 'special information notice' for the purpose. And he cannot issue one of those unless either litigation is already on foot or he receives a specific request from a complainant. Where he does issue a special information notice, the newspaper can appeal it. And if he does finally make a 'determination' the newspaper can appeal that too. Any enforcement steps he is then able to take, whether investigative or compliance, each brings its own appeal rights.

2.37 Mr Coppel explained some of the cumulative practical impact of these provisions:[34]

> *"It results in a disapplication of the power to serve an enforcement notice – that's the first important thing that it does – and then secondly, where an individual has brought a claim, a section 4(4) claim for breach of statutory duty through the DPA, then the court must stay those proceedings until there has been a determination under section 45, and section 45 is a special procedure relating to the so-called special purposes, ie journalism, literature and art, to see whether in fact that is the case.*
>
> *"In practice, what happens is that it becomes so convoluted – the individual disgruntled has commenced proceedings under section 4(4). If they – if the point is taken that*

[33] pp11-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

[34] pp20-21, lines 24-25, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf

these are special purposes, then a satellite set of proceedings is effectively launched, namely the section 45 one. That, if one ever gets to the end of it, reaches its end, it might come up with a conclusion. If the conclusion is in favour of the individual, then they resume their claim, by which time, of course, matters have marched on significantly and it may be of cold comfort, any such relief – [they may quite possibly have lost interest in living by then] and particularly if one realises that at the end of it all one is going to get like, for example, Catherine Zeta Jones, £50, one can well understand why interest might be a little bit diminished."

2.38 During the course of the Inquiry, it has frequently been asserted that most or all of the evident problems with the culture, practices and ethics of the press would be solved if the existing law were to be properly enforced. Where press compliance with the legal requirements of the data protection regime is concerned, enforcing the civil law is a two-stage process. It must first ensure that the boundary between exempt and non-exempt activity in relation to dealings in personal information is properly observed by the press, and this is a point which applies wherever that boundary is drawn by the substantive law. Secondly, it must also ensure proper compliance with the regime where exemptions do not apply.

2.39 Law enforcement in these respects takes place in two different ways. First, it is by individuals bringing cases in the courts, and, secondly, by the exercise of his powers by the Information Commissioner. Both as regards litigation procedure on the one hand and as regards the assertion of the powers of public authorities on the other, there are already significant inhibitions in the general law which impact on the possibility of proper law enforcement in respect of the press because of the balance which must be struck between the public interest in law enforcement and the public interest in the protection of journalists' sources. The additional procedural thicket which the DPA erects in the way of anyone attempting to find out whether the press is complying with the law, that is to say whether their activities are genuinely covered by exemptions and if not whether they are complying with what is legally required of them, is for practical purposes near-insuperable. The press, so this analysis goes, is effectively beyond the reach of law enforcement. In that regard, the legal regime can be and is disregarded for any practical purposes. Whether what the press are doing with people's information is or is not specifically exempted from the regime hardly matters in practice since the question is effectively prevented from arising.

2.40 Mr Coppel suggested that this aspect of the problem should be addressed in two ways, that is to say by removing the elaborate tangle of red tape which stops the Information Commissioner doing his job in relation to the press, and by providing more straightforward access to justice for individuals.

Powers of the Information Commissioner

2.41 Here, Mr Coppel's proposal is very straightforward: the DPA should be amended to repeal the entirety of the complex special regime limiting the Information Commissioner's powers in relation to the press. Specifically, he recommends:[35]

"removing the provisions for special information notices (s 44), special purpose determinations (s 45) and special purposes restrictions (s 46), thereby aligning the DPA's enforcement procedures as they apply to the press with those that apply to others, i.e. the ordinary provisions for enforcement (s 40), assessment (s 42) and information notices (s 43)".

[35] p18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

2.42 These provisions of the DPA are highly redolent of a policy context in which the self-interest of the press was a powerful advocate, rather than one in which law enforcement was an active concern. Given the specificity and elaborate nature of the provision made for testing the compliance of the press with the law, however, this much can be said: it cannot have been the intention of the legislation that the compliance of the press with the law should, in reality, be incapable of being tested in practice. No doubt concerns were vocally expressed that legitimate journalism should be able to go about its business without interference or 'chill' from overzealous regulators or nuisance litigation. But there is no policy intention on the face of the legislation that it should be impossible, in the usual ways, to establish whether the journalism was in fact legitimate in the first place. Such an intention would have been very simple to express legislatively although it would, of course, have been incompatible with the spirit and letter of the Directive. However wide the boundaries of an exemption are set, those boundaries have to be given some real meaning. Making those boundaries inaccessible, and the question on which side of them any activity falls effectively incapable of being answered, strips those boundaries of meaning.

2.43 The risks of applying the ordinary regime of information and enforcement notices to the press are capable of being overstated. An information notice could not be issued unless the Commissioner reasonably required any information for the purposes of determining whether the press were complying with the law. Similarly, an enforcement notice could not be issued unless the Commissioner was satisfied that the press had contravened or was contravening the law. In each case, the Commissioner would have to bear in mind any genuine risk to freedom of expression. Each measure, if deployed, has an appeal mechanism through which its compatibility with freedom of expression could readily be tested, case by case. It is not my view that the mere existence of the possibility of law enforcement measures of this sort would itself be an improper inhibition to journalistic activity, nor that the press would be slow to understand and make use of the sort of procedural safeguards which the standard data protection regime provides.

2.44 None of this is of course intended to give any encouragement to the idea of over-zealous reliance by the ICO on formal powers. As successive Information Commissioners have repeatedly emphasised, in general, the first recourse of a regulator with concerns about compliance should always be to seek to resolve matters informally and cooperatively. But it has not been my perspective that over-zealous recourse to formal powers has been a major concern about the way in which the ICO has engaged with the press and there are, in any event, plenty of inhibitions in law and practice to any such tendency. On the contrary, it appears that the most pressing concern is the need to address the extent to which the ICO is shy about performing its proper role in relation to the press as a member of its field of regulation, not least by addressing the evident cultural inhibitions to doing so created by the DPA's complicated procedural regime. If the ICO has entertained a view that it is somehow unable to apply the law to the press, that it is not really supposed to do so, the process provisions are likely to have been a significant encouragement to that view, however overstated that view may be.

2.45 From the point of view of legitimate journalism, it is right that the ICO should not interfere or over-regulate. It is also right that journalism should be judged primarily by what it prints rather than be held to account at the newsgathering stage. A theme of this part of the Report, however, is that this does not mean that blanket exclusion from regular law enforcement measures is the only, or a very sensible, response. It is my conclusion that it is a part of the culture, practices and ethics of some sections of the press that there is a sense of comparative impunity and, in the main, of being beyond the reach of the law. This has not been in the public interest, and needs to be rebalanced by a greater sense of awareness of the law and what is

the continuum between the constraints of the law and aspiration towards good practice. The existing procedural provisions of the DPA in relation to the press appear to be an unnecessary and unwelcome inhibition to making progress towards that goal.

Access to justice

2.46 In general, the DPA provides[36] for individuals who suffer damage as a result of breach of the legal requirements of the regime to be entitled to financial compensation from the person or organisation responsible. It is a defence in such proceedings for the latter to show they had taken reasonable care to try to act in a way that is compliant with the law. If any individual has suffered damage, compensation is also payable for distress. Where, however, the contravention relates to acquiring or using personal for the purposes of journalism, literature or art, compensation is payable for distress alone, without the need to prove physical damage. This is in recognition of the fact that the unlawful widespread public dissemination of someone's personal information is capable of having a distressing impact in its own right; this is the impact about which very many of the witnesses before the Inquiry have eloquently spoken.

2.47 In practice, however, the way that the courts have interpreted this entitlement to compensation has been very limiting indeed. As a result, claims are rarely successful, and even when successful have resulted in very small awards.[37] At its root the problem is that the courts have been reluctant to award compensation for anything other than measurable financial loss caused by the breach of the regime. Nothing, in other words, is awarded for the distress in its own right, but only if it has occasioned economic loss. But by its nature, the subject matter of the regime, that is to say privacy, is unlikely to produce circumstances in which breach straightforwardly causes pecuniary loss. The harm done is the invasion of privacy itself.[38]

2.48 In other areas of the civil law, the courts have solved this problem by evolving a tariff of compensation to be paid for non-pecuniary loss. The best example is in relation to compensation for pain, suffering and loss of amenity in personal injury case. A more recent (and perhaps more relevant) illustration is the award of damages for breach of contract where holidaymakers have been let down by travel companies or holiday operators. The whole point of the contract was the pleasure of a holiday with the result that compensation will be payable for the disappointment.

2.49 On the face of it, the inability of victims of data protection breaches to obtain compensation for distress in its own right is an anomaly for a regime whose principal purpose is to safeguard individuals from unlawful intrusion into their private lives. The practical problem facing any attempt to address that lacuna, however, would be how to put a price on privacy in the way that the courts have evolved tariffs of compensation in other areas of 'immeasurable' psychological or emotional harm.

2.50 It must immediately be acknowledged that this is an issue which is relevant to activities in relation to private information which go beyond journalism, and beyond public dissemination of information in breach of the data protection principles. Damages for non-pecuniary loss in

[36] http://www.legislation.gov.uk/ukpga/1998/29/section/13

[37] pp15-17, lines 21-1, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf; p9, para 42, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

[38] pp15-16, lines 25-6, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf

privacy cases is a potentially large subject in its own right, and one which has an extremely large and detailed context in the law of damages more generally.[39] On the other hand, as indicated above, the DPA makes special provision for compensation for distress unlawfully caused by the press although this is a provision to which the courts have not in practice given substantive effect.

2.51 Mr Coppel tested the issue with the example of the medical records of an individual being published in a newspaper in breach of the DPA, that is to say, unfairly and without legitimate public interest justification.[40] To that example might be added the example of the dissemination of intimate sexual details or nude photographs, again, for the purposes of the argument, unfairly and without legitimate public interest justification. Mr Coppel suggested: *"That, it seems to me, is a fundamental breach of what the Act is there to protect"*. Should the measure of recompense be simply how much money the individual may lose as a result – and if none, should the individual be left to endure any amount of distress and personal devastation uncompensated?

2.52 The DPA has been amended in recent years to make provision for the Information Commissioner to be able to impose monetary penalties, including in cases of this sort.[41] But monetary penalties of course, while they may have a deterrent or punitive effect, still leave the victim uncompensated.

2.53 Mr Coppel's own suggested solution has two elements. First, the Information Commissioner should be empowered to set a tariff of financial solace for breaches of the data protection principles, referable to the duration, extent, gravity and profitability of their contravention, such amounts to be in addition to amounts for damage and distress resulting from the contravention and to be followed by the Commissioner and the Courts. Secondly, a wronged individual should be provided with the choice of an alternative system to claim the tariff only, with no provision for damages, legal costs or fees, such a system to be administered by the Information Commissioner.[42]

2.54 Within Mr Coppel's analysis and conclusions, there are proposals that are specifically directed to the law relating to data protection; others have far wider ramifications into the law of damages. As for the proposed way forward in relation to the DPA, I accept that, at their heart, they reflect a recognition that changes need to be made in order to provide a response to the demand repeatedly expressed for the law to be properly enforced in relation to press misconduct and for individuals to have proper access to ways in which they can enforce their rights.

2.55 More specifically, in relation to the 'special enforcement regime' provided in the 1998 Act in relation to the press, there are good grounds to conclude that it has had an unintended and damaging effect on the ability of the ICO to perform its functions. Exceptionally complex and largely unworkable in practice, it appears to have had a chilling effect on reasonable law enforcement and, equally, to have a high risk of impacting unfairly on individuals. In my judgment, Mr Coppel's view is correct: its removal would promote the overall public interest and a balanced improvement in the culture, practices and ethics of the press in its approach to personal information.

[39] This debate might be influenced by the level of damages being agreed in the phone hacking litigation being brought against News Group Newspapers Ltd in relation to the News of the World

[40] p48, lines 1-18, Philip Coppel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Morning-Hearing-17-July-2012.pdf

[41] ss55A-E, http://www.legislation.gov.uk/ukpga/1998

[42] p18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Philip-Coppel-QC-redacted.pdf

2.56 In reaching that conclusion, I am very conscious of the need to ensure that legitimate journalism is not unduly impeded by attempts at pre-publication law enforcement on the one hand, albeit at the same time that individual liberties are not unduly stripped of their content by being rendered wholly unenforceable before publication (and then to be defeated by the act of publication) on the other. It is my provisional view that this difficult, but essential balance, is one which can and must be performed on a case by case basis by the ICO in considering the exercise of its powers, and that it is not one for which it is necessary or appropriate to attempt to make further provision by law. If, however, it were thought desirable to do so, it would perhaps be possible to preserve expressly in the Act the principle that, in considering the exercise of any powers in relation to the press or other publishers, the ICO should have special regard to the obligation in law to balance the public interest in freedom of expression alongside the public interest in upholding the data protection regime.

2.57 Built into this balancing exercise should be a requirement on the ICO, when considering the exercise of any of its powers, to have regard to the fact of membership of an accredited press regulator by the relevant title: this should be capable of establishing the proposition that the title subscribes to recognised and approved standards of conduct which are, themselves, enforceable.

2.58 The proposals for adjusting the boundaries and operation of the press exemption in s32 is a more difficult exercise. Although I am minded to the view that there is, indeed, an issue about compatibility, I do not consider that it is necessary for me to resolve whether there is any incompatibility between the provision as interpreted by UK courts and the UK's European and international obligations. What I am, however, clear about is that there is room within the latitude afforded by those obligations for a fairer, more even-handed balance, and that improvement in that respect is, both as a matter of both law and policy, desirable.

2.59 I therefore recommend that the policy represented by the suggested revisions to section 32 of the DPA should be given effect to by suitable amendment to the Act. In doing so, I consider that particular attention should be addressed to one area where further refinement of that policy seems to me to be desirable.

2.60 The removal of the blanket exemption from the fundamental right of subject access currently provided by s32 seems to me to be right for the reasons considered above. But there are special considerations relating to the exercise of a right of this nature in relation to the press to which careful attention needs to be paid. It remains necessary for the right to be balanced against the special protections afforded by the law to journalists' sources. That protection is not absolute as the law stands, but it is extensive. On the face of it, the existing general limitations on the subject access right which are designed to safeguard third party information do appear generally apt to follow the existing (important) protection for journalists' sources. If it were thought that there was any doubt about the matter, however, that doubt should be resolved by a provision to the effect that the right of subject access is not intended to displace the general law on the inaccessibility of journalists' sources.

2.61 Turning to the question of damages, I do not consider that it is appropriate for the Information Commissioner to be setting a tariff of financial solace for breaches of data protection or why this should be different from damages for distress (which might themselves be linked to damages for breach of other privacy rights). The proper place for the assessment of damages (or non pecuniary compensation) is allied to the consideration of damages across this area of the law. I return to this topic when dealing with the civil law.[43]

[43] Part J, Chapter 3

2.62 In making these recommendations, I accept that the current state of the legal framework in relation to the ICO's civil law enforcement powers goes some way to explain the indications of reluctance by the ICO to take an active, or any significant, interest in the formal exercise of their regulatory functions in relation to the press. I do not, however, accept that as a complete explanation. In reality, there is a lack of evidence that the ICO has, over the years:

(a) regarded the symptoms of deficiencies in the culture, practices and ethics of the press in relation to personal information as a serious operational priority;

(b) shown a will to test in practice the powers and procedures conferred by law specifically for the purposes of ensuring compliance with the legal obligations of the regime by the press – however attenuated those obligations and however difficult those procedures; or

(c) drawn attention politically to any perceived shortcomings in the legal framework in this respect.

This raises questions about a possibly deeper reluctance to accept an active role in relation to the press. Neither do I accept that other operational priorities must be accepted without more as an explanation for ICO inactivity in an area which the very existence of this Inquiry demonstrates to be a matter of acute public concern.

2.63 While recommending changes to the law, I do not intend to encourage the idea that the ICO should continue to take no steps to address the culture, practices and ethics of the press in the meantime. I therefore additionally recommend that the ICO should take immediate steps to prepare, adopt and publish a policy on the exercise of its formal regulatory functions in order to ensure that the press complies with the legal requirements of the data protection regime. I explain elsewhere, it is also my recommendation that in future such a policy should expressly provide that membership of an effective and independent self-organised system of standards regulation should be able to be taken into account by the ICO in contemplating the exercise of those functions.

2.64 I further recommend that the ICO take immediate steps to publish advice aimed at individuals concerned that they are or may have been victims of unlawful use of their personal information by the press. That might, for example, take the form suggested above, of enabling individuals, on application to the ICO, to obtain confirmation in so far as the office is able to offer it of whether they can be identified among the Motorman victims, and if so in relation to which title or titles, and to obtain assistance if necessary in making a suitable request to those titles. It might also take the form of engaging with victims' representative organisations to those ends.

Promoting good practice: journalism and ss51-52 DPA

2.65 In considering the role of the ICO in relation to the conduct of the press in connection with the handling of personal information, it is sensible to start with ss51-52 of the DPA.[44] These are among the simpler and more straightforward aspects of the application of the data protection regime to the press and it has not been suggested that the provisions should not be taken at other than face value. In short, they provide that:

(a) the ICO has a positive duty to promote the following of good practice in relation to the handling of personal information by the press, no less than in the case of any other business;

[44] http://www.legislation.gov.uk/ukpga/1998/29/section/51; http://www.legislation.gov.uk/ukpga/1998/29/section/52

(b) the ICO also has a positive duty to promote the observance of the legal requirements of the DPA by the press, in so far as they apply;

(c) the powers of the ICO in relation to the dissemination of public information and industry guidance apply in the context of the press industry;

(d) the powers of the ICO to encourage sections of industry to develop and apply codes of good practice in the handling of personal information apply to the press sector;

(e) the duty of the ICO to make an annual report to Parliament on the exercise of its functions includes a power to cover press aspects in that report; and

(f) the power of the ICO to make special reports to Parliament includes the ability to make special reports about the intersection between the data protection regime in practice, and the culture, practices and ethics of the press in relation to personal information (which provision provided the basis for the laying of the *What Price Privacy?* Reports).

2.66 As a matter of ordinary public law, the exercise of any of these powers has to be kept under review, considered within the overall framework and purposes of the data protection regime as a whole, and both reasonable and proportionate in all the circumstances. On the face of it, relevant considerations in that context would include matters such as the extent of objective evidence of poor practice along with the nature and seriousness of that poor practice and levels of public concern. Evidence of widespread ignorance of the requirements of law and good practice (whether on the part of industry or individual) would be particularly relevant, especially if that ignorance were related to the genuine complexity of those requirements. As an expert regulator, the ICO would then be in a unique position to address the problem with explanation, education and support.

2.67 Of course, the exercise of any of these powers in relation to the press would also have to take into account the wider legal context, including respecting in full the balance to be struck both in law and in policy between the liberties of the individual and the vital requirements of a free press. That wider context would certainly affect the manner in which the powers were exercised, and the content of any guidance, codes, reports and so on. But it does not on the face of it appear to constitute a limitation on the existence or potential value of these powers in relation to the press.

2.68 For my part, I do not see any defect in these provisions which could limit their ability to contribute to the promotion of good standards of behaviour in the press in the handling of private information: none has been overtly suggested. There has been no suggestion, for example, that throughout the period in which Mr Thomas was trying to encourage the PCC to promote good practice in the industry, including by means of its own Codes and guidance, he was in any way inhibited as a matter of law by the legislation governing the ICO from acting in those areas or fulfilling those requirements himself.

2.69 If there were any real doubt in the matter, legislation could put its application to the press beyond doubt. Indeed, it would also be possible to introduce new positive duties in relation to the press, for example to insert positive duties into the legislation as follows:

(a) into s1(3) for the ICO, in consultation with the industry and the public, to exercise the power to issue comprehensive guidance to the press on good practice in the handling of personal information;

(b) into s51(2) to exercise the power to issue comprehensive guidance to the public on their individual rights in relation to the obtaining and use by the press of their information, and how to exercise them; and

(c) into s52 to include in the ICO's annual report to Parliament an account of its perspective on press compliance with law and good practice in the handling of personal information and to draw special attention to any concerns.

Having said that, I should make it clear that I do not see any reason to doubt that the ICO could exercise his powers in these ways as the law presently stands.

2.70 I do not accept that there is any reason in law to explain the failure of the ICO to use these powers by taking active steps to address the need for improvement in the standards of the practices of the press in relation to the handling of personal information. Successive Commissioners have emphasised that this drive for good practice function is the cornerstone of the entire regulatory regime. Unfortunately, evidence to justify serious concern about the standards of the press in this respect has been available and well publicised: an informed, well-targeted, proactive and engaged approach to the problem might have made a real difference. It is a matter of regret to record that the failure by the ICO to address this issue must be regarded as a regulatory opportunity missed.

2.71 In those circumstances, I recommend that, in discharge of its functions and duties to promote good practice in areas of public concern, the ICO should take immediate steps, in consultation with the press, to prepare and issue comprehensive good practice guidelines and advice. This should include the articulation of principles and standards dealing with the acquisition and use of personal information. I hope and anticipate that the press will actively cooperate in the preparation and implementation of such guidelines and advice, not least so as to ensure that its Article 10 rights are fully recognised and reflected in the work. In those circumstances I would expect the guidelines and advice to be prepared and implemented no later than six months from the date of this Report.

2.72 I also recommend that the ICO take steps to prepare and issue comprehensive guidance to the public on their individual rights in relation to the obtaining and use by the press of their information, and how to exercise them. To demonstrate the effect of this guidance, the ICO should include regular updates on the practices of the press in relation to handling of personal information in its annual reports to Parliament.

Criminal Law: the sentence for breach of s55 DPA

2.73 The history of the campaign started by Mr Thomas to amend s55 DPA to introduce the possibility of custodial penalties on conviction (by providing a statutory maximum of two years imprisonment) has been set out. The position is that the Criminal Justice and Immigration Act 2008 introduced that amendment, but the changes had not been brought into force. A statutory instrument, to be laid before Parliament by the Government, is required.

2.74 As a matter of principle, the existence of uncommenced legislation on the statute books is potentially problematic. The power of the Secretary of State to commence legislation must, by law, be kept under review, so it always remains a live issue. As described elsewhere,[45] the legislative process by which the maximum penalty was increased and the defence to the substantive offence available to journalists broadened, with both changes left uncommenced, was strongly indicative of a political compromise, designed as much as anything to quieten two opposing campaigning voices rather than as a response to a thought through policy analysis for which there was genuine empirical evidence. It is not surprising to find that the delicate balance of the compromise has not proved something which succeeding Secretaries of State for Justice have been in a hurry to revisit.

[45] Part I, Chapter 5

Recent history of the ICO's s55 campaign

2.75 In October 2009, the Government published a consultation paper in seeking views on the commencement of both parts of the changes.[46] Responses were sought by January 2010, with a view to assessing the possibility of activating the changes in the April of that year, at the same time as it was proposed to confer on the ICO enhanced powers in relation to civil penalties. It does not appear that the responses to that consultation exercise have been published by the Ministry of Justice. However, the press has consistently opposed the commencement of the provisions and the then Government did not bring the new provisions into force in what were the final weeks before the General Election. Neither has the current Administration advanced the position: a decision is now said to await this Report.

2.76 Successive Information Commissioners have continued to press for the increased penalties to be brought into force. Mr Thomas repeated his case in his first witness statement to the Inquiry:[47]

> *"The main reform, in my view, should be an immediate ministerial Order to activate the prison sentence for s55 offences. The public controversy of the last two months, and public outrage at press misconduct, make the case for that reform more pressing than ever. Even if there has been improvement in press conduct since 2006 there is still no guarantee that this will remain indefinitely and I understand that illegal activity remains rife in other sectors. A strong deterrent is needed and it is vital that a clear signal should be sent that s55 offences are not trivial or "technical"."*

His exasperation was evident in his oral evidence to the Inquiry:[48]

> *"I cannot for the life of me understand why the Government has now not activated that provision. … I am very disappointed as an individual now that still, despite all the material that has surfaced in recent months, the order has not been activated. It would be a very simple matter to bring that into force now, and my broad understanding back in 2008 was that it would only be a delay of six months or so, but that has not yet materialised."*

2.77 The ICO campaign on s55 has continued under Mr Graham, but with a perceptible change of emphasis. The ICO submitted evidence to the consultation on activation of the new provisions at the end of 2009[49] but, by this time, Motorman was presented as somewhat distant history. The ICO submission focused instead on examples, including half a dozen case studies, of the blagging of personal information by deceit in the routine criminal contexts of unscrupulous debt-collection, commercial espionage and profiteering, and personal grudge and intimidation. Judicial sentencing remarks in cases prosecuted are cited to the effect that the sentence maxima on s55 conviction did not allow a sentence to be passed commensurate with the criminality of the behaviour. An example is given of ICO investigators executing a search warrant:

[46] http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/data-misuse-increased-penalties.pdf

[47] p15, para 48, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf

[48] pp47-48, lines 15-5, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

[49] pp1-10, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG6.pdf

> *"They were greeted at the premises, by an individual who had a previous conviction for a section 55 offence, with the following comments. 'What's the maximum fine for this, £5000? I will write the cheque out now.'"*

At the other end of spectrum, Mr Graham explained in evidence that he wanted to:[50]

> *"…deal with the problem of the courts being limited to fines and then dealing with people who are of limited means and can only be fined about £100, and the court doesn't have the option of doing anything about a community sentence or tagging or curfew or whatever else might be involved. It's just the going rate is £100. It happened again the week before last. It's nothing."*

2.78 Other general points are made in the ICO submission to the consultation exercise about the consequences of s55 not being capable of attracting a custodial penalty. Two points in particular should be noted:

> *"At present the offence of unlawful obtaining etc is not a recordable offence. It is not therefore recorded on the Police National Computer. Fingerprint impressions, DNA samples and descriptive details are not currently taken from those individuals who are prosecuted by the ICO for the section 55 offence (a descriptive form contains personal information relative to the accused person, for example, ethnic appearance, build, shoe size, glasses, hair, facial hair, marks, scars and abnormalities etc). If the penalties for this offence are increased to imprisonment the offence will become a recordable offence. This will not only underline the serious nature of the offence but will ensure that those convicted carry a meaningful criminal record."*

The criminal record is both a matter of deterrence in its own right and also of assisting detection. The second point made is that, with a custodial penalty available, s55 crime could fit within the framework of the European arrest warrants; data crime is an easy cross-border activity, and the availability of simple extradition procedures would overcome jurisdictional inhibitions to criminal enforcement.

2.79 Subsequently, including in an update report to the Ministry of Justice in August 2011[51] and in the evidence that Mr Graham provided to the Inquiry, the ICO has sought to turn the spotlight in relation to s55 definitively away from the press altogether. As discussed above, that is articulated by way of an assertion that the practices of the press are no longer an issue in relation to information blagging. From the perspective of the ICO, however, given the history of the s55 campaign, there is no doubt a degree to which the press are simply seen as the principal inhibition to the commencement of these provisions. The policy is now to seek to neutralise the hostility of the press and emphasising that the policy aim to be achieved now has little to do with their activities no doubt has that in mind. Mr Graham illustrated this in his evidence when he said:[52]

> *"In fact, I went to the Society of Editors conference in 2009 and said: 'it's so not about you. It's about NHS workers, it's about private investigators, it's about bank clerks, and it's frustrating not to be able to deal with that real challenge, which the Information Commissioner's office is concerned to deal with, because we're constantly met by the press saying, "This is terrible, the sky is falling, the sky is falling". It really isn't.'"*

[50] pp54-55, lines 25-7, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf
[51] p7, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG7.pdf
[52] pp7-8, lines 20-3, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

2.80 That the tension between the ICO and the press on the s55 issue is still very much a current source of heat was vividly illustrated by exchanges between Mr Graham and Mr Rhodri Davies QC, asking questions on behalf of News International. This exchange is set out at some length here because it illustrated in microcosm, and in many ways can be regarded as the summation of, the long years of debate and lobbying on this subject, in Parliament, in successive Governments, and in other public fora. Mr Davies put it to Mr Graham that, if the behaviour of the press was not itself the current operational focus of the campaign, nevertheless:[53]

> *"The political problem, if I can call it that, that you have in getting the existing legislation into force is what we might call the perceived effect on the press. It's not the bank clerks who are campaigning against this; it's the perceived effect on the press which is your problem?*
>
> *"A. My problem is the press. It's not the perceived effect on the press, it's the behaviour of the press, worrying away at a penalty designed to deal with a problem which they say doesn't apply to them, and I say, "If it doesn't apply to you, get out of the way."*
>
> *"Q. Isn't the way through this, which might perhaps satisfy both parties, simply to exempt from the threat of a prison sentence anyone who is acting for the special purposes of journalism, artistic or literary matters, using the phraseology in Section 32?*
>
> *"A. How much of a good deal do you guys want? Excuse me, sir, for being heated about this, but you fought everyone to a standstill back in 2006/7. You did it again in 2009/10. You've got so many privileges and exemptions. It's perfectly possible for a journalist to do a decent job legally. There is Section 78 [of the Criminal Justice and Immigration Act 2008] on the statute book, applying the reasonable belief of the journalist that what they were doing for publication was in the public interest. It's going to be very difficult for anyone to strike that down, but there are some people who believe that that's more generous to the press than really should have been the case, but that was the deal. Now, if I understand it, you're sort of coming back for more - on behalf of your clients.*
>
> *"Q. What I'm trying to do, Mr Graham, is to point out a route through the problem, or one that bypasses the Gordian Knot, and I'm not quite understanding why this solution is not acceptable to you.*
>
> *"A. Well, this isn't a negotiation about these things, but it sounds to me as if the representatives of the press want to be somehow above the law. Surely a free press operates within a framework of law, and a vibrant and healthy press, challenging those in authority and doing the job that it should be doing and the job that I joined the profession to do, operates within the law. Yes, okay, you sometimes have to apply the dark arts to get the story, and then you're accountable for it. And if you're really in trouble, that's the mitigation that you put to the court. But we can't keep having more and more carve-outs and reductions and special cases, surely.*
>
> *"Q. The point is, Mr Graham, that prison sentences do have a more chilling effect than the lesser sanctions available to the court -*
>
> *"LORD JUSTICE LEVESON: Is that right, Mr Rhodri Davies? I'd be very interested to see evidence about that, because one thing is for rock solid certain: interception of communications did have a custodial sentence attached to it, and it didn't seem to have stopped a great deal of activity.*

[53] pp55-58, lines 8-17, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

"MR DAVIES: Well, that certainly was true-up to 2006/7, I entirely understand that.

"LORD JUSTICE LEVESON: I'm not, I think, trying to make a cheap point. I'm not doing that at all. But I am concerned about the evidence base for the assertion. I'm not stopping you, I understand the point, and of course you can pursue it.

"MR DAVIES: Well, I think - really, what I'm putting to you, Mr Graham, is your own assumption, which is that if the sentences available for breach of Section 55 are increased and the range of sanctions available to the court is widened, then you think that that will have a beneficially chilling effect on people who would otherwise contemplate a breach of Section 55?

"A. It would have a beneficially chilling effect on DVLC workers handing out car numbers and addresses based on those car numbers in exchange for money. It will have a beneficial chilling effect on health workers who apparently think it's perfectly okay to access someone's medical records in order to find the telephone numbers of their in-laws, who they're having a fight with, or the bank clerk in Haywards Heath who thinks it's fine to look at someone's bank records in order to provide the case in her husband's defence in a sex attack trial. That's what we're dealing with. What's that got to do with the press? If you're not doing this stuff, get out of the way.

"Q. Yes. I entirely understand those problems."

2.81 Mr Davies took Mr Graham through some practical examples of where the public interest defence might be relied on by a journalist in a s55 case. These drew on the sort of material which emerged in Motorman. The exchange continued:[54]

"MR DAVIES: So that is a situation, Mr Graham, where, as I understand it, you think that the journalist might very well have a public interest defence?

"A. I say it's arguable, anyway.

"Q. It's arguable. That's the difficulty, isn't it? Because once we're into the territory of it's arguable, and it's a prison sentence if you're wrong, do we not have a chilling effect?

"A. But all you have to advance is the reasonable belief that the story you're pursuing was in the public interest. Really, if you can't make that case, you shouldn't be in journalism. It's a very, very good increased defence for journalists.

"Q. I'm just wondering how far that goes. So you say if there's a reasonable belief that the story you're pursuing is in the public interest, then that would be a public interest defence to obtaining an ex-directory telephone number?

"LORD JUSTICE LEVESON: I'm not going to allow you, Mr Davies, to use the opportunity to try and tie the Information Commissioner down. Let me say what I presently believe, and then people can make submissions in due course. I presently believe that the new potential provision contains both subjective and objective elements, so not only must the journalist believe that it's in the public interest to do so, but there must be reasonable grounds for that belief. Thereafter, if I follow up your earlier question, the Information Commissioner would have to decide whether there was evidence to rebut that defence before he thought of bringing a prosecution. If he thought of bringing a prosecution because he thought he could rebut the defence, it would be open to the journalist to advance the defence in court. If the court decided against the

[54] pp62-63, lines 5-19, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

journalist, then it would have to decide on a scale how grave the particular offence was, and in my experience of sentencing criminal cases, which extends over 27 years, I don't think you'll find that there would be any question of a mandatory sentence in those circumstances at all."

2.82 No further formal submissions were in fact received by the Inquiry on this subject and it now falls therefore to reflect on the extent to which this Report should seek to resolve the matter on way or the other. I do not, for the reasons set out above, accept that I should avoid doing so on the grounds that I can be confident that the culture, practices and ethics of the press are such that it is simply no longer a live issue within the Terms of Reference of the Inquiry. Bearing in mind those Terms of Reference, however, it is important to make clear two points.

2.83 The first point is that the thread of argument in Mr Thomas's original campaign (that increasing the sentencing maxima for s55 was a necessary element in increasing the profile of the data protection regime generally, and the seriousness with which it is regarded, whether politically of forensically), is not the concern of this Inquiry and not something on which this Report can or should express a view. Secondly, since the operational considerations currently being advanced in favour of commencing the increased maxima are explicitly said to be directed elsewhere than in the direction of the press, these are not considerations within the purview of this Inquiry and not matters on which it would be appropriate for this Report to have a determinative effect

2.84 S55, in other words, is not a provision of exclusive application to the press, and it is necessary that I should be suitably circumspect about any effect of considering the matter otherwise than in relation to the press. S55 is, however, a provision which, as amended, has a specific and modified application to the press, and to that extent the uncommenced amendments must be considered to be part of the special approach to journalism that is evident throughout the data protection regime. It is also a provision the history of which, up to and including the present day, has been dominated by the press's policy interests. It is impossible therefore to avoid reflecting on the history of the s55 issue in the context of this Report at any rate in relation to the press dimension to the policy.

2.85 This is not in any event, as indicated above, simply a policy issue at large. Parliament has considered this matter in extensive detail and legislated on it. The very strong presumption must be that Parliament does not legislate in idleness. Deferred implementation of legislation, in the rare instances in which that is deliberate policy, is usually a matter of making provision for preliminary practical issues or, as in this case, to allow for contingent events. The s55 contingency might be described as a policy of waiting to see whether the mere uncommenced existence of the possibility of a prison sentence would itself prove to be a deterrent to criminal activity. There appears to be ample evidence that criminal activity comprising the knowing or reckless misuse of personal information continues to be a real problem, and that specifically the absence of a potential custodial sentence (which would therefore permit sentences short of custody such as a community penalty) has emerged as a contributory factor. This is not least because, as Mr Graham made clear, a financial penalty must be related to means to pay and those of limited means will therefore face potential sanctions which have little correlation with the gravity of the offence and the potential for harm.

2.86 The only reason which has been cited to the Inquiry for failure to commence the provisions for increasing the maximum potential sentence is the potentially damaging effect that it would have on journalism. These are not considerations which, in my view, can reasonably argued to be persuasive, let alone determinative.

2.87 In the first place, the argument that the prospect of custody would have a differential 'chilling' effect on lawful and ethical journalism from the prospect of a financial penalty is one which it is barely respectable for national press organisations to advance at all. Its necessary implication is that the prospect of a criminal conviction can, of itself, be regarded as a tolerable business risk, and a criminal fine a tolerable overhead, in journalism. This says little more than that 'unchilled' journalism is an activity which takes calculated risks with deliberate and indefensible criminality. This is an argument for criminal impunity including (as it was put before the Inquiry) by way of a plea for indemnity from the otherwise universal application of criminal penalties; it amounts to special pleading to be placed above the law. I put the matter starkly, because no-one reading this Report should be in any doubt as to the true nature of the argument being advanced on behalf of the press in its most unqualified form.

2.88 There is a more respectable version of the argument that there is a chilling effect in this provision. That version is not a contention that the press should be indulged in committing calculated criminality. It is an argument that the boundaries in this territory between what is criminal and what is not are not clear enough to make it safe for journalists to operate confidently. It is not an argument therefore about the consequences of criminality but about the risks of crossing criminal boundaries unwittingly. Where the boundaries are unclear, the possibility of a custodial penalty raises the stakes to the extent that decent journalists will have to take a risk-averse approach and give them a wide berth. The result, so the argument goes, is that some areas of investigative journalism on the right side of the law will be lost and that this would be contrary to the public interest.

2.89 This remains an argument which envisages journalism tracking the boundaries of crime in a way which is not, and has not been over the years in which the s55 issue has been debated, empirically evidenced as a genuine operational problem to any degree; neither does it deal with the ethical (and indeed legal) questions which are raised by behaviour which is only just on the right side of crime. But the important point is that it is essentially an argument about whether the provision made in the new defence to cater for journalistic operations where they do sail close to the wind is adequate. If the defence deals satisfactorily with the boundaries between criminal and lawful journalism, then the question of the ultimate penalty must be a genuine second-order issue.

2.90 It is hard to see how the new defence could go any further. If a journalist engages in a course of conduct which *prima facie* crosses the criminal boundary marking the unlawful acquisition of personal information, but can show that he or she was acting with a view to publication and in the reasonable belief that it was in the public interest, there can be no conviction. Note that it is not even necessary to show that the conduct was in fact, in the end, in the public interest. There is no alternative to asking the journalist to establish that the belief was genuine, because its basis will be uniquely within his or her own knowledge. And if the belief was neither genuine nor rational it is hard to see the case for a defence to crime. The provision made by the new defence to give honest journalists trying to respect the boundaries of the criminal law confidence in doing so, appears to be straightforward to understand, and more than adequate in giving honesty the benefit of the doubt.

2.91 I am, therefore, entirely unpersuaded that the argument that there is a possible chilling effect on legitimate journalism is a reasonable one, and should be regarded as a proper reason in itself for continuing to resist giving effect to the legislation. Much more the point: Parliament has already settled the matter from a policy point of view. To the extent that the press effectively wishes to reopen not the question of penal policy but the matter of the substantive law itself, it is both too late and devoid of merit. Without suggesting that no other

formulation of the new defence is imaginable, Parliament has given very close attention to the alternatives, and settled on something which, on any fair analysis, is fully capable of being made to work for the press.

2.92 I am conscious that in recommending the activation of the amendments to the Data Protection Act created by the Criminal Justice and Immigration Act 2008, this Report is dealing with an issue with considerable history, and not just as a matter of addressing the culture, practices and ethics of the press in relation the acquisition and use of private personal information. It is also addressing the operations of the press as powerful lobbyists on self-interested questions of media law and policy. On both of these grounds, I conclude that the public interest, taken in the round, favours there being no further delay in the implementation of this measure.

2.93 As indicated in the Government consultation paper,[55] therefore, I recommend that the necessary steps are taken (by statutory instrument) to increase the sentence maxima on conviction for an offence under s55, to include, in addition to the current fines, custodial penalties up to the statutory maximum on summary conviction, and, on conviction on indictment, up to two years' imprisonment.

2.94 It is important to underline that I also recommend that the enhanced defence for public interest journalism be activated at the same time.

Prosecution powers of the ICO

2.95 Before concluding this part of the Report, a number of further aspects of the criminal law functions of the ICO in relation to the press fall to be considered. One particularly important piece of context to the s55 debate is the fact that this is the only offence in respect of which the ICO has prosecution powers. There are other criminal offences which are also contraventions of the data protection regime when committed in relation to personal information (which, incidentally, already attract the possibility of custodial sentences). There may be considerable overlap between these other offences and s55. Examples include:

(a) phone hacking contrary to the Regulation of Investigatory Powers Act 2000;[56]

(b) computer hacking contrary to the Computer Misuse Act 1990;[57]

(c) offences of corruption, bribery and aiding and abetting misconduct in public office; and

(d) inchoate and accessory offences including attempt and conspiracy.

2.96 There is indeed an argument that, since the first data protection principle requires that all acquisition and use of personal information must be fair and lawful, all criminal offences in relation to personal information within the meaning of the data protection regime will also constitute a breach of that regime.[58] In practice, in any case in which a breach of the data protection regime may also constitute a criminal offence *other than* under s55, the ICO will effectively hand the matter in its entirety, and defer wholly, to the police and the CPS. That is at least in part because all of the other offences comprehend, including by way of higher sentencing maxima, a much wider spectrum of seriousness. That is important context for the decision in Motorman itself which, effectively, was to stand back from the prosecution process while the police and CPS proceeded with corruption and conspiracy prosecutions. But it has two important practical consequences.

[55] http://www.dfpni.gov.uk/consultation_misue_of_personal_data.pdf
[56] http://www.legislation.gov.uk/ukpga/2000/23/contents
[57] http://www.legislation.gov.uk/ukpga/1990/18/contents
[58] *The Law Society & Ors v Kordowski* [2011] EWHC 3185 (QB), paras 100-101, where the equivalent point is made about the first data protection principle and civil torts

2.97 The first consequence is that it effectively relegates s55 to a wholly residuary position, in practice only of real use in cases where all other criminal possibilities have been eliminated. But the process of elimination itself may, including by reason of delay, weaken the prospect in the end of bringing s55 charges. Secondly, it also puts the ICO at a disadvantage in considering cases of breach of the data protection principles in the round, including giving full consideration to alternatives to prosecution. So in cases at the extreme end of breaches of the principles and rights of the regime, the expert regulator is in danger of being left out of the picture altogether.

2.98 Mr Graham explained the position in his witness statement to the Inquiry:[59]

> *"In some circumstances, such as an allegation of unlawful processing, I have to rely on the police and the CPS to indicate whether they consider that an offence under another relevant Act has been committed before I can properly assess whether there has also been an associated breach of the data protection principle on which I might act. On the other hand if my office comes into possession of evidence which suggests that an offence has been committed under other legislation, I would pass this directly to the police or suggest to a complainant that he or she does so…..*
>
> *"It is possible that, in some circumstances, personal data could be obtained in a way that suggests the commission of offences under both another Act and under section 55 of the Act. The investigation of offences which carry a custodial penalty takes precedence over the investigation of offences, such as those under the Act, which do not. Usually, the police will take the lead in investigating where penalties that carry a custodial penalty are suspected. They can consider the offence under section 55 of the Act as part of their investigation if they choose to do so. Whilst my office will pass relevant information on to the police to assist them in any investigation, it does not make good sense for us to run our own investigation in parallel."*

2.99 As considered at length above, this cannot stand as a full account of the operational inaction of the ICO in relation to the press and its involvement in Operation Motorman. But it does suggest a weakness in the scheme of the powers and functions of the ICO. It is a weakness which would be remedied *in part* by the activation of the higher sentence maxima for s55 because, at least, it would address the problem of its role as an offence of last resort by strengthening the ability of the ICO to prosecute s55 cases *which also* constitute other offences. But it would not address the position of the ICO as a prosecutor of last resort or the disabling effect of that on its consideration of the exercise of its other regulatory functions in relation to serious abuses of personal information.

2.100 This is a point of considerable importance for that strand of opinion in relation to phone hacking that urged that the primary response of this Inquiry should be to ensure that the existing law (and, in particular, the existing criminal law) is properly enforced. As fully set out above,[60] the huge investment of the resources of the Metropolitan Police in their current Operations Weeting (phone hacking), Tuleta (computer hacking), and Elveden (corruption) is both unsustainable indefinitely and unrepeatable in the future. It is, however, noteworthy that all concern the possibility of the press committing crimes which involves the acquisition of personal information in breach of the data protection principles.

[59] pp17-18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf
[60] Part E, Chapter 5

2.101 Information crime in contexts involving neither national security issues nor the furtherance of other criminal purposes (that is to say, crime constituted wholly by the extreme violation of personal information privacy), is a matter which cannot hold a place at the top of the police agenda in competition with the many other priorities that the police face. Nor, in any event, can the police be expected to invest in the deep expertise in personal information privacy which the data protection regime envisages in for its own regulatory authority. Furthermore, the handling by the police of these cases is effectively binary: charges are either brought or dropped, without consideration of law enforcement issues falling short of criminal liability. The present disposition of prosecution powers therefore presents a threat to the proper enforcement of privacy crime in the future, including in relation to the press.

2.102 One possible way to address that problem would be to enable the ICO to prosecute breaches of the data protection regime which constituted criminal offences *whether or not* they did so as a result of s55. This would, in particular, enable the ICO to deal with cases of data abuse going beyond the processes of first acquisition of the information. It would have a number of specific advantages. It would:

(a) relieve the police and CPS of the pressure of privacy crime on their priorities and resources;

(b) place prosecution in the hands of an expert regulator who would be well placed to investigate cases and if appropriate place their full criminality before the criminal courts;

(c) enable cases to be dealt with within the rounded context of a regulatory regime which has a range of other operational options falling short of prosecution.

Three matters would, however, have to be addressed in taking forward thinking in this context.

2.103 The first is the necessity of acknowledging, again, that this is not an issue of sole application to the press, and that it is beyond the purview of this Inquiry to address its implications in areas which have nothing to do with its terms of reference. As against that, however, it is necessary to note the very close association of the issue of prosecution powers with the s55 issue as discussed extensively above. And whereas it is to a degree speculative to reflect on the Motorman case itself from this perspective, there are genuine questions, including those raised at the time and since by the ICO itself, as to whether in the circumstance an information regulator, alive to the magnitude and nature of the breach of the law and good practice of the data protection regime and armed with a full range of responses up to and including prosecution for serious offences, would not have afforded the best prospects of effective law enforcement and of making the case a turning point for the good in the culture, practices and ethics of the press in the handling of personal information.

2.104 The second matter that would need to be addressed would be the capability and governance of the ICO itself in handling any enhanced prosecution functions. In so far as those questions have wider implications they are addressed more generally below. But it would be highly desirable to ensure that in all of its prosecution functions there was excellent liaison between the ICO and the police and CPS. It might, for example, be desirable to make the exercise of any powers to prosecute s55 cases which also constitute or may constitute other criminal offences and criminal breaches of the data protection regime falling outside s55 formally the subject of a duty to consult with the CPS.

2.105 The third matter concerns the position of the press as the potential subjects of criminal investigation by the ICO. Under that heading two issues in particular present themselves. The first relates to the circumstances in which the ICO might bring a prosecution as opposed to

relying on its civil regulatory powers. That is a question which would need to be addressed by reference to the public interest. At the invitation of the Inquiry and following consultation, the Director of Public Prosecutions has issued guidelines for prosecutors on assessing the public interest in cases affecting the media.[61] The ICO would be expected to follow these guidelines in the exercise of any enhanced prosecution powers and indeed in relation to its current powers. Mr Graham has already indicated that he is:[62]

> *"happy to give an assurance that I will not seek to prosecute journalists who are genuinely pursuing enquiries in the public interest, even if those enquiries do not ultimately bear fruit."*

2.106 Subject to the point of generality noted above, my conclusion, therefore, is that proper and proportionate enforcement of the criminal law in relation to press abuse of personal information would be enhanced by extending the prosecution powers of the ICO to include offences which comprehend a breach of the data protection principles in addition to the offence created by s55 of the DPA, coupled with a duty (whether formal or informal) to consult the CPS on such prosecutions, and the formal adoption by the ICO of the CPS guidelines on media prosecutions.

2.107 I recommend also that the ICO take immediate steps to engage with the Metropolitan Police on the preparation of a long-term strategy in relation to alleged media crime with a view to handling the issue in the aftermath of Operations Weeting, Tuleta and Elveden, on the basis that the priority currently being given by the police to addressing this form of alleged criminal behaviour is not sustainable indefinitely, and with a view to ensuring that the ICO is well placed to fulfil any necessary role in this respect in future.

2.108 The position of the ICO as prosecutor of last resort does not fully account for evident weaknesses in its handling of the question of criminal investigations in relation to the journalists involved in Operation Motorman. The ICO has prosecution powers at all because it is uniquely placed to view personal information privacy crime in the full context of its regulatory regime as a whole. This includes the perspective of the victim in such a context. That is a responsibility which it does not appear was fully engaged let alone discharged. I consider, however, that the enhancement of the prosecution powers of the ICO has a potential positively to support that position of overview and overall direction regarding information privacy breaches that are so serious as to enter the criminal spectrum. Further, it is reasonable to conclude that it could help to dissolve artificial boundaries, avoid confusion of accountabilities and support a better focus on the nature of the conduct and its impact on the individual.

2.109 A final issue to be considered within the framework of formal criminal law enforcement is the matter of sentencing. When dealing with the criminal law generally,[63] I recommend that the Sentencing Council of England and Wales be asked to prepare guidelines in relation to information privacy and misuse offences (including computer misuse): for the sake of completeness, it is sufficient simply to repeat the recommendation and refer to the reasons for it.

[61] http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/index.html. This is discussed at greater length in Part J, Chapter 2

[62] p24, para 6.7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Christopher-Graham.pdf

[63] Part J, Chapter 2

Conclusions and recommendations on the legal framework

2.110 The recommendations set out above are not intended to do other than provide for more effective enforcement of the existing principles of law as they stand, and for a fairer, more even handed approach to the reconciliation of existing rights within those principles in cases in which they may conflict. They are also intended, importantly, substantially to simplify the law and make it more accessible to those, that is to say both press and the public, whom it is designed to serve. There are implications in these recommendations also for the legal system, the legal profession and the courts. Although the data protection regime is intended to sit lightly on businesses and not regularly to trouble the world of litigation, that is precisely because it is explicit in the provision it makes as a matter of law; in the rare cases where it does need to enter the legal system to resolve a disputed issue, the fundamental liberties with which it deals, and the sensitivity with which it deals with them need to be recognised for what they are.

2.111 As Mr Coppel has pointed out, the European Commission is currently considering replacing the existing Data Protection Directive with a directly applicable regulation. The present proposed Regulation would leave it to individual Member States to provide in detail for the exemptions or derogations it sets out. Those include provision relating to the processing of personal data for journalistic purposes. That means that it would be for Parliament in due course to come up with a suitable formulation, within the limits of what the regulation eventually requires. In other words, the expectation is that Parliament will have to revisit this topic in any event.

2.112 It would be unfortunate if that were regarded as reason for legislative inaction in the meantime. Any new regulation would itself, of course, have to make general provision within the overall requirement of the ECHR for a balance between Articles 8 and 10, and indeed would any UK domestic legislation. The risk posed by the prospect of a new regulation that any legislation prompted by this Report would have to be revisited seems to me in this respect to be of modest proportions, and to be outweighed by the need to make progress on amendment to the 1998 Act, both as a matter of law and of policy.

CHAPTER 6
THE RELATIONSHIP: THE ICO AND THE PRESS

1. "Too big for us?"

1.1 This section of the Report takes its title from the passage in Mr Owens' evidence where he describes an exchange in a meeting he says took place with Mr Thomas and Mr Aldhouse in which he sought to explain the full extent of the Motorman 'treasure trove'. Mr Owens said:[1]

> *"Well, it was at the end, I basically said what we have here, if we haven't got any public defence we can go for everybody, from the blagger right up to the newspaper, at which point there was a look of horror on Mr Aldhouse's face and he said, "We can't take them on, they're too big for us", and Mr Thomas just sort of bemused, deep in thought, just said, "Fine, thanks very much, Alex, pass my compliments on and congratulations to the team for me, job well done." And that was basically it."*

Both Mr Thomas and Mr Aldhouse have said that they had no recollection of the meeting and disclaimed the language attributed to them by Mr Owens in any event.

1.2 Mr Owens, however, amplified in his evidence that he had formed the clear impression that there was, if not an express instruction or even express language, a cultural understanding within the ICO that the press were too big for the office to take on:[2]

> *"The decision not to pursue any journalist was based solely on fear – fear of the power, wealth and influence of the Press and the fear of the backlash that could follow if the press turned against ICO."*

1.3 Mr Thomas specifically challenged Mr Owens' reliability as a witness in this context, even suggesting that he may have had a motive, in the light of *"a number of performance, disciplinary and grievance issues between Mr Owens and the ICO"*, to put the latter in a poor light[3] this is an inference that Mr Owens, in turn, resisted.[4]

1.4 Mr Thomas and Mr Aldhouse were also emphatic that there was not at any time in the ICO a deliberate or explicit policy of holding back from taking action in respect of the press, or from engaging directly with the press, whether from fear or otherwise. As we have seen, a number of operational rationales have been given in explanation of the 'roads not taken'.

1.5 It is not appropriate now for me to seek to resolve the evident dispute between Mr Owens and the ICO and, in particular, it is not necessary to determine whether the conversation as recounted by Mr Owens took place or not. It is not even necessary for me to determine

[1] p24, lines 13-22, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf
[2] p18, para 5.18c, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf
[3] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Sixth-Witness-Statement-of-Richard-Thomas.pdf
[4] pp57-60, lines 23-25, Alexander Owens, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-30-November-2011.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Third-ws-of-Alexander-Owens.pdf

whether there was a deliberate, explicit or promulgated policy in the ICO of not 'taking on' the press which was operative during the course of the Motorman decision-making. The question addressed in this part of the Report relates to something more fundamental, and at the same time less easy to pinpoint, which is the extent to which there may have underlying assumptions in the culture of the ICO and its leadership which instinctively held them back from an engagement with the press which their knowledge of the extent of the problem, and an objective assessment of their available powers, functions and options, might otherwise have suggested. Regardless of whether the words were ever uttered, it is legitimate to ask whether 'the press are too big for us' did, in fact, accurately identify some reluctance, or lack of confidence, in dealing with the press which goes some way to explaining events.

1.6 With the single (and, in the event, salutary) exception discussed below, the ICO does not appear ever seriously to have tested its regulatory powers in relation to the press. Successive Information Commissioners have taken the view that the law must be understood to discourage them from doing so. Although it is clear that there are features of the current data protection regime which seem to make it unnecessarily difficult for the ICO to apply the law to the press, the conclusion that the press is not the business of the ICO is not one for which any authority in law can, in the end, be claimed. Moreover successive Information Commissioners have never sought to draw attention to problems in applying the current law to the press. If there was a case for political campaigning for changes to the law, it is legitimate to ask why it was not addressed to the impediments to mainstream civil law enforcement rather than the relatively more peripheral issue of criminal penalties.

1.7 Even more notable has been the reluctance of the ICO to engage informally with the industry (otherwise than by way of the PCC or other intermediary bodies), whether as a matter of law enforcement, of promoting good practice or simply of business education and communication. Successive Information Commissioners assured the Inquiry that the press was simply not a priority for the ICO's attention. And yet Operation Motorman was one of the biggest operational cases to confront the ICO and the basis for two reports to Parliament and years of campaigning with the PCC and successive Governments. This was a case with the culture, practices and ethics of the press at its heart. Furthermore, the current press issues relating to phone hacking have created one of the biggest crises of confidence in the integrity of private information to have been experienced in the UK.

1.8 On the face of it, this phenomenon is not straightforward to understand. The question before the Inquiry was whether there is evidence of a failure of regulatory will on the part of the ICO in relation to the press, going beyond the specifics of the Motorman case, and the technical imperfections of the legal regime, to a more general reluctance to discharge its functions in this area.

The ICO and The Sunday Times

1.9 In considering this question, it is interesting to turn first to a series of events which predate many of the key developments in the Motorman case. It was put to Mr Thomas in oral evidence that the ICO had invited the editor of The Sunday Times, Mr Witherow, to attend interview under caution in 2003 in respect of possible breaches of s55 of the DPA in relation to the tax affairs of Lord Levy. Mr Thomas said he had no knowledge of this whatever, but having been put on notice of the question earlier he had checked with Mr Aldhouse, with whom the account 'rang a faint bell'. Mr Thomas offered this thought:[5]

[5] p66, lines 5-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

> *"If that had been the case – and can I speculate? If the Office had invited the editor and had been rebuffed, that might perhaps have influenced people at the investigatory level as to the problems of interviewing people from the press. I don't know."*

He suggested that it might have been before his time.

1.10 The history appears to have been that The Sunday Times had published an article in 2000 about the tax affairs of Lord Levy which the latter had sought to prevent by means of an application for an injunction which had come before the then Mr Justice Toulson. According to Mr Witherow,[6] that attempt failed *"because the judge decided that publication of the information was firmly in the public interest"*; Mr Witherow described Mr Thomas as subsequently seeking to interview him under caution about the Lord Levy story but *"again this was rebuffed because of our public interest defence"*, in support of which the judgment of Toulson J was deployed. Mr Witherow thought the ICO had accepted that.[7] Eventually, the Sunday Times ran a front page story on 29 October 2006 connecting Lord Levy with a 'cash for honours' scandal.

1.11 The matter was explored further with Mr Thomas by Mr Rhodri Davies QC on behalf of News International.[8] Mr Thomas had taken up his post in November 2002 and it was in fact on 11 December 2002 that the ICO wrote to Mr Witherow inviting him to attend an interview under caution. The signatory of the letter was an investigator in the ICO junior to Alex Owens. The proposition which, in effect, Mr Davies put to Mr Thomas was that the attempt to interview Mr Witherow was the direct result of powerful and well-connected pressure being applied to the ICO by Lord Levy rather than any independent operational consideration, and was in effect misconceived in the first place because it was plain that nothing other than investigative journalism in the public interest was in issue. Whether or not that was the case is not to the purpose of this Inquiry, although Mr Thomas accepted that Lord Levy had, around the relevant time, *"expressed quite strong frustration that my office had not been much use at sorting out his complaints"* and that this was not the first time the office had been subject to high profile criticism from a public figure who had gone to them with a problem.

1.12 This episode is of interest to the Inquiry not because of any light it may shed on the susceptibility of the ICO to operational pressure from high profile complainants, but because it stands out as the only occasion on which, so far as we have been able to establish, the ICO attempted to exert its functions directly in relation to the press. Mr Davies put it to Mr Thomas that this was, in fact, the only occasion upon which *"the big stick of an interview under caution was wielded"* by the ICO against the press; Mr Thomas confirmed that he was not aware of any other example in which the ICO *"directly approached a journalist or editor"*. Moreover, Mr Thomas sought to distance himself from the Witherow decision; he suggested that it was taken at a junior level and that it did not look entirely defensible. The contrast with the absence of any approach to a journalist or editor in the Motorman case was made by Mr Davies for a different purpose from that of the Inquiry, but is nevertheless memorable.

1.13 The issue of the impact on the ICO of its rebuff at the hands of the Mr Witherow is not unimportant. The episode evidently remained in the memory of The Sunday Times, and it is interesting to note that the one or two subsequent occasions on which that title and the ICO had occasion to interact had a distinctively adversarial quality.

[6] p2, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-John-Witherow.pdf
[7] pp22-23, lines 2-8, John Witherow, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-17-January-2012.pdf
[8] pp75-81, lines 9-16, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf

1.14 The first concerns the editorial published in The Sunday Times on 29 October 2006 which is the day the paper led on its front page with the Lord Levy 'cash for honours' story. The thrust of the editorial was in opposition to the campaign by Mr Thomas for an increase to the maximum penalty for breach of s55 of the DPA; it cast the proposition as offensive to democracy and free speech and it was not sparing in the aspersions cast on Mr Thomas's intentions in this respect. A couple of brief excerpts will give a flavour:[9]

> *"…the role of the press in protecting the public by exposing the abuses of the powerful. Newspapers had already been doing this for centuries when he took up his post four years ago. This duty of the media is vital in the struggle to maintain an open society. Yet Mr Thomas would send reporters to prison for fulfilling it."*
>
> *"Mr Thomas is complicit in placing another brick in the wall that the state is building to protect itself from unwanted scrutiny. This newspaper's front page story today on cash for honours is precisely the sort of investigation that political parties would prefer not to happen. Mr Thomas is doing his bit to help them."*

The editorial also alluded to *What Price Privacy?* as a 'little noticed report'. Mr Thomas wrote to the paper a couple of days later in response, but his letter does not appear to have been published.

1.15 Mr Thomas characterised this editorial as an unfair representation of his campaign, and accordingly as a recognisable part of the concerted press campaign to oppose it.[10] More controversially, he said that he made a connection in his mind between the editorial and the meeting he had had with Les Hinton and others on the previous Friday as part of his PCC campaign, at which of course the difference of views on the s55 issue had played a prominent part. When he aired this thought in the Inquiry, it was subjected both to detailed rebuttal and to further challenge of his attitude to the press more generally. Mr Witherow made explicit the belief of The Sunday Times that, because the ICO had sought to interview him under caution in 2002, it was a matter of concern that Mr Thomas would not have adequately considered issues of the public interest in investigative journalism in running his s55 campaign.[11] Further, Mr Davies, on behalf of News International, put it to Mr Thomas that it was relevant that, on the intervening Saturday, The Times had published an interview with Mr Thomas that he had given a few weeks previously in an effort to obtain some press coverage for an international data protection conference in London the following week.[12]

1.16 Mr Thomas accepted the evidence that there was no connection between the meeting with Mr Hinton and the editorial, concluding: *"It appears I'm even wrong to raise questions…"*.[13] But it appears significant that, in rebutting the idea of a connection between the editorial and a meeting two days earlier, NI chose instead to make a connection between the editorial and the ICO attempt to interview the editor of the newspaper four years earlier. Whatever Mr Thomas and the ICO had learned from that attempt, the impact on The Sunday Times was manifest.

[9] pp1-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-RJT231.pdf
[10] pp54-55, lines 20-9, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[11] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-John-Witherow.pdf
[12] pp81-86, lines 17-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[13] p85, lines 9-14, Richard Thomas, *ibid*

1.17 A further exchange took place several weeks after the publication of the editorial. The managing editor of The Sunday Times, then Richard Caseby, wrote to Mr Thomas on 14 December 2006,[14] in the aftermath of the publication of *What Price Privacy Now?* (and after battle lines had effectively been drawn over the s55 policy issue) to express *"grave concerns"* over the publication in that report of further details of the Motorman information, particularly as it related to The Sunday Times. The tone of the letter can be described as confrontational; it alleges that the report was *"clearly defamatory"* of the publishers and managing editor (Mr Caseby himself), raises a number of points about the Motorman evidence and, before concluding with a request for an explanation and remedial steps as soon as possible, states that the writer did *"not believe that your conduct in this matter can be described as fair, or that it meets the standards which one should be entitled to expect from a regulator"*.

1.18 Mr Thomas' response of 2 February 2007[15] was a measured explanation of why the ICO had been entitled, or to an extent required, by virtue of its role and functions to deal as it had with the information published in *What Price Privacy Now?* but indicated that, on revisiting the figures connected with The Sunday Times, it had discovered an error in the report. Rather than identifying the title with 52 alleged transactions involving 7 journalists, it should have identified it with only 4 transactions and a single journalist. For this the letter offered an unqualified apology, and Mr Thomas explained that the error was corrected in letters to Parliament and to all the recipients of the report.[16]

1.19 This account of interactions between the ICO and The Sunday Times is set out in detail here because it brings into focus the following issues:

(a) It raises again the question of distance between the senior leadership of the ICO and operational decision-making with very high profile and long lasting strategic consequences. Mr Thomas was apparently not involved in and had no foreknowledge of the decision to try to interview Mr Witherow, and accepted that the way the decision was taken was unsatisfactory. There were lessons to be learned in this about the vital need for the senior leadership to be sighted on and involved in major operational decisions of this reputational nature.

(b) It illustrates with some clarity what might be described as the ideological opposition of the press to the assertion of law enforcement powers, even in criminal matters, and the lack of objectivity and restraint with which that resistance is manifested; this is a matter considered extensively elsewhere in this Report.

(c) On the other hand, it also illustrates the dangers to the operational credibility of a regulator such as the ICO in investing so heavily, prominently and persistently in a political campaign to which a regulated sector was obviously deeply antagonistic.

(d) It can hardly be doubted that the reverberations of these adversarial encounters (many of which were played out in public) would have been felt personally by Mr Thomas and by the staff of the ICO. Whether or not Mr Thomas and Mr Aldhouse felt or articulated the view that the press was 'too big for us', I consider it almost inevitable that Mr Owens and his small team (to whom operational decision-making was effectively consigned) learned that lesson from the experience of trying to utilise their powers on the press in the form of the editor of The Sunday Times.

[14] pp1-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-272.pdf
[15] pp1-4, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-29.pdf
[16] p103, lines 9-21, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf

Operational 'monkey tricks'

1.20 With that significant narrative thread in mind, it falls to consider what can be known or can be deduced about the thinking of the ICO more generally in relation to the press. Mr Aldhouse denied being party to any *"timorous approach"* to the press[17]; as well as disclaiming the attitude that 'the press are too big to take on' he cited his experience of discussions in 1996 which was the run up to the passage of the 1998 Act. He said that:

> *"we were quite happy to stand up to the media and try to negotiate with them. I wish I still had the copies of the press gazette articles roundly attacking Elizabeth France [the then Data Protection Registrar - the ICO predecessor body] and myself. So I don't fear the media…"*

It might be observed, however, that these experiences were evidently not on the operational side of the business, and that, in any event, Mr Aldhouse evidently considered his role to be at some distance from the operational decisions where fear of the press might have played a material role.

1.21 The Inquiry pursued explicitly with Mr Thomas himself the question of whether the power or influence of the press, or his perception of it, in any way affected the operational decisions taken in the Motorman case. He said that it did not, nor did he have any fear himself of the press.[18] As we have seen, both Mr Thomas and Mr Aldhouse rejected any suggestion that there had been a deliberate, explicit or promulgated policy of holding back from taking any proactive operational measures in respect of evidence of press contravention of the legal requirements of the data protection regime or in respect of promoting good practice in data protection matters within the industry. Again, it is not the concern of this Part of the Report to establish the existence or otherwise of a formal policy, but to explore the nature of any significant cultural or psychological predispositions within the ICO and its leadership not to assert itself with the press or at least not to do so in an adversarial or confrontational way.

1.22 Standing back to consider the explanations for the various paths not taken by the office in the Motorman case, the following reflections presented themselves. The explanation for targeting the 'middlemen' (that is to say, the investigation agencies) rather than the commissioning journalists proceeded by reference to an analogy with drug dealers which I consider misconceived.[19] This was not a market in which the private investigators were a dominant power, controlling supplies of standard goods and pushing them on a disadvantaged clientele. It was a market in which the press were the dominant power, commissioning bespoke products from what must be assumed to be a limited number of investigators willing to obtain them at some risk to themselves.

1.23 Indeed, Mr Thomas himself, in explaining the stance taken in *What Price Privacy?*, stated that it was the journalists who were driving this market.[20] He said the same thing in explaining his policy decision to proceed by engagement with the PCC: the focus there also was on stopping the market.[21] Accordingly, it is difficult to accept at face value the logic of concentrating

[17] pp45-47, lines 25-3, Francis Aldhouse, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf
[18] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Third-Witness-Statement-of-Richard-Thomas-CBE1.pdf
[19] p36, lines 9-17, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf; p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Second-Witness-Statement-of-Richard-Thomas-CBE1.pdf
[20] p93, lines 14-15, Richard Thomas, *ibid*
[21] p119, lines 19-24, Richard Thomas, *ibid*

exclusively on the middlemen on the grounds that they were *"organising the illegal trade"*.[22] The middlemen were on the supply-side, but it was the power of the demand-side which must account to a large degree account for the existence of the trade. The conclusions of *What Price Privacy?* put the point rather well:[23]

> *"These offences occur because there is a market for this kind of information. At a time when senior members of the press were publicly congratulating themselves for having raised journalistic standards across the industry, many newspapers were continuing to subscribe to an undercover economy devoted to obtaining a wealth of personal information forbidden to them by law. One remarkable fact is how well documented this underworld turned out to be."*

1.24 At least one operative reason why the ICO took no direct enforcement action against any journalist, editor or proprietor in response to Motorman (and, in particular, no prosecution action) was evident apprehension about the likely response of the press to any attempt to do so. Mr Thomas told the Inquiry that, in planning to wait and see how criminal proceedings against the investigators and public officials fared before actively considering any further enforcement action:[24]

> *"I was also conscious that any action against journalists would be a major logistical, evidential and legal challenge, would almost certainly be strongly resisted and would be very expensive for an Office with very limited resources."*

1.25 The evidential and legal challenges in the way of prosecution (which including the protection afforded to journalistic materials and sources) may have been significant, but the prospects of facing combative defence litigation appeared to be a disincentive in its own right. Counsel instructed by the CPS in Operation Glade was reported to have described the experience of dealing with press defendants in these memorable terms:[25]

> *"London counsel indicated that the journalists were interviewed and were found to be tricky, well armed and well briefed, effectively a barrel of monkeys."*

1.26 Pressed as to whether this suggested an excessively circumspect approach on the part of the ICO in the face of potentially powerful prima facie evidence of criminality, Mr Thomas put it this way:[26]

> *"Well, I have to look at it from all points of view, I suppose, but I can see that the media would not like any of their journalists being prosecuted and I suspect they would, for example, argue there's a public interest in being able to ensure freedom of expression. Now, I don't believe that, I don't accept that, but I – it's one thing as to whether or not that would be successful, but one can anticipate that that sort of point would have been raised and it would have engaged the office and bogged down the office for many years."*

1.27 In other words, there was an apprehension of the *unreasonable or unfair* deployment of the rhetoric of freedom of expression as a litigation tactic to deterrent effect. Without

[22] p40, lines 12-15, Richard Thomas, *ibid*
[23] p29, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Exhibit-1.pdf
[24] p2, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Fourth-Witness-Statement-of-Richard-Thomas-CBE.pdf
[25] p68, lines 13-16, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-9-December-2011.pdf
[26] p69, lines 6-15, Richard Thomas, *ibid*

commenting on its justification in this context, this perception is noteworthy in its own right not least because it was evidently a general perception within the ICO team. Mr Thomas recalled a conversation within the office around 2007 along the lines:[27]

> *"Thank God we didn't take the journalists to court. They'd have gone all the way to Strasbourg." In other words, they would have challenged any action we would have taken, we would have gone right to Strasbourg, the Court of Human Rights, Article 10 issues coming in. We'd seen all the material being thrown at us during What Price Privacy? and the Bill."*

1.28 There was a gut instinct that litigation against the press would present the ICO with enormous difficulties.[28] These were evidently perceived to be difficulties over and above the normal litigation issues of accessing and deploying evidence, navigating the law, and the overall strengths and weaknesses of the case. It can be reasonably inferred from the evidence that the perception extended to:

(a) the likelihood of a generally aggressive stance;

(b) the generalised deployment of the rhetoric of freedom of expression beyond the fair articulation of balance contained in the law; and

(c) the expectation that that approach would extend beyond the confines of any single case of criminal litigation, and even beyond the bounds of any single attempt at regulatory action of whatever nature, to a generalised stance of hostility towards the function of the ICO as a regulator.

The evidence the Inquiry considered[29] suggests that this apprehension was almost certainly justified on the basis that the press have a cultural inclination to be defensive and to utilise attack as the best form of defence. It was plainly operative.

1.29 The press, in other words, as an object of regulatory contemplation, was seen as trouble. That is so whether it was actively making operational mischief in response to regulatory attention or impassively declining to address its culture, practices and ethics itself (as Mr Graham memorably developed the metaphor, *"if we're talking monkeys, it's see no evil, hear no evil."*)[30]

H

2. The struggle for a profile: political campaigning and the power of the press

2.1 At the beginning of this section of the Report, reference is made to the problematic reputation of the data protection regime. This is a burden with which successive Information Commissioners and their predecessor bodies have struggled constantly. Trying to get the issues surrounding data protection to be better known and understood is a vital precursor to improving compliance and standards. Communication and profile are in turn vital components of raising awareness. The ICO needs publicity for its functions. To a degree, it needs the press, and therefore has a motivation or predisposition to court it, or at least to view it as a potentially ally. To what may be a significantly greater degree, it is also vulnerable

[27] p67, lines 11-20, Richard Thomas, *ibid*
[28] p70, lines 11-19, Richard Thomas, *ibid*
[29] Part F, Chapter 6
[30] p23, lines 18-20, Christopher Graham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-26-January-2012.pdf

to press hostility and suppression or damage to its reputation which can translate directly into weakened operational capability.

2.2 Raising the profile of data protection is an important part of the remit of the office and of the personal remit of its figurehead Commissioner. Both Mr Thomas and Mr Graham have clearly and commendably shown real commitment to, and significant leadership and personal investment in, that very challenging remit. Mr Thomas put it in this way:[31]

> *"When I started, data protection had quite a poor reputation. It was seen as a bit nerdy, not taken very seriously across many organisations. I think my office probably had some responsibility. I used to say that, you know, we were seen outside as the temple of data protection and being the high priests of data protection, and I wanted to destroy that sort of approach, and therefore I was trying to make us much less esoteric, much more avoiding the technical language. I mean, a data subject is a man, a woman, a child, not a data subject. So I took a much more practical down to earth approach. Our slogan was that we are here to help organisations who want to get it right, but we'll be tough on those organisations which don't want to get it right…"*

2.3 Mr Thomas also explained his profile-raising function with particular reference to the wider role he saw for the two *What Price Privacy?* reports:[32]

> *"I was personally involved in this promotional activity to a very considerable extent. The Commissioner – as the personification and leader of the ICO - is obviously expected to be a visible part of all major activity. In this case, I attached particular priority to the issue and also viewed promoting the reports as a tangible way of fulfilling a wider ambition to get data protection taken more seriously."*

2.4 The potential power of the press as a friend of data protection however, also confronted the ICO with an awareness of its potential power as an opponent. Mr Thomas was aware of the obvious risk inherent in his strategic response to Motorman by way of the publication of the *What Price Privacy?* reports and the s55 campaign:[33]

> *"We were aware from the outset that the media would probably ignore or show hostility to our reports. This presented two problems:*
>
> - *The media usually play an important and influential role in any campaign by an independent body to secure legislative and other change. In this case we anticipated hostility through both editorial and proprietorial influence.*
> - *We had worked very hard to secure a "good press" for the ICO across a very wide range of other DPA and FOI functions and had been largely successful. There was a real fear that this could be jeopardised."*

That was a fear which proved to be entirely well-founded. Furthermore, if it was a fear which was clearly present in Mr Thomas mind in relation to his strategic and political response to Operation Motorman, it does not seem a large step to infer that that was a fear understood more generally in the office, not excluding its (more junior) operational staff.

[31] p111, lines 7-22, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[32] p8, para 19, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf
[33] pp8-9, *ibid*

2.5 Although the risk of press hostility to the objectives of the ICO was present from the outset, it is evident that the sheer scale of the risk and its potential to affect not only the outcome of a particular political campaign but the fundamental nature of the relationship between the press and the regulator was only a gradual revelation over the months and years. Towards the end of his oral evidence to the Inquiry about the course of the s55 campaign, Mr Thomas said this:[34]

> *"I think there was a general feeling that people at the head of newspapers were very influential with the politicians and this perhaps was an example of that. And although they rested their case, as I said just now, on the threats to investigative journalism, I was surprised by how hard they were fighting, and it really left me with a message that we were challenging something which went to the heart of much of the - certainly the tabloid press activity. Someone once said to me: "You do realise that you are actually challenging their whole business model?" Maybe that's one reason they were fighting so hard, because on the one hand, they were not publicly accepting this sort of thing went on. On the other hand, they were fighting very hard to avoid the consequences of the law as we saw it."*

2.6 Mr Thomas mature reflections on the lessons he learned from the experience of the s55 campaign are worth pondering in this context:[35]

> *"Whatever was precisely known about the nature and extent of press misconduct across the industry as a whole, it became increasingly clear that the press were able to assert very substantial influence on public policy and the political processes. I have, throughout my career, been involved in a wide range of activities where it has been essential to attract media attention and, better still, active media support. The ICO press team was very effective at giving strategic, tactical and practical advice and securing favourable media coverage on many occasions. But, in the matters covered by this Statement, the press had a direct interest and a hostile attitude which made it very difficult to achieve our objectives. The history of the campaign over the Criminal Justice and Immigration Bill … left me in no doubt about the power of the press. I can recall saying to my colleagues in 2007 and 2008 that, with hindsight, it may have been a mistake on our part to have highlighted press misconduct in our reports. We may have made better progress if we had concentrated more on breaches of s55 by other sectors."*

3. Independent regulation of the press: lessons learned

3.1 It is hard to avoid the conclusion that the ICO did indeed consider itself disadvantaged in the task of discharging its functions in relation to the press. That was expressed in a number of dimensions which include insufficiency of legal powers, deference to other authorities, competing operational priorities, practical resourcing and capability issues. Having said that, although each of those dimensions contains important truths, they do not give a full account. Despite the abundant evidence, both patent and latent, of problems in the culture, practices and ethics of the press in handling personal information, the ICO has not been

[34] pp59-60, lines 24-14, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Afternoon-Hearing-9-December-2011.pdf
[35] p13, para 37, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/First-Witness-Statement-of-Richard-Thomas-CBE.pdf

keen to exercise the powers and functions reposed in it by Parliament in the public interest to address the matter. That is not simply a historical matter; it is perceptible in its approach today. In a context in which public concern about press standards and respect for the law has reached sufficiently acute proportions to warrant the commissioning of a judicial inquiry, that must be seen as a regulatory failure within the Terms of Reference of the Inquiry.

3.2 It is an understandable failure. The lessons to be learned from the narrative of the ICO and the press are entirely congruent with the evidence to the Inquiry of the approach of the press more generally. That approach is too often characterised by:

(a) resistance to independent regulation of both law and standards;

(b) a confrontational, aggressive and personal approach to its critics;

(c) powerful behind the scenes political lobbying in its own interests; and

(d) the deployment, through a very loud megaphone, of the rhetoric of the freedom of the press to stifle rational criticism and debate about where the public interest lies.

3.3 Although it is a failure to which the ICO may be considered to have contributed by reason of its own choices, for example by engaging in the political arena on contested policy matters to a degree beyond what was likely to be constructive and productive, and in relation to operational decision making, I do not attribute it wholly or mainly to the individual leadership of the ICO. If, however, there is a perception of inequality of arms in the relationship between the ICO and the press, and if it is one which for understandable reasons the ICO has been reluctant to articulate or seek to remedy itself, then Mr Owens' rhetorical question takes on certain urgency for the Inquiry:[36]

> *"It's our job to take them or indeed anyone else on, that's what we are paid to do. If we do not do it then who does?"*

3.4 The ICO has to be capable of performing its function in relation to the press, however balanced and light touch the exercise of that function should be. It keeps wicket in this respect, on behalf of the public and at public expense. It does not have an option simply to leave the field open. As was observed in recent High Court proceedings, which also took a wider view of the ICO's functions in relation to journalism than it was minded to take itself:[37]

> *"there is a need for someone to protect the public."*

3.5 The final part of this part of the Report therefore briefly identifies the structural and governance issues which are likely to need to be addressed to put the ICO in a position in which it is capable of discharging its functions in relation to the press. This is at the margins of the Terms of Reference but, in the light of the analysis to which the ICO has been subject, I have no doubt that it is appropriate to identify the parameters of a solution before leaving the matter to the more detailed consideration both of the Ministry of Justice and the ICO itself.

H

[36] p7, para 4.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alexander-Owens1.pdf

[37] para 182, *The Law Society & Ors –v- Kordowski* [2011] EWHC 3185

4. Powers, governance and capability of the ICO: reflections for the future

4.1 The legal structure of the ICO is such that the entirety of the functions of the office is devolved through the office and the person of the Information Commissioner. The organisation of the office (that is to say, the division of functions, decision-making processes, accountabilities, staff mix and so on) are matters within the personal discretion of the Commissioner.

4.2 In looking at the issues raised in this section of the Report, some issues of governance appeared to be raised by the narrative. In particular, the importance of the connection between the strategic leadership and the operational activities of the office, and the question of the circumspection that the ICO evidently felt and feels about fulfilling its functions in relation to the press raised questions about its organisational capability to act effectively in this area.

4.3 The data protection regime has specific application to journalism, as indeed it does to other sectors for which special provision is made in the law. To operate successfully in specialist areas, a regulator needs to have access to two forms of specialist knowledge. This includes legal expertise in the operation of the relevant statutory provisions, and business knowledge of the sector concerned. In the person of Mr Graham, of course, the ICO is currently led by a Commissioner with direct experience in the sector, but it is essential that the relevant expertise is also accessible at operational levels. The historic lack of direct engagement between the ICO and the industry may not only be a symptom of the ICO's lack of operational familiarity with the press, but also a cause of it. I recommend that the opportunity should be taken by the ICO to review the availability of specialist legal and practical knowledge of the application of the data protection regime to the press, and to any extent necessary address it.

4.4 A fruitful exchange of knowledge, experience and perspective between the strategic and operational levels of a regulator such as the ICO is fundamental to the success of both. In the history of its engagement on matters relating to the press, I have some questions about whether the organisation and decision-making processes of the ICO have been such as to support the necessary exchange and that its success in discharging its functions has suffered as a result. I therefore recommend that the opportunity should be taken by the ICO to review its organisation and decision-making processes to ensure that large-scale issues, with both strategic and operational dimensions, such as the intersection between the culture, practices and ethics of the press in relation to personal information on the one hand, and the application of the data protection regime to the press on the other, can be satisfactorily considered and addressed in the round.

4.5 The model of a single post holder is not one which is generally encountered in modern regulatory regimes, especially those whose responsibilities extend to powerful business sectors. There has in recent years been a fairly general trend away from individual decision-makers to boards. The Director-General for Fair Trading was replaced several years ago by a Chairman, Chief Executive and Board. The DG for electricity and gas regulation was replaced in the late 1990s by the Gas and Electricity Markets Authority (a board in which non-executives form the majority), and subsequently the executive role was divided between Chairman and Chief Executive. With the creation of Ofcom, the DG for telecommunications was replaced with a full board (which spanned other areas); Ofwat made the same transition in the mid-2000s; and the health regulator, Monitor, recently moved from a combined executive role (with board oversight) to separate chairman/CEO roles.

4.6 There are a number of reasons why the single model has drawbacks:

(a) It can render an organisation particularly vulnerable to pressure as its profile and reputation are focused on an individual personality.

(b) The absence of an effective senior executive board with non-executive input can expose the office to a presidential style of leadership, with insufficient internal checks and balances to ensure that its overall priorities remain congruent with its statutory functions.

(c) The absence of an effective senior executive board can also, as a simple matter of business management, mean that priorities, business risks, resources and performance are not managed and monitored coherently.

4.7 The merits by contrast of a formal Board constitution potentially include the following:

(a) The benefits of collective decision making. This includes being able to bring a range of different expertise, experience and mindset to issues of strategy, priority and direction, and an enrichment of analysis, debate and perspective as a result.

(b) Firmer discipline can be maintained in decision-making, including the need to proceed by means of structured agendas, formal papers and recorded minutes. This is of particular importance in relation to decisions *not* to take action; when such decisions are taken individually or informally they are much more likely not to have been made from a structured position of strength.

(c) There are formal and precisely defined delegations and it is beyond doubt where decisions are to be delegated to the executive as not requiring Board approval.

All of these have a potential to promote collective decision-making as much more transparent and accountable. Each decision will thus both be more considered in itself and more susceptible to structured follow-through to specific outcomes.

4.8 The evidence before the Inquiry suggested that the constitution of the ICO as a corporation sole may, in at least some of these dimensions, have risked its ability to discharge effectively its functions in relation to the press. Unresolved questions must remain, for example, as to whether:

(a) the informal approach adopted by the ICO to its regulatory functions (partly a matter, perhaps, of presiding over a regime struggling for a profile, also possibly a matter of personal leadership style) has contributed to a reluctance to bring issues to a head through the use of regulatory powers, and has allowed inaction to be an unremarked default within its own structure;

(b) the tendencies of Information Commissioners to see themselves as having a major, even dominant, outward-facing role with a political or campaigning dimension has been at the expense of their ability to provide clear, engaged, understood and accountable leadership in the decisions made within their office, to the detriment of the quality of those decisions, and has posed some risk to the regulatory reputation of the ICO, including in relation to its quasi-judicial functions; and

(c) its current constitution leaves the ICO with insufficient strength to match major business sectors with power and influence, such as the press.

4.9 I recommend therefore that the opportunity be taken by the Ministry of Justice to consider amending the DPA formally to reconstitute the ICO as an Information Commission, led by a Board of Commissioners with suitable expertise drawn from the worlds of regulation, public

administration, law and business, and that active consideration be given in that context to the desirability of including on the Board a Commissioner from the media sector. In making this recommendation I do not, however, consider that the recommendations directed to reflecting on the governance of the ICO as currently constituted should be delayed in the meantime.

CHAPTER 7
SUMMARY OF RECOMMENDATIONS

1.1 I am conscious of both the length and complexity of this Part of the Report. For ease of reference, I have decided to place all my recommendations in summary form at the conclusion of this Part rather than to follow the approach I have pursued elsewhere.

I recommend to the Ministry of Justice that:

The exemption in section 32 of the Data Protection Act 1998 should be amended so as to make it available only where:[1]

(a) the processing of data is necessary for publication, rather than simply being in fact undertaken with a view to publication;

(b) the data controller reasonably believes that the relevant publication would be or is in the public interest, with no special weighting of the balance between the public interest in freedom of expression and in privacy; and

(c) objectively, that the likely interference with privacy resulting from the processing of the data is outweighed by the public interest in publication.

The exemption in section 32 of the Data Protection Act 1998 should be narrowed in scope, so that it no longer allows, by itself, for exemption from:[2]

(a) the requirement of the first data protection principle to process personal data fairly (except in relation to the provision of information to the data subject under paragraph 2(1)(a) of Part II Schedule 1 to the 1998 Act) and in accordance with statute law;

(b) the second data protection principle (personal data to be obtained only for specific purposes and not processed incompatibly with those purposes);

(c) the fourth data protection principle (personal data to be accurate and kept up to date);

(d) the sixth data protection principle (personal data to be processed in accordance with the rights of individuals under the Act);

(e) the eighth data protection principle (restrictions on exporting personal data); and

(f) the right of subject access.

The recommendation on the removal of the right of subject access from the scope of section 32 is subject to any necessary clarification that the law relating to the protection of journalists' sources is not affected by the Act.

It should be made clear that the right to compensation for distress conferred by section 13 of the Data Protection Act 1998 is not restricted to cases of pecuniary loss, but should include compensation for pure distress.[3]

[1] Part H, Chapter 5, para 2.60
[2] Part H, Chapter 5, para 2.60
[3] Part H, Chapter 5, para 2.62

The procedural provisions of the Data Protection Act 1998 with special application to journalism in:

(a) section 32(4) and (5)

(b) sections 44 to 46 inclusive

should be repealed.[4]

In conjunction with the repeal of those procedural provisions, consideration should be given to the desirability of including in the Data Protection Act 1998 a provision to the effect that, in considering the exercise of any powers in relation to the media or other publishers, the Information Commissioner's Office should have special regard to the obligation in law to balance the public interest in freedom of expression alongside the public interest in upholding the data protection regime.[5]

Specific provision should be made to the effect that, in considering the exercise of any of its powers in relation to the media or other publishers, the Information Commissioner's Office must have regard to the application to a data controller of any relevant system of regulation or standards enforcement which is contained in or recognised by statute.[6]

The necessary steps should be taken to bring into force the amendments made to section 55 of the Data Protection Act 1998 by section 77 of the Criminal Justice and Immigration Act 2008 (increase of sentence maxima) to the extent of the maximum specified period; and by section 78 of the 2008 Act (enhanced defence for public interest journalism).[7]

The prosecution powers of the Information Commissioner should be extended to include any offence which also constitutes a breach of the data protection principles.[8]

A new duty should be introduced (whether formal or informal) for the Information Commissioner's Office to consult with the Crown Prosecution Service in relation to the exercise of its powers to undertake criminal proceedings.[9]

The opportunity should be taken to consider amending the Data Protection Act 1998 formally to reconstitute the Information Commissioner's Office as an Information Commission, led by a Board of Commissioners with suitable expertise drawn from the worlds of regulation, public administration, law and business, and active consideration should be given in that context to the desirability of including on the Board a Commissioner from the media sector.[10]

[4] Part H, Chapter 5, para 2.46
[5] Part H, Chapter 5, para 2.57
[6] Part H, Chapter 5, para 2.64
[7] Part H, Chapter 5, paras 2.94-2.95
[8] Part H, Chapter 5, para 2.107
[9] Part H, Chapter 5, para 1.107
[10] Part H, Chapter 6, para 4.9

I recommend to the Information Commissioner's Office that:

The Information Commissioner's Office should take immediate steps to prepare, adopt and publish a policy on the exercise of its formal regulatory functions in order to ensure that the press complies with the legal requirements of the data protection regime.[11]

In discharge of its functions and duties to promote good practice in areas of public concern, the Information Commissioner's Office should take immediate steps, in consultation with the industry, to prepare and issue comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data. This should be prepared and implemented within six months from the date of this Report.[12]

The Information Commissioner's Office should take steps to prepare and issue guidance to the public on their individual rights in relation to the obtaining and use by the press of their personal data, and how to exercise those rights.[13]

In particular, the Information Commissioner's Office should take immediate steps to publish advice aimed at individuals (data subjects) concerned that their data have or may have been processed by the press unlawfully or otherwise than in accordance with good practice.[14]

The Information Commissioner's Office, in the Annual Report to Parliament which it is required to make by virtue of section 52(1) of the Act, should include regular updates on the effectiveness of the foregoing measures, and on the culture, practices and ethics of the press in relation to the processing of personal data.[15]

The Information Commissioner's Office should immediately adopt the Guidelines for Prosecutors on assessing the public interest in cases affecting the media, issued by the Director of Public Prosecutions in September 2012.[16]

The Information Commissioner's Office should take immediate steps to engage with the Metropolitan Police on the preparation of a long-term strategy in relation to alleged media crime with a view to ensuring that the Office is well placed to fulfil any necessary role in this respect in the future, and in particular in the aftermath of Operations Weeting, Tuleta and Elveden.[17]

The Information Commissioner's Office should take the opportunity to review the availability to it of specialist legal and practical knowledge of the application of the data protection regime to the press, and to any extent necessary address it.[18]

The Information Commissioner's Office should take the opportunity to review its organisation and decision-making processes to ensure that large-scale issues, with both strategic and operational dimensions (including the relationship between the culture, practices and ethics of the press in relation to personal information on the one hand, and the application of the data protection regime to the press on the other) can be satisfactorily considered and addressed in the round.[19]

[11] Part H, Chapter 5, para 2.64
[12] Part H, Chapter 5, para 2.72
[13] Part H, Chapter 5, para 2.73
[14] Part H, Chapter 5, para 2.65
[15] Part H, Chapter 5, para 2.73
[16] Part H, Chapter 5, para 2.107
[17] Part H, Chapter 5, para 2.108
[18] Part H, Chapter 6, para 4.3
[19] Part H, Chapter 6, para 4.4

PART I

THE PRESS AND POLITICIANS

CHAPTER 1
INTRODUCTION

1.1 In addition to addressing other concerns, the Terms of Reference require the Inquiry to examine the relationship between national newspapers and politicians and the conduct of each. That this issue should have been considered relevant to an Inquiry into the culture, practices and ethics of the press is a matter of considerable significance. It implies the existence of legitimate questions of public concern about the nature of that relationship and conduct, and about the connection between that relationship and the current state of press standards and accountabilities. It asks, in other words, whether anything about the relationship between the press and the politicians has amounted to 'part of the problem' of press standards.

1.2 In doing so, and in putting these questions before a judge-led inquiry, the Terms of Reference required reflection on the relationship between press and politicians in a way which was relevant to and directed towards the issue of press culture, practices and ethics, and of course to do so in an objective, evidenced, analytical and politically neutral way. That too is significant. If there have been failures of public interest in the relationship between press and politicians, then our democracy provides ways in which politicians can account for that directly to the public. However, if there were failures of what might be called generic political culture (a pattern across time and across parties) and if there were failures in the democratic mechanisms for accountability, then the ordinary political means of challenging and investigating such matters might not have been effective. The politicians would themselves have been, or at least appeared, too close to the problem itself to address it in a way which would leave no doubts in the mind of the public.

1.3 An issue of closeness is at the heart of this part of the Terms of Reference. More specifically, the issue is whether that relationship between politicians and the press had become too close in respects which might not have best served the public interest. The Prime Minister himself said that he believed that to be the case, first in July 2011 and subsequently when interviewed by Andrew Marr on 29 April 2012 when he said this:

> *"Have we all got too close? Yes. Do we spend too much time on this short-term news management agenda? Yes, we do. Should we try and have a better relationship where we fight the daily fire fight with the media, but we focus on the long-term change our economy needs, our society needs? Yes. And if that comes out of Leveson, great."*

1.4 To put the matter in context from the outset, however, it is essential first to reflect the overwhelming evidence that relations between politicians and the press on a day to day basis are in robust good health and performing the vital public interest functions of a free press in a vigorous democracy, providing an open forum for public debate, enabling a free flow of information and challenge and holding power to account. If there were any doubts about that they would have been dispelled by the perceptive insights of both politicians and political journalists and commentators among the Inquiry's witnesses, and by the remarkable quantity and quality of contemporary coverage of this module of the Inquiry's work.

1.5 Political journalism is one of the most highly-prized aspects of a free press operating in a developed democracy. It has often been referred to as the 'lifeblood of democracy', invigorating the body politic and supporting the effectiveness of democratic accountabilities. It is in this area (although not just in this area) that the press performs some of the most essential public

interest functions on which we all depend. Some excellent examples were seen first-hand during the course of the Inquiry's deliberations. I make very clear at the outset therefore that political journalism is not the focus of this Part of the Report, and indeed the Inquiry has had clearly in mind throughout the importance of ensuring that political journalism is fostered and encouraged to the greatest degree possible for the future.

1.6 This Part of the Report is not therefore directed at the relationships of everyday political journalism other than by way of background, nor particularly to the issue of press standards as they might apply to such journalism. Nor did the Inquiry pursue as a separate issue the status of individual politicians as actual or potential victims of media misconduct (although in the course of evidence there have been a number of accounts of the impact of personal attacks upon politicians by the press and concern about the potential for such attacks).

1.7 The narrative of this Part of the Report explores instead a very different aspect of the closeness of the relationship between press and politicians, the one that is in my view most directly relevant to the public interest concerns that prompted the setting up of this Inquiry in the first place. That is the question of a closeness which may have, or appear to have, impacted on the willingness or ability of the politicians to decide matters of public policy about the media, and specifically of policy on press standards, fairly and impartially in the public interest.

1.8 As I have already said,[1] this Inquiry takes its place in responding to the latest in a long sequence of spikes in public concern about press standards; this time it is phone hacking. That history is also a history of what has been described as failures by the politicians to make appropriate responses to those spikes in public concern. The Inquiry has taken a brief but informative look at what has happened in the past, with the invaluable privilege of access to the perspectives of many of those directly involved. In doing so, it has considered whether there was any discernible pattern in that history, and if so whether it was a pattern which could be related to a relationship that was 'too close'. The historical approach, which is reflected in this Part of the Report, is not therefore academic (and certainly does not pretend to any degree of historical discipline or originality); but is, as should be expected of an Inquiry of this nature, thematic and inquisitorial.

1.9 Module Three of the Inquiry has focused on the more recent manifestations of this issue, but it is an issue which I recognise (as has been pointed out) goes back in time very much further than that. The fact that I have not heard oral evidence about relations between the national press and politicians at a period any earlier than the middle of the last century certainly does not mean that I am blind to the very considerable influence which the press barons of the late nineteenth and early twentieth centuries are generally agreed to have had on politicians. I am well aware from written evidence and other material in the public domain of the role in public life which Lords Northcliffe, Beaverbrook and Rothermere had in their day. The power wielded in the past by these proprietors, and their influential relationships with the politicians of their time, demonstrates that the issues which the Inquiry is now addressing are far from new. However, these earlier events are not sufficiently proximate to the current culture to merit detailed examination: the primary focus of the Inquiry has been on what should happen in the future in the light of what has happened more recently.

1.10 Chronologically, the Inquiry began its focus on the relationship with evidence about the acquisition in 1981 by Rupert Murdoch of The Times and The Sunday Times and it has reflected on events from then to the present. To have gone back further would have demanded too much of any witness and was highly unlikely to have added to the understanding which emerged from the oral evidence which itself spanned a period of 31 years. That oral evidence

[1] Part D Chapter 1

is, of course, supplemented by documentary evidence some of which goes back considerably before 1981.

1.11 From this, a clear pattern has in my view emerged about the relationship between the press and the politicians in recent years at the most senior levels of influence. There is of course no evidence at all of explicit, covert deals between senior politicians and newspaper proprietors or editors; no-one should seriously have expected that there would be. These very powerful relationships are more subtle than that, the extent to which interests coincide or diverge is more complicated, and the dialogue more sophisticated. But there can be no doubt that within these relationships, some of them having the quality of personal friendships (and some of active hostility), there have been exchanges of influence on matters of public policy which have given rise to legitimate questions about the trust and confidence the public can have that they have been conducted scrupulously in the public interest.

1.12 Care has to be taken in talking about 'influence'. It is the prerogative of a free and partisan press in a democracy to campaign, lobby and seek to influence both public opinion and public policy. Where the issues arise is in the nature, visibility and accountability of the politicians' response. Nor is the existence of personal relationships and friendships at senior levels between press and politicians anything other than entirely natural and to be expected. The issues arise here in relation to the conduct of public affairs in the context of such relationships, and in the boundaries between public and private, accountable and unaccountable.

1.13 The pattern which emerges is one in which senior press/political relationships have been too close to give sufficient grounds for confidence that fear or favour have not been operative factors in the determination and implementation of media policy. That has been the position for some years at least. It is not a state of affairs confined to any one political party.

1.14 This section examines in particular the decision to permit Mr Murdoch's News Corporation to acquire The Times and The Sunday Times; the terms of the Broadcasting Act 1990 (insofar as they concerned foreign and cross media ownership) which were such as to permit Sky TV to continue in the ownership of News Corporation; the passage of the Communications Act 2003, in particular the development of its provisions on foreign and cross media ownership, which in their final form would not have prevented News Corporation from acquiring Channel 5; and finally, the bid by News Corporation for the remaining shares in BSkyB which came to an end shortly before the Inquiry was set up (and for connected reasons). Evidence on the last of these matters brought into sharp focus the pressures, from more than one direction, on governing politicians charged with making a decision of great importance to the media. In particular, it exposed a formidable and relentless lobbying operation which gave rise to serious legal and ethical issues.

1.15 On more than one occasion during the period under consideration, concerns about the culture, practices and ethics of the press surfaced in public debate. However, on each occasion the political reaction was not such as to bring about a lasting solution to the problem. As outlined earlier in this Report, concern during the late 1980s reached such a level that the then Home Secretary commissioned Sir David Calcutt QC to lead a committee which inquired into and reported on press standards, highlighting significant areas of legitimate public concern. The political response to the first Calcutt Report purported to give the press a final chance to put its own house in order before addressing the matter further. The press failed by some margin to meet the challenge, but the establishment of the 'self-regulatory' PCC was the chief exception to a prevalent "do nothing" response from the Government. How and why that was so is examined.

1.16 The PCC was (or at least could have been) a step forward from its predecessor, the Press Council. However, it was never endowed by the industry with the full range of powers and resources advocated by the politicians by whom it was presented as a credible response to public concern. In practice, as is discussed more fully elsewhere in this Report[2] irrespective of how it described itself or the powers (however limited) that it actually had, it functioned principally as a handler of complaints and latterly an advisory body. When concerns about press behaviour, and of paparazzi photographers in particular, resurfaced in 1997 with the tragic death of Diana, Princess of Wales, there was some tightening of the Editors' Code but, as the then Prime Minister candidly accepted, he took a conscious decision to manage rather than to confront the media, taking the view that to have confronted the press would have been an all consuming task.

1.17 There was a further missed opportunity to address press misconduct when the Information Commissioner published his findings about the ways in which private investigators had, in his view, unlawfully obtained confidential data which was then provided to the press in circumstances (including the extent of payments made for the data) which provided ample grounds for profound public concern.[3] The Information Commissioner recommended amendments to the Data Protection Act 1998. In the result, the political response was a further compromise and no effective action. How that came about is also illuminating.

1.18 This Part of the Report therefore begins by considering some relevant aspects of the relationships between our last five Prime Ministers (including the present holder of that office) and the press. Political leaders have their own approaches to and experiences of the press at a personal level. Personality and individual approach greatly influence the dynamic between a Prime Minister and the opinion-makers of the press. This Part reflects on these relationships for the insights they offer into what they might nevertheless have in common, and into whether any patterns can be said to emerge.

1.19 This search for patterns is an exercise which was fundamental to the work of the Inquiry in this Module. It would, however, be a mistake to think that the Inquiry can or should try to solve all of the unresolved questions about the relationship between the press and the politicians at the highest levels over the past 35 years. What follows, therefore, attempts simply and briefly to set out some of the narrative history which seemed to be particularly relevant to the Terms of Reference; there is no ambition to be comprehensive or to sit in judgment on political history whether past or contemporary, but only to identify the extent of the issues relevant to the Inquiry and to reflect on any pointers for the future. If the most recent past is considered in the greatest detail, that is, first, because some of these issues were prominent features of the context in which the Inquiry was set up and, second, because contemporary concerns are inevitably uppermost in the public mind, and have had the least benefit of the longer perspective.

1.20 This Part then canvasses some wider contemporary political perspectives. My overall conclusions and recommendations follow.

1.21 The Report addresses one final matter in this Part. The public concern which led to this Inquiry stands at the end of a long line of surges in public concern. Each has been followed by a political response which has not adequately addressed that concern. This all has to be viewed in the context of press/political relationships which themselves appear to have had problematic dimensions. Thus, the approach to this Inquiry also deserves consideration.

[2] Part D, Chapter 1
[3] Part H

CHAPTER 2
THE CONSERVATIVE YEARS

1. Prime Minister Thatcher: 1979-1990

1.1 Margaret, now Baroness, Thatcher enjoyed sustained, substantial though not unqualified support from a range of national newspaper titles throughout her tenure as Prime Minister, yet she is reputed to have spent little time herself actually reading newspapers:[1]

> *"Margaret Thatcher never read a newspaper from one week to the next."*

While titles with a consistent history of leaning to the left of centre were equally consistently critical, those sections of the press with a history of shifting political leanings were as supportive as traditionally Conservative newspapers. In that sense, at any rate, from Lord Mandelson's perspective:[2]

> *"Mrs Thatcher was able to call on the virtually uncritical support of both publishers and editors."*

1.2 A particular feature of Baroness Thatcher's era was the strong personal relationship which she enjoyed with a number of newspaper proprietors, characterised by mutual respect and shared political ideology. Rupert Murdoch described himself to be a "*great admirer*"[3] of Baroness Thatcher, agreeing that he was on the "*same page politically*".[4]

1.3 The Inquiry heard a consistency of opinion on this matter. Mr Murdoch's title, The Sun, was described to the Inquiry by Tony Blair as "*a major part of supporting Mrs Thatcher*",[5] although Mr Murdoch himself put it more modestly.[6] David Mellor QC observed that: "*[Rupert Murdoch's] ...straightforward right wing populist opinions made him a soulmate for Mrs Thatcher*".[7] Sir John Major attributed Baroness Thatcher's rapport with newspaper proprietors to her political outlook:[8]

> *"Margaret was probably the most right of centre leader the Conservative Party had had for quite a long time, and I think that appealed to the natural instincts of many proprietors and editors at the time, and I think support was accordingly offered."*

Andrew Neil, the former editor of The Sunday Times, also described Baroness Thatcher and Mr Murdoch as "*ideological soul mates*".[9] Sir John interestingly connected the bond between Baroness Thatcher and these proprietors with their common commitment to trade union

[1] p53, lines 1-2, Kenneth Clarke, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
[2] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
[3] p6, lines 15-16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[4] p15, lines 5-13, Rupert Murdoch, *ibid*
[5] p39, lines 3-4, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[6] p36, lines 4-24, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[7] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-David-Mellor.pdf
[8] p2, lines 20-24, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[9] p10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf

reform, to shared views about business (and buccaneering businessmen)[10] and the European Union, and to popular admiration for Baroness Thatcher's role in the Falklands War.

1.4 Baroness Thatcher's relationship with many proprietors did not manifest itself in frequent meetings with them or their editors. Mr Murdoch firmly denied the suggestion that he had consulted with her regularly on every important matter of policy.[11] Mr Neil saw Baroness Thatcher once in seven years.[12] Kelvin MacKenzie told the Inquiry that he probably saw Baroness Thatcher about twice a year but later confirmed that he did not doubt that she wanted his support.[13]

1.5 The relatively modest number of meetings does not necessarily indicate that a friendly proprietor did not have access to the Prime Minister. Mr Murdoch was readily received when he approached her whilst he was a bidder for Times Newspapers. The result was that he visited Chequers for lunch where he briefed her on his bid and his vision for Times Newspapers. The acquisition of Times Newspapers is described in detail elsewhere.[14]

1.6 It is easy to understand why Baroness Thatcher enjoyed a good relationship with a number of proprietors but more difficult to attribute any specific benefit for either party to the relationship itself. Baroness Thatcher enjoyed a good deal of positive media coverage, although even generally supportive titles were sometimes critical (for example, Mr Murdoch preferred to support President Reagan over Baroness Thatcher when the United States invaded Grenada).[15] But the explanation for the positive coverage is readily attributable to editorial approval for her policies and disapproval of those of the Opposition. There was straightforward political alignment and an element of straightforward mutual personal rapport (not to say admiration).

1.7 Importantly, it is clear from Mr Murdoch's evidence, which is corroborated by contemporary notes, that he neither expressly asked for nor was expressly offered any favourable policy decisions by Baroness Thatcher.[16] He was indeed permitted to buy Times Newspapers without a reference to the Monopolies and Mergers Commission (MMC) but this does not appear to me to be directly attributable to personal influence. The Prime Minister was not in any event the decision maker.[17]

1.8 Mr Neil suggested that in late 1985, in the run up to the major industrial dispute at Wapping, Mr Murdoch went to "*square Thatcher*", by which he meant seek an assurance that there would be sufficient policing of the dispute to enable him to continue to do business at Wapping.[18] That was indeed the result, but the Government's stance during the Wapping dispute was in accordance with its approach to other industrial disputes (not least the miners' strike).

[10] p3, lines 1-24, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[11] p36, lines 22-24, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[12] p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf
[13] pp33-34, lines 3-6, Kelvin Mackenzie, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-9-January-2012.pdf
[14] Part I, Chapter 5
[15] p10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf
[16] pp14-15, lines 13-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[17] Part I, Chapter 5
[18] p12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf

1.9 An indication of the influence of Mr Murdoch towards the end of Baroness Thatcher's tenure was provided by Mr Mellor in these terms:[19]

> *"By the time Murdoch came to establish Sky, a brave entrepreneurial investment that deserved to succeed, and a process I was happy to help along in the Broadcasting Act 1990, he was used to Ministers doing his bidding, rather than the other way around. He was personally charming to deal with, but he was one of the few people, apart from Heads of State, I, as a minister, had to visit at his premises rather than him having to schlepp over to the Home Office."*

1.10 There were nevertheless decisions on media policy taken by the Government which went against supportive proprietors. News International was not granted a domestic broadcasting licence and had to launch Sky, its satellite television service, using a foreign satellite.[20] On this, the Sunday Times, under Mr Neil, supported Lord Heseltine against Baroness Thatcher.[21]

1.11 More than one witness suggested that the prospect of honours played a part in Baroness Thatcher's relationship with senior media figures. Alastair Campbell put it bluntly:[22]

> *"Margaret Thatcher had much more press support, partly for political and ideological reasons, in that most owners and editors are right wing and genuinely supported her, but also because she operated what today would be seen as a corrupt system of patronage using the honours system to reward supportive owners and editors".*

1.12 Lord Mandelson did not put it so high:[23]

> *"She cultivated and honoured and nurtured editors and journalists very successfully. The relationship was, I think, relatively calm during her period. It might not have seemed so calm to her on all occasions ..."*

1.13 Lord Grade offered these thoughts on the question of patronage:[24]

> *"...we are happily past the days when the politicians of the day used to pack the boards of the regulators with their friends and supporters, such as my time as a controller of BBC One when in the days of then Mrs Thatcher's government when the board of the BBC were packed with her friends. We've moved on from then, we have a Nolan process ..."*

1.14 An issue of interest to the Inquiry was the question of the perception amongst politicians of the extent to which newspaper endorsement assists election prospects. Andrew Marr said:[25]

> *"There is always a hierarchy of media contacts. For a Conservative minister, contacts at The Daily Telegraph, Daily Mail, The Spectator and blogs like Conservative home are particularly valuable, and likely to be closer; Liberal Democrats will more likely turn to papers and blogs read by their activists, and Labour, ditto. Throughout the*

[19] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-David-Mellor.pdf
[20] p11, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf
[21] p51, lines 12-18, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[22] p20, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
[23] p99, lines 14-18, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[24] p34, lines 4-10, Lord Grade, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[25] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andrew-Marr.pdf

Thatcher, Major and Blair governments, the Murdoch stable was always perceived by its rivals to have a privileged position.

"This was because of its spread and power as a publishing group, and Mr Murdoch's readiness to use papers such as the Sun to intervene aggressively. But it made close social relationships, at Murdoch parties or Oxfordshire get-togethers, peculiarly disheartening for press rivals" (emphasis added)

1.15 As notable as the active support of much of the press for Baroness Thatcher was its hostile attitude to the Opposition. Throughout Baroness Thatcher's time in office, successive Leaders of the Opposition, first Michael Foot and then Neil Kinnock, were the subject of considerable adverse press coverage. Writing from the Labour Party's perspective, Mr Campbell described the period as follows:[26]

"What we do know is that the press [Michael Foot and Neil Kinnock] received was hugely biased against them, and in favour of Mrs Thatcher and her Party. Michael Foot had long been derided by the right wing media for perceived political and personal shortcomings, the most famous being the alleged disrespect he showed in attending the 1981 Remembrance Sunday Service in what was mythologised as a "donkey jacket". But that was but part of a long campaign during which in several papers Mr Foot could only be defined negatively. According to the book, Stick it up your Punter, the Sun and the Express told freelance photographers covering a Foot visit not to bother sending pictures of the Labour leader "unless falling over, shot or talking to Militants." The Daily Mail, under a pre-knighted David English, led a front page with a disputed claim that Nissan would "scrap plans for a £50m car plant" if Labour won the election. "35,000 jobs lost if Foot wins" screamed the headline. I cite this as a typical rather than exceptional example. Labour's defeat in 1979, and a seeming shift to the left, ignited not so much political debate as focus on sinister Marxist forces, wrongly ensuring that at times in the public debate Labour's political doctrine was indistinguishable from the Communists'. The Express earned top marks from Tory Central Office with a "Spot the Trots" feature of 70 "extremist" candidates, among them Neil Kinnock and Robin Cook".

1.16 Lord Mandelson put it this way:[27]

"I think what I meant by [horrible and bloody] is that, you know, there has been a longer standing trend in the press to mix reporting with comment, and it didn't simply revolve around that period in the 1980s and the 1992 election. I think that what took this sort of merging of comment and reporting to a higher level was the more lethal cocktail, which I believe that the Labour Party was exposed to, and that was a sort of mixture of aggression and inaccuracy, and I think that the Labour Party generally and its leader, Mr Kinnock, in particular were the victims of that.

"I think that the press took their gloves off, I think there was a sort of lack of scruple or restraint in the reporting of the Labour Party in those years.

"Now I also quite honestly observe in my witness statement that, you know, a lot of the damage the Labour Party had done to itself in the early part of the 1980s. We weren't exactly making it easy for people to report us positively or warmly given the vote-losing policies, the divisions, the entries into the Labour Party by the far left.

[26] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
[27] pp7-8, lines 22-25, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

> *"But by the end of the 1980s, by the time we got to the 1992 General Election, a great deal, I would say the bulk of that swamp had been emptied, and that the Labour Party had changed and I don't think we were given the credit for those changes and I think Mr Kinnock in particular was on the receiving end of treatment by the media, notably but not only News International titles, that was not warranted and was not fair".*

1.17 Peter Oborne felt that there had been: "*a poisonously unfair media towards Mr Kinnock at that time. He didn't get a fair crack of the whip, and therefore if he tried to sell a policy, it tended to get misrepresented*."[28] Headlines from this era included: "*Glenys the Menace*" (Daily Mail) and "*Kinnock – I back loonies*" (The Sun).[29]

1.18 The relationship between the Labour Party and News International was particularly poor during this period for another reason: the dispute at Wapping. Labour sought to mark its disapproval of Mr Murdoch's handling of the dispute by cutting off the supply of political news to his reporters. As Andrew Grice, formerly the political editor of the Sunday Times, put it:[30]

> *"There was a major industrial dispute at Wapping in 1986/7. During that period, officially at least, the Labour party was not even talking to the Murdoch papers and Murdoch paper journalists were banned from any briefings or press conferences the Labour party held. So the back cloth was not just difficult relations but no official relationships at all".*

1.19 Mr Campbell said that after the Wapping dispute the Labour Party wanted nothing to do with the Murdoch papers.[31]

1.20 A similarly confrontational line was also taken by the Labour Party with TV AM when it was involved in an industrial dispute. Adam Boulton explained to the Inquiry how he was unable to take cameras with him into the Labour Party conference:[32]

> *"...I report that in the context of having been through the TV AM dispute when, at the urging of the ACTT, the Labour Party had done precisely that. They had blacked, as it was then called, TV AM so we could not take our cameras, for example, into the Labour Party Conference of that year so that we – their spokesmen would not appear on our programmes. And of course, the immediate effect of that is that it means that your offering is weaker than the offering of your competitors, who have full access to all the political parties".*

I

[28] p3, lines 2-5, Peter Oborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf
[29] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
[30] p77, lines 2-9, Andrew Grice, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf
[31] p10, lines 20-24, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[32] pp66-67, lines 22-7, Adam Boulton, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-15-May-2012.pdf

2. Prime Minister Major: 1990-1997

2.1 In November 1990 Sir John Major took up office with what he himself described as a quixotic approach to the national press.[33] He was keen to win their support and closely followed political coverage. But he did not seek a close relationship with proprietors and editors. Instead, he kept his distance, leaving contact primarily to others, especially his Press Secretary, a post held throughout his tenure by a civil servant.

2.2 Sir John fared well, initially, so far as newspaper coverage was concerned. The 1992 election was marked by fiercely hostile coverage towards Sir John's political rival Lord Kinnock. However, it was not long before sections of the press turned their hostility towards him. By the time of the 1997 election, The Sun and The News of the World had unequivocally transferred their support to New Labour.

2.3 The Major years are undoubtedly important for the work of the Inquiry in relation to media policy because it fell to Sir John's Government to consider and respond to the recommendations of Sir David Calcutt QC's reports.[34] Many, including Sir John and Mr Cameron, now consider that the response of the time amounted to a missed opportunity.

2.4 As Prime Minister, Sir John made a conscious choice not to seek a close relationship with any part of the media. He did not think it appropriate and, in any event, he did not share a closely-aligned political ideology or personal affinity with any of the media proprietors of the time. In his own words:[35]

> *"As Prime Minister, I did not inherit – or seek – a close relationship with any part of the media. I did not go out of my way to engage with the press. This was my own choice, made in part by natural instinct, and in part because the Black and Murdoch press were wedded to a more ideological type of Conservatism than my own. Nor did I engage closely with the Maxwell press or other centre or centrist left titles. This decision was, to an extent, quixotic, since the press are a daily route to the electorate. Nonetheless, a close engagement did not feel comfortable or proper to me and I left relationships with the media largely to the No 10 Press Office – then staffed exclusively by civil servants – and, where appropriate, the Party machine...I did not offer any peerages or knighthoods to any national newspaper proprietors or editors ..."*

2.5 Sir John explained to the Inquiry his view that in terms of democratic accountability, the best relationship between the media and senior politicians is one of 'constructive tension'. It should be neither too friendly nor too oppositional. In particular, if the relationship becomes too close it can become the context for exchanges of self-interest: leaks and stories in return for favourable coverage, as Sir John told the Inquiry had happened to an unnamed politician during the passage of the Maastricht Bill.[36]

2.6 In practice, Sir John did not often meet national newspaper proprietors. He met Mr Murdoch on three occasions (in 1992, 1993 and 1997 respectively), Lord (Conrad) Black on seven occasions and Lord Stevens twice (and attended four social events at his invitation). He did

[33] p4, lines 13-20, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[34] Part I, Chapter 5
[35] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[36] pp4-5, *ibid*

not meet Robert Maxwell at all, although Mr Maxwell did on occasion telephone No 10.[37] Strikingly, he not only turned down an invitation from Mr Murdoch in August 1993 to attend a "special celebration" to mark the launch of new Sky TV channels but also discouraged other Cabinet members from attending.[38] He met editors and political editors occasionally, typically in the presence of his Press Secretary, and usually for the purposes of explaining a particular policy.[39] He could recall hosting only one press lunch at Chequers, on 3 December 1995.[40] Unlike his immediate predecessor, he did not confer any peerages or honours on national newspaper proprietors and editors (although the position was different in relation to regional and magazine editors).[41]

2.7 The difference of approach was put into this context by Mr Campbell:[42]

> *"You see, I think a lot of this started under Margaret Thatcher, because I think that newspapers were given a sense of power. The numbers that received the peerages and the knighthoods and the sense that they were almost part of her team. I think it changed under John Major, and then I think when we were in power, I think that we – I think we maybe did give the media too much of a sense of their own place within the political firmament when we should have challenged it more".*

2.8 Lord O'Donnell (as he now is), a career civil servant, served as Sir John's Press Secretary between 1990 and 1994 before being succeeded by another civil servant, Sir Christopher Meyer. Lord O'Donnell's brief was to present Government policy on an even-handed basis to all members of the media. This approach marked a change from the higher profile approach of his predecessor, Sir Bernard Ingham, and was associated with the return of the Guardian and The Independent to the lobby. In Lord O'Donnell's own words:[43]

> *"Well, I was told by the then cabinet secretary, Robin Butler, that what he wanted me to do in the role as press secretary was to lower the profile of the press secretary – as you mentioned, Mr Ingham, now Sir Bernard, had a higher public profile – and to establish very clearly the impartiality of the process. Its relationship with the media needed to change. At the time when I took over as Press Secretary, the lobby briefings had got to a stage where two newspapers, the Guardian and the Independent, had exited the lobby, and my job really was to try and get back to a situation where all newspapers could be represented there and felt able to attend, and indeed the Guardian and the Independent did come back in to the lobby.*
>
> *"So it was trying to establish general principles of the Prime Minister's press secretary being there clearly to present, in an impartial fashion, government policy, and to do that equally to all members of the media, both broadcast and newspapers."*

[37] p15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf; p7, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-1.pdf
[38] p15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-3.pdf; and pp30-31, lines 13-3, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[39] p15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[40] p16, *ibid*; Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-4.pdf
[41] pp2-3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-2.pdf
[42] p66, lines 10-19, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[43] pp16-17, lines 13-6, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

2.9 The distance which Sir John put between himself and the national press did not prevent his Government from paying close attention to the press or from seeking to get their message across to the press through briefings. Sir Christopher put it in these terms:[44]

> *"...Enormous attention was paid to editors of national newspapers – this extended, to a degree, to regional editors, but not much – and so a considerable effort went into courting them, bringing them around for privileged one-on-one briefings for example. This was in the early 1990s. I believe that that practice has now expanded phenomenally over the years.*
>
> *"So what it came down to was an exaggerated belief in the influence of the front page headline and commentary columns within. There was an absolute belief that newspapers and their editors could win or lose elections depending on how they reported the stories.*
>
> *"I personally believe that that influence is gigantically exaggerated.*
>
> *"So the result was we did pay – we, in Downing Street, did pay a lot of attention, more than I thought was necessary, to trying to pull people on board. And of course the more you do that, the more demanding the editors and proprietors, in some cases, become. So I was always a bit sceptical about that."*

2.10 As Philip Webster, the editor of The Times website and a former political editor with the paper, observed in his evidence, Sir John built good relations with the press on his way to Downing Street.[45] Once in office, between 1990 and 1992, Sir John received press which he himself thought was appropriate, and regarded as neither especially supportive nor hostile.[46] That, of course, falls to be contrasted with the extremely negative political coverage that was accorded to the Leader of the Opposition during the same period.

2.11 By 1993, the evidence clearly shows that Mr Murdoch's British titles were writing some very hostile, and sometimes very personal, articles about Sir John. A selection of such articles was attached to a briefing note which Lord O'Donnell produced for the then Prime Minister on 18 August 1993.[47] Lord O'Donnell suggested in the note that Sir John took the opportunity of a forthcoming meeting with Mr Murdoch to communicate to him the matters quoted below. In the result Sir John did not consider it appropriate to do so, not least because of the implied threat, but the document nevertheless gives a flavour of the level of concern generated by the adverse press coverage:[48]

> *"Your papers have made matters worse. They have ceased to make rational criticisms of policy. They are now simply anti everything and anti me in particular. (see attached cuttings.) This is bad for economic confidence and hence, bad for business. Longer term political repercussions difficult to assess. Conservative MPs now see no reason to be helpful to media. [Pressure growing over privacy rules, VAT on newspapers,*

I

[44] pp20-21, lines 8-3, Sir Christopher Meyer, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-31-January-2012.pdf
[45] p93, lines 1-3, Philip Webster, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf
[46] p7, lines 3-19, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[47] pp5-17, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-5.pdf
[48] pp29-30, lines 18-7, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf; p3, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-SJM-5.pdf

cross-ownership. I am not keen to move on any of these areas but MPs from all parties becoming increasingly attracted to them.]"

2.12 Peter Riddell described the coverage of the Major Government as becoming "*very hostile*".[49] Mr Webster said this:[50]

> *"Well, there were occasions I think where the treatment of certain leaders got a little bit – was over the top, I think. I recall newspaper treatment of Neil Kinnock, John Major, latterly of Gordon Brown, where it got too personal and in a sense I felt that was going a little bit too far. But I don't regret the passing of the age of deference at all. I remember in the late 1960s, when I joined the Times, there was a much more deferential attitude of reporters towards politicians. I am rather glad that is all gone.*
>
> *It's just in some cases I think the treatment has been just a little bit too personal at times."*

2.13 There were probably many reasons for the change in coverage and the maintenance of its changed course. Antipathy to the Government's policies and, in due course, the rise of New Labour were probably amongst them. But Sir John's personal relationship, or rather lack of it, with influential media figures of the time was probably also a factor. Mr Murdoch said this:[51]

> *"Q. So the support the Sun gave to the Tory Party. not that it was the strongest support, because you, to put it bluntly, weren't that appreciative of Sir John Major"*
>
> *"A. Or his government. Well, we were reading in all the papers of cabinet divisions".*

2.14 Kelvin MacKenzie, then editor of The Sun, said something similar:[52]

> *"Q. First of all, were your relations with or respect for Mr John Major as good as they were with Baroness Thatcher?*
>
> *A. No, they were – no, we didn't have a – no, we did not have a particularly good relationship. He was no Thatcher, John Major."*

2.15 There was a conflict in the evidence of Mr MacKenzie and Sir John in relation to the content of a telephone conversation which both men recalled took place late on Black Wednesday.[53] Whatever the precise course of the conversation, however, it is noteworthy that the editor of The Sun was amongst those, including HM The Queen and senior ministers, to have been telephoned by the then Prime Minister.

2.16 Sir John put it to the Inquiry that there had developed something of a culture of press hostility to his administration, and personal ridicule of him, which resulted in coverage which went beyond vigorous partisanship, and was not only unfair but inaccurate and misleading. He cited what he considered to be the mischaracterisation of his Back to Basics initiative as a moral crusade, certainly a depiction which had serious repercussions for his Government,

[49] p39, lines 1-2, Peter Riddell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf
[50] p90, lines 9-20, Philip Webster, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf
[51] p55, lines 5-9, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[52] pp36-7, lines 18-23, Kelvin MacKenzie, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-9-January-2012.pdf
[53] 16 September 1992, when the Government was forced to withdraw the pound from the European Exchange Rate Mechanism

and which was associated with (and was claimed as legitimising) highly intrusive coverage of the sexual behaviour of a number of Conservative politicians.[54]

2.17 He also pointed to the caricaturing of the Citizens' Charter:[55]

> *"Similarly, a policy to improve the culture of public services was launched under the title "Citizens' Charter". This policy was aimed at improving public services, ensuring courtesy to the taxpayer who paid for them, and improving the esteem in which public servants and public services were held. The press undermined this campaign from the outset, through a total misrepresentation of the facts behind it – led by journalists who seemed to have no experience of public service and little care for it."* (emphasis added).

2.18 Sir John also pointed to a number of examples of unwarranted press intrusion into his private and family life. These included the following:

(a) intrusion by a tabloid title into the family's holiday home in Portugal to rearrange the furniture, take photographs and publish a story; Dame Norma Major telephoned the editor to seek an explanation but was told that she and her husband had "*no right to any privacy*";[56]

(b) an attempt to blag personal information about his son's then girlfriend:[57]

> *"on another occasion, my office received a telephone call purporting to be from the A&E Department of a hospital. The caller explained that my son's then girlfriend had been involved in an accident and that emergency surgery was necessary. However, before this could be carried out, it was vital to know whether she was pregnant. Even though, on the face of it, this enquiry was clearly an urgent one, before giving any response my office made immediate contact with my son's girlfriend, who was entirely well and in a meeting. For the record, she was not pregnant";*

(c) speculative surveillance of his son:[58]

> *"In circa 1996/7, my son was followed repeatedly by an individual on a motorbike, with a long piece of equipment attached to his bike. My son became very alarmed, since this was at a time when Northern Ireland was a much larger security concern than it is today and – through his rear view mirror – he believed the equipment might be a rifle. My son followed the security procedures he'd been taught to follow, in order to "shake off" his pursuer, but to no avail. He therefore continued to drive, and requested assistance from the Cambridgeshire Armed Response Unit who flagged down the motorcycle and pulled it over. It turned out that the rider was a photographer for the News of the World, and the equipment was a telephoto lens. The motorcyclist had been instructed to follow my son "day and night", in the hope of providing a story.";* and

(d) picture manipulation:[59]

> *"Following the General Election of 1997, I was on a private holiday. Following a picnic on the beach, I tossed an empty bottle to my wife, who was immediately beside me, tidying up. The following day, a series of photographs appeared in one of the British*

[54] p20, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[55] p21, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[56] p25, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[57] *ibid*
[58] *ibid*
[59] p26, *ibid*

tabloids (from all of which my wife had been airbrushed), accusing me of tossing the bottle onto an empty beach, and thus being a 'litter lout'."

2.19 There was also this from Paul McMullan, the former News of the World journalist:[60]

"Yeah, I was sent to France – because I'd lived there and worked for an agency for a while – to try and track down the woman who took John Major's virginity. This was a while ago. We found her but we couldn't get a picture of her with her new boyfriend. So the idea was she traded in John Major, the Prime Minister, for this French wrinkly. I think the cleaner was in the house, so I blagged my way in and pinched it off the mantle piece and copied it. I remember at the time Rebekah Brooks said, "No, put it back, we're not allowed to nick stuff!" And Piers said, "No, who cares? Well done. We'll put it in the paper." Which is what we did."

2.20 Sir John nevertheless fairly also said this about his personal coverage:[61]

"Q. You refer to your disengagement in the first sentence of paragraph 7. Would it be fair to say, though, Sir John, that you were very sensitive about what was written about you by the press?

"A. It certainly would be, yes. I wouldn't deny that at all in retrospect. It's certainly true. I was much too sensitive from time to time about what the press wrote. God knows, in retrospect, why I was, but I was...I woke up each morning and I opened the morning papers and I learned what I thought that I didn't think, what I said that I hadn't said, what I was about to do that I wasn't about to do."

"So there was a practical need to know what was going on but did I read them too much? Yes, I did. Was it hurtful sometimes? Yes, it was. Did I think, it was malicious? I think that's for others to make a judgment about."

2.21 There was a significant exchange between Mr Murdoch and Sir John shortly before the election. Sir John invited Mr Murdoch and his wife to dinner because he had been urged by party officials to "woo" newspaper proprietors. Sir John said this about the occasion:[62]

"...In the run-up to the 1997 election, in my third and last meeting with him on 2 February 1997, he made it clear that he disliked my European policies which he wished me to change. If not, his papers could not and would not support the Conservative Government. So far as I recall, he made no mention of editorial independence but referred to all his papers as "we". Both Mr Murdoch and I kept our word. I made no change in policy, and Mr Murdoch's titles did indeed oppose the Conservative Party..."

2.22 As Sir John observed:[63]

"It is not very often someone sits in front of a prime minister and says to a prime minister: "I would like you to change your policy, and if you don't change your policy, my organisation cannot support you". People may often think that, they may often

[60] p70, lines 9-21, Paul McMullan, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-29-November-2011.pdf
[61] pp7-9, lines 20-16, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[62] p8, para 29, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Sir-John-Major.pdf
[63] pp33-34, lines 20-2, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

react –but it's not often that point is directly put to a prime minister in that fashion, so it's unlikely to have been something I would have forgotten."

2.23 When Counsel to the Inquiry explored the nature of the opposition of Mr Murdoch's papers to his Government at the 1997 election, Sir John said:[64]

"Q ...the Sunday Times continued to support the Conservative Party and the Times' position was more equivocal, supporting anybody who happened to be anti-Europe"

A "Well, may I please have a definition of "support"? If you mean, did they perhaps write an editorial saying, "On balance, the least of all evils is the Conservative and you had better vote for them", I think the answer is probably that they did. If you mean: was there news coverage day in, day out, morning after morning, weekend after weekend, hostile, then I would have to say to you that I think it was. So I think I would have preferred to have less of the editorial support and more of the equitable news coverage".

2.24 He did also acknowledge:[65]

"...After all, they had written about the Conservative Party between 1992 and 1997, how could they, in all credibility, have then said, "Despite all we have written over the past five years, we actually invite you to vote for these people we've been telling you are useless for five years"? I think that would have been quite a difficult editorial position to take".

2.25 More than one commentator has perceived a cyclical nature in the relationship between the press and Prime Ministers, starting well and finishing badly. Mr Riddell suggested:[66]

"Recent prime ministers – John Major, Tony Blair, Gordon Brown and David Cameron –have all sought close relations with the media, at various levels, from proprietors, through editors to political correspondents, during their rise to the top. But, when they have been in office for some time, the relationship has soured as media criticism has increased, and each PM has complained about the stridency, intrusiveness and unfairness of the media. Both the initial closeness and later disillusion have been detrimental to the public interest. It would have healthier to have a more distant, workmanlike, relationship throughout."

2.26 Mr Webster agreed:[67]

"Q. You describe, rather like Mr Riddell, a circle whereby recent prime ministers and you name John Major and Tony Blair as initially having very good relations with the press but eventually becoming disillusioned; would you add Gordon Brown to that list?

"A. Yes, I would, yes. I think in all cases they began with good relations. John Major built good relations with the press on his way to Downing Street. But he became very quickly disillusioned with the press afterwards".

[64] p34, *ibid*
[65] p35, *ibid*
[66] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Peter-Riddell2.pdf
[67] pp92-93, lines 20-3, Philip Webster, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf

2.27 It would be perverse to suggest that Sir John's relationship with the press was 'too close' in the sense of too friendly, or such as to give rise to perceptions of mutual favour. It was, however, certainly personal. The lesson many subsequent politicians took from observation of the personal destructiveness of the press towards political leaders such as Mr Foot, Lord Kinnock and Sir John was a complex one. In part, it had to involve scrupulous reassessment of unpopular policy positions. That in itself contained its own complexities: was unpopularity with the press the same as unpopularity with the public? How far did the press themselves convince the public to dislike a policy, and was that fair or unfair? How should the personal dimension of a political leadership position be considered integral to the political? And, most of all, what could be done about any of it? For some at least, one of the lessons taken from these experiences was that previous relations between politicians and the press had been 'not close enough'.

CHAPTER 3
NEW LABOUR

1. The 1992 general election

1.1 The Labour Party's media strategy going into the 1992 election campaign did not aim to win over hostile sections of the media and was positively averse to engaging with News International (NI) in particular. It included some manifesto pledges on media policies to which elements of the press were explicitly opposed, including on implementation of the recommendations in the Calcutt Report and the establishment of an urgent inquiry by the Monopolies and Mergers Commissions into the concentration of media ownership.[1]

1.2 There was, in the event, significant negative coverage of both the Labour Party in general and its Leader, now Lord Kinnock, in particular throughout the election campaign. Even the victor of that election, Sir John Major, described it as both "*a pretty crude campaign*" against Lord Kinnock and "*over the top*".[2] The Rt Hon Jack Straw MP, a Labour candidate at the election, described the experience in his evidence in these terms:[3]

> *"Now, what the Sun was doing in the 1992 election was working over each senior member of the Labour front bench and this had an effect, and if you were on the receiving end of it, it felt like power. It had an effect in my constituency. I remember doing an open-air meeting that Wednesday and you could feel support falling away, and my majority scarcely moved, although it did not reflect the national swing".*

1.3 At the climax of The Sun's election coverage were two particularly negative and personal headlines directed against Lord Kinnock. "*Nightmare on Kinnock Street*" was followed, on election day itself, by the headline: "*If Kinnock wins today will the last person to leave Britain please turn out the lights*".[4] As is well known, Labour lost the 1992 election but tabloid coverage in the years running up to election, and in particular The Sun's coverage during the campaign, has remained the subject of controversy ever since.

1.4 Kelvin MacKenzie, then the editor of The Sun, famously proclaimed through a headline after the Conservative victory that: "*It's the Sun Wot Won It*".[5] Rupert Murdoch distanced himself from that; in his own words, he gave Mr MacKenzie "*a hell of a bollocking*".[6] Mr Murdoch said this:[7]

> *"I just thought it was tasteless and wrong for us. It was wrong in fact. We don't have that sort of power. I think if you – well, you can't do it now, but if you go after an election and you see a newspaper that's taken a very strong line, particularly the*

I

[1] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Harriet-Harman-QC-MP.pdf
[2] p39, lines 14-15 and line 24, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf
[3] p22, lines 7-14, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[4] The Sun, 9 April 1992; see p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Steven-Barnett-University-of-Westminster.pdf
[5] The Sun, 11 April 1992; see p16, *ibid*
[6] p53, lines 18-19, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[7] p54, lines 1-7, Rupert Murdoch, *ibid*

Sun, and ask their readers how did they vote, there would be no unanimity. It may be 60/40 one way..."

1.5 Lord Kinnock, in his resignation speech delivered on 13 April 1992, blamed his defeat on the newspapers which had supported the Conservatives, quoting the former Conservative Treasurer who had said that: "*The heroes of this campaign were Sir David English, Sir Nicholas Lloyd, Kelvin MacKenzie and the other editors of* the *grand Tory press"*. Lord Kinnock warned: "*This was how the election was won and if the politicians, elated in their hour of victory, are tempted to believe otherwise, they are in very real trouble next time"*.

1.6 None of the witnesses who gave evidence to the Inquiry suggested that The Sun's support for the Conservatives had in fact been decisive, although many, especially in other parties, thought that it was very influential. Alastair Campbell put it this way:[8]

"I am not sure if it can be claimed, as the Sun did after the Tories won in 1992, that "it was the Sun wot won it," but there is no doubt in my mind that the systematic undermining of Labour and its leader and policies through these papers, actively encouraged and fed with lines of attack by Tory HQ, was a factor in Labour's inability properly to connect with the public, and ultimate defeat."

1.7 The Rt Hon Harriet Harman MP's analysis was similar: "*The Labour Party went on to receive extremely hostile coverage from newspapers owned by Rupert Murdoch. We then lost the 1992 General Election*".[9] During the course of her oral evidence she made clear that she thought that there were also other factors at play: *"... I'm sure there were many things which contributed to us not getting elected in 1992 over and above the bombardment that we'd received from the Murdoch press ..."*[10]

1.8 Mr Straw observed: "*Few of us who took part, for example, in the 1992 General Election are in any doubt that the Sun's approach lost us seats. That was their purpose, and it is disingenuous for any now to deny this*".[11] Even more succinctly: "*It did contribute to our defeat. I took that as power*".[12]

1.9 Sir John Major, whilst critical of the treatment of Lord Kinnock, did not think that it was actually so influential:[13]

"How much did that affect the election? Labour Party mythology has it that it made a huge difference. I don't actually think so. I think the news coverage in 1992 and 1997 accelerated a trend that existed. I do not think it changed the result of either of those General Elections. I think we would have won in 1992; we would have lost in 1997."

1.10 Whether or not press coverage affected the outcome of the election, it is clear that the experience had an impact on the perceptions of politicians as to the importance of political

[8] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
[9] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Harriet-Harman-QC-MP.pdf
[10] p68, lines 9-12, Harriet Harman, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
[11] p4, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
[12] pp22-23, lines 25-1, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[13] p39, lines 17-23, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

press coverage; and those perceptions have subsequently been a key factor in the media strategies of political parties. The Rt Hon Tony Blair put it this way:[14]

> *"Q. I return to the issue of spin. I think we agreed that it was borne out of the unfair treatment, in your eyes, of Mr Kinnock's Labour Party, which required a disciplined and possibly a ruthless handling of the press. Is that right?*
>
> *"A. Yeah, but you see I draw a very clear distinction between what I would say is a very tough professional media operation and ruthless handling of the press in the sense of – when I read this stuff about how people felt bullied and harassed and intimidated and so on ..."*

1.11 Mr Campbell recounted an active choice to change the Labour Party's approach to what he described as the Murdoch papers.[15] He described Rupert Murdoch as the single most important media figure and said that "*it would have been foolish on our part not to have sought to build some sort of relationship with him*."[16]

1.12 Mr Straw said:[17]

> *"...once Mr Blair had come into office in 1994, we all shared the same view, that if humanly possible, without completely compromising ourselves, we should do our best to get the papers on side. It was better than the alternative. This was because I'd been through 18 years of opposition."*

1.13 Ms Harman, questioned at the Inquiry, offered this perspective:[18]

> *"Q. May I sort of turn that around and say, well, those manifesto commitments which we saw in 1992 were singularly absent in 1997, and there was a reason for their being absent, which was not to estrange or inflame or otherwise discourage the Murdoch press. Is there force in that observation?*
>
> *"A. Well, I think it goes back to what Tony Blair said in what became known as his 2007 "feral beast" speech, is that we, after all those years in opposition and believing that we wanted to get into government to do things on the health service and on unemployment and on whole range of things, that it felt necessary to do more assuaging, neutralising, courting, that was the decision that was taken, and that did feel like it was necessary."*

1.14 Mr Blair put it slightly differently:[19]

> *"Between 1994-1997, we did change Labour's policy on media ownership. However it should be remembered that this policy was itself partly a product of the terrible relations between the Labour Party and the Murdoch press and the unions and that press. My view was and remains that there should be no presumption in favour of any media organisation or against it; that foreign ownership should not be regarded*

[14] pp16-17, lines 17-2, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-28-May-2012.pdf
[15] p10, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[16] p9, lines 7-9, *ibid*
[17] p23, lines 2-7, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[18] pp68-69, lines 24-13, Harriet Harman, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
[19] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tony-Blair1.pdf

differently from ownership by British nationals; and that the best way of dealing with undue interference through size whether within one medium or across media, is through competition policy. So it would be fair to say that had we kept that policy, it would have been a problem with the Murdoch press. But there were sound objective reasons for changing it. I can't recall any conversations on it with anyone from the Murdoch media."

1.15 Mr Blair rejected the suggestion, made by Lance Price, who worked first as Mr Campbell's deputy from 1998, and then as New Labour's Director of Communications between 2000 and 2001, that the old media policy was quietly dropped within six months of his (Mr Blair's) trip to Hayman Island in 1995, where he met Mr Murdoch, although he readily accepted that had he maintained the old policy then: "*it would definitely have been a problem with the Murdoch media group in particular ...*".[20]

1.16 He made very clear that he had not wanted media policy to distract him from his agenda of wider political reform:[21]

"...I mean, I'd taken the view I was not going to have the Labour Party coming back into power after 18 years with a programme of change for the country and having the centrepiece of the programme being issues to do with media ownership. I thought that would have been a distraction and wrong".

1.17 The scale of the distraction which Mr Blair believed would have resulted had he made media reform a central plank of his agenda was forcefully put:[22]

"My view, rightly or wrongly, was that if, in those circumstances, I had said, "Right, I've decided what I'm going to do is take on the media and change the law in relation to the media", my view is – and I think it's still my view, actually – that you would have had to clear the decks. This would have been an absolute confrontation. You would have had virtually every part of the media against you in doing it, and I felt the price you would pay for that would actually push out a lot of the things I cared about, and although, you know – I think I say towards the end of my statement: although I think this is an immensely important question , I mean, I don't, in the end – not for me at any rate, as the Prime Minister, was it more important than the health service or schools or law and order.

"...If you take this on, do not think for a single moment you are not in a long, protracted battle that will shove everything else to one side whilst it's going on".

1.18 Speaking directly about the lessons and experience of 1992, Mr Blair said: "*...I went through that 1992 election. I remember it. It was etched on my memory, and yes, I was absolutely determined that we should not be subject to the same onslaught".*[23]

1.19 Andrew Grice gave a similar sense of the impact which tabloid treatment of Lord Kinnock had and the Labour Party's strong wish to avoid it happening again:[24]

[20] p82, lines 15-16, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[21] p81, lines 14-19, Tony Blair, *ibid*
[22] pp14-15, lines 7-12, Tony Blair, *ibid*
[23] p9, lines 3-6, Tony Blair, *ibid*
[24] p78, lines 17-22, Andrew Grice, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-25-June-20121.pdf

> *"The Labour party was haunted by the treatment Neil Kinnock received as Labour leader and they were absolutely determined not to go through that again. They wanted a fair hearing. If they couldn't get the endorsement they wanted a more level playing field; as you know, in the end they got the endorsement".*

1.20 Adam Boulton noted not only the Labour Party's close attention to the media after 1992 but also that the Conservatives later adopted a similar closeness to the press. Asked whether he agreed with the words of Mr Blair: *"...We paid inordinate attention in the early days of New Labour in courting, assuaging and persuading the media..."* he said:[25]

> *"Yes, I would. As I also say, there was a reason for it, as has been cited elsewhere in the Inquiry. The soreness which Labour felt about the 1992 treatment of Neil Kinnock and the feeling that they needed to turn the media around if they were going to have a chance of getting their message across in 1997, but it struck me reading that again how remarkably close that is to some of the remarks that the current Prime Minister made last summer".*

1.21 There was open hostility between sections of the press and the Labour Party during the 1980s, most acutely in the Labour Party's refusal to deal with NI as a result of the Wapping dispute. It was to a degree personal. Sections of the press used the power of personal attack and deployed both a sustained campaign of negative and aggressive personal coverage over a long period as well as a more concentrated burst during the 1992 General Election.

1.22 Labour's 1992 election manifesto contained policies which reflected (on Mr Blair's own analysis) the poor relationship between Labour and sections of the press, especially NI. The pledge to implement Sir David Calcutt's proposals if self-regulation failed put the party at odds with much of the press, and the promise to call for an urgent inquiry by the MMC into media ownership were, however principled, consciously oppositional.

1.23 It is worth repeating the real difficulty in determining precisely what impact the negative coverage of Labour politicians had on the outcome of the 1992 election. People do not necessarily agree with the opinions which they read in their newspapers, or they may already be of the same view and need no persuasion. However, it would be idle to suppose that sustained negative coverage had no effect. It is reasonable to conclude that political coverage can influence voting, although it is important not to overstate the degree to which it can or does do so.

1.24 Perhaps of even greater importance, and certainly easier to discern, is the impact of the 1992 election on perceptions about the power of the press to influence the fortunes of political parties. A belief that improved relations with the press were vital to future election prospects is agreed to have been a cornerstone of New Labour's approach, a lesson learned from Lord Kinnock's treatment by sections of the press.

1.25 The impact of personally hostile media coverage is not exclusively a Labour Party issue. Conservative politicians also bear in mind the fate of Sir John Major's Government which, in time, came to attract coverage every bit as negative and personal as that which Lord Kinnock had endured.

[25] pp51-52, lines 24-7, Adam Boulton, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-15-May-2012.pdf

2. The 1997 general election

2.1 On 21 July 1994, Mr Blair was elected as Leader of the Labour Party, heralding a new era in the relationship between the Labour Party and the media.[26] Mr Blair himself told the Inquiry:[27]

> *"... by the time I took over the leadership of the Labour Party, we'd lost four elections in a row, We'd actually never won two consecutive full elections in our history ... I went through that 1992 election. I remember it. It was etched on my memory and ... I was absolutely determined that we should not be subject to the same onslaught ... We paid inordinate attention in the early days of New Labour to courting, assuaging and persuading the media".*

2.2 He described this new era as one of *"courting, assuaging and persuading the media".*[28] Mr Blair confirmed that he met Rupert Murdoch on at least one occasion before becoming leader; this was on 15 September 1994 at a private dinner at a restaurant.[29] Although Mr Murdoch could not recall the dinner, he accepted in evidence that much of what was attributed to him by a number of sources sounded plausible.[30] From this it may be possible to infer that Mr Blair took the opportunity to explain that the Labour Party would not undertake an inquiry into cross-media ownership, and also the state of policy on the statutory recognition of Trade Unions.[31]

2.3 The new strategy appears to have had almost immediate effect. Within just a few days of his election as Labour Party Leader, it was being reported that Rupert Murdoch had stated publicly that he 'could imagine' backing Blair[32] (Mr Murdoch's evidence was that although he did not remember saying this, it was quite possible that he had).[33]

2.4 On 27 July 1994,[34] Mr Blair appointed Mr Campbell (then assistant editor at Today, a NI newspaper)[35] as part of his political and election strategy team. Mr Campbell played a prominent role in repositioning the relationship of the Labour Party with the press.[36] He became in due course the Prime Minister's Chief Press Secretary in May 1997 and on 15 July 2000 was appointed Director of Communications and Strategy at No 10.

2.5 Mr Campbell himself stated in evidence that, as soon as he was appointed in 1994, he set himself the objective of ensuring that Mr Blair did not suffer the same fate as Lord Kinnock.

[26] p10, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf; pp69-70, Harriet Harman, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf; p8, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

[27] pp8-9, lines 23-6 and p9, lines 20-22, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

[28] p9, line 21, Tony Blair, *ibid*

[29] p41, lines 17-19, Tony Blair, *ibid*

[30] pp61-64, in particular, p64, lines 11-15, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf

[31] p43, line 23, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

[32] Mullin, C, 2009 *A Walk on Part*, p20

[33] p60, line 16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf

[34] Campbell, A, 2009, *Diaries, Volume 1*, p45

[35] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf

[36] p5, para 7, *ibid*

That this meant taking a more strategic and proactive approach to communication and relationships with the media.[37] He said this about it:[38]

> *"In addition to the historic bias against Labour, the Wapping dispute had given rise to real bitterness between parts of the media and the Labour Party, to the extent that the Party did not communicate with, for example, some of the Murdoch titles. Also other titles like the Mail and the Express were so supportive of the Tories, and hostile to Labour, that our people tended to avoid them. We changed that approach very deliberately. Part of our message was that there was no part of public opinion we were afraid of and where we would not take the basic arguments of Labour".*

2.6 Mr Blair appointed Lord Mandelson (then MP for Hartlepool) to manage the Labour Party's general election campaign. Lord Mandelson described his role as follows:[39]

> *"Now, part of that was to reassure the media that we weren't the same Labour Party, and that, in a sense, trying to persuade them that we were no longer the toxic brand of the 1980s you could describe as an attempt to sort of neutralise, to sort of take the roughest edges off their hostility to us".*

2.7 On 17 July 1995, Mr Blair accepted the invitation of Mr Murdoch and News Corp to attend their conference at Hayman Island and to deliver a speech. In evidence to the Inquiry, Mr Blair said:[40]

> *"... I would strongly defend that decision. It is important to understand that the Murdoch press (a) represented a large part of the media with large numbers of readers i.e. voters and (b) had been viscerally hostile to the Labour Party. The fact is I was changing the Labour Party to become New Labour ... The continued hostilities between the Murdoch Group and Labour had no rationale to it given our changes and the fact that the Conservative Government was running out of steam. Actually, my speech held closely to all the policies I believed in".*

2.8 He added:[41]

> *"I had a minimum and maximum objective. The minimum objective was to stop them tearing us to pieces and the maximum objective was, if possible, to open the way to support. Now, actually, the speech I gave – yes, of course you had to balance it very carefully. There's no policy I changed, and actually in the speech I went out of my way – and we were very careful about this – to make sure I emphasised support for minimum wage, union recognition, pro-European position, increases in public investment, all of which may not have been what they wanted to hear. On the other hand, what I felt perfectly comfortable in doing was saying – and this I was perfectly comfortable with saying – "This Labour Party is going to be a party of aspiration, not merely redistribution. It's going to be a party that's going to appeal to the emerging aspirant working class. It's going to be a party that is essentially about creating a meritocratic society and expanding opportunity and it's not going to go back to the old ways". But that was a message I was determined to give to the country.*

[37] p6, para 7, *ibid*
[38] p7, para 8, *ibid*
[39] p10, line 22, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
[40] p7, para 21, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tony-Blair1.pdf
[41] pp63-66, line 21, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

...

But what is important, I think, to emphasise ... I actually did have in all the things that we were committed to they wouldn't like. I was also – because I was having to watch my other audience as well".

2.9 Mr Murdoch put it this way:[42]

"I distinctly recall Mr Blair's address at our conference on Hayman Island. He spoke convincingly of the ability of a new Labour Party to energise Britain. I do recall believing that Mr Blair and the policies he advocated could help revitalise Britain, and sharing that view with newspaper editors at the conference, who were also impressed by Mr Blair's speech".

2.10 He also confirmed that he may well have said the following when thanking Mr Blair for his speech:[43]

"If our flirtation is ever consummated, Tony, then I suspect we will end up making love like porcupines, very, very carefully".

2.11 The different perceptions and perspectives on the dynamics of this interaction interested the Inquiry. Mr Murdoch was keen to impress on the Inquiry a view that all the power and influence lay with politicians, but Mr Blair's evidence and autobiography were very different.[44] He spoke of feeling '*this pretty intense power*' in the relationship (although Mr Murdoch was not mentioned by name in this context).[45]

2.12 This contrast was particularly striking. Mr Murdoch:[46]

"As for the 'value' to me of these meetings, my view is that if an editor or publisher is invited or otherwise has an opportunity to meet with a head of government or political leader, you go..."

Mr Blair:[47]

"Again, now, it seems obvious: the country's most powerful newspaper proprietor, whose publications have hitherto been rancorous in their opposition to the Labour Party, invites us into the lion's den. You go, don't you?"

2.13 Shortly after the Hayman Island speech, on 17 and 21 July 1995, editorials were published in The Sun which were broadly supportive; Mr Blair, it was said, *"has vision, he has purpose and he speaks our language on morality and family life"*.[48] But Mr Murdoch's evidence recalled

[42] p23, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[43] p66, lines 12-17, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[44] Blair, T, A Journey, September 2010
[45] p4, line 18, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf; he later referred to the "few people" of the press having "substantial power", p56, line 24, *ibid*
[46] p22, para 90, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[47] Blair, T, *A Journey*, p96
[48] p2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-30.pdf; p2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-31.pdf

that the editorials also noted that a number of questions about Mr Blair's policies remained unanswered at that stage.

2.14 Shortly before the 1997 election, Mr Blair wrote two articles in The Sun about the Labour Party's commitment to a referendum on the Euro: *"I'm a British Patriot"* on 17 March 1997 and *"My Love for the Pound"* on 17 April 1997. Mr Campbell recalled that it had been made clear to him by the editor of The Sun that, if Mr Blair were to emphasise the point in these articles that there would be no entry into the Euro without a specific referendum on the issue, and that he understood people's fears about a so-called European super-state, this was likely to be the final piece of the jigsaw before Mr Murdoch agreed that the paper would back the Labour Party at the election.[49]

2.15 Mr Campbell and Mr Blair both emphasised to the Inquiry that they did not tailor their policies to seek favour from the proprietor of The Sun. Instead, they sought to highlight those parts of Labour Party policies which might appeal to Sun readers.[50] Mr Campbell noted, as an example, that holding a referendum on the Euro was already official policy long before The Sun made the request it did.[51] In other words, there was alignment. There were also '*concessions in rhetoric*'.[52]

2.16 The landslide victory of New Labour in 1997, and the decisive defeat of Sir John Major, have been widely analysed. Policies, personalities and the public mood on the one hand, and the press on the other, were all in the same place. The press no doubt both reflected and affected public opinion, in immeasurable proportions. Mr Murdoch generally backed the winning side (although he also stated that he sought to judge the candidates on the issues, not on whether they were likely to win).[53] Mr Campbell put it this way:[54]

> *"Again, I do not believe that the papers swung the result, though they may have helped increase the majority because of the sense of momentum we were able to gather. I believe the Sun backed us because they knew we were going to win: we did not win because they backed us. But it is certainly the case that we very deliberately set out to get our voice and our arguments heard in papers normally hostile to us, and that this had the positive political impact we sought."*

2.17 Mr Blair was asked to comment on a passage from Chris Mullin's diaries dealing with the dinner between him and Mr Murdoch on 15 September 1994:[55]

> *Q. "If he thinks we're going to win, he'll go easy on us, but if he thought we could lose, he would turn on us." He [Mr Blair] added: "If the press misbehave badly during*

[49] p11, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
[50] p68, lines 14-22, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[51] p11, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf; p84, lines 16-25, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[52] p31, line 3, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
[53] pp56-57, lines 12-9, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[54] p7, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Alastair-Campbell.pdf
[55] pp55-56, lines 1-15, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf, Mr Mullin is diarising a conversation he had with Mr Blair on 17 November 1994. The direct speech is Mr Blair's

the election campaign, I will stop everything for two days and we'll have a debate about what they're up to, who owns them, the lot." Then Mr Mullin: "Did you say that to Murdoch?" And your answer: "Not in so many words." Is that an accurate gist then of your conversation with Mr Mullin?

A. I think it is. I mean, as I say, this is going back 18 years or 17½ years now, but certainly that was my attitude. I think now, by the way, I would have a slightly different view. In other words, I think – there was a view of Rupert Murdoch, which I think Paul Keating speaks to the same effect, which is that he just backs the winner. My view now is it's not as simple as that actually. There are very strong political views and those actually do come first, I think, or put it like this: they're equal first, let's say, with whatever interests he feels in being on the winning side or the losing side, and – you know, so I'm not – my view of this now is if he'd been persuaded – I mean, it looked as if we were going to win, so you didn't have to be a genius to think we had a good chance of winning, although when you've lost four a row, by the way, you never think it's that clear. So I'm not sure I would have the same view now about that, but that may well have been what I said to Chris and to – and yes, look, if I'd ended up in a situation where they turned on me, I would have had to fight back. You know, there's no – that would have been the only recourse. And we weren't – in 1992, we weren't really in a position where we were able to fight back, but this time we would have".

3. Prime Minister Blair: 1997 – 2007

3.1 Mr Blair took an early step, by way of the Civil Service Amendment Order in Council 1997, to appoint Mr Campbell to an unprecedented position, a political or Special Advisor role with the power to instruct permanent civil servants.[56] An indication of the considerable importance attached to news management strategies in the early years of the administration, it proved in the end to have been a highly controversial step, which has not been subsequently repeated. Lord O'Donnell viewed the matter in this way:[57]

> *"... [this amendment] blurred those lines between what a special adviser does and what civil servants do, and I think, with the benefit of hindsight, it didn't work as well as it should have done because it created the idea that the civil servants were obeying some rules by someone who was politically appointed, which meant that they also would be politically biased, and so it ... I don't think it was a good idea. I was very pleased when it was abandoned, and I did advise that it should be abandoned, and that's very good. I don't think it's an experiment we will try again, I hope".*

3.2 Mr Blair himself observed with the benefit of hindsight: "*in the event, apparently, we didn't need* [it]".[58]

3.3 Mr Campbell told the Inquiry that many of the other changes relevant to relations between Government and the media made by Mr Blair during his time as Prime Minister were designed to ensure that politics, and media coverage of it, was more 'on the record', in an effort to make politics more accessible to the public.[59] These included 'lobby' briefings both being put on the record and made available online, monthly Prime Ministerial press conferences, and the agreement that Mr Blair would attend select committees in addition to answering Prime

[56] In the result, only two such Special Advisors were appointed
[57] p52, lines 2-12, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
[58] p9, para 26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tony-Blair1.pdf
[59] p19, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf

Minister's Questions. These changes addressed the more formal aspects of the relationship between the press and politicians; not all of them were popular on the press side. Adam Boulton said:[60]

> *"After 2003 Tony Blair attempted to restore media relations by establishing regular monthly news conferences. He honoured these punctually even when the chosen date coincided with a 'crisis'. However, they were never popular with the press who felt the electronic media benefitted disproportionately and neither Brown nor Cameron have continued with regular extended news conferences."*

3.4 Mr Blair articulated his overall strategy in this way:[61]

> *"My view was this: I, as say, took a strategic decision that this was not an issue that I was going to take on ... when I came to office ... there was a whole set of things we wanted to do. My view, rightly or wrongly, was that if in those circumstances, I had said 'Right, I've decided what I'm going to do is take on the media and change the law in relation to the media", my view is that – and I think it's still my view actually – that you would have had to clear the decks. This would have been an absolutely major confrontation. You would have had virtually every part of the media against you doing it, and I felt that the price you would pay for that would actually push out a lot of the things I cared more about".*

3.5 He added:[62]

> *"We'd ... been out of power for 18 years. We got into a rhythm which is very much the rhythm of opposition. So we were still, as it were, campaigning, you know, in the first few months, possibly the first year of government, but frankly after that time, you got into a proper rhythm of government and we had a very strong media operation...".*

3.6 Mr Campbell said:[63]

> *"I don't make any apology for the changes we made in opposition because they helped us to win. I don't make apologies for the changes we made in government because they helped us to communicate more effectively and I think that helped the Prime Minister to govern more effectively. What I do accept is that at times, we probably were too controlling, that at times we did hang on to some of the techniques of opposition when we should have dumped them at the door of Number 10, but I'd also ask you to bear in mind the sheer volume of issues we were expected to deal with, be on top of. 24/7 media means just that. You are dealing with this 24 hours a day at a time when, in my case, also trying to be in charge of overall strategy as well".*

3.7 The issue which has been much analysed subsequently is the extent to which the transition from Opposition to Government ought properly, in the public interest, to be reflected in

[60] p10, para 47, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Boulton.pdf
[61] p13, lines 14-16, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[62] p10, lines 17-22, Tony Blair, *ibid*
[63] pp72-73, line 24, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf

distinctive and observable differences in the conduct of relations between politicians and the press. As Lord Mandelson put it:[64]

> *"Because of the particular and specific public duties of a minister, and the requirement for these to be carried out in a transparent and accountable manner, my strictures would apply more to government than opposition politicians, but not exclusively. And, of course, the circumstances of a minister's job are very different from opposition. The intensely scrutinised fishbowl world of government places incredible demands on the time, energy and focus of those who inhabit it. Ministers have less and less time in the day for policy deliberation and formulation because of media (as well as parliamentary) demands. On the other hand, politicians – ministers in particular – have greater opportunities than ever to communicate directly with electorates."*

3.8 Mr Blair's Government enjoyed a 'honeymoon period' with the press; Mr Campbell summarised the trajectory in this way:[65]

> *"Though the press largely turned against him at various stages of his premiership, and some continue to campaign relentlessly against him even now, we did have a fairly benign media environment for some years, and by the time they turned, most of the public knew him well enough to have a fairly settled view".*

3.9 And, in Lord Mandelson's view:[66]

> *"I think Mr Blair ... rescued and made good Labour's relations with the media. I think he was two or three years into government and they started taking a further dive, and climaxed, in a way when they became their worst at the time of the Iraq War".*

3.10 The personal dimension of the relationship is, again, an interesting one. Mr Blair took the view that, as time wore on, he, and more particularly his family, were often unfairly subjected to personal intrusion and attack. Although the Blairs were friendly with the Rothermeres, he cited the Daily Mail as being, from his perspective, particularly personal in this respect. He said:[67] [68]

> *"The fact is, if you fall out with the controlling element of the [newspaper] ... you are then going to be subject to a huge and sustained attack. The [newspaper] for me – they've attacked me, my family, my children, those people associated with me, day in, day out, not merely when I was in office but subsequent to it as well. So that is – and they do it very well, very effectively, and it's very powerful ... With any of these big media groups, you fall out with them and you watch out, because it is literally relentless and unremitting once that happens and my view is that what creates this situation in which these media people get a power in the system that is unhealthy and which I have felt, throughout my time, uncomfortable with".*

[64] p5, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
[65] pp20-21, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
[66] pp99-100, line 23, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[67] p33, lines 12-25, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[68] Associated Newspapers Ltd has robustly denied these allegations, and Mrs Cherie Blair has submitted further evidence in support of them. The Inquiry is in no position to adjudicate as between them http://www.levesoninquiry.org.uk/wp-content/uploads/2012/11/Witness-Statement-of-Cherie-Blair1.pdf

3.11 In May 1997, the relationship between Mr Blair and Mr Murdoch was not close; they had only met on a handful of occasions and there were references in Mr Campbell's diaries to Mr Blair's ambivalence about such meetings (*"...he felt that there was something unpleasant about newspaper power and influence"*), although he recognised their importance and value.[69] The relationship grew closer although, on Mr Blair's account, did not develop into personal friendship until after 2007 by which time he had left office.[70]

3.12 Lord Mandelson's evidence was along these lines:[71]

> *'It is also arguably the case, however, that personal relationships between Mr Blair, Mr Brown and Rupert Murdoch became closer than was wise in view of the adverse inference drawn from the number of meetings and contacts they had.'*

3.13 Mr Blair did not accept that his relationship with Mr Murdoch was too close in that sense. He spoke more generally of the danger of relationships which were 'unhealthy'; he said:[72]

> *'...but the relationship is one in which you feel this – this pretty intense power and the need to try to deal with that...'*

that is to say by managing rather than confronting it,[73] by building a relationship with Mr Murdoch and others within NI. This entailed meetings and contact in private as well as in an official context.

3.14 Mr Blair's relationship with Rebekah Brooks may well have been warmer, when he was in power, than his relationship with Mr Murdoch. Although Mr Blair was careful to point out that Mrs Brooks was not a key decision maker within the company,[74] he accepted her characterisation of him being 'a constant presence' in her life.[75] Mr Blair also accepted that, after his third election victory in 2005, both Mrs Brooks and Mr Murdoch were a sympathetic pair of ears in an increasingly hostile media landscape.[76] As with Mr Murdoch, Mr Blair said his personal friendship with Mrs Brooks did not really develop until after he left office: as he put it, when free from the constraints of power.[77]

3.15 Both Mr Blair and Mr Campbell emphasised to the Inquiry that, viewed objectively, there were many aspects of the Government's media policies which ran contrary to the interests of NI:[78]

> *'I mean, if you just look at the big policy decisions we took, the biggest in the media sphere is probably the rise of the BBC licence fee. They weren't terribly happy about*

I

[69] Campbell, A, *Diaries Volume One: Prelude to Power 1994-1997*, pp631 and 634 in particular
[70] p23, para 92, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf; p80, lines 1-7, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf. It was in 2010 that Mr Blair became a godfather to one of Mr Murdoch's daughters
[71] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
[72] p4, lines 19-20, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[73] p4, lines 22-23, Tony Blair, *ibid*
[74] p72, lines 2-3, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[75] p74, lines 2-6, Tony Blair, *ibid*
[76] p53, lines 6-8, Tony Blair, *ibid*
[77] p80, lines 3-7, Tony Blair, *ibid*
[78] pp19-20, lines 24- 9, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf

that. Ofcom, I think Mr Murdoch said in his evidence, not terribly happy about that. He tried to take over Manchester United and was blocked. The digital switch, there were differences. ITV, Channel 5 – there were lots of areas where you'd be hard-pressed to say that the Murdochs and the Murdoch businesses were getting a good deal out of the Labour government.'

3.16 Again, although the party changed its policy in relation to the Euro notwithstanding Mr Blair's sympathy in principle with the idea of entering the single currency, the fact that the eventual Government position aligned with Mr Murdoch's is explicable by reference to very many objective factors.

3.17 The perception of influence has, however, been a persistent point of debate. In March 1998, Mr Murdoch confirmed to The Times that he had requested Mr Blair to ask the Italian Prime Minister, Romano Prodi, whether the Italian Government would allow Mr Murdoch to acquire Mediaset, Italy's leading commercial television network. It should be noted that Mr Murdoch's intention was not that Mr Blair seek to persuade his Italian counterpart to waive the bid through, in obvious contravention of EU and domestic law, but rather that Mr Blair ascertain whether it was worth his making a formal bid, given that he was not an Italian or EU national. The acquisition did not in the event proceed.

3.18 Mr Blair confirmed that he did speak to Mr Prodi about Mr Murdoch's proposed acquisition of Mediaset, but that the call had come from Mr Prodi himself and had not been initiated by Mr Blair. He said he had asked about the proposed acquisition, and Mr Prodi had communicated to him that he wanted an Italian purchaser for Mediaset. Mr Blair explained that he would have done the same for anyone with substantial British interests:[79]

"... the call was initiated from Romani Prodi, and basically I ... raised the issue of whether the idea of having someone from the outside come and own part of Mediaset would be resented or not. He gave me an answer and I can't remember how it was relayed back, but I'm sure it was. But my point is that I would have done that for anyone with substantial British interests. I would have done that if another media group had asked me to do it."

3.19 In his evidence, Mr Campbell quoted a contemporaneous No 10 briefing he had given on the issue, and added:[80]

"The call from Prodi was not about [the proposed acquisition] ... It was about something completely different, and Prodi had asked for us not to brief on it... Rupert Murdoch had mentioned this company to the Prime Minister and the Prime Minister, as I recall – we did have a discussion about whether there was anything wrong in him raising it. In the end he didn't raise it until this phone call came along on something else and he mentioned it and Prodi said words to the effect that Murdoch's wasting his time and I don't think it went any further".

3.20 Whether Mr Blair would have telephoned Mr Prodi to intervene on Mr Murdoch's behalf had the latter not telephoned him first on another matter is unclear. In any event, taking full account of the fact that Mr Murdoch was seeking very limited benefit from the intervention,

[79] p94, lines 4-14, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[80] pp27-28, line 5, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf

what may be more important is what can be inferred from the fact that Mr Murdoch was able to ask the Prime Minister to make the enquiry in the first place.[81]

3.21 The war in Iraq was a landmark event in Mr Blair's political fortunes. Some commentators[82] have argued that Mr Blair's decision to go to war in Iraq was influenced by Mr Murdoch's firm and enthusiastic views on the subject. Mr Blair rejected that suggestion:[83]

> *"I disagree completely with Paul Dacre's assertion over Iraq. I had a view about this issue. I was prepared to lose a vote and resign over it. I had taken a position since 9/11 to stand with the US. I strongly believed it was right to remove Saddam Hussein. It is correct I spoke to Rupert Murdoch in the days leading up to the vote. I can't recall at whose instigation. I would have obviously wanted to explain what I was doing and why to the Head of Media Group that was most disposed to support the action; but I had long since made up my mind on it and the notion that I required "lobbying" by him or anyone else is plain wrong. And I have no doubt that the Mail would have attacked me whichever course I took".*

3.22 Mr Blair was asked by the Inquiry about three telephone calls made on 11, 13 and 19 March 2003 in the run up to the Iraq War. He said this:[84]

> *"Look, this is a huge issue, obviously. I mean, my recollection is that I initiated one of those calls. I actually remember only two, but the records show there were three, although I think they were no more than 45 minutes in total for all three. But you know, I would have been wanting to explain what we were doing, and I did this – I think I had similar calls with the Observer and the Telegraph, and indeed I had a lunch later with the Guardian. So you know, I think that's – it's not – I wouldn't say there's anything particularly unusual or odd about that when you're facing such a huge issue.*
>
> *Now none of these calls was particularly long, but they were important... I think with him, probably, I would also have been asking him what the situation was in the US, for example, in Australia, which were also major parts of the coalition. But no, it would not have been about the tone of the coverage. I mean, look, they were supportive of it and that was that".*

3.23 Although Mr Blair did not have a clear recollection of the precise content of these calls (and nor did Mr Murdoch when asked about them), it is interesting that he made time to discuss these issues with a newspaper proprietor speaking from the USA. It is also interesting that Mr Murdoch's 173 newspapers worldwide all supported the war.

3.24 In his evidence to the Inquiry, Mr Blair explained that although he had considered throughout his period of office that, while he had views about press conduct and standards, addressing them was not a priority, by the time he had come to the end of his term as Prime Minister he had concluded that the issue had become far more pressing.[85] On 12 June 2007, approximately two weeks before leaving office, Mr Blair gave a speech on *Public Life* to the Reuters Institute

[81] It may not be an uninteresting parallel that Mr Murdoch felt able to contact Mrs Thatcher, the then Prime Minister, at the time that he was seeking to acquire The Times and The Sunday Times
[82] p117, line 5, Paul Dacre, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Transcript-of-Afternoon-Hearing-6-February-20121.pdf
[83] p8, para 25, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tony-Blair1.pdf
[84] pp50-51, line 13, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf
[85] p14, line 23, Tony Blair, *ibid*

of Journalism, in which he made some trenchant criticisms of the press, famously describing at least sections of the industry as 'feral beasts'.

3.25 He made four specific points:[86]

> *"The media is increasingly and to a dangerous degree driven by 'impact'... First, scandal or controversy beats ordinary reporting hands down. News is rarely news unless it generates heat as much as or more than light. Second, attacking motive is far more potent than attacking judgment. It is not enough for someone to have made an error of judgment. It has to be venal. Conspiratorial ... But misconduct is what has impact. Third, the fear of missing out means today's media, more than ever before, hunts in a pack. In these modes it is like a feral beast, just tearing people and reputations to bits. But no one dares miss out. Fourth, rather than just report news, even if sensational or controversial, the new technique is commentary on the news being as, if not more important, than the news itself".*

3.26 He suggested that the "*relationship between public life and media [was] ... now damaged in a manner which [required] repair*", that "*a way needed to be found*" to ensure that the press remained accountable, and that serious concerns about unbalanced reporting would be addressed in the future. He noted that broadcasting, for example, was regulated by Ofcom.[87]

3.27 The speech was almost universally criticised by the press itself. The Daily Telegraph on 13 June 2007,[88] carried a headline "*Blair's Last Enemy: Freedom of Speech*" above an article which, while accepting that some of the points that Mr Blair had made were valid, considered his call for reform would "*impair freedom of speech and the liberties of the subject*...[and] *eventually make them obedient to the government of the day*", and concluded that "*... we do find his argument deeply disturbing, founded on false premises and worthy of the strongest refutation*".[89]

3.28 A Mail Online article of the same date was headlined "*The Magnificent Self-Delusion of Mr Blair*".[90] It also rejected the idea of statutory regulation, describing such thoughts as "*decidedly sinister*" and suggested that it was odd for Mr Blair to 'attack' the press in this way, as he had "*enjoyed for most of his years as Prime Minister a more approving and more docile press than any British leader in living memory*". It went on to assert that "*for the most part, the media acted like a great sloppy Labrador which repeatedly bestowed its affections on Mr Blair*".[91]

3.29 A Guardian leader of 13 June 2007 was headed "*Right Sermon, Wrong Preacher*".[92] It considered the speech to be a *"heartfelt homily"* which "*deserved a serious response*", but noted that "*it is pretty rich to be lectured on such matters by this prime minister who, more than any other, has marginalised parliament through a combination of sofa government, selective leaking and sophisticated media manipulation*". The article concluded:[93]

[86] *ibid*
[87] *ibid*
[88] The Telegraph, 13 June 2007, http://www.telegraph.co.uk/comment/telegraph-view/3640592/Blairs-last-enemy-freedom-of-speech.html
[89] *ibid*
[90] Stephen Glover, 13 June 2007, http://www.dailymail.co.uk/news/article-461603/The-magnificent-self-delusion-Mr-Blair.html
[91] *ibid*
[92] The Guardian, 13 June 2007, http://www.guardian.co.uk/commentisfree/2007/jun/13/media.pressandpublishing
[93] *ibid*

> *"It has been a consistent pattern – witness terror briefings to the Sunday newspapers. Truly, he helped feed the animal he now wants to chain".*

3.30 Mr Campbell confirmed that the issue of addressing press standards had been discussed in 2002 and 2003 but not pursued.[94] In an article in the Guardian published in July 2011,[95] Lord Mandelson reflected that '*we were cowed from reforming the media*'.

4. Prime Minister Brown: 2007 – 2010

4.1 The Rt Hon Gordon Brown MP was Prime Minister between 27 June 2007 and 11 May 2010. Mr Brown was asked to comment on the strategy New Labour adopted in the mid-1990s; he said:[96]

> *"My efforts were to persuade every media group that what we were doing was serious. Look, we were trying to rebuild the National Health Service, improve our education system, get more police onto the street, legislate for freedom of information. We had agendas on civil liberties, on issues like gay partnerships. All these issues, you needed to have an understanding, at least, on the part of the media, and you needed to talk to them. As for any particular media group, I don't think I was involved in any sort of way that I would feel uncomfortable about now with any particular media group at all."*

4.2 Mr Brown said that he had few dealings with Rupert Murdoch at this stage, and by implication that close engagement with the press was left to others.[97] He also stated that he had no involvement in what he called the 'particular issue' of winning the support of The Sun in March 1997.[98]

4.3 Mr Brown said that he had intended from the start of his premiership to set a new tone in the Government's relationship with the press. He explained that he was concerned to ensure fair access to Government, including by meeting regularly with all media groups without giving preferential treatment to anyone.

4.4 Mr Brown's evidence, however, was that he faced a hostile press almost from the very outset, and that the hostility came to be of a very personal nature. Lord Mandelson said:[99]

> *"Mr. Brown comes in and he has good, rather easy relations with the media. It didn't last, as we know. It took a very significant dive".*

4.5 Mr Brown described his initial approach:[100]

> *"When I came in in 2007, we had no mandate in our manifesto to propose reform of the media. I did want to make a change, and I did try to move away from what I*

[94] p45, lines 2-8, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[95] http://www.guardian.co.uk/profile/petermandelson
[96] pp48-49, lines 24-11, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[97] pp45-49, *passim*, Gordon Brown, *ibid*
[98] p51, line 9, Gordon Brown, *ibid*
[99] p100, lines 2-5, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[100] pp21-23, lines 22-12, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

thought was the excessive dominance of what is called the lobby system, and what really has led to these allegations of spin … I tried to move away from that.

One, we moved away from having a political chief of communications to having a civil servant doing the job. That was to send a message that we were not trying to politicise government information; we were trying to give the information that was necessary for the public to understand what was happening.

We then tried to move back to a system where announcements were made in Parliament. They were not pre-briefed, they were made in Parliament, and therefore that moved away from a system where, to be honest, there were a selected group of people who previously could expect to get early access to information, and I think that's been a problem with the way the media system has worked, but I'm afraid it was wholly unsuccessful, and I see that the current government have moved back to having a political appointee … and the lobby system remains intact. It's not the lobby system per se that's the problem, it's this small group of insiders who get the benefit of early access to information, and I think that is one of the problems that prevents the greater openness that we have to see.

… The changes that eventually we tried to make we didn't make successfully I'm afraid because there was a huge resistance to them, and to be honest, if you announce something in Parliament or announced it in a speech, it was not being reported. Unless it had been given as an exclusive to a newspaper, they tended to put in on page 6, rather than page 1."

4.6 In relation to changes to the lobby system, Mr Boulton commented:[101]

"... Under the Brown and Cameron governments there has been a concerted attempt by press colleagues to use the Lobby system to constrain their competitors in the electronic media by imposing artificial embargos on information given in order to benefit print deadlines. This practice is particularly irksome on foreign trips in different time zones and has resulted in several calls to ban Sky News for allegedly breaking the rules. Downing Street habitually takes the side of print on the pathetic ground that 'we've got to give the hacks something to justify the cost of the trip.'"

4.7 In June 2007 the personal relationship between Mr Brown and Mr Murdoch was said to be close, and appears to have become so over the preceding years. However, by September 2009 it had cooled, associated with a shift in political support in The Sun. As Lord Mandelson explained:[102]

"Q: You presumably detected that shift in support, which was gradual, from Mr. Brown to Mr. Cameron; is that right?

A: Yes. That was during 2009. Yes, during the course of that year.

Q: Had you seen signs of it the previous year in 2008?

A: It was hard not to get Rebekah Wade, or Brooks, as she became, to wax eloquent about the inequities of Gordon Brown and the so-called coup against Tony Blair. She had strong views. I remember on one occasion ... she tipped into this great tirade against Gordon and these others who had brought Tony down and whatever, and

[101] pp9-10, paras 45-46, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Boulton.pdf

[102] p67, lines 1-14, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

Mr. Murdoch said 'For goodness sake Rebekah, can't you let history be history? Let bygones be bygones. Let's not go into that anymore.'"

4.8 Lord Mandelson's focus was on the personalities involved, but Mr Brown chose to emphasise what he called NI's public agenda:[103]

"News International had a public agenda. What's remarkable about what happened in the period of 2009 and 2010 is that News International moved away from being – I think it was under James Murdoch's influence, not so much Rupert Murdoch's influence, if I may say so – to having an aggressive public agenda ... I don't think I had a conversation with Mrs. Brooks in the last – I think I had one conversation in the last nine months of our government. It became very clear in the summer of 2009, when Mr. Murdoch junior gave the MacTaggart lecture, that News International had a highly politicised agenda for changes that were in the media policy of this country, and there seemed to me to be very little point in talking to them about this".

4.9 In terms of his personal relationship with Mr Brown, Mr Murdoch expressed the matter in this way:[104]

"I felt a personal connection with Gordon Brown. He is Scottish, as was my grandfather, and we spent time discussing the fact that we are both descended from a long line of Presbyterian ministers. He gave me a lovely gift, a book of his father's sermons. My wife and his also developed a friendship, and my children and his played together... I certainly thought we had a warm personal relationship.

...

My personal feelings about Mr. Brown did not change my view that, just as I had earlier concluded that the Conservative Party had grown tired in its approach in 1995, I concluded in 2010 after 13 years of Labour Party rule the country needed a change. I am afraid that my personal relationship with Mr. Brown suffered after The Sun no longer supported him politically. I continue to hold him in high personal esteem."

4.10 Mr Brown's evidence was as follows:[105]

"Q: Mr. Murdoch himself describes a warm relationship he had with you. Is this a fair characterisation?

A: Yeah, I think the similar background made it interesting because I think I understood where many of his views came from, and I do also think he's been, as I said ... a very successful businessman, and his ability to build up a newspaper and media empire, not just in Australia but in two other continents, in America and Europe, is something that is not going to be surpassed easily by any other individual. But I think you have to distinguish again between the views that you have about him as an individual and the red line that I would draw, the line in the sand I talked about, between that and any support for commercial interests ..."

Q: Were you not concerned at ... the signs of The Sun moving away from you to support the Tory Party?

[103] pp37-39, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[104] p25, paras 101 and 104, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[105] pp46-52, lines 16-10, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

A: I think that happened from the time I became Prime Minister. I'll be honest. I think they had severe reservations that were expressed in the European campaign, the Broken Britain campaign, their Afghanistan campaign, and I think, as I said, also there was a new agenda that Mr. James Murdoch was promoting about the future of the media policy in Britain. So I was not surprised at all when The Sun – I was perhaps surprised about the way they did it ... but the act of deciding to go with the Conservatives, I think, had been planned over many, many months."

4.11 On a personal level, Mr Brown was also quite close to Mrs Brooks and his wife, Sarah, was described as a good friend. In the context of coverage of his son's medical condition, which is considered above,[106] Mrs Brooks explained:[107]

"You have to remember that the – this is 2006. This is only five years later that Mr Brown had ever said anything – that he was in any way concerned about my behaviour, the behaviour of the Sun, how we handled it. Indeed, after 2006, I continued to see them both regularly. They held a 40th birthday celebration party for me. They attended my wedding. I have many letters and kind notes. Sarah and I were good friends..."

4.12 Neither Mr Brown nor Mr Murdoch accepted that their relationship had been 'too close' during Mr Brown's time as Prime Minister, nor that NI had provided support for Mr Brown or his Government in its newspapers on the express or implied basis that the company's commercial interests would be safeguarded or wider political agendas espoused. Asked about this, and whether there could even have been legitimate concerns about perception, Mr Brown told the Inquiry:[108]

"No, because the implication is that I would be influenced by Mr. Murdoch was saying about these big issues. I mean, I thought that it was wrong to join the euro ... but I didn't agree with him on most of these other issues, and the idea that Mr. Murdoch and I had a common bond in policy is, I'm afraid, not correct. Mr. Murdoch was probably more on the flat tax school of policy than in the school of policy that was identified with what we were doing.

...

I have never asked a newspaper for their support directly and I've never complained when they haven't given us their support. I don't think you should be dependent on people by begging them to support you in this way, and perhaps it's a failing on my part that I never asked them directly, but I never asked them directly and I never complained to them directly when they withdrew support from the Labour Party".

4.13 The issue of the so-called 'pyjama party' held at Chequers to mark Mrs Murdoch's fortieth birthday has, however, been cited as evidence of a legitimate cause of concern about the blurring of relationship boundaries between the personal and the conduct of public affairs. Commentators such as Mr Boulton spoke of this in extremely critical terms:[109]

"Well, I think you can be blamed with hindsight if a lot of people think it looks wrong, and – you know, the famous Wendi Deng pyjama party, for example. I remember

[106] Part F, Chapter 5
[107] p43, lines 2-9, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-11-May-2012.pdf
[108] p47, lines 11-21, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[109] p88, lines 9-20, Adam Boulton, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-15-May-2012.pdf

a then member of the cabinet telling me about that at the time and I just thought: "This is completely bonkers that this sort of intimacy is being indulged in between the Prime Minister and the Prime Minister's wife and a senior proprietor's wife", and I thought at the time, you know, it will end in tears. But we all find ourselves in social circumstances or awkward social circumstances which we perhaps have been recruited for, which we didn't seek out but we've ended up in."

4.14 Mr Brown described himself as having been unfairly and personally hurt by an attack in The Sun following the publication of a handwritten letter he had sent to the mother of a soldier killed in Afghanistan. Email correspondence between Mr Brown and Mr Murdoch ensued,[110] following a telephone conversation which took place on or about 10 November 2009.[111]

4.15 A number of commentators have suggested that Mr Brown had enjoyed a close relationship with Daily Mail editor Paul Dacre and that, although their political perspectives differed, they shared similar values. About that he said this:[112]

"A. I didn't see Mr Dacre that much, as you can see from the records. Mr Dacre and I disagreed about many things on politics. I think he, like me, believes that there should be an ethical basis for any political system and that that is an issue that is not properly addressed both in our media and in our politics, so there is sort of common ground on that, even though we may disagree about what that means in practice. He was personally very kind, as Rupert Murdoch could be personally very kind, when we had difficulties with our child, our first child, and I have not forgotten that. But to be honest, I got no support from the Daily Mail. The Daily Mail was totally against the Labour Party, and when it came to the election, you may see that I had a meeting with Lord Rothermere, as I talked to Paul Dacre, and I said, "Look, you're entering a situation where you have a party that's got a relationship with the Murdoch empire and their commercial interests and you should be very wary of it", and I did warn them that that was one of the problems that was going to happen.

Q. Some have said, including Mr Alastair Campbell, that the Daily Mail was less hostile to you personally when you were chancellor, owing in part to your position on the euro. Do you think that's a fair comment or not?

A. I don't know whether it was. Look, one of the huge dividing lines in British politics over the past 10 years has been the euro. Most of the newspapers, of course, were against it. I was in a minority within our government for a very long period of time of being sceptical about the euro. My colleague, Ed Balls, who was the economic adviser to the Treasury at the time and was later a Member of Parliament, did this enormous amount of work that proved to my satisfaction that the euro couldn't work, but it was a hugely divisive issue. But if the Daily Mail supported the objections that I had to the euro, then that's absolutely understandable, but I'm afraid to say on just about every other issue they were wholly against us and they wanted to see a Conservative government, as you know."

4.16 In his oral evidence Lord Mandelson explained his perspective in this way:[113]

[110] pp2-3, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-GB-1A1.pdf; pp2-3, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-GB-1B1.pdf
[111] pp1-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-GB6-to-Witness-Statement-of-Gordon-Brown-MP-Black.pdf
[112] pp70-71, lines 3-18, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[113] pp63-64, lines 1-19, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

"Q: Did he become an ally of Mr. Dacre or vice versa?

A: He was, much to our astonishment, incredibly close to Mr. Dacre. I'm not saying that it's wrong to be a friend of Mr. Dacre; I too sometimes enjoyed Mr. Dacre's company. I enjoyed his company more than his treatment of me in his newspapers. But he – Gordon and Paul Dacre had a great friendship and I remember Paul Dacre describing to me the virtues of Mr. Brown in contrast to Mr. Blair in fairly graphic terms. And that continued, actually. Even when Gordon, as Prime Minister was, you know, having a really tough time, you know, following the financial crash and what happened to our economy as a result of the financial crash, and the Mail and the Mail on Sunday would be laying into the Labour government left, right and centre, there was always an element, an element, of laying off Mr. Brown and so I think that friendship continued.

Q: Did that friendship, in your view, have any influence on Mr. Brown's political and policy thinking, particularly in the context of Europe?

A: I think Mr. Dacre's influence in their friendship would have accentuated his cooling on Europe and the single currency, but that was by no means the only influence. A far greater influence would have been his economic adviser and minister throughout the period, Ed Balls...

Q: Do you think Mr. Brown had an eye on the Daily Mail, Mr. Dacre's view, in terms of policies for which he was responsible?

A: As Prime Minister, he was responsible, in a sense, for all policies. I'm not sure. In mean, the only thing I can vaguely remember was something to do with data protection. There was an issue to do with data protection."

4.17 Mr Brown was asked a number of questions about alleged anonymous briefings to journalists which it was put to him were in fact given by Charles Whelan and Damian McBride, who worked for him as his special advisors, the former until 1999 and the latter until April 2009. Mr Brown denied that they gave any such briefings, or that if they did so it was without his knowledge or sanction.[114]

4.18 Many political commentators have expressed surprise at this evidence. The current Leader of the Opposition has said that the reason Mr Whelan left his position was 'because of the style of his operation', and that he had raised a specific concern with Mr Brown about some of Mr McBride's activities.[115]

5. Political news management

Background

"The truth becomes almost impossible to communicate because total frankness relayed in the shorthand of the mass media becomes simply a weapon in the hands of opponents."[116]

[114] pp85-88, *passim*, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[115] p31, lines 1-11, Ed Miliband, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
[116] The Rt Hon Tony Blair cited in Oborne, P, *The Rise of Political Lying*, (2005), p1

5.1 A thread running through a quantity of the evidence to the Inquiry about the relationship between politicians and the press was the issue of the extent to which politicians attempted to affect (or, put less neutrally, to manipulate) press coverage in their favour, not this time at the level of personal interactions or potential interchanges of influence, but simply by seeking to control what information is released about their thoughts and plans, when, how and to whom.

5.2 This is an issue of interest to the Inquiry, first because it offers the prospect of insight into the dynamics of the relationship and, in particular, where power lies. To the extent that a politician can control the news agenda he or she is in a position of relative dominance in the relationship. It is also of wider interest from the viewpoint of the general public interest because it has a potential to affect the clarity with which the public can understand what is going on and the ability of political journalists to do their job of promoting free debate and holding power to account. It has a potential to have results which are partial, misleading, distorted or placed out of context. On the other hand, it also has the opposite potential, namely to counteract whatever tendencies might exist in the press to drive the political agenda, if not public opinion, in any particular direction.

5.3 It is an issue which is accordingly very hard to deal with objectively. It largely comes down to a matter of standpoint. It is therefore dealt with relatively briefly in this Report. I have nevertheless concluded that there are some interesting patterns which can be picked out, and perhaps one or two lessons which can be drawn.

5.4 The issue probably owes its contemporary prominence to the critique of 'spin' associated with the news management techniques of Lord Mandelson and Mr Campbell.[117] Both, when invited by the Inquiry to do so, painted a picture instead of a need to counteract unfair press hostility.

5.5 Mr Campbell's role was certainly one that trod new ground in the history of relations between politicians in Government and the press. Some commentators described it as a wholly different approach to the imparting and presentation of information from Government. Others take a longer view. The Rt Hon Michael Gove MP was able to remind the Inquiry of historical parallels with the Roman Republic.[118] Lord Mandelson suggested that the first 'spin doctor' was appointed by Clement Atlee, and that Baroness Thatcher's press spokesman when she was Prime Minister, Sir Bernard Ingham, was as high profile and controversial as Mr Campbell.[119]

5.6 Sir John Major provided the Inquiry with an illuminating perspective on these issues:[120]

> *"Now, we've had political spin forever. Every politician since the dawn of time will put a gloss on something to ensure that it is presented in the best possible light. We've all done it. Everyone does that. But I think there is a distinction between a gloss and a deliberate attempt to deceive in the way in which the news is presented, and my concern was that once you move towards the politicisation of the government information services, which is what it was, you did move into a sphere where the*

[117] p48 lines 7-18, Kenneth Clarke, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
[118] p8, lines 12-14, Michael Gove, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf
[119] p8, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Mandelson.pdf
[120] pp19-20, lines 12-13, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

news could be perverted rather than presented accurately and without spin to the media at large.

I think you also saw some other things which journalists are better able to talk about than I, but that they've certainly mentioned to me: people being given stories when other people weren't and presenting them with a particular tilt, so that when the story hit the public news, immediately it had a favourable tilt for the government rather than a neutral or perhaps even a deservedly unfavourable tilt. A whole range of things like that, which I'm sure this Inquiry has heard about, so I won't tediously run through them all. But in short, I think the straightforward, clear cut certainty of an honest presentation of policy from the information service that was there when you had civil servants presenting it on behalf of the government was lost when you moved to a political information service.

The New Labour perspective

5.7 As indicated above, on 27 July 1994, Mr Blair appointed Mr Campbell to be his press spokesman and jointly responsible with Lord Mandelson for election strategy.[121] It was put to Mr Campbell that Mr Blair's memoirs had referred in terms to the value of appointing a tabloid editor,[122] an assessment which he only partly accepted:[123]

"No, what he said to me when [he] finally approached me was that he wanted somebody that was strategic, that understood the press and that would be able to do the job that he wanted done. So I don't recall it being particularly he wanted somebody who was from the tabloids, but he wanted somebody that kind of knew that world."

5.8 Mr Blair's own perspective was as follows:[124]

"I cannot believe we are the first and only government that has ever wanted to put the best possible gloss on what you're doing. I would be surprised if governments hadn't done that throughout the ages. That is a completely different thing from saying that you go out to say that things that are deliberately untrue or you bully or harass journalists and so on. I read a lot of things we are supposed to have done. I actually dispute we did those things, very, very strongly. My view is this: I totally understand why there's a kind of symmetry in being able to say, "Oh, well, the government was spinning and so the media had to react to that". In my view – but you can take a different one – that's not what happened.

I mean, the truth is, in 1992 Alastair Campbell wasn't heard of. If you look at the way that election was covered – and by the time I took over the leadership of the Labour Party, we'd lost four elections in a row. We'd actually never won two consecutive full elections in our history. The longest we'd ever been in power was six years at one go. So – I went through that election. I remember it. It was etched on my memory and yes, I was absolutely determined that we should not be subject to the same onslaught."

[121] Campbell, A, *Diaries Volume One: Prelude to Power 1994-1997*, p45.
[122] Blair, T, *The Journey,* p75
[123] p2, lines 3-9, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[124] pp8-9, lines 7-6, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

5.9 Lord Mandelson was asked directly about his news management strategy and the label of 'spin'. His explanation was as follows:[125]

> *"I think 'spin' is a derogatory term. I mean, what we determined to do, really from the time that Tony Blair became leader of the Labour Party in 1994, was to speak as far as possible with a consistent voice, and to – perhaps to go back to your earlier question, to try to ensure that the media understood what it was that we were trying to achieve. So yes, I mean, there was more discipline about what we said, how we said it, who we said it to, than there certainly had been through the many years of Labour in opposition.*
>
> *Q: Did it lead to a breakdown of trust between the public on the one hand and the politicians on the other?*
>
> *A: I don't think it was – I don't think it was that that led to a breakdown of trust in the public. I do think that we were always too reliant on the support of newspapers, and I think that in the context of everything I've said earlier ... our expectations were too high of the degree to which the government's story could be conveyed through the newspapers."*

5.10 Mr Campbell's personal, retrospective evaluation was that the critique of 'spin' was itself a symptom of the problem which he thought he faced, and that suggestions that the quality of public discourse was corroded were rarely supported by evidence:[126]

> *"I can remember, for example, one briefing where, at the end of yet another frenzy and journalists accusing me of lying and the politicians then getting roped in saying I should resign – I can remember saying to all the journalists there in the room: "Right, come on, just say what the lie is and then provide any evidence whatsoever". And they never could! So just – that in itself is a form of spin. You sent me Peter Oborne's essay that he did for the British Journalism Review. "Most lobby journalists [he said] have been deliberately misled or lied to by Downing Street". Followed by zero evidence whatsoever. "New Labour's culture of deception or manipulation of statistics, secretive smear campaigns...." No evidence whatsoever."*

5.11 Mr Campbell was also asked about Lord Mandelson's views:[127]

> *"Q: Lord Mandelson, one of his concluding observations – ...*
>
> *"There was a great emphasis on managing the media at the expense of managing policy. There was a sense that if you'd got the story right, you'd achieved something and that's not how government is." Do you think there's any validity in that comment?*
>
> *A: No. I think the policy process was always taken more seriously, but I think we all spent far too much time focussed on – and I speak as the guy who was in charge if this. The politicians spent way too much time worrying about this stuff."*

[125] pp76-77, lines 2-4, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[126] pp79-80, line 15-7, Alastair Campbell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-14-May-2012.pdf
[127] pp81-82, lines 25-14, Alastair Campbell, *ibid*

5.12 Interestingly, there are perhaps echoes of this in Mr Cameron's public statements in April 2012 about wider failings in politics: the concentration on presentation over the content of the message itself.[128]

5.13 Mr Blair's evidence was along similar lines. He accepted that there were problems in the carrying over of the techniques of Opposition into Government. He also accepted that Mr Campbell was somewhat of a 'combative figure'. Asked about whether there had in fact been bullying or intimidating of journalists, or alternatively the favouring of certain journalists, Mr Blair stated:[129]

> *"If you take someone like Andrew Marr, who is a very good journalist, I would be astonished if he felt that he'd been bullied or intimidated. If he did feel that, then I'm sorry about it, and I certainly wouldn't have known about it. .... But I suspect he is feeding back this thing that has grown up. You know – and also, some of these issues are different. For example, there will always be an interaction with the newspapers. If you're going to launch a major campaign, and let's say there's a particular newspaper that's been interested in this type of campaign – let's say you were going to do a big thing on anti-social behaviour. It would make sense to talk to the Mirror, the Sun, maybe, about that. We probably, in the later part, would have hesitated before talking to some of the papers that were utterly hostile for fear of the fact that you would simply have the story distorted in some way, so maybe that gives rise to that.*
>
> *Briefing against people – I just want to make this clear: I couldn't abide that. If I ever thought anyone was doing it, I would be absolutely down on them like a ton of bricks. I remember, for example, stories – I remember there were a lot of prominent stories at a certain point in time in relation to the late Mo Mowlam, and how I was very angry because she got a standing ovation at a party conference and we were briefing against her ... It was completely untrue.*
>
> *...*
>
> *Q: I think the thesis being advanced is that the masters of the dark arts, whether they be Lord Mandelson or Alastair Campbell, tended to pick on junior reporters or producers... and let off people like Mr. Marr himself.*
>
> *A: No, that's my point, really, that in the end they receive this as sort of second-hand – look, I have no doubt that we used to complain strongly if we thought that stories were wrong. You know, I think that's perfectly legitimate. But I always felt – and I'm probably not the right person to be objective about this at all – but I always felt that their actual pushback against us was because for the first time, the Labour Party ran a really effective media operation, where we were able – and also, by the way, we were in circumstances where, for the first time politically, the Labour Party was able to go on and win successive elections. As I said earlier, we'd never won two successive first terms, never mind three, and I felt you had to have a strong media operation, but I completely dispute that it was part of that to go and brief against ministers".*

5.14 Towards the end of his evidence was this interesting series of answers from Mr Blair:[130]

[128] Andrew Marr show, 29 April 2012, http://www.guardian.co.uk/politics/2012/apr/29/david-cameron-commons-jeremy-hunt
[129] pp18-21, lines 22-16, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-28-May-2012.pdf
[130] pp23-25, lines 3-10, Tony Blair, *ibid*

"Q. If, as I think you are not, you are not accepting even a kernel of truth in a thesis which may be exaggerated, how is it that this mythology has built up around you that people like Lord Mandelson, Mr Campbell, at your instigation, were the masters of these so-called dark arts?

A. It's got to the point where I almost hesitate to dispute it with you, because I know these people just say, "Oh, how dare he dispute the fact that actually they were out using black arts and briefing against this person and that person?" The fact is, you know, I never authorised or said to someone: "Go out and brief against" – I hate that type of stuff. It's the lowest form of politics. It's just a complete diversion from everything that is important. Now, I don't doubt, by the way – look, in any system you will have people that will say things or do things or brief things that they shouldn't be doing, but I simply say to you my view is that the – what I think a part of the media felt – and this is the odd thing, and I used to comment on this sometimes – is that to the outside world, when you're Prime Minister, you seem as if you're all powerful, and for that first period of our time in government, it looked as if we were carrying in everything. You know, the opposition were very poor, we didn't just win one landslide, we then went on to win two, and I think part of the media frankly felt we were far too powerful, we had to be taken on and curbed and so on. But, you know, in relation to this stuff with black arts, look, I don't – I don't know whether Peter was doing it or Alastair was doing it, but if they – all I know is that my interactions with them, we were aware that you start doing all that stuff, all it does is blow back on you. I'm a real believer in this regard that what goes around comes around. So for me, the important thing was to have a strong effective media operation. I think that what Alastair produced for us in Downing Street was that, but I think it was a perfectly proper media operation.

Q. I'm really coming back to the point about the draining of the poison, and perhaps who is responsible for the implantation of the poison. If one focuses too much on the press, it might be said that one is arguably missing the wrong target. How about this as a possibility: we might have now a poisonous state of affairs which is a contribution really of both sides to this equation – the press on the one hand, the political classes on the other – and accidentally or unwittingly, they've created something which has grown beyond either of their contributions. Is that a possible analysis?

A. Look, it's certainly a possible analysis, and I'm not saying we don't bear any responsibility for this situation – don't misunderstand me – as a political class, but I think if I'm frank about it, the primary responsibility is not having confronted it and dealt with it."

5.15 Mr Brown offered this perspective on his personal approach:[131]

"I did want to make a change, and I did try to move away from what I thought was the excessive dominance of what is called the lobby system, and what really has led to those allegations of spin – by the way, spin assumes that you got success in getting your message across, even if it's superficial and I don't think anybody could accuse me of having a great success in getting my message across. But I tried to move away from that.

One, we moved away from having a political chief of communications to having a civil servant doing the job. That was to send the message that we were not trying to

[131] pp21-22, lines 23-12, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

politicise government information; we were trying to give the information that was necessary for the public to understand what was happening".

5.16 Mr Brown did suggest that there had been risks to the public interest in New Labour's approach to news management. Asked if there were any lessons to be learnt from the period 1997 to 2010, he indicated:[132]

"Yes. We should have ... changed the system where people relied on exclusive briefings and had a far more transparent system of addressing the country through the press than we have even today, and I obviously have to take some responsibility for this ... So yes, there needed to be more openness. We inherited a system which was based on, if you like, exclusivity. It was also based on insiders winning over outsiders, so a lot of people were excluded from that system".

5.17 From one standpoint, then, the priority of the politicians learning the lessons administered to them by the press in the 'wilderness years' of the 1980s and early 1990s was both to persuade the press that they had nothing to fear from a change of Government and to reach the public in a less adversely mediated way. From another standpoint, this was at the expense of a breakdown of public trust engineered by political self-interest. For politicians trying to manage the agenda, it was about getting a fair hearing; for journalists resisting the management of the agenda, it was about manipulation and favouritism. Neither standpoint is neutral or objective. In the relationship between press and politician, in circumstances where political positions are not aligned there is a contest of wits (or megaphones) in which each viewpoint seeks to outmanoeuvre the other in a contest to dominate the public debate. Sometimes that can benefit and enrich the public debate and a balanced perspective can emerge. Sometimes it can have the opposite effect: the public is so overwhelmed by the messages delivered by competing megaphones, it does not have the chance to sort the wheat from the chaff or to discern the true kernel of the issue.

5.18 If New Labour did not invent 'spin', it nevertheless found itself in an unprecedented place in relation to news management as an agenda item in its own right. On the one hand, its election-winning strategy in 1997 explicitly had in mind the lessons to be learned from the recent past. On the other, there is an obvious question about the extent to which a media strategy of 'neutralising' those sections of the press which had been hostile to the party in the 1980s and in the run-up to the 1992 general election became a victim of its own success, and resulted in diminishing public confidence in political communications.

The perspective of journalists and commentators

5.19 Andrew Marr offered this overview in his book "*My Trade*", from his long perspective of political journalism in the print media and more recently working for the BBC:[133]

"... As trust crumbled, so did reporters' willingness to defer to the government. Tales of how New Labour had bullied junior reporters or producers spread through the warren of press gallery offices and between broadcasters' headquarters. The backlash was slow, but it came. By the end of Blair's first two years, it was a badge of honour to be 'bollocked' by Campbell or Mandelson, and to shout back just as loudly. The persistent attempts to dictate what should appear on a front page, or at the top of a running order, became infuriating and hardened journalistic hearts.

[132] p97, lines 2-24, Gordon Brown, *ibid*
[133] Marr, A, *My Trade: A Short History of British Journalism,* pp 160-161

Even before the 1997 election it was obvious that Labour had spies tipping it off about running orders, script lines and correspondents being used for news programmes and was attempting to ambush them before they went on air to get more favourable coverage. In lobby meetings, Alastair Campbell and others would single out and ridicule the correspondents of editorially hostile newspapers ... Favoured reporters were given special treatment, just as their editors were made much of in Downing Street and invited to weekends at Chequers.

But political correspondents have a certain esprit de corps alongside their professional rivalry, and the cynical way in which some were favoured because they worked for Rupert Murdoch, while others were sneered at because they worked for Conrad Black, disgusted many who worked for neither."

5.20 In oral evidence to the Inquiry, Mr Marr was asked to expand on this final paragraph. He said this:[134]

"I think that a decision was taken that it was very important to keep the Murdoch papers, so far as was possible – it wasn't always possible – on side and to have a close relationship with their leading journalists and their leading reporters. They were inside of the tent, if you like, as were some Labour friendly newspapers too, while papers like the Daily Telegraph were indeed kept at arm's length, made to feel unwelcome. From time to time their correspondents like George Owens [sic] would be mocked during lobby briefings. There was very much an attempt, I felt, to divide this core – this group of journalists into the favoured ones, the ones who were sort of part of the project, almost, and the ones who were off in the wilderness."

5.21 Peter Oborne, chief political commentator at the Daily Telegraph, also commented on this issue from his own perspective. He observed as follows:[135]

"Q: I'm going to read the opening quotation of chapter 7 of your book ... The Quotation is from Robert Shrimsley, who is the news editor of the Financial Times, and it reads: "When I joined the lobby in 1992, I would abandon a story if Number 10 denied it. By the time I left, I sometimes felt justified in merely recording the denial at the bottom."

A: Yes.

Q: How accurate a summary is that of the change in government communications during that period?

A: I completely agree with Mr. Shrimpley[136] ... I felt that what was true – I think what we had when New Labour emerged in power in 1997 was really a – what I'd call a new epistemology, which was that truth was really seen as something which served the purposes of government or the party in power. It wasn't – the rigorously testable, empirical truth was of no interest – of a kind which would be of interest to this Inquiry – was not of interest to New Labour spokesmen. They were interested in the truth as it served their political purposes, and so that was a different definition of truth. That, I think, is what Mr. Shrimpley[137] is referring to there that denials or assertions became really an instrument of government rather than an instrument of telling the truth."

[134] pp64-65, lines 23-12, Andrew Marr, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf
[135] pp6-7, lines 17-19, Peter Oborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-17-May-2012.pdf
[136] this is an error in the transcript; this should read Mr Shrimsley
[137] as above

5.22 Simon Walters is the political editor of the Mail on Sunday, a position which he has held since 1999. He has been a journalist since 1974 and a member of the lobby since 1983. In his written evidence, Mr Walters noted that: [138]

> *"During Mr. Blair's government, much energy was devoted to ensuring all departments were 'on message' – repeating the Downing Street line on any given issue. From the point of view of the Government, this greater degree of political control makes sense. But it can be argued that this is not in the public interest or that of the media. For example, if Number 10 is trying to cover up a politically embarrassing story, it is easier to do so if there is central control over the entire Whitehall media machine".*

Reflections

5.23 This Chapter has focused on aspects of news management during the 13 years of the New Labour: insofar as it has become relevant to the Conservative Party and the Coalition, this will be analysed in the course of Chapter 4. But precisely because more than one view is possible about the advantages and risks of news management techniques, particular care must be exercised to ensure that the message – an encapsulation of the facts and policies which politicians of whichever party wish to share with the public – is not lost in distractions about the packaging.

5.24 Once again, the substantive issues which remain are to do with public perception. If the public do not have confidence in the politicians to provide a straight message even, where necessary, warts and all and the public do not have confidence in the press to provide a fair (although not necessarily balanced or impartial) account, everybody in our democracy loses. Holding power to account can be partisan, but if the public detect that it is not fair, one way or the other, the consequent loss of faith will damage both politicians and the press. Furthermore, if 'favoured' relationships and the transaction of exclusives play a prominent role in the presentation of issues or, on the other side, simple error is always portrayed as venal, corrupt or wanting in integrity, public trust will be lost and the currency of public debate devalued.

[138] p4, paras 21-22, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Simon-Walters.pdf

CHAPTER 4
THE CONSERVATIVE REVIVAL AND THE COALITION[1]

1. Introduction and background

1.1 In common with a number of politicians of his generation, the Rt Hon David Cameron MP has spent most of his adult life in politics. He began his political career working for the Conservative Party Research Department, before becoming a general political SpAd, first to Norman Lamont at the Treasury (1992-1993) and then later to Michael Howard at the Home Office (1993-1994).[2] During this period he witnessed first-hand the national press' treatment of both Lord Kinnock and Sir John Major. He also forged numerous professional relationships with political journalists:[3] *"…probably in terms of political journalists I got to know, I would have said that was more related to the time when I was a special adviser, because I was dealing with political journalists then and some of them are still around today."* In some cases, these became personal friendships.[4]

1.2 The working life of Mr Cameron which was beyond politics was spent in the media. Between 1994 and 2001 he worked for Carlton Communications Plc (Carlton). There, his role involved public affairs, Government relations, investor relations and communicating with the financial press.[5] By his own account this was a period formative of his views on media policy and, in particular, about television:[6]

> *"I would say my time at Carlton probably taught me more about the television industry, about how it was regulated, and maybe we'll come on to this, a lot of the views I formed about media, media policy, media regulation, the BBC – Carlton was quite a formative period because I was working for a big part of the British broadcasting industry, ITV effectively, and I formed a lot of views and opinions there which I still hold today".*

1.3 Mr Cameron retained his interest in politics whilst at Carlton and was elected to Parliament as the member for Witney on 7 June 2001.[7] This was the period of New Labour's potent new media strategy. His close political ally and near contemporary, George Osborne, put it this way: *"…we came of political age – myself, David Cameron and others –during that political*

I

[1] On the basis that current relationships between the press and the Prime Minister have been the subject of considerable recent interest – and have each been ventilated at length during the course of the Inquiry – this section is considerably longer than those covering other periods of time and administrations where the issues are less immediate

[2] p5, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[3] p4, lines 6-12, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[4] See paragraphs 3.18-19 and 3.38 below

[5] p21, para 60, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[6] pp4-5, lines 16-2, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[7] p5, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

period …".[8] As a backbencher, Mr Cameron wrote a column for the Guardian Online.[9] His perspective has therefore been informed by more than twenty years of political activity and wide contact with national newspaper journalists, covering most of the period considered by the Inquiry in Module Three.

1.4 This subsection of the Report concentrates upon the relationship between Mr Cameron with national newspapers during the periods in which he was Leader of the Opposition and then Prime Minister. It considers how his media strategy developed in Opposition, including the recruitment of Mr Coulson, and the gradual winning of widespread support in the national newspapers, most notably The Sun's dramatic abandonment of Gordon Brown in September 2009. Was the switch in allegiance the product of a 'deal' or did it have other origins? The diminution in Mr Cameron's contacts with the media which followed the general election of 2010 is explored, as are Mr Cameron's own contacts with the national newspapers, especially their proprietors and senior executives. The emergence of the phone hacking scandal is traced, both as it affected Mr Coulson's position as Director of Communications, and in the way that it led to the setting up of this Inquiry. Finally, Mr Cameron's well known view that politicians have become "too close" to the media is assessed.

2. Mr Cameron's relations with the press whilst Leader of the Opposition

2.1 Mr Cameron was elected Leader of the Conservative Party on 6 December 2005 and thereby became the Leader of the Opposition.[10] He explained the inherent disadvantage which Opposition parties face in getting their message across to a media which usually accords more priority to covering the Government of the country than it does to reporting the prospective policies of the Opposition. Consequently, he saw a particular need for Opposition politicians carefully to develop their relations with the media:[11]

> *"All politicians are keen to have the opportunity to explain the policies they advocate but the media generally considers comments made by Ministers as more newsworthy. In Opposition, political parties operate on a much smaller scale and sometimes struggle to gain media coverage. It is much more difficult to make the public aware of the relevance and impact of Opposition policies. For obvious reasons, attention and focus is directed on the party or parties in power. Senior politicians in Opposition therefore tend to have to focus even more on developing their relations with the media in order to get their message across. As I said in the Commons on 13 July 2011:*
>
> *"As Leader of the Opposition, you spend quite a lot of time trying to persuade newspapers and others to support you, because you want to explain your policies, your vision and what you are doing for the country."*

2.2 The practical product of this analysis was a considerable effort on his part to engage with the media whilst in Opposition. In terms of scale, the effort was reflected in the sheer number of meetings and interviews with the media which Mr Cameron had in Opposition: 1,404 in the four year, five month period from December 2005 to May 2010: an average of 26

[8] p22, lines 13-18, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[9] p30, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[10] p4, para 9, *ibid*
[11] pp12-13, para 33, *ibid*

meetings or interviews per month.[12] These meetings and interviews encompassed a very wide range of media contacts in both broadcast and print media, which resulted from a strategy of building *"...a relationship with all the relevant media, including political editors, editors and proprietors".*[13] The volume and breadth of these contacts did not prevent a careful and deliberate focus on *"...those with the biggest audiences and those best placed to get my message across..."*[14] which was no doubt intended to maximise the return on the investment of time and effort. In practice, for Mr Cameron that meant the BBC and *"...in terms of newspapers, my focus has been on those who either already held and supported Conservative views, or could be persuaded to do so".*[15]

2.3 There was some evidence that Mr Cameron's approach to the media in the period between December 2005 and 2007 differed significantly from the period that followed. It was said that Mr Cameron sought to establish a relationship with more distance and less deference to the media, with reference to Rupert Murdoch in particular. Recalling and interpreting the period, Andrew Neil wrote in his evidence that:[16]

> *"It is one of the ironies of the current state of relations between press and politicians that Mr Cameron did not set out to replicate a Blair/Brown style relationship with the Murdoch press. He told me not long after becoming Tory leader in 2005 that he would not go cap-in-hand seeking Mr Murdoch's blessing, denigrating Mr Blair's decision to fly to the other side of the world in 1995 to parade before Mr Murdoch and his lieutenants. Rather he would transform the Tory party as he saw fit and, if Mr Murdoch liked what he saw, would happily accept his endorsement. But he would not seek to ingratiate himself with the media tycoon or recreate the extensive and close nexus that existed between the Murdoch Empire and New Labour. This strategy lasted until the summer of 2007, by which time Mr Brown was the new Prime Minister and enjoying an (albeit brief) honeymoon with the British people so advantageous that there was a widespread expectation that he would go to the country in the autumn and win. Mr Cameron, for his part, found himself friendless: the left-leaning press were rallying to Mr Brown while right-leaning newspapers were becoming increasingly critical of the Tory leader and his modernising agenda. It was in this predicament – with a fourth defeat for the Tories staring them in the face – that Mr Cameron reached out for Mr Murdoch and his newspapers, with consequences that are now being revealed and documented."*

2.4 George Eustice MP served as David Cameron's Press Secretary for almost two and half years between May 2005 and October 2007. Not inconsistently with parts of Mr Neil's evidence, he has said of his work for Mr Cameron:[17]

> *"When I was his press secretary, we pursued a strategy of quietly puncturing the arrogance of both editors and proprietors and raising the status of what I term real journalism."*

I

[12] p50, lines 8-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[13] p24, para 71, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[14] p24, para 71, *ibid*
[15] p24, para 71, *ibid*
[16] pp24-25, para 18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf
[17] p47, lines 7-13, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

2.5 Mr Cameron recognised that early on he had not enjoyed much personal support from the press:[18]

> *"...I'd won the leadership of the Conservative Party without the support of I think any newspapers frankly. I had a pretty rocky time with them during the leadership election, and I think I'd won the leadership basically through what I'd said at Conservative Party Conference and it was television that had helped me to get my message across."*

2.6 He also acknowledged that initially there were different views about how best the Conservative Party could get its message across. For his part, he placed emphasis on television, which he believed had been so instrumental in his successful bid for the leadership of the Conservative Party:[19]

> *"I wanted us to have a good relationship with newspapers. I knew we needed to win over more support, but to start with there were certainly some in my office who were very keen on trying to do things completely differently and communicate much more through the Internet and what have you. I would say I was more cautious about that, thinking we wanted to work very hard on television, we should do what we could with the newspapers, but I think that's the way it was..."*

2.7 It is worth pausing to note the early emphasis on television which has been retained throughout Mr Cameron's leadership of the Conservative Party. The importance accorded to television reflects the enormous reach which television has to mass audiences and its power to communicate political messages notwithstanding the duty of impartiality to which broadcasters are subject. It is one of a number of indicators that, whilst the support of national newspapers remains very important to modern politicians, that importance has to be seen in perspective relative to television and increasingly also to the internet.

2.8 Mr Cameron confirmed that he had wanted more distance and a different approach to the media. Significantly though, he recalled them as eliding into one another rather than being tried sequentially. Given the opportunity to respond to Mr Eustice's observation, quoted above, he said:[20]

> *"I think parts of it are right, in that we did want to have this – we didn't want to go down the same route as everything Labour had done. We did want to have a bit more distance, but if you look at the record of the sort of meetings I was having and the rest of it, I was still, you know, flying off to meet proprietors and trying to win people over, so I don't think it totally squares up that there was one approach that was tried and failed and then another approach. There's slightly more elision between the two, my reflection on it."*

2.9 Mr Cameron's evidence that he had been trying to "win people over" (that is to say, build political support) from the time of his appointment is amply borne out by the record of his meetings with the media. The record shows a modest increase in the frequency of meetings from 2007 onwards, but nothing like a step change.[21] His entry in the Register of Members' Interests dated 27 September 2006 records a helicopter flight from London to Brecqhou, provided by Aidan Barclay. The entry was made the day after he met Sir David and Sir Frederick

[18] p46, lines 14-20, David Cameron, *ibid*
[19] pp46-47, lines 21-4, David Cameron, *ibid*
[20] p47, lines 14-23, David Cameron, *ibid*
[21] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf

Barclay, owners of the Telegraph Media Group for a general discussion, thus showing that Mr Cameron was indeed meeting with media proprietors as early as 2006.[22]

2007: The appointment of Andy Coulson

2.10 Whether or not the strategies employed by Mr Cameron merged or were distinct and sequential, it is clear that by 2007 he was looking significantly to strengthen his media operation. He explained that:[23]

> *"After my first year or so as Leader of the Party, it became increasingly clear that the Conservative Party needed a heavyweight media operator, someone who had operated at the highest levels and who knew how a newsroom was run..."*

2.11 The need to recruit a media heavyweight was attributed to the huge pressures upon modern political media operations:[24]

> *"...I was looking for someone who was a big hitter, and I was looking for someone who could really cope with the huge media pressure that you're under, and tabloid editors and leading executives on a tabloid newspaper I think do have – they bring something that others wouldn't, and so there wasn't a particular wish list, but it was trying to get the right person with the right skills."*

2.12 The object was not simply to absorb the pressures but to change and improve the Conservative Party's media operation:[25]

> *"I had this very good guy, George Eustice, who was doing a good job. If I was going to bring someone in above him, I wanted somebody who really would be able to materially alter and improve the way we did things, particularly in the face of this massive pressure you face."*

2.13 Self evidently, the appointee would need to be sympathetic to Conservative views as well as have very considerable experience in the media and particularly of operating successfully in an intensely pressured media environment. In practice there was a very small pool of potential recruits. Yet Mr Coulson was not the only person considered for the post. Mr Cameron recalled seeing at least four people personally about the position:[26]

> *"How many people did I see? Obviously Guto Harri, who's outed himself or been outed, I did have conversations with him. There was someone senior from a broadsheet newspaper. There was someone else very senior in the BBC. There was this tabloid journalist..."*

2.14 It was Mr Osborne who proposed that Mr Coulson should be approached. At first glance, it might be thought surprising that Mr Osborne should have made this particular suggestion. As the editor of the News of the World (NoTW), Mr Coulson had been responsible for a damaging front page headline about Mr Osborne: *"TOP TORY, COKE AND THE HOOKER"*.[27]

[22] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-3.pdf
[23] p74, para 221, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[24] p97, lines 8-15, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[25] p98, lines 6-11, David Cameron, *ibid*
[26] p99, lines 19-23, David Cameron, *ibid*
[27] Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AEC2.pdf

Whilst it is true that the story also ran in the Sunday Mirror with a leader far less kind than that contributed to by Mr Coulson, a reflection perhaps of the differing political perspectives of the two titles, it is certainly impossible to regard the NoTW's headline as helpful to Mr Osborne.[28] As the author of the headline "HUG A HOODIE", Mr Coulson had not helped Mr Cameron's popular profile either.[29] The Prime Minister described it as *"...the most effective and destructive headline about me that anyone's managed..."*[30]

2.15 The most that could be said about the stance of the NoTW on Mr Cameron's bid for the leadership of the Conservative Party was that it had not been against him. More generally, although the paper had engaged William Hague as a columnist between December 2003 and 2005, when he returned to the Shadow Cabinet, the NoTW under Mr Coulson had supported New Labour, backing Mr Blair at the 2005 general election.[31] The importance of Mr Coulson to the Labour Party is well illustrated by the fact that when Mr Coulson resigned from his position as editor of the NoTW in 2007 both Mr Blair and Gordon Brown contacted him to commiserate with him on the turn of events.[32]

2.16 That Mr Coulson had resigned in response to the conviction and imprisonment of one of his journalists added yet another reason to question why it was that Mr Coulson's name came to Mr Osborne's mind.

2.17 Mr Osborne's explanation for suggesting Mr Coulson to Mr Cameron was that he sensed that Mr Coulson was in fact instinctively sympathetic to Conservative views:[33]

> *"...I had met Mr Coulson on a handful of previous occasions when he was editor of the News of the Word, although we had not met privately before. Under his editorship the newspaper had supported the Labour Party in the previous general election. However, in my conversations with him, I had sensed that his personal view of political issues was more closely aligned with the Conservatives – although I had never asked him as editor whether he was someone who had voted Conservative."*

2.18 On this point Mr Osborne's intuition proved to be correct.[34] The circumstances in which Mr Coulson had come to resign did not deter Mr Osborne from advocating an approach to Mr Coulson because he assumed that the matter had been fully investigated by the police and, in any event, he could ask Mr Coulson about it:[35]

> *"I was, of course, aware from media reports that Mr Coulson had resigned as editor of the News of the World following the convictions of the paper's Royal correspondent Clive Goodman and private investigator Glenn Mulcaire for phone hacking. I assumed that since the matter had been subject to a police investigation and a criminal trial*

[28] p9, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf; see also pp20-25, lines 17-15, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf for Mr Coulson's explanation
[29] p110, lines 17-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[30] p110, lines 17-21, David Cameron, *ibid*
[31] pp9-10, para 39, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[32] p5, para 7.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[33] p5, para 7.2, George Osborne, *ibid*
[34] p29, lines 8-18, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[35] p5, para 7.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf

that all the relevant facts had come to light. I also intended to ask Mr Coulson himself about the issue – and later did (as set out below).” (emphasis added)

2.19 He thought that as a recently resigned editor of the NoTW, Mr Coulson would be a very strong candidate for the task which was envisaged, explaining:[36]

> *“... First of all, he had been the editor of a major national newspaper, so he had an enormous amount of professional experience, and what we needed was someone who was going to be able to handle the communications of a large organisation, the Conservative Party, and develop a media strategy, but also be able to handle, on an hour by hour basis, the problems that were thrown at us ... I thought that Andy Coulson had that experience, as someone who had run a large newsroom, was used to the pressure of dealing with fast-changing stories.”*

2.20 Mr Osborne denied that Mr Coulson’s associations with or contacts with News International were relevant factors, whilst emphasising that his experience as the editor of a big newspaper and prospects of succeeding in the new role were:[37]

> *“Q. Are you saying that his associations with or contacts with News International were not relevant factors at all?*
>
> *They were not relevant as far as I was concerned, or certainly, as far as I’m aware, David Cameron was concerned. The fact that he had edited a big newspaper was the relevant fact, and as I say, the other candidates we considered were not people who were working for News International. I think if Mr Coulson had, for example, been editing the Mail on Sunday, then we would have also hired him. So I think it wasn’t relevant that he was a News International ex-employee.*
>
> *LORD JUSTICE LEVESON: But relevant that he was very experienced in the ways of the press?*
>
> *A. That was the relevance, sir. I mean, I have seen people suggest that the reason we hired him was because of his connections with the Murdochs or Rebekah Brooks or his knowledge of the internal workings of News International. I can tell you that was not a consideration. What we were interested in hiring is someone who was going to do the job going forward ...”*

2.21 Mr Cameron had a similar, although not identical, view about the relevance of Mr Coulson’s News International background. He was at pains to say that there was no calculation that a former News International editor would facilitate winning over the NoTW:[38]

> *“Q. Is it your evidence that his News International background was irrelevant to the decision, in other words it was a factor.*
>
> *A. No, it wasn’t irrelevant, clearly. As I said, his contacts, his knowledge, his work at a newspaper, all of that mattered. But if what lies behind the question [is] were you after a News International executive because this was going to make it easier to win over the News of the World or whatever, no, that wasn’t the calculation. The calculation was: who is going to be good enough, tough enough, to deal with what is a very difficult job?”*

[36] pp54-55, lines 19-19, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[37] p56, lines 3-23, George Osborne, *ibid*
[38] pp113-114, lines 25-10, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

2.22 The right person for the job, to Mr Cameron's mind, regardless of whether or not he or she had a News International background, was someone who was going to be able to *"...handle tough stories and meet fast deadlines, particularly for tabloid newspapers..."* whilst at the same time engaging *"...more systematically with the broadcast media who ...have huge influence in terms of political coverage and discussion"*.[39]

2.23 Mr Osborne took forward his suggestion by arranging to meet Mr Coulson for a drink at a central London bar, on 15 March 2007, two months after he had resigned from the NoTW. Mr Coulson recalled discussing what the Conservative Party should do to organise its communications in readiness for a general election. He expressed views which are very similar to those held by Mr Cameron, placing an emphasis on television and the need to promote good relations over the whole spectrum of the media:[40]

> *"I told him that my view of communications was that it needed to be first and foremost professional, that we needed to have good relationships with as many media representatives as possible right across the spectrum, and I also told him in that conversation and again later in a conversation with Mr Cameron that my firm belief was that television would play a crucial part in any General Election campaign. My view was more so than it had done previously."* (emphasis added)

2.24 Mr Coulson felt that it was: *"...clear from the off that they were interested in hiring me"* and did not feel as if he was being interviewed at all.[41] He confided in Rebekah Brooks about the Conservative Party's approach.[42]

2.25 Mr Osborne recalled asking Mr Coulson at the meeting whether he would be interested in being considered for the post of the Conservative Party's Director of Communications. In his witness statement he described Mr Coulson saying that he would think about it and calling, some days later, to say that he was indeed interested, an answer which Mr Osborne passed on to Mr Cameron.[43] Mr Coulson's recollection was slightly different. He believed that Mr Cameron had called him later the same night: *"...to say that Mr Osborne had told him of our conversation and that he would like to meet"*.[44] In his oral evidence, Mr Osborne's account was consistent with Mr Coulson's:[45]

> *"Q. And then in paragraph 8.1, after Mr Coulson, a few days later, confirmed that he was interested in the job, you had a conversation with Mr Cameron about it; is that correct?*
>
> *A. Yes. I think I spoke to him pretty soon, actually, David Cameron. My recollection is that I probably spoke to him on the way back from the drink I'd had with Mr Coulson on the telephone".*

[39] p74, para 222, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[40] p30, lines 16-24, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[41] p32, lines 5-7, Andy Coulson, *ibid*
[42] p8, para 32, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[43] p6, para 7.7, 52 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[44] p7, para 29, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[45] p62, lines 15-22, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

2.26 Nothing turns upon which recollection is correct; both men were trying to recall a minor detail some five years ago.

2.27 Whatever the precise mechanics were, the initial meeting was certainly followed up. A meeting with Mr Cameron was arranged at his office in the Norman Shaw Building, probably later in March 2007. Mr Cameron described this meeting as having been significant: "*... the key meeting about deciding whether or not to employ him...*".[46] Having met Mr Coulson and discussed his possible appointment with Mr Osborne and Steve Hilton, Mr Cameron decided in principle that he wanted to appoint Mr Coulson as the Conservative Party's Director of Communications and Planning. He asked the Party Chairman, the Rt Hon Francis Maude MP, and his Chief of Staff, Ed Llewellyn, to meet with Mr Coulson to discuss practical arrangements.[47]

2.28 These discussions occurred, and at some stage in the process Mr Coulson also spoke to Mr Hilton.[48] Final acceptance of the job appears to have occurred in May 2007 after that year's local elections, during the course of a telephone call between Mr Cameron and Mr Coulson.[49] Mr Coulson commenced his employment with the Conservative Party on 9 July 2007.[50]

2.29 An issue on which all the witnesses were agreed is that during the recruitment process Mr Coulson was asked about phone hacking. However, recollections differed as to precisely who asked what and when they did so. Mr Osborne recalled asking at his very first meeting whether there was anything more on phone hacking that he should know about that was not already public. He stated that he received a reply in the negative.[51] Mr Cameron could not recall being told about this but had no reason to doubt Mr Osborne.[52] Mr Cameron's own recollection was that not only did he personally raise the matter with Mr Coulson but also that it was raised when Mr Coulson met with Mr Maude and Mr Llewellyn:[53]

> *"I believe that three such meetings took place: one with both Francis Maude and Ed Llewellyn. These were about the terms and conditions of the appointment. In the meeting they held together, they also asked him specifically about his involvement in the well-publicised hacking that had taken place while he was editor of the News of the World and which had led to the convictions of Clive Goodman and Glenn Mulcaire. He denied any knowledge of the hacking but said that he took responsibility for what had happened on his watch and had therefore resigned. This was consistent with what he had said at the time of his resignation as Editor"* (emphasis added).

I

[46] p104, lines 5-7, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[47] p75, para 224, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[48] p7, para 30, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[49] p8, para 31, *bid*
[50] p8, para 31, *ibid*
[51] p6, para 7.6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[52] pp100-101, lines 25-3, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[53] p75, para 225, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

2.30 So far as his own investigation of the issue was concerned, in his oral evidence Mr Cameron described raising the issue at the face-to-face meeting which he had with Mr Coulson in March 2007. He said:[54]

> *"My recollection is that I raised the issue of phone hacking and sought the assurance in the face to face meeting we had in my office. That's my recollection. I vaguely remember the further telephone call, but that's – I've obviously racked my brains to try and remember exactly the sequencing, but my recollection is that I knew it was very important that I needed to ask him that question, and therefore did so, as it says in my evidence".*

and, in response to the suggestion that the issue was raised only during the May 2007 conversation, he said:[55]

> *"That's not my recollection. My recollection is that the assurances I sought were in the face-to-face meeting, but it may be there was a further specific question I needed to ask in the phone call, I can't remember.*
>
> *What I'm absolutely sure about is I remember the conversation with Ed Llewellyn was how important it was to see the assurance, and I remember very clearly seeking that assurance and getting the assurance..."*

2.31 The suggestion that the issue had been raised only once by Mr Cameron was put to him because that was how his witness statement appeared to read. Having dealt with the March face-to-face meeting without mentioning the issue, and the subsequent meetings with Mr Maude and Mr Llewellyn to discuss practical arrangements, at which they had asked Mr Coulson about phone hacking, the witness statement continued:[56]

> *"[Francis Maude and Ed Llewellyn] reported these assurances orally to me, but said that since these were serious allegations I should personally satisfy myself as to these assurances by putting these questions directly to Andy Coulson in my own conversations with him, and before formally offering him the job.*
>
> *I then had a further conversation with Andy Coulson in which I also asked him specifically about his involvement in the hacking case. He repeated what I understood he had said to Francis Maude and Ed Llewellyn, that he had no knowledge of the hacking but said that he took responsibility for what had happened on his watch and had therefore resigned as Editor. I also recall asking him at the same time whether there was anything else which I should be aware of which might embarrass the Conservative Party. He said he did not believe that there was."*

2.32 Mr Coulson recalled being asked by Mr Cameron during the course of the telephone conversation in May 2007: "*He also asked me about the Clive Goodman case".*[57]

2.33 The witnesses were trying to recall the precise timing of conversations some five years ago now and it is not surprising that in those circumstances that there were some discrepancies. I make no criticism of them for that. Whether the issue was raised with Mr Coulson once,

[54] pp104-105, lines 18-1, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[55] p107, line 3, David Cameron, *ibid*
[56] p75, para 227, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[57] p8, para 31, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf

twice, three times, or four times (ie 7 March 2007, at the March 2007 face-to-face meeting with Mr Cameron, at the meeting with Messrs Maude and Llewellyn, and during the May telephone conversation) I am entirely satisfied that it was raised; given the significance of the issue, it was most probably raised on each of the four occasions.

2.34 However many times the hacking issue was raised during the recruitment process, what is clear is that the inquiries did not go beyond asking Mr Coulson about the issue and accepting his assurances. Mr Osborne described consciously considering whether the circumstances of Mr Coulson's departure ruled him but concluding that it did not. In doing so, he fairly pointed to the context at the time which must have been reassuring:[58]

> *"I did consider whether the circumstances surrounding Mr Coulson's departure from the News of the World ruled him out as a Director of Communications. But I made what I believed was the reasonable assumption at the time that the police had uncovered all the relevant evidence. Mr Coulson had also confirmed to me that this was the case. It is worth noting that I was not the only person who accepted this. Before the appointment was confirmed on 31 May 2007, the Press Complaints Commission said:*
>
> *There is no evidence to challenge Mr Myler's assertion that: Goodman had deceived his employer in order to obtain cash to pay Mulcaire; that he had concealed the identity of the source of information on royal stories; and that no one else at the News of the World knew that Messrs. Goodman and Mulcaire were tapping phone messages for stories."*

2.35 Mr Cameron similarly pointed to the fact of the police investigation and the subsequent prosecution of Messrs Goodman and Mulcaire. He did not shrink from taking responsibility for the decision but he understandably reminded the Inquiry of the indisputable importance of judging the decision without the benefit of hindsight:[59]

> *"The responsibility for employing him on the basis of the assurances that he gave is mine. I took the view that because he had given me repeated assurances that he had no knowledge of hacking, he deserved a second chance.*
>
> *If anyone had given me any evidence that Andy Coulson knew about or was in any way involved with phone hacking, I would not have employed him.*
>
> *And as I said in my statement in the Commons on 20 July 2011, with 20:20 hindsight and all that has followed, I would not have offered him the job, and I expect that he would not have taken it. As I said then, you do not make decisions in hindsight; you make them in the present".*

2.36 Before Mr Coulson started work at Conservative Party Headquarters not only had the PCC made a reassuring statement about the extent of hacking at the NoTW, so too had the Chairman of News International. James Murdoch's evidence was that:[60]

> *"...the company told the Select Committee in March 2007 that it believed that Clive Goodman was the only person who knew what was going on, and the Committee noted in its report dated 3 July 2007 "the assurances of the Chairman of News*

[58] pp6-7, para 8.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[59] p76, para 229, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[60] p24, para 13.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf

International that Mr Goodman was acting wholly without authorisation and that Mr Coulson had no knowledge of what was going on".

2.37 Dealing with the Terms of Reference of what is described as Part 1 of the Inquiry that I am conducting, particularly in the light of the current prosecution that Mr Coulson faces, it is simply not fair or appropriate to inquire into precisely what Mr Coulson knew or did not know about phone interception at the NoTW. On the other hand, however, it is relevant to consideration of Mr Cameron's decision to recruit Mr Coulson to take into account the then prevailing positions of both PCC and News International.

2.38 Mr Osborne was unequivocal about his reason for recommending Mr Coulson for appointment: "*I recommended that Mr Cameron appoint Mr Cameron because I thought that he was the best candidate for the job*".[61] He described having been "*very impressed*" by Mr Coulson.[62] Mr Cameron was similarly focused on Mr Coulson's skills when appointing him:[63]

> *"Well, obviously his knowledge of the industry, his contacts, his work as an editor were all important, but the most important thing was: is this person going to be good at doing the job of managing the press and communications for the Conservative Party? I wasn't just after some –any old person from News International or from the Daily Mail or from wherever. I wanted somebody really good who was going to be able to stand up to the pressure that were under and would face in the run-up to an election campaign. That was the absolutely key consideration."* (emphasis added)

2.39 Both Mr Cameron and Mr Osborne recognised that there was a risk in hiring Mr Coulson, but both were content to accept that risk. Mr Osborne put it in these terms:[64]

> *"Q. Why did you run that risk?*
>
> *A. Because I thought in the end, the balance was that it was worth hiring someone with real talent and ability and weathering the adverse publicity that appointing someone who had had to resign from the News of the World would bring...".*

2.40 Mr Cameron identified not only the potential controversy arising from the circumstances of Mr Coulson's departure from the NoTW but also the fact that he was a tabloid editor. His evidence was as follows:[65]

> *"Q. When you accepted the assurances, did you assess there to be any risk?*
>
> *A. What I assessed was that this was clearly a controversial appointment for two reasons. One was that bad things had happened at the News of the World while he was editor and he had resigned. So he had left his last job after resigning because of things that had happened. So that was obviously – as I said in my evidence, I was giving him a second chance.*

I

[61] p7, para 8.5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[62] p63, lines 2-4, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[63] p113, lines 8-19, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[64] p63, lines 18-23, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[65] pp108-109, lines 23-15, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

> *"The second reason it was – there was controversy [sic] is this was a tabloid editor and there are some people who would say, you know, "Don't have a tabloid editor", to which my answer would be: it's a very tough job, dealing with the press for a major political party. You need someone who has the skills, who has the knowledge, who can really help you through what can be an absolute storm, and so I thought it was the right thing to do..."*

2.41 The confidential nature of the recruitment process prevented the taking up of formal references. Both Mr Cameron and Mr Osborne did, however, speak informally to Mrs Brooks about Mr Coulson. Mr Osborne recalled a brief conversation which took place in the context of the recruitment process:[66]

> *"Well, I spoke to her after I'd seen Mr Coulson and after we'd been considering it for a couple of weeks, and I don't recollect the precise day or anything like that, but I remember a conversation where I asked her: "Tell me about Andy Coulson. Tell me, is he a good person? Is he a good person to work with? What do you think of him?" It was never a question about: "Is he going to bring his News International connections?" or: "Tell me more about the circumstances of Andy's resignation." I was just simply asking her opinion of him as professional".*

2.42 Mr Cameron was unsure whether his conversation with Mrs Brooks about Mr Coulson had taken place before or after the decision was made, although there would only really have been a point to such a conversation before the decision was taken:[67]

> *"I wasn't seeking a reference. I mean, when you're employing someone like this who's been an editor of a newspaper, you can't seek sort of formal references. I'm sure I would have asked how effective he would be, but this conversation may well have taken place after I had made the decision. I can't recall exactly when the conversation took place. But in the end it was my decision. I was satisfied this was the right thing, to have a former tabloid editor to help us with our media and communications, and it was my decision."*

2.43 Although Mrs Brooks was aware of the recruitment process at the time, Rupert Murdoch denied any direct or personal involvement. He described himself as *"...just as surprised as anybody else..."* when he heard the news.[68]

2.44 An obvious question was the extent to which the decision of the Conservative Party to hire Mr Coulson had been influenced by the success in opposition of Alastair Campbell for New Labour. Mr Osborne recognised some influence, but both he and Mr Cameron were keen to stress that Mr Campbell and Mr Coulson were different men. Mr Cameron's evidence on this point was:[69]

[66] pp65-66, lines 16-1, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[67] p102, lines 15-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[68] p4, line 15, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf; see also p27, para 111, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[69] p98, lines 12-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

"Q. To what extent were you looking at the example of Alastair Campbell as being obviously politically in a different place but the sort of man in terms of temperament and robustness who would be of assistance to you?

A. Not necessarily. I don't think, you know, Alastair Campbell had – he was much more political than Andy Coulson, and I think in all sorts of ways there were occasions when clearly he'd overstepped the role of what he should have been doing."

2.45 Mr Osborne put the matter in this way:[70]

"LORD JUSTICE LEVESON: Well, is it more that actually he brought skills which you'd seen evidenced by New Labour in Mr Campbell?

A. I think it is undoubtedly the case that Tony Blair had seen that hiring someone from the media would bring an added dimension to the communications effort, and the Conservative Party had, in opposition, hired a number of people subsequently who had been journalists, indeed one person who had been an editor of the paper.

So that was true, but I don't think that Mr Coulson and Mr Campbell are cut from the same cloth, I would suggest. Alastair Campbell was a political editor.

I thought Andy Coulson brought a broader experience, as an editor of a paper, so managing a large newsroom, and as I say, I think subsequently the way he did the job shows that he was very well qualified to do that job."

2.46 Having been appointed as Director of Communications and Planning, Mr Coulson's role was to oversee all of the party's communications departments including press, broadcast and online. He specifically oversaw all of the communications for David Cameron and his Shadow Cabinet and was included in the small group of people with responsibility for the strategic planning and execution of the General Election campaign. He attended Mr Cameron's morning and afternoon meetings, along with other key staff, and was a part of the general planning team. His job was to make sure policy was properly communicated and to advise on the likely media impact of policies. The remit was wide enough to encompass speeches, press conferences, interviews, and articles given or written by Mr Cameron. He monitored broadcast coverage and assumed a central role in crisis management, for example responding to the MPs' expenses scandal.[71]

2.47 There has been speculation as to whether Mr Coulson had continued to be paid by News International whilst working for the Conservative Party. Disclosure by Mr Coulson of a compromise agreement by which his employment with News Group Newspapers Limited was terminated explained what had happened. Mr Coulson did not resign unilaterally without regard to his contractual entitlements. His employment was terminated on terms which he agreed with his employer and which were set out in the compromise agreement.[72] Mr Coulson was paid in lieu of his employer's contractual notice period and compensated for the termination of his employment. The sums due to him pursuant to the compromise agreement were paid in two tranches, the second of which was in November 2007, after Mr Coulson had started work for the Conservative Party. He also received a quantity of restricted

[70] pp57-58, lines 14-4, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[71] pp11-13, paras 50-60, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[72] Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AEC1.pdf

News Corp stock units which vested in him in August 2007, again after the commencement of his employment with the Conservative Party.[73]

2.48 In other words, Mr Coulson did receive both cash and shares from his former employer whilst he was working for the Conservative Party, but these were payments made in respect of the termination of his employment with News International and agreed at the time of his departure from that company. There was no evidence that he was receiving a retainer from News International whilst he worked for the Conservative Party.

2.49 Having appointed Mr Coulson there were further developments which must have reassured Mr Cameron. In July 2009 Mr Coulson gave the same assurance to the Culture Media and Sport Select Committee that he had given to Mr Cameron: *"I have never condoned the use of 'phone hacking and nor do I have any recollection of incidences where 'phone hacking took place".* The Committee concluded that it had "*seen no evidence that Andy Coulson knew that phone-hacking was taking place"*. Mr Coulson also denied knowledge of hacking under oath in the trial of Tommy Sheridan which was held in December 2009: "*I'm saying that I had absolutely no knowledge of it. I certainly didn't instruct anyone to do anything at the time or anything else which was untoward"*.[74] As is discussed later in this section, in 2010 there were to be a number of less reassuring developments and, ultimately, Mr Coulson resigned from his post in January 2011.[75]

Strategy and tactics

2.50 Mr Cameron described the approach to planning his media effort in the context of his overall strategic planning:[76]

> *"Well, the strategy mapped out at the beginning of the year are the things you want to achieve, the policies you want to get across, the ideas that you want to champion, and then after that, you think: right, how do we do that? What's the mixture of newspapers and television and direct campaigns and the rest we want to do? Then following that, you're looking at: where are we going to have impact?"*

2.51 When it came to assessing the relative importance of newspapers, television and direct campaigns, Mr Osborne shared with both Mr Cameron and Mr Coulson the view that broadcasting was becoming increasingly important. In particular, Mr Osborne challenged the view that newspapers set the agenda and broadcasters follow. He explained how broadcasters now quite often set the news agenda themselves and described their power as enormous:[77]

> *"Q. Do you feel, as some have said again, that the news agenda tends to be driven by the printed media and the BBC and other broadcasters follow suit, or do you feel it's the other way around or a mixture of the two?*
>
> *A. I saw Tony Blair's evidence on this, and I think that might have been the case perhaps when he was Prime Minister. Speaking personally as someone active in front*

[73] pp25-27, lines 24-24, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf: The subject of the shares is discussed further below
[74] p76, para 228, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[75] paras 3.56-3.75 below
[76] p38, lines 1-7, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[77] pp8-10, lines 21-2, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

line politics today, I would say the broadcasters are incredibly important. It is not clear that they're always following a newspaper judgment. I would say the significance of a story is massively elevated if it is right at the top of one of the big news shows and that's often the judge of whether something is really going to have an impact in the political sphere.

Now, quite often they will be picking up indeed stories from newspapers, but quite often they'll have their own investigations and quite often those – you know, the BBC, for example – and I'm a supporter of the BBC, so this is not – I'm not seeking to criticise the entire institution, but they will run a special report, a Panorama report, then put that top of the Today programme and suddenly we're all expected to treat that as the most important thing happening in Britain that day.

So I wouldn't say it's a straightforward process whereby the newspapers run a story and the journalists – the broadcast journalists cover it. I think it's more complicated than that, and I think the power of the broadcasters is enormous. It is power exercised with responsibility, but nevertheless it's significant."

2.52 Mr Coulson described how he vigilantly monitored broadcasters' output, especially the BBC's, and took issue with it as he thought necessary, whilst keeping open as many lines of communication with the organisation as he possibly could:[78]

"Another aspect of my job was to monitor broadcast coverage, in particular the BBC, given its audience dominance. My approach was to keep as many lines of communication as possible open with the BBC, and to argue our case. I never took the view that ranting at producers and editors was either proper or productive. But I would monitor the BBC's coverage, including online, and firmly register our view when I thought it was appropriate."

2.53 As for the newspapers, Mr Osborne described a general strategy with achievable objectives:[79]

"I don't think it was a particular strategy for the Sun newspaper. It was a strategy for the newspapers. We wanted the full throttled support of Conservative-leaning papers like the Telegraph and the Mail. We wanted to win over some of those more neutral broadsheets like the Times and the FT. We didn't have much hope of the Mirror and the Guardian, and obviously we wanted to win the support of the Sun. But it was a general media strategy and it mainly consisted of setting out our argument about why the Labour government had forfeited the right to remain in office and why we thought a Conservative government would be better for Britain."

2.54 Mr Cameron, who was essentially agreeing with an observation of Mr Brown's, identified a problem with what he described as the newspapers' volume knob. It is a feature of modern newspaper coverage of politics with which all current politicians have to deal and which one supposes must give them an added incentive to make as much effort as possible to cultivate good relationships with the press. Mr Cameron put it this way:[80]

"Q. Can I ask you to address Mr Brown's point that reporting is hyperbolic, it's sensationalised. He said the politicians don't simply make errors of judgment, their

[78] p13, para 57, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[79] p68, lines 2-14, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[80] pp35-36, lines 9-4, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

motives are always put into question. Do you associate yourself as a matter of generality with that point or not?

A. I think there are occasions when that can happen. As I've said, it links back to this thing about newspapers being under pressure to find something special and different and go for impact, and sometimes that can mean questioning motives. So you do – I don't want to make this sound like sort of politicians complaining about – of course we should have a vigorous press and they should give us a good going over and they do and that's fine.

Sometimes it is frustrating when you feel your motives are endlessly being questioned, and – but, you know, there's bound to be a certain amount of that, but I think the way I put it is that the volume knob has sometimes just been turned really high in our press and I'm not sure sometimes that does anyone any favours."

2.55 Mr Coulson aimed to meet or talk to most editors, political editors and some columnists on a reasonably regular basis (as he also did with broadcast journalists), considering it to be an important part of his job. He occasionally met with proprietors or senior executives. These meetings were mostly off the record and with an informal agenda. Amongst other things, Mr Coulson sought to use the meetings to clear up inaccuracies or misunderstandings which had been printed or broadcast or simply to promote the Prime Minister's message. Together with Mr Cameron and other senior Conservative politicians he would also occasionally attend meals hosted by newspapers, for example at the party conference when the Telegraph, the Daily Mail and The Times all hosted their own dinners. The conference itself was a period of intense contact with the media. They would also give speeches at events organised by various newspapers.[81]

2.56 Mr Cameron said that he had sometimes directly asked titles for support: *"…But obviously on occasion you'd say, "We'd love a bit more support from your paper".*[82]

2.57 Although Mr Cameron was in any event spending a great deal of time cultivating good relations with the media and seeking to spread his message through them, it is clear that Mr Coulson brought a renewed vigour to this activity with a particular emphasis on ensuring not just formal but also informal face-to-face contact with journalists:[83]

"I attended coffee meetings between David Cameron and other journalists, at various times. In opposition, David and Samantha Cameron would also host occasional dinners at his home for media. These included newspaper and broadcast journalists. I would usually, although not always, attend. I played a central role in organising this diary of activity but David Cameron was not always an entirely willing participant. Given the choice, I think he would have preferred to be doing other work or enjoying a night home with his family. However, he understood, and reluctantly agreed, that it was important to meet with journalists, formally and informally."

[81] pp16-17, paras 72-77, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[82] pp43-44, lines 20-2, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[83] p16, para 78, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf

2.58 Notwithstanding Mr Cameron's reluctance on occasion to give up his time to cultivate media contacts, he did not express to Mr Coulson the view that press and politician were becoming too close:[84]

> *"Q. The Prime Minister said in July 2011 words to the effect that "We all got too close to News International". You probably recall that, Mr Coulson, don't you?*
>
> *A. Yes.*
>
> *Q. Is that a view he expressed to you before July 2011, in particular before you left, which I think was in January 2011?*
>
> *A. No, I don't remember him doing so."*

2.59 Nor did he express that view to Mrs Brooks:[85]

> *"Q. Mr Cameron also said publicly:*
>
> *We all got too close to News International." Or words to that effect. Was that a view he ever communicated to you personally?*
>
> *"A. No."*

2.60 Mr Coulson advanced three reasons to explain why he felt that contact of the nature and extent which he was orchestrating had become essential:[86]

> *"It was important for three reasons. Firstly, you stood a better chance of getting your message across and of stopping misunderstandings quickly if you had good relationships. In a perfect world as Prime Minister you would issue a statement, give an interview, or stage a press conference and your message would be communicated to the public in fair, even-handed reports. Modern politics doesn't work that way. What we did and said required explanation and at times I needed to fight our corner for fair coverage.*
>
> *Secondly, I took the view that it was important that journalists saw David Cameron in a relaxed and informal mode, as well as at work. Again, modern politics demands this. I felt it was important to show his authentic life away from work, not least as the Labour Party was working hard to convince the public that he spent his private moments lounging around a mansion, in top hat and tails, sipping champagne and nibbling on caviar. This was an important myth to dispel.*
>
> *Thirdly, journalists want to meet politicians. There is no substitute in journalism for face to face contact. It was also important for David Cameron to hear what some of the journalists had to say on behalf of their readers and viewers. I believe I was even-handed in who had access to him".*

2.61 These are revealing insights into what motivated Mr Cameron's Director of Communications to seek even closer proximity to the media for a principal who was already highly active and experienced in his dealing with the media. Mr Coulson clearly felt that this extra effort was required to achieve the legitimate media goals which are incorporated into the reasons quoted above: fair and even handed reporting, the rapid resolution of misunderstandings,

[84] p50, lines 18-25, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[85] p8, lines 10-14, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[86] p17, para 79, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf

an authentic picture of the politician and receipt of reader and viewer feedback. One might easily add to this list.

2.62 It is self evident that any solution to a problem of over proximity between the press and senior politicians must involve a proper distance or, at least, transparency. But if that is to be achievable in practice, the politician's legitimate media objectives, such as those identified above, must be attainable from that proper distance and with appropriate transparency. Otherwise, the temptation to get too close will be irresistible. I shall return to this issue when concluding this Part of the Report and making recommendations.

2.63 Mr Coulson drew on his experience in the media to advise about the Conservative Party's communications effort, including matters such as how best to talk to proprietors and editors, as Mr Osborne explained:[87]

> *"Q. But was Mr Coulson able to give advice as to how best to obtain the Sun's support, even if, as you say, it was far less important than many commentators have claimed?*
>
> *A. Well, I think his advice was how to handle our communications effort. Yes, how to talk to proprietors and editors and so on ..."*

2.64 Mr Cameron's strategy of maintaining a very wide range of media contacts met with Mr Coulson's entire approval. He said:[88]

> *"... I think the party had very good relationships with the Guardian. I think I probably wouldn't include the Daily Mirror, in truth, or the Sunday Mirror. I didn't put an awful lot of effort into either of those papers, although we met and we talked, actually. But yes, I – and more importantly David Cameron – took the view that we had to talk to as many people as possible. The Tories had a – the party had an electoral mountain to climb, it was of historic proportions. So we wanted to touch as many readerships as we possibly could and get our message across as far and wide as we could."* (emphasis added)

2.65 When considering individual titles the Conservative strategy was not limited to those at the top of the organisation but extended to developing contacts and promoting contacts in depth. Mr Coulson explained that the rationale for doing so was to maximise the chance of favourable coverage:[89]

> *"... I was keen actually that we had good relationships throughout – as much as we could throughout the paper. Same goes for – if I can keep adding this – for other newspapers. It is not – newspapers don't work that way. You know, you can't rely on a call to an editor to guarantee anything, and nor should you. What you were attempting to do was build a series of relationships where when you had something positive to say you would give yourself the best possible chance of getting the best possible coverage, and so it was actually a range of relationships throughout all the newspapers."*

2.66 Returning to one of the concerns which he expressed when explaining why informal face-to-face contact was important, Mr Coulson identified a growth in the importance of individual

[87] pp66-67, line 22-2, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[88] pp48-49, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[89] p48, lines 9-20, Andy Coulson, *ibid*

personality in politics and stressed the need for a great deal of effort to ensure that an "*authentic view*" of Mr Cameron in particular was being expressed in the media.[90]

Relations with Telegraph Media Group

2.67 Mr Cameron met Aidan Barclay, Chairman of TMG, numerous times whilst in Opposition, sometimes in formal surroundings and sometimes informally. Two of the meetings occurred during the contest for the leadership of the Conservative Party, in the form of a meeting at Mr Barclay's office and then a short while later, breakfast at the Ritz (which is owned by the Barclay family). There were two more meetings, on 27 April 2006 and 12 June 2007, in the period between the leadership election and Mr Coulson's appointment; both were meals at the Ritz. Thereafter, there was a dinner on 25 February 2008, a meeting at Mr Barclay's office on 3 November 2009, before Mr Cameron invited Mr Barclay to his home for dinner on 25 November 2009. The final meeting in opposition was a breakfast at the Ritz on 22 March 2010, a few weeks before the general election.[91]

2.68 A text message the day after the pre election meeting evidences the fact that the election campaign had been discussed and plans laid for there to be a daily call between the Telegraph and the Conservatives during the campaign:[92]

> *"David good to see you congratulations to you both on the prospect of an addition to the family spoken to tony G and repeated our conversation asked him to be in touch to arrange daily call during campaign as discussed. Regards Aidan"*

2.69 In his evidence, Mr Barclay explained the background to the text and, in particular that he had suggested that there be a daily call between Mr Cameron and the editor of the Telegraph in order most easily to enable Mr Cameron to get his message across:[93]

> *"A. Well, as you probably realise, in any large organisation sometimes you have difficulty communicating a message across to the right person, particularly if it gets passed down the line, and so I suggested to the Prime Minister that if he wanted to get the attention of the editor and wanted to get his message across in the most efficient manner, he should make a habit of phoning him on a daily basis and I recommended that's what they should do.*
>
> *Q. Sorry, is it the Prime Minister calling –*
>
> *A. It's whichever way around it was, but there should be a daily call –*
>
> *Q. Between the editor and the Prime Minister?*
>
> *A. Yes"*(emphasis added).

2.70 Mr Cameron did not think that a daily personal call between him and Mr Gallagher had been discussed but he agreed that a call between the Conservative Party and Mr Gallagher had been agreed and that its purpose was to facilitate putting across the Conservative message:[94]

[90] pp82-83, line 24-9, Andy Coulson, *ibid*
[91] Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Appendix-D-to-Witness-Statement-of-Aidan-Barclay.pdf
[92] p1, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-AB1B.pdf
[93] pp84-85, line 13 -1, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[94] p71, lines 11-16, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

> *"A. I don't think so. I think the daily call was between the Conservative Party and Tony Gallagher. I don't know whether it was necessarily going to be me, but I think this was me wanting to make sure that the Telegraph knew our policies and our plans and all the rest of it. I think that's what it was about."*

2.71 The advantages for both Mr Cameron and the Telegraph arising from this example of informal contact with the proprietor of a friendly title are plain to see. By this time Mr Cameron had already secured the clear support of the Telegraph and the discussions on 22 March 2010 concerned only the mechanics of best communicating Mr Cameron's message. That the 'full throttled' support of the Telegraph (as Mr Osborne described the Conservative Party's goal) had been won was made unequivocally clear both during and after Mr Cameron and Murdoch MacLennan, the Chief Executive of TMG, had dinner together in February 2010. In his follow up letter dated 9 February 2010, Mr MacLennan wrote:[95]

> *"As I said when we sat down for dinner, we desperately want there to be a Conservative government and you to be our next Prime Minister. We'll do all we can to bring that about and to give you great support in the gruelling months ahead, and as we are no fairweathered friend, we'll be there with you too when you're in Downing Street."* (emphasis added)

2.72 These successes for Mr Cameron were of course not simply the result of dinner with Mr Barclay and Mr MacLennan. The Telegraph's support of the Conservative Party was predictable and there had been numerous meetings between senior Conservatives and editors and senior executives from TMG over the years. But they vividly illustrate the power of face to face meetings to maximise both the personal support of a sympathetic title for an individual political leader and the communication of a political party's message through it.

Relations with News Corporation and News International

2.73 Mr Cameron was understandably keen to win back the support of News International's titles from New Labour. As he put it:

> *"No politician who wishes to get his message across to the public could afford not to take into account the scope of News International's coverage when deciding which people to meet".*[96] *When he assumed the leadership of the Conservative Party he hoped that: "...in time, we would have the support of News International's papers. After all, these papers fundamentally share the same views on society and the free market as the Conservative Party".*[97]

Rupert Murdoch

2.74 Contact with Rupert Murdoch had in fact begun during the leadership contest. Mr Murdoch first recalled meeting Mr Cameron socially at a picnic hosted by his daughter Elisabeth.[98] He

[95] pp59-60, line 15-8, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf; p8, Aiden Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-AB1D.pdf

[96] p64, para 190, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[97] p66, para 196, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[98] Elisabeth Murdoch has her own substantial business interests in the form of Shine Limited

dispelled rumours that his first impression of Mr Cameron was of a 'lightweight' politician.[99] Rather, he said that he had been impressed with Mr Cameron as a family man.[100] The first contact of a strictly business nature was when the two men met at The Sun's offices in Wapping in October 2005 before the leadership election.[101]

2.75 Thereafter they met face to face, or were at the same events, on at least ten occasions whilst Mr Cameron served as Leader of the Opposition.[102] There was some discrepancy between the schedules of contact provided by the witnesses.[103] There were many potential reasons for the discrepancies and no indication that those who had compiled the schedules on behalf of their principals had done anything other than their best from old records, diaries etc, which were never intended to record precisely what contact had actually occurred.[104]

2.76 The contact usually took place at meetings over a meal, or at News Corporation functions but there was also some social contact. Both men were present, as were Mr Blair and Mr Brown, at the wedding of Rebekah Wade to Charlie Brooks on 13 June 2009. Six months later, on 19 December 2009, Mrs Brooks arranged a dinner attended by the Camerons, the Osbornes, Mr Brooks, Rupert, James and Kathryn Murdoch. This event took place not long after The Sun had, in September 2009, switched its support from Mr Brown to Mr Cameron, and it is easy to envisage it cementing the newly warmed relationship between News International and Mr Cameron.

2.77 Describing what passed between them during the course of the working meals which they had together, Mr Cameron emphasised Mr Murdoch's global perspective and interests:[105]

> *"…I mean, in most of my lunches or breakfasts with Rupert Murdoch, the conversation has always been predominantly about economic issues, security geopolitical issues, he was very interested in what was happening in Afghanistan, very interested in global markets.*
>
> *I think it's – of course all businesses have their interests and the rest of it, but in my dealings with Rupert Murdoch, most of the conversation has been about big international political issues."*

2.78 Mr Murdoch did not recall the detail of the conversations but his recollection generally of his conversations with Prime Ministers certainly bore out that these were topics which he spoke to senior politicians about and was interested in. His keen interest in geopolitics was very probably raised and, in particular, the conduct of the war in Afghanistan and perception of public opinion on the circumstances in which British troops were fighting was to play a role in

[99] p1, lines 8-16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[100] p1, lines 15-16, *ibid*
[101] p65, para 193, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[102] p54, lines 8-12, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[103] Compare David Cameron: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf and Rupert Murdoch's schedule of contact with Opposition leaders: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-29.pdf
[104] pp54-55, line 13-3, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[105] p68, lines 6-15, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

The Sun's transfer of support away from Mr Brown to Mr Cameron.[106] His strength of feeling on this issue was well illustrated by the following evidence which he gave about his views on Mr Brown's handling of equipment issues:[107]

> *"…And Afghanistan I felt very strongly about. First, I thought it was right – this was, I think, beyond us going in there. I felt very strongly, particularly when I came here and saw the photographs of the great young British soldiers who'd either been wounded or killed there, I felt very strongly when the charge was made that they weren't being properly protected, and I was dissatisfied with Mr Cameron's [sic] answer that they were better protected than any other Europeans. Our argument was that they should be as well protected as the Americans.*
>
> *And although we kept the relationship always with Mr Cameron – I'm sorry, Mr Brown, you'll note in the letters between he and I, we always finished with best wishes to our families."*

2.79 Mr Murdoch's interest, and that of The Sun, in British soldiers included News International Supply Company Ltd funding the Leader of the Opposition's Combat Stress Summit at the House of Commons, as declared in Mr Cameron's entry for 15 July 2009 in the Register of Members' Interests.[108] Mr Brown was the subject of strongly worded criticism by The Sun on matters relating to Afghanistan.

2.80 Mr Cameron said that he had not had a conversation either with Mr Murdoch or any other proprietor akin to that which Sir John Major had had with Mr Murdoch in which the latter had made clear that he could not support the Conservative Party unless policy on Europe was modified.[109]

2.81 On questions of media policy, Mr Murdoch denied discussing broadcasting regulation with Mr Cameron, BBC license fees, or Ofcom's role. He said, surprisingly, that the BBC and Ofcom had not come up in conversation even to the extent of his view being sought:[110]

> *"LORD JUSTICE LEVESON: – I'd like to ask you to separate out in your mind the question whether you might be discussing some topic or issue for commercial advantage – you've told Mr Jay that you never did – from the separate question: whether in fact these were topics that were worthy of discussion and on which you had a view. So, for example, you've mentioned that you talked about Afghanistan, and it would be perfectly reasonable for you to have a view on that. Lots of people will. And your view may be informed by your worldwide contacts through the businesses that you operate. That's merely your view. But, therefore, your view on, for example, the regulation of television would itself be of value and may be of interest to those who are formulating policy, not because it necessarily would affect News Corp, but because this is a business to which you have devoted your life, therefore it's not surprising you will have strong views and I'm just slightly surprised –*
>
> *A. I understand.*

[106] p3, lines 11-25, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[107] pp6-8, line 15 -8, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[108] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-3.pdf
[109] p44, lines 3-11, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[110] pp5-6, line 6 -1, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

LORD JUSTICE LEVESON: – if nobody did ask your view.

A. I understand, sir. I just wish to say that I'd long since become disillusioned and it was a waste of time to talk to politicians about the BBC, and that was about all there was to it. And Ofcom, no, I did not speak to him about that. It would have been asking for something, probably, and I didn't do that."

2.82 Mr Murdoch was at pains to point out that if his priority had been to secure the most benign regulatory environment for his business interests then he would always have supported the Conservative Party which, of course, has not always happened. He said:[111]

> *"No, Mr Jay, you keep inferring that endorsements were motivated by business motives, and if that had been the case, we would have endorsed the Tory Party in every election. It was always more pro business. I could have been like the Telegraph. I could even have texted him every day. But I didn't. I was interested in issues."* (emphasis added)

And later:[112]

> *"If I'd been interested in commercial interests, I would have supported the Tory Party in every election, because they were always more pro business –"*(emphasis added)

2.83 He did not pretend though that his interest in issues was entirely divorced from his business interests: *"…it was also in my interests to reflect the views or to talk to our readers, and maybe attract more readers."*[113]

2.84 For his part, Mr Cameron was emphatic that there had been no 'deals' between the Conservative Party and News International. He rejected the suggestion that there had been either express or implied deals with the media with this answer:[114]

> *"A. I don't accept that. First of all, on this idea of overt deals, this idea that somehow the Conservative Party and News International got together and said, "You give us your support and we'll wave through this merger", that by the way we didn't even know about at that stage, I think the idea of overt deals is nonsense, and you've heard that from lots of people in front of this Inquiry. I also don't believe in this theory that there was a nod and a wink and some sort of covert agreement. Of course, I wanted to win over newspapers and other journalists, editors, proprietors, broadcasters.*
>
> *I worked very hard at that because I wanted to communicate what the Conservative Party and my leadership could bring to the country. I made those arguments. But I didn't do it on the basis of saying, either overtly or covertly, "Your support will mean I'll give you a better time on this policy or that policy", and there are plenty of examples of policies that I believe in that the people who were backing me didn't believe in."*

2.85 One meeting which was to prove important from the point of view of public perception, if not of substance, was that which occurred on board a yacht, probably Elisabeth Murdoch's, off the Greek island of Santorini, on 16 August 2008.[115] The meeting, which resulted a brief face-

[111] p3, lines 17-23, Rupert Murdoch, *ibid*
[112] p6, lines 11-13, Rupert Murdoch, *ibid*
[113] p6, lines 16-19, Rupert Murdoch, *ibid*
[114] pp32-33, line 9-4, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[115] pp9-10, line 21-6, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

to-face encounter in a social context, involved some convoluted travel arrangements which were made possible by the provision of a private jet owned by Matthew Freud, Elisabeth Murdoch's husband and a longstanding friend of Mr Cameron.[116] Mr Cameron, who declared the flight in the Registry of Members' interests, explained the lengths to which he had been prepared to go to meet Mr Murdoch:[117]

> *"My wife and two of my children flew on Mr Freud's jet from Farnborough to Istanbul, where I met them on the way back from a visit to Georgia (which had recently been invaded by Russia). We then flew on the jet to Santorini where I met Mr Freud on his yacht before meeting Rupert Murdoch. After that we returned on the jet to Dalaman for a family holiday. My family and I did not fly back to London on the jet and I paid for my air fare as well as that of my family."*

2.86 The excursion to Santorini was proposed to Mr Cameron by Mr Freud. For Mr Cameron it was an opportunity to try and win support from Mr Murdoch, by engaging directly at a personal level:[118]

> *"Well, from my point of view, it was just a better opportunity to try to get to know Rupert Murdoch better. Obviously I was trying to win over his newspapers and put across my opinions, so for me it was just an opportunity to try and build that relationship."*
>
> *"It was quite a long way to go and all of that, but it seemed a good opportunity".*

2.87 For Mr Murdoch, the meeting was less memorable. He did not recall it and had had to check with his wife and daughter to remind himself.[119] He regarded the lengths to which Mr Cameron had gone to meet him as not unusual and one got the feeling that Mr Murdoch was well used to political leaders seeking him out: a telling indicator of the power and importance of one of the biggest media proprietors:[120]

> *"A. Well, I think I've explained that politicians go out of their way to impress people in the press, and I don't remember discussing any heavy political things with him at all. There may have been some issues discussed passingly. It was not a long meeting. As I say, I don't really remember the meeting. I think that's part of the democratic process. They – all politicians of all sides like to have their views known by the editors of newspapers or publishers, hoping that they will be put across, hoping that they will be – that they will succeed in impressing people. That's the game."*

The proprietor later added:[121]

I

[116] p57, lines 18-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[117] p67, para 199, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf; Rupert Murdoch was missing from the list of people Mr Cameron listed in exhibit DC2 as having been present on 16 August 2008 but he rapidly corrected this error (which arose at a time when the meeting was already in the public domain) in his oral evidence, pp56-57, line 14 –3, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[118] p59, line 11-17, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[119] p26, para 107, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf; p10, lines 1-6, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

[120] p10, lines 13-24, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

[121] p11, lines 11-14, Rupert Murdoch, *ibid*

> *"Mr Cameron might, of course, think stopping in Santorini would impress me. I don't know. But I certainly didn't – ... I didn't, I don't have any fealty to the Tory Party or to the Labour Party ..."*

2.88 Mrs Brooks' recollection was that Mr Cameron had spent *"… an afternoon and an evening …"* with them.[122] She had been a party to some but by no means all of the conversation between Mr Cameron and Mr Murdoch and concluded that:[123]

> *"Well, it seemed to – it was a very cordial meeting and it went well. Like I say, it lasted for either an afternoon or an evening, so it wasn't particularly long".*

James Murdoch

2.89 Mr Cameron saw more of James Murdoch than Rupert Murdoch whilst in Opposition. There were at least 15 meetings during this period.[124] The type of contact was similar, typically taking place over meals or at events.[125] Mr Cameron's purpose in meeting James Murdoch was to get across his political message in the hope of winning the support of News International:[126]

> *"… most of these meetings were really about me trying to promote Conservative policy, the Conservative approach and the rest of it, but sometimes, because I'm interested in media issues and have longstanding views on them, sometimes I'm sure we would have discussed them."*

2.90 There were wide ranging discussions including defence and economy.[127] As James Murdoch put it: *"… discussions were on a broad range of subjects, from foreign policy to other things"*.[128]

2.91 Of particular interest to the Inquiry, they also discussed both the role of Ofcom and the BBC, subjects on which each held different views. Speaking about the BBC and Ofcom, Mr Cameron put it this way:[129]

> *"… I'm sure that over the years I've discussed some of those issues with James Murdoch. He has very strong views on them, I have very strong views, they're not really the same views, and I'm sure we would have had discussions about it. Perhaps particularly – well, I think probably on both. I don't recall the specifics, but I'm sure we must have discussed our views."*

2.92 These differences of view did not prevent News International ultimately coming to the view that The Sun should stop supporting Mr Brown and instead support Mr Cameron. When that

[122] p49, lines 1-2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[123] p49, lines 17-19, Rebekah Brooks, *ibid*. Note that the transcript here records Mrs Brooks as saying that the duration of the stay was either an afternoon or an evening whereas she is earlier recorded as saying an afternoon and an evening. On any view it was a short stay.
[124] p54, lines 8-12, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[125] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf; James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-10.pdf
[126] p61, lines 4-10, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[127] p64, lines 3-16, David Cameron, *ibid*
[128] p61, lines 10-12, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[129] p60, lines 15-22, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

time came, it was James Murdoch who first signalled the change of course to Mr Cameron. Both the differences of view and the circumstances of The Sun's political change of mind are discussed further below.[130]

Rebekah Brooks

2.93 Influential, and supremely connected, Rebekah Brooks (née Wade) was editor of The Sun when Mr Cameron became Leader of the Opposition. She remained in that role until September 2009 when she was promoted to become Chief Executive of News International.[131]

2.94 The Inquiry took evidence from both Mr Cameron and Mrs Brooks about their contacts. Both provided lists of their contacts, Mr Cameron a list of meetings with media figures as Leader of the Opposition and Mrs Brooks a list of meetings with leaders of political parties.[132] As has already been adverted to above, there were many straightforward reasons why Mr Cameron's list could not be 100% accurate or comprehensive.[133] Similar considerations applied to Mrs Brooks' list and she accepted that hers was not comprehensive.[134] It is plain enough that neither list is comprehensive insofar as it relates to contact between the two because each contains a number of entries relating to such contact not found in the other. Nevertheless, they were useful starting points for piecing together enough of their contact to form a reliable impression of what had passed between them in this period. Supplemented by the oral and documentary evidence, the Inquiry was able to build a picture, amply sufficient for its high level Terms of Reference. The account which follows is drawn from the totality of the evidence.

2.95 After the leadership contest, contact started on 18 January 2006, when Ms Wade (as she then was) was one of a party of senior News International figures who accompanied Rupert Murdoch when he lunched with Mr Cameron.[135] During the leadership race itself, Mrs Brooks did not recall supporting any particular candidate. She said:[136]

> *"Q. Mrs Brooks, we're onto Mr Cameron now, According to his biography, in 2005, you actually supported Mr Liam Fox for the Conservative leadership. Is that correct or not?*
>
> *A. I don't think that is correct. I can't – I don't think the Sun came out for a particular candidate in the leadership. We probably didn't support Ken Clarke because of Europe, but I don't remember actually having a particular line in the paper for the leadership".*

2.96 Ms Wade next dined with Mr Cameron, in the company of Trevor Kavanagh on 28 March 2006. Further dinners followed on 30 September and 1 October 2006, both in the company of a number of journalists from other media companies.[137] Ms Wade's record of contact also included a meeting at a hotel on 15 June 2006.[138]

[130] paras 2.138-2.159 and paras 2.120-2.137 below
[131] p1, para 5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Rebekah-Brooks.pdf
[132] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf
Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf
[133] para 2.75 above
[134] p41, lines 13-21, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[135] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf
[136] p46, lines 1-9, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[137] p5, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf lists a dinner on 2 October 2006 but not 1 October 2006
[138] p5, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf,

2.97 Meetings with Mr Cameron in 2007 started with a lunch on 16 January 2007, attended by colleagues from both The Sun and the NoTW and included a dinner on 1 October 2007, at which Les Hinton and journalists from The Sun were present, as well as drinks on 30 December 2007. As has already been discussed above, it was during the course of this year that Mr Coulson was recruited by Mr Cameron who spoke to Mrs Brooks about him.[139] Mrs Brooks' schedule of meetings with party leaders records a dinner with Mr Cameron on 24 March 2007.

2.98 As for telephone contact during this period, including mobile phone contact, Mr Cameron described telephoning less than once a week. Less often, he thought, than Mr Brown:[140]

> *"In opposition, perhaps particularly sort of 2006, 2007, not a huge amount. I mean, I always felt when I did ring her, ... it felt like I was telephoning a lot less than Gordon Brown, which I thought was interesting, that he was the Prime Minister and I was the leader of the opposition. My sense was I was in contact a lot less than he was. But I can't put numbers on it.*
>
> *But certainly, you know, in 2006, 2007, not necessarily every week, I don't think".*

2.99 In 2008, Mr Cameron and Ms Wade lunched on 23 April 2008. They were both at a social event on 5 July 2008 and an event on 10 July 2008. On 16 August 2008 they were both at a dinner with Matthew Freud and Elisabeth Murdoch (this being the occasion on which Mr Cameron flew to Santorini and also met Rupert Murdoch). Relations between Mr Cameron and Ms Wade were already warm by this stage. She accepted that by then she was "quite friendly" with Mr Cameron.[141] Ms Wade and colleagues from The Sun dined with Mr Cameron on 29 September 2008.

2.100 The Rt Hon Dominic Grieve MP was the Shadow Home Secretary between June 2008 and January 2009.[142] There was animated discussion about the Human Rights Act at a dinner at which Ms Wade, Mr Grieve and other shadow cabinet members, but not Mr Cameron, were present. The discussion turned upon the Conservative Party's interest in the possibility of repealing the Human Rights Act and replacing it with a British Bill of Rights. According to Mrs Brooks, Mr Grieve was *"just making the legal point that it was very difficult to do"*. Mrs Brooks denied rumours that she later sought to persuade Mr Cameron to remove Mr Grieve from his portfolio as Shadow Home Secretary, asserting that it was his colleagues who were in disagreement with him at the time:[143]

> *"No, I did not tell Mr Cameron to move him. What – the conversation – as I say, it was a very heated conversation, borne out by – his colleagues were trying to almost silence him at the table because he was, in effect, saying one of the promises the Conservatives had made to the electorate was they were going to repeal – and it was almost the opposite way around, that they were concerned that his view was not to be taken seriously, and as it turned out, he was entirely correct".*

I

[139] paras 2.14-2.42 above
[140] p79, lines 14-23, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[141] p49, lines 20-22, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[142] http://www.dominicgrieve.org.uk/about-dominic-grieve
[143] p110-111, lines 18-2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

2.101 Mrs Brooks also denied expressing a view in any way to Mr Cameron about Mr Grieve.[144]

2.102 Mrs Brooks' list of meetings with the leaders of political parties refers to a breakfast meeting with Mr Cameron at the start of the year, on 22 January 2008 and to a New Year's Eve Party on 31 December 2008. Neither of these entries is in Mr Cameron's list. The New Year's Eve Party was held at the Brooks' farm and was in fact hosted by Mr Brooks' sister. By 2008, Mr Cameron counted Ms Wade as a good friend, notwithstanding her paper's support, and her personal support, for Mr Brown.[145] The growing friendship had been helped along by the fact that Mr Cameron had known Charlie Brooks, whom Mrs Brooks was to marry in 2009, for over 30 years.[146] It did not prevent her newspaper giving its continued support to Mr Brown's Government and remaining critical of the Conservatives. For example, on 14 October 2008, The Sun criticised Conservative opposition to extending the detention time for terrorist suspects to 42 days.[147]

2.103 There was a dinner on 29 January 2009 at which a number of newspaper editors and Robert Peston were present. Mr Cameron and Mrs Brooks were both at Mr Brooks' book launch on 1 April 2009. Mr Cameron was then one of a number of high profile politicians who attended the wedding of Ms Wade to Mr Brooks on 13 June 2009. As has been explained he was a friend of both the bride and groom. The wedding further cemented Mr Cameron's friendship with Mrs Brooks. In his words: "*… our relationship got stronger when she married Charlie Brooks, who I've known for some time and who's a neighbour*".[148]

2.104 It was during this month that Mrs Brooks recalled initial internal discussions with Rupert and James Murdoch about transferring The Sun's political support.[149] Although it was not Mrs Brooks who informed Mr Cameron of The Sun's decision to abandon its support for Mr Brown, Mr Cameron had felt that she was onside months rather than weeks before it actually took place.[150] On 21 September 2009, a few days before The Sun announced its change of allegiance, James Murdoch, Mrs Brooks and Mr Cameron had dinner together. The three also shared breakfast on 2 November 2009 and on 19 December 2009 Mr Cameron dined with Mrs Brooks and Rupert Murdoch at the Brooks'.

2.105 Mrs Brooks' list of meetings with party leaders for 2009 includes a lunch at the home of James and Kathryn Murdoch on 3 May 2009, a meeting on 1 September 2009 and dinner at the Camerons' home on 24 October 2009. None of these meetings appeared in Mr Cameron's record. As best she could recall, Mrs Brooks thought that the European constitution debate and Afghanistan were discussed on 3 May 2009.[151]

I

[144] p111, lines 3-7, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[145] pp78-79, lines 19-5, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[146] p71, para 209, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[147] pp71-72, para 212, David Cameron, *ibid*
[148] p79, lines 1-5, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[149] pp51-52, lines 17-20, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[150] p77, line 9-13, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[151] p51, line 1-7, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

2.106 The increasing social contact that Mr Cameron was having with Mrs Brooks brought about a commensurate increase in telephone contact. When asked about such contact in the years 2008 and 2009, Mr Cameron put it this way:[152]

> *"I think as we got closer to the election and the decision of the Sun and also the wedding and she's moved in to Charlie Brooks' house, which is very near where I live in – where we live in the constituency, then the level of contact went up, and we saw each other socially more."*

And then:[153]

> *"It's very difficult because I don't have a record and I don't want to give you an answer that isn't right, so, you know, sometimes I expect we would have been talking to each other quite a bit, particularly around the time perhaps of the wedding or when we were both in Oxfordshire, we would have had more frequent contact"* (emphasis added).

2.107 A check by Mr Cameron with Mrs Samantha Cameron's diary was able to provide more detail, enabling Mr Cameron subsequently to add: *"…[Mrs Cameron] points out that we were only in the constituency 23 weekends in 2008, 23 weekends in 2009 and I think 15 in 2010. And she reckons we probably didn't see them more than on average once every six weeks, so that is a better answer than what I was able to give you earlier."*[154]

2.108 Mr Cameron and Mrs Brooks also used SMS text messages to keep in touch. Mrs Brooks estimated that she exchanged texts on average once per week with Mr Cameron, more during the subsequent general election campaign:[155]

> *"Probably more – between January 2010, maybe – during the election campaign, maybe slightly more, but on average, once a week".*

2.109 Text contact between Mr Cameron and Mrs Brooks reflected the close and friendly relationship which both explained had developed. This was not in issue because Mr Cameron agreed in general with the gist of her evidence about the quantity and tone of text messages.[156] If illustration is needed, when asked how the messages were signed off, Mrs Brooks said:[157]

> *"A, … He would sign them off "DC" in the main"*
>
> *Q. Anything else?*
>
> *A. Occasionally he would sign them off "LOL", "Lots of love", actually until I told him it meant "laugh out loud", then he didn't sign them like that any more. But in the main, DC, I would have thought."*

[152] p80, line 1-6, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[153] p80, line 12-17, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[154] p1, lines 8-14, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[155] p73, lines 20-22, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[156] p79, lines 6-10, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[157] p76, lines 1-4, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

2.110 It is important that I repeat what I made clear during the hearing. Like everyone else, politicians are entitled to be friendly with whomsoever they wish and there must remain some space for a private life in even the most public of figures. For the purposes of the Inquiry, concerned with the relationship between politicians and the press, what matters is the extent to which the influence of the press can be manifest not only in public, through the megaphone of newspapers, or formally through transparent access, but also informally in ways which might cause a perception of undue influence. It is unnecessary, intrusive and unhelpful to descend into too much detail of personal contact; only its extent needs to be clear: this also I shall return to in the context of conclusions and recommendations.

2.111 That point naturally leads to the quantity of text messages passing between Mr Cameron and Mrs Brooks which were disclosed by News International and thus identifies the approach of the Inquiry to them. Mr Jay explained why only one of these was put into evidence:[158]

> *"I should make it clear before I read it out that News International have recently disclosed a number of other text messages between Mrs Brooks and Mr Cameron, pursuant to a Section 21 request. A section 21 request is in fact an order under statute requiring people to disclose material. Those relate to the period October 2009, May 2011 and June 2011. In the Inquiry's judgment, all the other text messages I have referred to are irrelevant to its terms of reference. That's why we're only going to look at one. And News International through their solicitors Linklaters have also explained why text messages in other monthly periods are not available, and their letter will be put on our website.*
>
> *So the one we're looking at is 7 October 2009, which I think is during the party conference."*

2.112 The text in question (which has been the subject of considerable media attention) was sent by Mrs Brooks to Mr Cameron on 7 October 2009 at 16:45hrs, just days after The Sun had abandoned support for Mr Brown. After the first line which was redacted on grounds of relevance, the text read:[159]

> *"But seriously [which suggests that the first line contains or might contain something of a jocular nature] I do understand the issue with the Times. Let's discuss over country supper soon. On the party it was because I had asked a number of NI [that's obviously News International] people to Manchester post endorsement and they were disappointed not to see you. But as always Sam was wonderful – (and I thought it was OE's that were charm personified!) I am so rooting for you tomorrow not just as a proud friend but because professionally we're definitely in this together! Speech of your life? Yes he Cam!"* (emphasis added)

2.113 The reference in the message to "tomorrow" was to Mr Cameron's speech to the Conservative Party Conference. The background to the message was that Mr Cameron had apologised for not attending the Times' party at the conference.[160] The striking phrase "*we're definitely in it together"* was, in Mr Cameron's words, a reference to the fact that, having parted company with Labour, The Sun wanted to: *"…make sure it was helping the Conservative Party put its*

[158] pp81-82, lines 23-10, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf, and http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Letter-from-Linklaters-regarding-Rebekah-Brooks-communications-with-Prime-Ministers.pdf

[159] pp82-83, lines 19-5, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[160] p83, lines 8-18, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

best foot forward with the policies we were announcing, the speech I was going to make and all the rest of it …" and *"…we were going to be pushing the same political agenda."*[161] The text illustrates how complete the sudden transfer of support was and how close the communication between News International and Mr Cameron was.

2.114 Mr Cameron confirmed that a country supper was the sort of interaction he often had with Mrs Brooks and demonstrates how the discussion of professional matters in a very informal social environment was occurring.[162]

2.115 The only pre-election meeting in 2010 between Mrs Brooks and Mr Cameron recorded in Mr Cameron's schedule of contact with the media in opposition was on 29 January 2010, at an event also attended by the editors of the Times and the Sunday Times.[163] This appears to correspond with Mrs Brooks' record which refers to a single meeting at News Corporation's Davos conference in that month.[164] More meetings in fact took place. Mrs Brooks recalled meeting the Prime Minister "*three or four times"* between January 2010 and the election.[165]

2.116 During the general election campaign of 2010 Mrs Brooks put the frequency at twice a week. As to their content, she said:[166]

> *"Some, if not the majority, were to do with organisation, so meeting up or arranging to speak. Some were about a social occasion, and occasionally some would be my own personal comment on perhaps the TV debates, something like that".*

2.117 Mrs Brooks did not text either Mr Brown or Mr Clegg during the campaign.[167]

2.118 Tracing the development of the communications between Mr Cameron and Mrs Brooks during opposition reveals clear trends. The volume of contact increased over time, particularly as a result of the increasing social contact. The nature of the contact changed. At the start it can only really have involved Mr Cameron trying to get his political message across to the editor of a newspaper then supporting the opposition. By the end, it was less a matter of Mr Cameron getting his message over to the new editor of The Sun and more a question of News International being "*in it together*" with Mr Cameron, and seeking to get his message across for him.

2.119 It was not only Mrs Brooks who played a part in the developing contact between Mr Cameron and News International. Matthew and Elisabeth Freud (née Murdoch) also moved in similar circles. As has been described, Mr Freud provided his private jet to enable Mr Cameron to meet Rupert Murdoch in Santorini.[168] He and his wife had dinner with Mr Cameron and Ms Wade during the course of Mr Cameron's brief visit on that occasion. Rupert Murdoch first met Mr Cameron at a picnic hosted by his daughter Elisabeth.[169] Mr Cameron's list of contacts with media figures as Leader of the Opposition records six occasions on which Mr Cameron met either one or both of the Freuds. Three of these occasions are listed as "social" contact and the remainder as "dinner".

[161] pp83-84, lines 22-9, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[162] p84, lines 10-13, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[163] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-2.pdf
[164] p6, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf
[165] p75, lines 1-2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[166] p74, lines 6-10, Rebekah Brooks, *ibid*
[167] p75, lines 7-12, Rebekah Brooks, *ibid*
[168] See above at paras 2.85 – 2.87
[169] See above at para 2.74

The Sun's transfer of support from Labour to the Conservatives

2.120 As relations warmed between Mr Cameron and Mrs Brooks, so they appear to have cooled between Mr Brown and Mrs Brooks, at least professionally. Criticism of Mr Brown's Government increased and the subject of Afghanistan, in particular, became an issue on which The Sun was highly critical of Mr Brown. The title ran a campaign critical of the equipment and resources being allocated to British forces in Afghanistan, reflecting Rupert Murdoch's strong views on the issue. One of the last headlines which Mrs Brooks published as the editor of The Sun, on 28 August 2009, read "*Don't you know there's a bloody war on?*".[170]

2.121 Rupert Murdoch, James Murdoch, Mrs Brooks, Dominic Mohan, Trevor Kavanagh and Tom Newton Dunn were all involved in the discussions which led to the decision to abandon Mr Brown.[171] The discussions appear to have begun around June 2009.[172]

2.122 By 10 September 2009 the plan to switch support was sufficiently concrete for James Murdoch to meet Mr Cameron at The George and tell him that it was going to happen. Mr Cameron described a short meeting of 30-40 minutes' duration. At that stage Mr Cameron was not given the precise date on which the switch would be announced but he was given an indication that it would be during the conference season. Mr Cameron recalled:[173]

> *"… It was a drink and a catch-up, but it was – he wanted to tell me that the Sun was going to support the Conservatives and he told me, I think, from my memory, that it was going to happen around the time of the Labour conference, and I remember obviously being pleased that the Conservative Party was going to get the Sun's support, and I think we had a conversation about other policy issues at the time. That's my memory of it".*

2.123 Mr Cameron could remember discussion of economic policy and defence but not mention of Conservative policy on either the BBC or Ofcom, about which James Murdoch had pronounced views. Both bodies had received trenchant criticism as recently as 28 August 2009 in the controversial MacTaggart lecture that James Murdoch had delivered. Asked directly whether either had been mentioned Mr Cameron said:[174]

> *"A. I don't recall that, and I think it unlikely. I think that this was – he was very keen to tell me directly that the Sun was going to support the Conservatives, that he felt on the big economic judgment about what Britain needed we had the right argument, the government had the wrong argument, and my memory is that's what the conversation was about.*
>
> *LORD JUSTICE LEVESON: Yes, you said you had a conversation about other policy issues?*

[170] p52, lines 1-2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf; http://www.thesun.co.uk/sol/homepage/news/campaigns/our_boys/2611351/Dont-you-know-theres-a-bloody-war-on.html

[171] p18, para 8.6, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf; pp55-56, lines 25-3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

[172] p51, para 20-22, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

[173] p63, lines 1-10, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

[174] pp64-65, lines 3-1, David Cameron, *ibid*

A. Yes, he has lots of enthusiasms that aren't about the media. He's particularly enthusiastic about defence. He takes the view we should have at least six aircraft carriers, I think at the last count, rather than two, so he has lots of enthusiasms and I'm sure we discussed some of those, but the key – my memory is, and it's difficult to recall all of these events, I definitely remember him saying the Sun was going to support the Conservative Party. I wouldn't forget that. I think he gave me a hint of the timing, and my memory is it was mostly about the big economic picture, because that was the key issue of the day".

2.124 James Murdoch emphatically denied any mention of regulatory issues on 10 September 2009: "*At that meeting I certainly didn't*".[175]

2.125 The change, when it came, was calculated to do maximum political damage to Mr Brown.[176] It was announced through The Sun headline: "*Labour's Lost It*", published on 30 September 2009, the day after Mr Brown's speech to the Labour Party Conference.[177] The timing and choice of headline bore a significance that went beyond simply communicating the transfer of The Sun's political support, important though that was. The emphasis was placed heavily on the move away from Mr Brown personally rather than the shift towards Mr Cameron.

2.126 Mr Coulson would have preferred an endorsement of Mr Cameron timed to coincide with the Conservative Party Conference. He stated: "*I felt it was more a rejection of Labour than a positive endorsement of us. If I'd had half the influence on The Sun that some claim, the front page would have looked very different*";[178] and he said: *"… I didn't get involved in the Sun's decision on the timing and frankly, had I done, I would have wanted it to come as a positive endorsement of the Conservatives in our conference."*[179] Nevertheless, he regarded securing the title's support as *"… a serious positive for us …".*[180]

2.127 A number of explanations were given by witnesses for the change in support. Rupert Murdoch confirmed that he had been very much involved in the decision. He felt that Labour *"was making lots of mistakes"*[181] and also compared the decision to that which he had made in 1997 only in reverse, stating: "*I supported a shift to Labour by NI's titles when I thought the Conservative Party had run out of ideas, and I supported a shift to the Conservative Party after 13 years of Labour rule for the same reason".*[182]

2.128 James Murdoch described the discussions which led to the decision in terms of discussion of Labour policies:[183]

[175] p67, James Murdoch, lines 2-5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[176] p66, lines 20-23, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[177] http://www.thesun.co.uk/sol/homepage/news/2661063/The-Sun-Says-Labours-lost-it.html
[178] p21, para 100, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[179] p60, lines 14-17, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[180] p67, lines 15-17, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[181] p90, lines 6-11, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[182] p29, para 120, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[183] p18, para 8.6, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf

> *"The Sun is a campaigning paper involved in many policy issues, and there were discussions about some of these issues. The paper had started moving away from the Labour party over lack of funding, supplies and support for British troops in Afghanistan after the government had committed to the conflict there. The consensus was reached after discussing a range of policies and effectiveness at implementing them and resulted in the decision to support a change of Government."*

2.129 He confirmed that polling data was available, and accepted that they were trying to read the mood of the country. There was also consideration of the individuals involved and the readership.[184] The decision had a number of components.

2.130 Mrs Brooks described having an instrumental role in the change of support. Asked whether she had played a major role, she said: "*I was certainly instrumental in it. I mean, ultimately, Rupert Murdoch's the boss, but I was instrumental in it, as was Trevor Kavanagh, Tom Newton Dunn and the editor, Dominic Mohan*".[185] She said that the decision was taken because it was "*the right thing to do for the paper and for our readership.*"[186]

2.131 All those from whom the Inquiry received evidence denied that there had been any conditions or exchanges, whether express or implied, upon which The Sun's support was contingent.[187] The allegation that the transfer of The Sun's support to the Conservatives was the product of a 'deal' between News International and the Conservative Party was made publicly by Lord Mandelson when he was interviewed on the Today programme on BBC Radio 4, a matter of weeks after The Sun's about turn. He told the Inquiry that the basis for his view was what he perceived to be a coincidence between the views expressed in James Murdoch's MacTaggart lecture and Conservative media policy:[188]

> *"Q. I'm going to come to that. Your feeling was that some sort of deal had been done between the Conservative Party and News International. You said as much on Radio 4, the Today programme, on 11 November 2009, didn't you?*
>
> *A. I did say that, and I know that, you know, some people have said that I was just, you know, throwing around these claims for specious reasons or without evidence. In fact, I made these comments both on the Today programme and in the House of Lords, when it was clear to me that there was more than a coincidence, if I can put it that way, between the Tory's media policies and the views that were being expressed, for example, by James Murdoch in his MacTaggart lecture.*
>
> *In July 2009, Mr Cameron had pledged to dismantle the hated Ofcom – I mean hated by News International. He said that it was part of the Tories' cutting back of the*

[184] pp94-95, lines 21-2, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[185] pp55-56, lines 25-3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[186] p60, lines 13-17, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[187] pp51-60, lines 10-18, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf; pp58-69, lines 10-11, Dominic Mohan, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-9-January-2012.pdf; p20, para 9.9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf; p90, lines 3-11, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[188] pp71-72, lines 5-7, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf

quango state and he said that under the Conservatives Ofcom will cease to exist as we know it.

When I subsequently learned that the team supporting the Conservative Party's media policy developments were the same team and the same people who were helping Mr Murdoch to draft his speeches, including the MacTaggart lecture, I didn't have to go very far to put two and two together to realise that this coincidence of policy had slightly greater meaning and that there was, in fact, a sort of organic link between the two, which is why I said what I did".

2.132 Lord Mandelson's public comments contrast with those which he later expressed on the issue in his autobiographical book, *The Third Man*, which was published in the following year. He wrote:[189]

"At his [Mr Brown's] urging I spoke out on that issue publicly on a couple of occasions following the Sun's switch. In fact, I suspected that the real reason for the change was simpler, and in a way even more discouraging. The Sun was a mass market paper. It saw its interests as backing a winner. While I was still not convinced, or at least not ready to accept, that a Tory victory at the next election was inevitable, given the yawning gap we would have to make up in the opinion polls, it was certainly looking that way" (emphasis added).

2.133 Questioned about the apparent inconsistency, he said that his two statements were not mutually exclusive identifying two reasons why he thought that The Sun would have wanted to support the Conservatives: a desire to back the likely winner and commercial self-interest of its proprietor. Lord Mandelson said:[190]

"First of all, I chose my words in finishing this book in 2010 without any prescience that I might be poring over it line by line, word by word with you in the course of justice, but secondly, and more seriously, two things were operating here, in my view: one, the Conservatives looked as if they were on the up and with a good chance of winning the election, and the Murdochs wouldn't ignore it.

Secondly, they would have seen very clearly that their commercial interests would have been suited more by a Conservative victory, given what Mr Cameron was saying in his own public speeches, than they would with a further Labour government, you know."

2.134 Pointing to The Sun's campaigns for a referendum on Europe and about "Broken Britain", Mr Brown said that The Sun had never really supported him: "*… at no point in these three years that I was Prime Minister did I ever feel I had the support of the Sun*".[191] Nevertheless, he identified a real change and felt that, under James Murdoch, News International adopted an "*aggressive public agenda*" and sought to put its own commercial interests first. He thought the Conservative Party went along with the media policies which News International sought:[192]

"News International had a public agenda. What's remarkable about what happened in the period of 2009 and 2010 is that News International moved from being – I think

[189] Mandelson, P, *The Third Man,* 2010, p489
[190] pp74-75, lines 25-12, Lord Mandelson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-21-May-20121.pdf
[191] p24, lines 4-6, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[192] pp37-38, lines 22-15, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

> *it was under James Murdoch's influence, if I may say so – to having an aggressive public agenda. They wanted not only not just to buy BSkyB, of course; they wanted to change the whole nature of the BBC. They wanted to change Ofcom, they wanted to change the media impartiality rules, they wanted to change the way we dealt with advertising so that there was more rights for the media company to gain advertisers. They wanted to open up sporting events so that Sky could bid for them in a way that – they were perfectly entitled to put this agenda. That was the agenda they were putting publicly. I think what became a problem for us was that on every one of these single issues, the Conservative Party went along with the policy, whereas we were trying to defend what I believe was the public interest."* (emphasis added)

2.135 Whatever the reaction of the Conservative Party to James Murdoch's views about media policy in the United Kingdom (and they are explored below), for his part Mr Brown reached the point where he felt it was no longer worth talking to News International about the subject:[193]

> *"It became very clear in the summer of 2009, when Mr Murdoch junior gave the MacTaggart lecture, that News International had a highly politicised agenda for changes that were in the media policy of this country, and there seemed to me very little point in talking to them about this."*

2.136 Mr Brown provided an eleven point note to the Inquiry containing information and quotations from the Murdochs and Conservatives on which he relied in support of his view that "*the Conservatives in opposition and in Government shaped their policy to match the demands of NewsCorp – on Ofcom, on the BBC, on TV advertising, on regulation and on the proposed takeover of BskyB*".[194]

2.137 Mr Cameron rejected the allegation:[195]

> *"To respond generally, and frankly it is absolute nonsense from start to finish. I think where it comes from is obviously Gordon Brown was very angry and disappointed that the Sun had deserted him, and as a result, in my view, he has cooked up an entirely specious and unjustified conspiracy theory to try and, I don't know, justify his anger.*
>
> *But I've taken the time to look through the individual parts of policy that he points to, and in almost every case it is complete nonsense.*
>
> *Just to take a couple of examples, he makes the point about the listing of sporting events and particularly the Ashes, and actually it was the Labour government, his government, that delisted the Ashes. He makes a point about us taking a particular view on product placement. Again, it was a Labour government that started the process of changing the rules on product placement under his oversight.*
>
> *On the BBC, as I've argued before, my position on the BBC is not the same as James Murdoch's position on the BBC. I support the BBC, I support the licence fee.*
>
> *So the Conservative Party, I think, will be submitting a piece-by-piece response to this because it is complete nonsense, but I'm very happy to go through the individual parts. But, as I've said before, there was no overt deal for support, there was no covert deal, there were no nods and winks. There was a Conservative politician, me, trying*

[193] p39, lines 6-11, Gordon Brown, *ibid*
[194] Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-GB8-to-Witness-Statement-of-Gordon-Brown-MP.pdf
[195] pp87-88, lines 11-17, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

to win over newspapers, trying to win over television, trying to win over proprietors, but not trading policies for that support. And when you look at the detail of this, as I say, it is complete nonsense."

David Cameron's media policy and manifesto

2.138 Having identified the stance taken by Mr Brown on the one hand and Mr Cameron on the other, the matter can perhaps be left there. What will be important, however, is to examine whether (and, if so, to what extent) the allegation that the relationship between the press (and, more particularly, News International) might legitimately be argued to have affected public policy decisions of the new administration. It is therefore appropriate to consider Mr Cameron's media policy and relevant parts of his general election manifesto. In doing so this subsection concentrates on policy towards the BBC and Ofcom. The BskyB bid is considered elsewhere in this Report.[196]

2.139 By the time of the general election of 2010, the Conservative Party's manifesto contained only a single paragraph about media policy and that concerned local media, particularly local television:[197]

"Our plans to decentralise power will only work properly if there is a strong, independent and vibrant local media to hold local authorities to account. We will sweep away the rules that stop local newspapers owning other local media platforms and create a new network of local television stations".

2.140 Of relevance to the Conservative Party's policy towards the BBC, the manifesto contained a pledge relevant to its financing to: *"ensure the National Audit Office has full access to the BBC's accounts"*. So far as Ofcom was concerned, the general pledges to *"cut the quango state"* and *"any quangos that do not perform a technical function or a function that requires political impartiality, or act independently to establish facts"* were of relevance as is explained below.[198]

2.141 The principles underlying Mr Cameron's approach to media policy were stated by him to be: *"… the need for a strong BBC, backed by the licence fee; plurality of provision; proportionate, not artificial, rules on media ownership; and a greater role for local television"*.[199] That statement of broad principles left plenty of scope as to the detail and during opposition Mr Cameron and his shadow cabinet colleagues debated and explored what that detail should be.

The BBC

2.142 In March 2008 the Conservative Party published a discussion document, "*Plurality in a new media age",* setting out its then current thinking. It entertained a particularly controversial

[196] Part I, Chapter 6
[197] p31, para 99, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf; p176, http://www.general-election-2010.co.uk/2010-general-election-manifestos/Conservative-Party-Manifesto-2010.pdf
[198] p31, para 100, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[199] p32, para 103, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

idea as to the use to which the BBC licence fee might be put, known as "top slicing", which was described in the document in these terms:[200]

> *"One option is to consider whether other organisations should be allowed to bid for small parts of the licence fee. This would ensure a plurality of provision in key genres, such as daytime children's TV and current affairs. However such a model would need to avoid the risk of distorting the commercial television market by mixing public and commercial funding, so it may be preferable for it to fund new channels rather than "top up" funding of existing channels."*

2.143 In October of the same year Mr Cameron wrote an article about The Sun which was published under the headline "*Tory chief hits out – Bloated BBC out of touch with viewers*". It contained both praise for and criticism of the BBC, expressing particular concern about the negative impact which the BBC could have on small private sector competitors and proposing rules to prevent that from happening. In support of the BBC he wrote:

> *"I am a slightly rare creature – a lifelong Conservative who is a fan of the BBC.*
>
> *I don't just mean the quality stuff …*
>
> *If I tot it all up: rummaging around the BBC news website, Radio 4 every morning, Radio 5 on a Sunday, The Big Cat Diaries and whatever Andrew Davies has written up recently, I get a huge amount from the full range of what the BBC has to offer.*
>
> *And yes, I even approve of the way the BBC is funded."*

2.144 Mr Cameron then critically observed that:[201]

> *"We've all seen in our own constituencies small internet businesses, often involved in education or other information provision, working away to create a market, to make some money, and then the BBC comes along and squish, like a big foot on an ant, that business goes out".*

He proposed:

> *"… a better set of rules that stops the BBC from charging in … and actually putting other people who are struggling to provide a market, out of work".*

2.145 In a significant speech to the Oxford Media Conference in January 2009, Ed Vaizey, then Shadow Culture Minister, expressed support in principle for the BBC but made clear Conservative concerns about competition, the breadth of the BBC's activities, costs, funding, regulation and management. What he said merits full quotation because it articulates Conservative thinking at that time:[202]

> *"We are fans of the BBC. In an uncertain world, the BBC provides a great resource for publicly-funded high-quality content. When looking for a solution to the future of public service broadcasting, we want one that is the least damaging to the BBC's integrity.*

[200] p40, para 117, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf; p4 of *Plurality in a new media age*
[201] p69, para 203, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[202] http://www.conservatives.com/News/Speeches/2009/01/Ed_Vaizey_BBC_must_not_drive_up_stars_salaries.aspx

"Although we believe in plurality in public service broadcasting, we do not believe the solution to the challenges presented by the internet age is necessarily to try and create another BBC. Having said that, it is equally important that the BBC stop acting like a friendly monopolist, making noises about partnerships, and engages seriously in discussions about how to ensure plurality in public service broadcasting.

On other matters: while we support the licence fee, and believe it is the best way to fund the BBC for the foreseeable future, we believe the level of the licence fee is at the top end of what is acceptable to the public.

The current settlement – which began in 2006 and lasts to 2012 – built in increases of 13 – 15% over that period. That was a generous settlement when times were good. It may start to look prohibitive as times get increasingly bad. The BBC will have to think very hard about whether substantial licence fee increases can be justified in the coming years.

The BBC Trust, under Sir Michael Lyons, has done a good job, and I would like to congratulate him. So what follows is not personal, it is, as they say, business. We think that there needs to be a clearer divide between the regulation and management of the BBC. The BBC and the BBC Trust should be clearly separate. The BBC should have its own chairman, who can cheer lead for the Corporation, while the head of the regulator gets on with regulating. A truly independent regulator would provide a genuine voice for the licence fee payer.

Moving on from that, the expansion of the BBC into areas where the private sector is already working needs to be carefully watched. Our watchword will be simple – if the private sector is already doing a good job in the area, or is developing a market in an area, the BBC should be prevented from going in with all guns blazing.

Finally, there is the issue of costs. The Ross/Brand row was not just about bad taste, though of course that was important. It was also about the huge amount of money the BBC is paying Jonathan Ross and other stars. A public service broadcaster with guaranteed revenue shouldn't compete with the private sector on top talent salaries. In fact, I would go further and say the BBC actually pushes up the price of talent with its interventions. So we will ensure that the BBC publishes fully audited accounts which will include details of the salaries of all its top talent. The BBC should be prepared to defend salary and indeed all expenditure decisions it makes."

2.146 Significantly, Mr Vaizey went on to make clear that the Conservatives were already moving away from the idea of top-slicing the BBC's licence fee. He said:[203]

"There are the solutions that involve the BBC – straightforward top-slicing of the licence fee; partnerships with the BBC and BBC Worldwide, or by using money ring-fenced for digital switchover; or the sharing of resources such as studios and technology.

Then there are the market solutions – a merger with Five, with BBC Worldwide, changing the terms of trade, or a combination of these.

We have been careful not to rule out any solution. But as I have indicated, we are less convinced about a solution that involves top slicing of the licence fee." (emphasis added)

[203] pp33-35, para 107, David Cameron, *ibid*

2.147 Two months later, in March 2009, in the context of an increasingly difficult economic climate, Mr Cameron personally returned to the question of the BBC's funding. He announced that a Conservative Government would freeze the licence fee:[204]

> *"... solving Labour's Debt Crisis by making sure government lives within its means and delivers more for less. And it's not just government that has to live within its means – we all do.*
>
> *So today, I want to make an announcement that shows our expectation that government and all taxpayer-funded institutions should start leading by example.*
>
> *The BBC is one of our most important national institutions. It plays a vital role in bringing the country together, and I want to see it prosper and succeed and continue to be a fantastic cultural asset for Britain.*
>
> *But it also needs to maintain public support, and I want to see it leading by example at a time when the whole country is tightening its belt.*
>
> *And so I can announce today that we would freeze the BBC licence fee for one year.*
>
> *I think that would be an important signal to the country of the need for all public institutions, in these difficult economic circumstances, to do more with less."*

2.148 In April 2009, the Rt Hon Jeremy Hunt MP launched a review of the creative industries which was chaired by former BBC Director General, Greg Dyke. It was one of a number of Conservative Party task forces formed in Opposition. Its work was still ongoing at the time of the general election. Elisabeth Murdoch, as CEO and Chairman of the Shine Group, was a member of the task force, one amongst a number of eminent industry figures.[205]

2.149 In October 2009, Mr Hunt told the Financial Times that he did not support Labour's plan for state supported local television news on ITV, financed by top slicing the licence fee. On the topic of the ambit of the BBC's activities and competition he also said:[206]

> *"It might sound well and good for [the BBC] to have, say, an angling website, but if it drove out of business every angling magazine in the country, you would have to question if it was the right sort of thing to do".*

2.150 It was Mr Hunt also ultimately made clear that the Conservatives had rejected top slicing. On the Conservative Party website, he posted: "*on top-slicing… We floated this idea two years ago and rejected it*".[207]

2.151 In the result, when in power, the Coalition Government froze the BBC licence fee as Mr Cameron had promised to do. Mr Cameron was keen to point out that the imposition of a freeze left the BBC better off than many in the current climate of austerity and that the policy had fallen far short of what James Murdoch was advocating:[208]

> *"… We froze the licence fee, much to the anger of James Murdoch, who I think – I think the Chancellor George Osborne [said] thought that it should have been cut. So we had*

[204] p36, para 109, David Cameron, *ibid*
[205] pp36-37, para 110, David Cameron, *ibid*
[206] p39, para 114, David Cameron, *ibid*
[207] p40, para 119, David Cameron, *ibid*
[208] p89, lines 14-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

our own policy on the BBC licence fee which I think had been fair and reasonable to the BBC when other organisations have had their budgets cut be considerably more.

So, again, this part of the conspiracy theory I think has absolutely no weight at all".

2.152 Mr Cameron rejected the suggestion that in imposing the freeze he had been meeting Mr Murdoch half way. He said:[209]

"I think it's quite difficult to argue, at a time when you know if you get into government you're going to have to be making spending reductions, that you're going to see the BBC licence fee go up and up and up, and I think we had a consistent and long-term argument, which very much flowed from my own views formed at Carlton, that the BBC needed to be strong, it needed the backing of the licence fee. I do think the BBC had gone into areas it shouldn't have done, and I mention that in some of my evidence, but I think this is a fair settlement for the BBC and it's certainly not one that James Murdoch supported."

2.153 Mr Osborne recalled James Murdoch's reaction to the decision to freeze the licence fee in these terms:[210]

"Well, I remember – this was a very specifically about the BBC licence fee, rather than – as I say, James Murdoch would often let us have his views in public as well as in private about his view about the BBC, but specifically about the licence fee and our decision in October 2010 to freeze the licence fee but not to dismantle it, and indeed to, in effect, continue for the next five or six years with the current structure of BBC funding.

Now, as I say in this statement, I cannot remember exactly how this conversation took place, and it may well have been on the phone, because it's not obvious that there was a meeting where this would have had – but I have a pretty clear memory of him being quite angry about our – the decision we had taken, and I explained to him why I thought it was the right decision and why, in any case – you know, we had always made it clear that we were not setting out to dismantle the BBC or radically cut the licence fee or distribute the licence fee in a different way, but he was clearly disappointed with that decision".

2.154 Commenting on James Murdoch's 2009 MacTaggart lecture, Mr Osborne later made clear how significant were the differences between the Conservative Party and Mr Murdoch on the BBC:[211]

"I disagreed with him, basically, and certainly David Cameron also disagreed with him, and I think – you know, he had been agitating for some dramatic change in the funding of the BBC or the structure of the BBC and he was not going to get that from the Conservatives".

Ofcom

2.155 The attitude adopted by Mr Cameron to Ofcom has to be viewed in the overall context of his policy on quangos generally which, in his words, was *"to redistribute power away from*

[209] p90, lines 1-12, David Cameron, *ibid*
[210] pp23-24, lines 20-15, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[211] p25, lines 20-24, George Osborne, *ibid*

unaccountable institutions and back to the people". Explaining his approach, and singling out Ofcom as an example, he said during the course of a major speech delivered on 9 July 2009:[212]

> *"I have asked the Shadow Cabinet to review every independent public body that currently sits within their portfolio. For each one, they will be asking the key questions:*
>
> *Does this organisation need to exist?*
>
> *If its functions are necessary, which of them should be carried out in a directly accountable way within the department?*
>
> *And which, if any, should be carried out independently, at arm's length from political influence?*
>
> *If there really is a need for an independent quango, how can we make sure it is as small as possible, operating with maximum efficiency, frugality and respect for taxpayers' money?*
>
> *That process of review will go on up to and beyond the election. But today, I want to give you an idea of the scale of change we envisage by setting out what our approach would mean for three specific quangos.*
>
> *OFCOM is the regulator for the communications industry, and it's clear that it has an important technical function. It monitors the plurality of media provision for consumers. It licenses the spectrum in the UK. And it sets the charges and the price caps for BT's control of so much of the industry's infrastructure. OFCOM also has an enforcement function – ruling on breaches of the broadcasting code for instance. These matters relate to the operations of private companies in a commercial market and it is therefore right that they are free from political influence.*
>
> *But Jeremy Hunt has concluded that OFCOM currently has many other responsibilities that are matters of public policy, in areas that should be part of a national debate, for example the future of regional news or Channel 4. These should not be determined by an unaccountable bureaucracy, but by minsters [sic] accountable to Parliament.*
>
> *So with a Conservative Government, OFCOM as we know it will cease to exist. Its remit will be restricted to its narrow technical and enforcement roles. It will no longer play a role in making policy. And the policy-making functions it has today will be transferred back fully to the Department of Culture, Media and Sport."* (emphasis added)

2.156 It is important to note from the speech that although Mr Cameron was proposing that "*Ofcom as we know it will cease to exist*" what he was referring to was the repatriation of policy functions back to a central Government department. There was no proposal to dilute Ofcom's technical regulatory functions which the speech expressly recognised should remain with Ofcom and at arm's length from political influence.

2.157 Mr Cameron explained that the decision to use Ofcom as an example was simply a matter of his familiarity with it and had nothing to do with any external influence. He also pointed out that at the time Ofcom was the subject of criticism from diverse quarters:[213]

> *"One of the reasons I picked Ofcom was because of my own experience from television of remembering what the Independent Television Commission had done, the ITC, the precursor of Ofcom, and also remembering the sort of levels of pay that there were in*

[212] pp38-39, para 113, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[213] pp92-93, lines 23-14, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

the ITC compared with Ofcom, and I did think Ofcom was quite a good example of a quango that had got too big, too expensive, and the pay levels were pretty excessive.

I would just make the point – I'll shut up in a second – but at this time Ofcom was being actually roundly attacked on this basis by ITV, by the BBC, with which it had almost nothing to do, and also by commentators on the left of politics like Andrew Rawnsley, who were all saying Ofcom seems to have got too big and too bureaucratic.

So this was an agenda that was very limited to my own views, not in any way proposed or dictated by others".

2.158 Mr Osborne confirmed that the Conservative Party's concerns about Ofcom were those which it had about quangos in general and did not relate to its media regulatory function:[214]

"Q. [James Murdoch] was also agitating for the neutering, if not quite the dismantling of Ofcom. Did that chime at all with your policy?"

A. I never discussed with him Ofcom and I don't remember personally being involved in any great internal discussion within the Conservative Party about the future of Ofcom.

There was a general concern that Ofcom had become, like many Quangos, rather bloated, but that was not a complaint about the function of Ofcom, just that like many parts of government, that there had not been a proper regard for cost."

2.159 In the result, Mr Cameron explained the impact of Coalition Government on Ofcom policy:[215]

"Q. To take the story forward, as it were, is this right, that the reason this policy was not enacted was that in the pragmatic realities of the Coalition government it wasn't possible.

A. That's right. I wasn't involved in the detailed negotiation of the Coalition agreement, but some policies made it through, others didn't, and I suspect this is one that we didn't get agreement on, but we have taken action on pay levels in quangos and we have tried to restrict them".

The 2010 General Election campaign

2.160 The 2010 election campaign of course involved all of the contenders doing their utmost to get their competing political messages across using the media, including new media, and otherwise. Mr Cameron had won the much coveted support of News International's politically variable titles. He had secured the 'full throttled' support of the centre right press and enjoyed the support of those other politically uncommitted media titles, the Economist and the Financial Times. But the endorsement of The Sun did not bring outright victory.

2.161 The political commentator Andrew Neil attributed the outcome to a number of factors: the declining political influence of The Sun; the lack of a long period of sustained press support for Mr Cameron before the election; the overshadowing of newspapers generally by television and, in particular, the introduction for the first time in the United Kingdom, of televised leaders' debates during the campaign. Thought provokingly, he wrote:[216]

[214] pp25-26, lines 25-11, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[215] p94, lines 11-20, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[216] pp27-28, para 20, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Andrew-Neil.pdf

"I have already referred (para 4) to the fact that, despite the overwhelming endorsement of what we still refer to as Fleet Street, Mr Cameron was unable to win an overall majority in 2010, even though the circumstances were widely regarded as propitious for the Tories. The Sun is a shadow of the political influence it enjoyed in the 1980s, peaking in the close-run election of 1992. In the 1997 and 2001 elections it largely piggy-backed on the Blair landslides: it needed to back Mr Blair to show it was in touch with its readers much more than Mr Blair needed its backing (though he did not realise that at the time since he was still obsessed with what had happened to Neil Kinnock).

The Sun was following the crowd rather than telling it what to think. In 2005 the Sun was largely irrelevant because it took so long to make up its mind and by then had become half-hearted in its support of New Labour. In 2010 it backed Mr Cameron, though only in the autumn before a spring election, which did not give it time to get strongly behind him. Mr Cameron's hopes of an overall majority faded the more the Sun cheer-led for him; he did not win. Like other newspapers the Sun was overshadowed by the leaders' debates on prime-time TV and unfolding events on the news channels, replayed every night to much larger audiences on network news. The Guardian and other left-leaning papers backed the Liberal Democrats: they lost seats.

Newspapers and their proprietors still have what many regard as an inordinate influence on our politics because politicians chose to confer it on them, despite increasing evidence it is not merited. Press proprietor-politician relationships will be transformed, many would say for the better, when the political elite realise that the emperors have no clothes, or are at most scantily clad."

2.162 Mr Osborne agreed that the support of The Sun, although important, was not, and probably had never been, determinative, saying:[217]

"… I think the endorsement of the Sun has been elevated to almost mythical status. It was just one of a whole range of things we felt we had to get right in the run up to a General Election, and ultimately, if we had not had the endorsement of the Sun I think we still would have gone on and done well in the General Election".

2.163 He further explained why he thought that the role played by support from the Economist and the Financial Times was significant:

"I remember also that it was significant we had the endorsement of the Financial Times and the Economist, both publications I think previously at various points had supported the Labour Party. They don't have mass readerships, but they bring a different kind of cachet."

Before concluding:[218]

"So I think in all this process, and I think maybe it stems back to the 1992 election and some of the mythology around that – there is this feeling that the Sun endorsement is all you need to win a general election, and I would say it is far from that, and I certainly think you could win an election without the endorsement of the Sun".

[217] p66, lines 2-9, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[218] p66, lines 15-21, George Osborne, *ibid*

3. Prime Minister Cameron: 2010-present

3.1 There has been a significant and inevitable diminution in Mr Cameron's personal engagement with the media once in office. Comparison of the lists of meetings which he provided for the periods as Leader of the Opposition and as Prime Minister showed that the number of contacts halved from approximately 26 meetings or interviews per month to 13. There was a simple and compelling explanation for this change in the tempo of media engagement, as Mr Cameron explained:[219]

> *"As I say, when I was elected, I did try to do less of this and try to have more of a distance, try to make sure – because genuinely when you're in opposition, what are you doing? You're campaigning, you're drawing up policies, you're trying to convince people. In government, it is and should be different. You should be spending your time governing, not talking about governing, so I did try to create some more distance, but as I explained earlier I think it's very difficult because of these daily battles that you fight".*

3.2 It is clear that Mr Cameron did very consciously change his approach to the press between Opposition and Government. He had some observations about the process:[220]

> *"Yes. I think it's right that in government you're making real decisions rather than just policy ideas and campaigns, so it's more important that what you do is done properly. And that's why you have special advisers' codes, ministerial codes and all the rest of it. But I do think there is – when you're leader of the opposition, and I did the job for five years, it's only in the last year you get the sort of Civil Service machine starting to talk to you about how you'd translate your structure and your processes into Number 10 Downing Street, and I think there could be a strength in – I don't believe in having a sort of official opposition office, as it were, but I think there could be a strength in having earlier discussions between the Cabinet Secretary or the Permanent Secretary at Number 10 with a new leader of the opposition, just to make them aware of some of the processes and practices that might assist them in the work that they do and avoiding any conflicts and the rest of it."*

3.3 The latter is an interesting point. I can see that it might even have a potential to reduce the risk, which Mr Campbell felt had eventuated in 1997, of an opposition party carrying the media tactics of Opposition into Government. The same outcome, however, can also be approached (or assisted) by a more open and transparent approach to the press. I shall return to this issue when analysing possible ways forward.

3.4 Asked whether media engagement in Government occupied time at the expense of policy formation, leadership and Government, Mr Cameron described how he sought to arrange his private office at No 10 Downing Street to reflect the extra distance from the media which he sought so as to be able to concentrate on Government:[221]

> *"It shouldn't, but it can. I think the way I've explained the 24-hour news agenda, when I arrived in Downing Street, I did think that the set-up was quite geared to 24-hour news. It felt too much like a newsroom, and that's what the press department*

[219] p50, lines 15-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[220] pp51-52, lines 11-4, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[221] pp53-54, lines 17-1, David Cameron, *ibid*

should be like, but you have to try and create a structure and a private office and a set of arrangements where you can think, take decisions, prepare for decisions properly, structure your day so you're not permanently in a sort of news warfare mode, if I can put it that way."

3.5 The risk which Mr Cameron was seeking to avoid, and which he graphically described in the quotation as news warfare mode, was of spending a disproportionate amount of time engaging with what is now a truly 24 hour, multi-media news cycle. It is the challenge which faces all current and future politicians. Establishing and maintaining both healthy boundaries and sufficient distance in this environment is not easy when what is published and broadcast can, at least over time, be so influential to a political party's fortunes. Mr Cameron accepted that he had not always been wholly successful in resisting the demands of the 24 hour news cycle. This was the exchange with Counsel to the Inquiry:[222]

"Q. You refer to having a bit more distance. That depends, I suppose, on each party to the debate, as it were, having a sense of propriety as to what is right and where the boundaries are. Are we agreed about that?

A. I think that's right, but distance is also about for the politician, and this relates to the issue of the 24-hour news cycle. There is a difficulty in – I'm not expecting sympathy for this, but there's a difficulty in politics that you are fighting a sort of permanent battle of issues being thrown at you hour by hour where responses are demanded incredibly quickly, and it can, if you're not careful, take up all your energy in dealing with that, and that is hopeless, because if that's what you spend your time doing, you will never reform our schools, cut our deficit, deal with our economic problems and all the rest of it.

When I say distance, partly what I mean is that the politicians, and particularly prime ministers and Cabinet ministers, have to get out of the 24-hour news cycle, not try and fight every hourly battle, and focus on long-term issues and be prepared sometimes to take a hit on a story they don't respond to so quickly.

That's very easy to say that, but I did actually try on getting into Number 10 Downing Street to do that. I'm not sure it's always been totally successful, but that's part of what I mean by distance. It means not sitting under a 24-hour news television screen looking at the ticker and worrying about what's happening every hour. If you do that, you get completely buried by the daily news agenda." (emphasis added)

3.6 Focusing more specifically on newspapers, Mr Cameron explained how technological change has affected the content of printed news coverage, forcing it away from its historic model which focused on reporting the previous day's news:[223]

"… I think a lot of evidence that's been put forward in the sessions you've had where people have talked about the growth of the 24-hour news culture, the fact that things move so fast that I think newspapers have been put in a difficult position, because the news has been made and reported long before they reach their deadlines and they publish their papers the next day, so I think newspapers have moved more towards trying to find impact, trying to find an angle on a story, rather than, as would have been the case before 24-hour news and all the rest of it, of just reporting what happened the day before.

[222] pp12-14, lines 25-4, David Cameron, *ibid*
[223] pp6-7, lines 22-11, David Cameron, *ibid*

So I think there has been a change, but I think that's quite a lot to do with technology and the development of the media rather than anything else."

3.7 From the politician's perspective he considered this development to have been certainly one which has brought challenges:[224]

"I think from the politicians' point of view, and particularly perhaps from the government's point of view, it's sometimes a change for the worse, because if there's a big announcement, something we think is very important, that gets announced on the television, it gets picked over by the 24-hour news, and it's quite understandable that the newspapers, by the time they come out the next day, have to find something different, and I completely understand why they want to do that, but from the perspective of trying to explain to the country why you're making difficult decisions, why you're reforming the health service in this way, why you're trying to cut the deficit in that way and get across more what it is you actually decided to do rather than an endless analysis of what the motives were or what the splits were or whatever, but politicians will always complain about this sort of thing, so I wouldn't put too much weight on it".

3.8 Mr Osborne explained how he and Mr Cameron had drawn lessons from New Labour's media strategy in the early days of the New Labour Government and confirmed that there was less emphasis in Government on fighting for every headline than there had been in Opposition. He pointed out, though, that the proliferation of news sources has in any event now made such an endeavour impossible. He said:[225]

"This is going to sound like talking my own book, but it also, I think, is genuinely the case. I think New Labour were very aggressive, when they became the government, in pursuing the media management techniques they had developed in opposition. And they had developed those techniques in opposition, to be fair to them, because of the way people like Neil Kinnock had been treated by all the press beforehand.

Now, we learnt, in a way, from that. We were – we came of political age – myself, David Cameron and others – during that political period, and we felt too that that government in its early years had been too obsessive about tomorrow's headline and tried to control every aspect of the media.

That's not to say when we came into government, we didn't want to have a good and effective media operation, but we were more relaxed about fighting for every single headline or fighting for every news bulletin, and I think there is also partly an understanding on our behalf that in what has become, even over that period, a much more fragmented media, it is impossible to manage every single headline or fight for every headline. In the end, we had a belief that – we came into government, we had to set out some difficult things we needed to do and we would trust ultimately to the judgment of the public but also trust to the judgment of the media, even if along the line you got some bad headlines.

Certainly, I have been more relaxed as Chancellor of the Exchequer in that early period than I would have been as Shadow Chancellor about some the headlines we've had."

[224] pp7-8, lines 14-7, David Cameron, *ibid*
[225] pp22-23, lines 5-11, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

3.9 That was not to say, however, that there had not still been a close relationship between the press and the Coalition Government under Mr Cameron's leadership. Mr Osborne described calling editors and proprietors often:[226]

> *"… I often make calls to editors and proprietors after Major Treasury announcements and fiscal events which the diary records as a single block of time for "calls to editors"…"*

3.10 Mr Cameron candidly accepted that political news management strategies had not always been unambiguously in the public interest, and not just those of other political parties. When asked whether he had seen evidence of attempts to control the news agenda by politicians in his own party through favouritism and anonymous briefings, he replied:[227]

> *"Yes. These things do happen and it's deeply regrettable. I think as long as there's been a press and politicians these things happen. But it is very regrettable, it often makes running a political party more difficult, running a government more difficult. It's deeply destructive.*
>
> *I think there are degrees of this. Of course, you know, some politicians have journalists they have a particular good relationship with, they think they're going to understand a particular speech or a particular idea better than others, and in this world where the newspapers aren't reporting yesterday's news, because that's already been reported, clearly newspapers are looking for something special, they're looking for a particular angle or a particular story.*
>
> *So there are responsible ways of handling media relations in that way, but briefing against people, doing people down, there are some dreadful things that have been done in politics on both sides in recent years, and they're very, very regrettable."*
> (emphasis added)

3.11 As for a solution to the problem, Mr Cameron agreed that there was no single panacea, that a mixture of rules and culture were required and that political leaders themselves needed to put a halt to bad practice and a poor culture.[228]

3.12 A good start has already been made so far as transparency is concerned. On 15 July 2011, Mr Cameron was responsible for the amendment of the Ministerial Code requiring Ministers to disclose their meetings with media proprietors, editors and senior executives. The relevant addendum to the Code reads:

> *"The Government will be open about its links with the media. All meetings with newspaper and other proprietors, editors and senior executives will be published quarterly regardless of the purpose of the meeting".*

3.13 The current practice is that all Government departments compile the information required by the Ministerial Code set out above and give details of the month the meeting took place, the name of the individual and organisation meeting the Minister, and the purpose of the meeting. Each list is available for public inspection on the relevant departmental website (as part of a wider list of Ministers' meetings with external organisations), as well as via links on

[226] p2, para 2.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[227] pp33-34, lines 18-12, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[228] pp34-35, lines 23-8, David Cameron, *ibid*

the No 10 website. In addition, hospitality received by Ministers is also declared and published on the respective websites.[229]

3.14 Mr Cameron has made public the fact of his Ministerial meetings with media proprietors, editors and senior executives since the 2010 General Election, regardless of the nature of the meeting.[230] It has been an important step forward and transparency is an issue to which I shall return.

3.15 Amendment of the Ministerial Code was undoubtedly a very important step towards affording the transparency that is going to be vital if public trust in the relationship between our national press and politicians is to be rebuilt. An important issue is whether it would be desirable to go further. On that question Mr Cameron thought that there was room for improvement. His view was:[231]

> *"I think there are improvements we can make here. I think the idea that someone suggested of a sort of written note of every interaction with every editor, every broadcast – I think that would be overly bureaucratic because most of the meetings are pretty similar. You're explaining why you're in favour of free schools and academies and how to get that message across, and why the policy's a good idea. You're explaining something that you've already published.*
>
> *But where I think there is potential for improvement is in two areas. If it's obvious that this is a meeting where the proprietor or the broadcasting business or what have you has got some, you know, commercial issues they want to raise, then I think it does make sense that a note is taken. Or, if in a meeting that's really about your policies and your approach and the rest of it, there's a discussion about commercial interests, then I think again in government, you know, under the Ministerial Code, I think it's probably right that the minister or the politician should make a reference to that to the private secretary."*

3.16 He also warned against an excessively bureaucratic approach which might easily become counter-productive:[232]

> *"The problem with all this is the more rules and codes we create, the more difficult it is to make sure in every instance that people abide by them. I don't want to create a system that doesn't work, that is permanently broken. That would actually sap the faith of the public in this whole area. But I think some modest additions to the Ministerial Code to deal with the two points I've made, I think that is something we could certainly look at."*

3.17 I have no hesitation in endorsing the proposal that consideration should be given to enhancing the Ministerial Code so as to require a note to be taken at meetings with media proprietors, editors and senior executives at which their commercial interests are discussed and that should such an issue be raised in the course of a meeting with a different purpose, of which a note is not being taken, then that issue should be reported to the Minister's private secretary. Indeed, as I have said, I believe that it is appropriate to go further and I shall return

[229] pp10-11, para 28, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[230] p10, para 26, David Cameron, *ibid*
[231] pp39-40, lines 14-9, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[232] p41, lines 2-9, David Cameron, *ibid*

to the concept of greater transparency when discussing the appropriate conclusions and recommendations to make.

3.18 A consequence of Mr Cameron's contact with the media throughout his career, and in his private life, is that he has formed many friendships with people in the media. When compiling the lists of those media figures with whom he had had contact both as Leader of the Opposition and in Government, there are some whom he had met so often that it was impractical to list contacts individually. Instead he identified them:[233]

> *"There is a small number of journalists who are close friends of mine and who I see so frequently that I have not included them systematically in these lists, namely Daniel Finkelstein, Alice Thomson and Sarah Vine from The Times, Xan Smiley and Christopher Lockwood from The Economist, and Robert Hardman from The Daily Mail. While my contacts are mainly social, they are also people with whom I discuss politics and particular projects, such as speeches."*

3.19 The number of such friends demonstrates that Mrs Brooks was not alone amongst media figures with whom Mr Cameron socialised. Mr Smiley is a neighbour of Mr Cameron's and Mr Finkelstein a former Conservative Party Parliamentary candidate, giving some indication of the diverse ways in which Mr Cameron has formed these media friendships. It is a convenient point at which to emphasise that there is absolutely nothing wrong with friendships between politicians and journalists and that they will inevitably be close contact between the two which result in friendships. That is not only perfectly normal, it is good. It is worth repeating: it is not friendship that is relevant to the Terms of Reference but, rather, the way in which what the politicians have described as 'overly close' relationships can impact on policy and the needs of transparency to ensure that this becomes apparent.

Relations with Telegraph Media Group

3.20 Naturally, Mr Cameron continued to make efforts to retain the very strong links which he fostered with the Telegraph Media Group (TMG) in Opposition. He has met with a number of senior executives and editors on a number of occasions since the election.[234] Aidan Barclay's business interests are very much wider than TMG and so there are additional reasons why he is an important person for Mr Cameron to remain in contact with. There have been two face-to-face meetings since the election, in the period covered by disclosure to the Inquiry, which well illustrate how Mr Cameron has continued to engage in a mixture of formal and informal contact with senior media figures. On 6 July 2010 there was a meeting at No 10 Downing Street for general discussion followed by drinks.[235] To put this meeting into context, it was one of a number of meetings with media proprietors and senior media executives which Mr Cameron had in the months immediately after he became Prime Minister.[236] Mr Barclay was then given dinner on 18 November 2010 by Mr and Mrs Cameron, at which there was general discussion.[237]

[233] p26, para 79, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[234] David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf
[235] p3, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Appendix-D-to-Witness-Statement-of-Aidan-Barclay.pdf; p4, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf
[236] p70, para 206, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[237] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Appendix-D-to-Witness-Statement-of-Aidan-Barclay.pdf; p7, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf

3.21 Rupert Murdoch pointed out that in contrast to Mr Barclay he had not been invited to dine at No 10 by Mr Cameron: *"…Unlike Mr Barclay I don't get invited to dinner at 10 Downing Street…".*[238] It is right that Mr Murdoch does not appear to have had quite the same access to the Prime Minister if Mr Barclay is used as a comparator, although that is but one of a number of comparisons that might be made. Media proprietors certainly do enjoy a good level of access generally to our political leaders.

3.22 In addition to the face-to-face meetings, Mr Barclay and Mr Cameron have continued occasionally to communicate by SMS text message. Only two of Mr Barclay's post-election texts disclosed to the Inquiry concerned a substantive issue and reflected Mr Barclay's interest in the macro-economic situation. One of Mr Barclay's texts read:[239]

> *"David im sure your aware [sic] that the credit markets are not good and are likely to get worse as they all err on the side of caution faced with combination of more regulation Basle 3 more liquidity losses from sovereign debt the end of bank of England support and potential tax all at wrong time for economy given also government cuts I hope you don't mind me mentioning it regards Aidan".*

3.23 The other contained advice for Mr Cameron:

> *"Suggest therefor Bank of England announce extension to liquidity scheme allow Banks say 5yrs to implement Basle 3 and if you can scrap talk of Bank Tax other countries won't go along with it anyway Best Aidan"*[240]

3.24 Mr Cameron explained how this was one of a number of economic views which he had received and, coming from informed sources, they were useful. He said:[241]

> *"Yes. I think this was the view of him, you know, not really as chairman of a newspaper group but as chairman of a big business heavily invested into the UK with lots of property and other businesses and this was his strong views about the financial situation and I think it's perfectly legitimate. I get a lot of exposure to businesses' views on these sorts of points, some by text, many more by the meetings I have, and that seems to me not a bad thing, as long as you can order them properly in your mind."*

3.25 The contact was of a kind which is unexceptionable but the use of text messaging highlights just how, in the age of informal electronic communications, policy issues are easily discussed privately without the need for a face-to-face conversation. As already discussed, Mr Cameron has proposed that any contact relating to the commercial interests of a media company which occurs should be noted, if it is pre-planned, and reported to a Minister's private secretary if it occurs spontaneously. It is difficult to see any difference in principle if the same sort of communication takes place by text, email or telephone. I shall also return to this issue when discussing the way forward.[242]

[238] p11, lines 16-18, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[239] p8, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-AB1B.pdf
[240] p7, Aidan Barclay, *ibid*
[241] p72, lines 15-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[242] Part I, Chapter 8

Relations with News Corporation and News International

Rupert Murdoch

3.26 The first of four post-election meetings between Mr Cameron and Rupert Murdoch took place on 18 May 2010, shortly after Mr Cameron became Prime Minister. Mr Cameron explained how the meeting came about and gave his recollection of events which was as follows:[243]

> *"The reason for Rupert Murdoch's visit was that he was in London and in common with the reasons for my other meetings with newspaper proprietors and senior media executives, to set out the challenges that I and my Government saw the country facing and our broad approach to addressing them. I also wanted to thank him for his support. As far as I can recall, this meeting covered similar ground to my other meetings with newspaper proprietors and senior media executives at the time."* (emphasis added)

3.27 Mr Murdoch recalled a short meeting at which he told Mr Cameron that his titles would be watching closely to ensure that campaign promises were kept:[244]

> *"…I do recall that, shortly after his election, Mr Cameron invited me in for tea at No.10 Downing Street, he thanked me for the support of our papers; I congratulated him and told him that I was sure our titles would watch carefully and report whether he kept all of his campaign promises. The meeting lasted at most 20 minutes..."*

3.28 He also recalled that Mr Coulson *"was present".*[245] Mr Coulson was certainly at No 10 when the meeting occurred. He recalled that: *"I met him when he arrived and took him to the Prime Minister's office. I didn't sit in on the meeting which I think lasted around 30 minutes. Afterwards I met him later in the corridor and we had a brief conversation."*[246]

3.29 Commentators have observed that Mr Murdoch had been admitted to Number 10 otherwise than through the famous front door and speculated as to the reason for that, suggesting that there was a desire to keep the meeting low key. Mr Cameron said that he was not involved in the arrangements but explained that No 10 has a number of entrances which frequently are and have been used by visitors now and in the past by previous administrations.[247] There is also a car park to the rear. Mr Murdoch's evidence on the subject was somewhat equivocal, but a desire to avoid photographers appears to have played a part:[248]

> *"Q. On that occasion and possibly other occasions you go in through the back door, is that right?*

I

[243] p70, para 207, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[244] p27, para 110, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf
[245] p14, line 14, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[246] p19, para 91, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[247] pp70-71, para 208, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[248] p13, lines 5-14, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf; David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf

A. That – yes. There are reasons for that. They always seem to – don't want me to be photographed going out the front door or I don't want to be, but it also happens to be a shortcut to my apartment, so it's quite okay".

Q. All right. Why do you think –

A. And the car park [sic] is usually parked behind there, there's a car park behind 10 and 11 Downing Street."

3.30 Whatever the precise reason, the fact of the meeting was disclosed by Mr Cameron in his first quarterly release of general external meetings on 28 October 2010.[249]

3.31 The other three meetings included a dinner with Mayor Bloomberg, in New York, on 21 July 2010, the News Corp summer party on 16 June 2011, which is attended by a large number of politicians, amongst others, and the Times CEO summit dinner at which Mr Cameron was the keynote speaker.[250] Of the dinner in New York, Mr Coulson said:[251]

"The second post-election meeting with Rupert Murdoch was in New York on the day Mayor Bloomberg organised a party in honour of the Prime Minister. Before the party Rupert Murdoch met David Cameron for around half an hour. He and I met briefly when he arrived, but I did not sit in on the meeting. In the evening, before the dinner, I had a longer conversation with Rupert Murdoch and his wife Wendi at the drinks reception. From memory we mostly discussed American politics".

3.32 It is not surprising that Mr Murdoch and Mr Cameron have not met since July 2011 when the hacking scandal reached its apex. It is also right to observe that despite the election support afforded by News International's titles to Mr Cameron before the 2010 General Election, there has been noticeably critical coverage in News International and other titles dating from around the same time.

James Murdoch

3.33 James Murdoch met the Prime Minister twice after the 2010 General Election. The first occasion was on 7 November 2010 when Mr Murdoch visited Chequers.[252] The second occasion was a little over a month later, on 23 December 2010 at the home of Mr and Mrs Brooks.[253] Both occasions took place whilst News Corp's bid to acquire BskyB was current. The second was two days after the sudden and dramatic events which had led to responsibility for considering the bid being transferred from Dr Cable to Mr Hunt. Mr Murdoch recalled a dozen or fifteen people being present. He said the events of 21 December 2010 were briefly touched upon in conversation:[254]

"… there was no discussion with Mr Cameron other than as I've detailed in my witness statement, which is simply he reiterated what he had said publicly, which is that the

[249] p70, para 206, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[250] p4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-27.pdf
[251] p19, para 92, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[252] p7, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf; p2, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-9.pdf
[253] p8, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf; p2, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-9.pdf
[254] pp68-69, lines 23-5, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf

behaviour had been unacceptable, and I imagine I expressed a hope that things would be dealt with in a way that was appropriate and judicial".

3.34 Mr Cameron's recollection was to the same effect. Having reminded the Inquiry that he had completely recused himself from the substantive decision about the bid, which is a fundamental consideration, he said:[255]

"Well, the gist was, as I explained, what Vince Cable had said, albeit privately but made publicly, was very embarrassing for the government, and I wanted to make clear, I think appropriately, that this shouldn't have happened, that it was wrong, and that this issue would now be dealt with entirely properly, and I thought that was quite an important point to make."

3.35 The comment was perfectly in order. However, the fact that there was mention of the bid at a private function and that it had not previously been made public caused speculation when it emerged. Mr Cameron explained why Downing Street repeatedly declined to confirm the fact of the supper on 23 December 2010:[256]

"I think what would have happened here is that before we became totally transparent about all these meetings, if Downing Street press office was asked about any social engagement or private engagement they wouldn't normally answer those questions, and I think that's what happened on this occasion. So they said, "We don't comment on the Prime Minister's private or social engagements".

"I think the issue was pressed and in the end, I can't remember if it was me or someone else, suggested, "Come on, there's nothing to hide here, just answer the question", but we're now in a different world where all these sorts of meetings would be declared in the normal way, but at that stage we weren't routinely giving out private and social engagements." (emphasis added)

3.36 The encounter illustrates why transparency is needed and also why it would be prudent to enhance the current system of disclosure: once more, I shall return to this issue later.

Rebekah Brooks

3.37 After the 2010 General Election Mr Cameron and Mrs Brooks continued to have a significant amount of both formal and informal contact. Politicians, like everyone else, are free to choose their friends, and to be friends with whomsoever they please. What is of interest to the Inquiry, and what has been investigated, is whether the contact has brought with it any pressure or influence on the Coalition Government's policies.

3.38 Mr Cameron had dinner with the Brooks' on 22 May 2010.[257] Mrs Brooks visited Chequers on three occasions: 13 June 2010, 13 August 2010 and 9 October 2010[258]. The last of these visits

[255] pp24-25, lines 25-6, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[256] pp25-26, lines 13-1, David Cameron, *ibid*
[257] p3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf
[258] pp4, 6-7, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf; p3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf

was to celebrate the Prime Minister's birthday.[259] Shortly before that, on 4 October 2010, she had met Mr Cameron at the Conservative Party Conference.[260]

3.39 Mrs Brooks hosted the dinner party on 23 December 2010, discussed above, at which there was mention between James Murdoch and Mr Cameron of News Corp's bid to acquire BSkyB.[261] On 26 December 2010 both Mr Cameron and Mrs Brooks were at a party hosted by Mrs Brooks' sister in law, although both Mr Cameron and Mrs Brooks recalled little contact on that occasion. Asked whether there was discussion of the BSkyB bid, Mr Cameron replied:[262]

> *"No, I don't think there was. My memory is that Boxing Day was actually Charlie Brooks' sister's house, there was a party, I think Rebekah was there briefly. I don't think there was – certainly I don't think there was a conversation about BSkyB. I'm not even sure there was much of a conversation at all, but that's my recollection".*

3.40 Mrs Brooks was similarly unsure whether there had been any conversation at all and was sure that the BskyB bid had not been mentioned:[263]

> *"A. Yes, no, it's – I've been asked about it before. Mr Cameron attended a Boxing Day mulled wine, mince pie party at my sister-in-laws, and I popped in on my way to another dinner and I actually don't have any memory, because I don't think I did even speak to him or Samantha that night, but my sister-in-law tells me they were definitely there for the party, so I would have seen them, but not even to have a proper conversation.*
>
> *Q. So as to the scope of any conversation, which you say wasn't a proper conversation, are you sure it would not have covered the BskyB issue?*
>
> *A. Boxing Day.*
>
> *A. Definitely. Absolutely not. I mean, I don't think there was a conversation."*

3.41 Other Cabinet Ministers also maintained the connection with News International generally and Mrs Brooks in particular. The most frequent such contact was with Mr Osborne who had six meetings with Mrs Brooks after the election, two of which were at Dorneywood.[264]

3.42 Turning to specific issues, the Inquiry explored with both the Home Secretary, the Rt Hon Theresa May MP, and the Prime Minister what role Mrs Brooks and The Sun had played in the decision for the Metropolitan Police to review the case of the disappearance of Madeleine McCann. The review had the benefit of extra financial support from the Home Office and was a subject of interest to a number of newspapers and their readers. The object of the review was to establish whether there were any other avenues of inquiry that should be pursued.[265]

[259] p87, lines 1-19, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[260] p6, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf
[261] p8, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-DC-1.pdf; p4, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf
[262] p26, lines 7-13, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[263] pp88-89, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[264] p12, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-11.pdf
[265] p97, lines 16-22, Theresa May, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-29-May-2012.pdf

3.43 On 11 May 2011, Mrs Brooks saw two of Mr Cameron's SpAds about the review. Both she and Mr Mohan also spoke to the Home Secretary about it by telephone. Mrs May was able to explain that the decision to have the Metropolitan Police review the case was, in fact, not one which had been made suddenly:[266]

> *"No, a review was not ordered – was not requested or required at short notice. The Home Office had been discussing – first started discussing with ACPO the possibility of a Police Review or further police work on this – they first started discussing with ACPO under the previous government. So the discussion had been taking place for some time – it took place with ACPO initially – for ACPO to identify which police force would be appropriate to undertake the is work, if it was to be undertaken, and at the same time there were discussions taking place with the Portuguese authorities, because of course, no UK police force can go into another country and start investigating; they can only do so with the agreement, approval and assistance of the resident authorities in that country."*

3.44 She was clear that she had not been threatened with adverse coverage if she did not support the review by either Mrs Brooks or Mr Mohan. On the contrary, she had called them to tell them about developments: *"I think it was a call at my instigation".* The exchange with Counsel to the Inquiry was as follows:[267]

> *"Q. Did Mrs Brooks say anything about – words to this effect: that unless you ordered the review, you would be on the front page of the Sun until that happened?*
>
> *A. No. Neither Mrs Brooks or Mr Mohan made any indication of that sort to me. The nature of the telephone conversation was to alert them to the fact that the government was taking some action, that there was going to be this further work by the police here in the UK and to put forward the point that it was very important that the UK authorities were able to work with the Portuguese authorities."*

3.45 The Home Secretary did not feel that she had been pressured behind the scenes on the issue to take a position she would not otherwise have taken. Rather, she said:[268]

> *"I felt that the work that we were doing to look at this review had been going on for some time, it was coming to a fruition around this time anyway, and obviously the issue was a matter of public concern."*

3.46 The Prime Minister similarly had not felt pressured by Mrs Brooks, whether directly or indirectly, to support and finance the review: *"Pressure? No I wasn't aware of any pressure"*.[269] He had checked and confirmed that the additional central government funding that was to be provided to the Metropolitan Police was being properly deployed. When asked whether Mrs Brooks' visit to his SpAds had been reported to him, he said:[270]

> *"I don't recall. It might well have been. I don't recall the exact conversations. I do recall, because I can see what might lie behind the question, which is: are you treating different investigations and campaigns fairly? And I do remember actually, as Prime Minister, consulting the Permanent Secretary at Number 10 about the step that the*

[266] p98, lines 1-15, Theresa May, *ibid*
[267] pp98-99, lines 22-7, Theresa May, *ibid*
[268] p99, lines 13-16, Theresa May, *ibid*
[269] p86, line 6, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[270] pp85-86, lines 11-2, David Cameron, *ibid*

police were about to take, backed by the government, which was to provide some extra funding for the investigation, and it was drawn to my attention that there is a special Home Office procedure for helping with particularly complex and expensive investigations that's been used in various cases, and it was going to be used in this case and he was satisfied that that was – that had been dealt with properly and effectively. So it's an example, if you lie, of the importance of making sure these things are done properly and I believe it was."

3.47 When it came to the influence of newspaper campaigning on the issue, Mr Cameron had rightly taken care to ask himself whether he was being confronted with self-interested media pressure or genuine public pressure:[271]

"Well, I mean clearly this was a very high-profile case, and a case that a number of newspapers wanted to champion because their readers wanted to champion it, and obviously as government you have to think: are we helping with this because there's media pressure or is it genuine public pressure, is there a genuine case, are we treating this fairly? And I did ask those questions of the Permanent Secretary at Number 10, and so I think we made an appropriate response. But I don't remember any sort of specific pressure being put on me…" (emphasis added).

3.48 Mr Cameron and Mrs Brooks did discuss the phone hacking story. Mrs Brooks recalled that in the period after the Guardian's July 2009 story, they spoke about it in general terms *"on occasion"* and once more specifically in late 2010 when there was an increase in the number of civil claims alleging phone hacking and seeking compensation. About the general conversations, Mrs Brooks said:[272]

"I think on occasion – you know, not very often, so maybe once or twice, because of the news and because, you know, the phone hacking story was a sort of a constant, or it kept coming up. We would bring it up, but in the most general terms. Maybe in 2010, we had a more specific conversation about it, which I think is – yeah, that's about right".

3.49 On the occasion of the more specific conversation, she could recall only in general terms what Mr Cameron had asked:[273]

"I think he asked me – I think it had been in the news that day – I think it was about the civil cases. Maybe a new civil case had come out, and he asked me about it and I responded accordingly."

3.50 As for what she had told Mr Cameron, she said:[274]

"It was a couple of years ago. It was a general discussion about – I think he asked me what the update was. I think it had been on the news that day, and I think I explained the story behind the news. No secret information, no privileged information; just a general update. I'm sorry, I can't remember the date, but I just don't have my records".

[271] p86, lines 9-20, David Cameron, *ibid*
[272] pp78-79, lines 22-3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[273] p80, lines 22-25, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[274] p80, lines 10-16, Rebekah Brooks, *ibid*

3.51 Mr Cameron had little recollection of the conversation but did not deny asking questions about the subject:[275]

> *"I don't really remember the specifics. I saw in her evidence that this was perhaps something to do with me asking a question about some of these civil cases and what was happening. I suspect it could have been that. This was an issue that was obviously being discussed. It was a controversial issue with all the civil cases and the rest of it, and I expect I could have asked some questions about that, but I don't recall the specifics".*

3.52 From these imperfect recollections, it can be seen that the Prime Minister was paying attention to the emerging story, recognising its sensitivity, but does not appear to have focused on any detail. The indications are that he was provided with only general and publicly available information.

3.53 When, on 15 July 2011, after the story had reached its height, Mrs Brooks resigned from her position as Chief Executive Officer of News International, she recalled receiving a message of support from Mr Cameron, albeit indirectly. The exchange with Counsel to the Inquiry on the subject was this:[276]

> *"Q. It has been reported in relation to Mr Cameron – but*
>
> *who knows whether it's true – that you received a message along the lines of: "Keep your head up." Is that true or not?*
>
> *A. From?*
>
> *Q. From Mr Cameron, indirectly. You'll have seen that in the Times.*
>
> *A. Yes, I did see it in the Times. Along those lines. It was more – I don't think they were the exact words but along those lines.*
>
> *Q. Is the gist right, at least?*
>
> *A. Yes, I would say so. But it was indirect. It wasn't a direct text message.*
>
> *Q. Did you also receive a message from him via an intermediary along these lines: Sorry I could not have been as loyal to you as I have been, but Ed Miliband had me on the run." Or words to that effect?*
>
> *"A. Similar, but again, very indirectly.*
>
> *Q. So, broadly speaking, that message was transmitted to*
>
> *you, was it?*
>
> *A. Yes."*

3.54 It was but one of a number of messages of support or commiseration which she received from politicians, those working in their offices and others. The messages from politicians were all indirect and predominantly from Conservative rather than Labour politicians.[277] This may have been more a reflection of News International's support for the Conservatives and a legacy of the company's sudden move away from Labour in 2009 than anything else.

[275] p10, lines 1-8, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[276] pp7-8, lines 6-2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf
[277] pp6-7, lines 2-24, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-11-May-2012.pdf

3.55 As is well known, Mrs Brooks is currently facing criminal charges in connection with allegations of wrongdoing at the NoTW, including in relation to phone hacking, perverting the course of justice and conspiracy to commit misconduct in public office. As is equally well known, she vehemently denies wrongdoing and has declared her intention of mounting a vigorous defence to all charges.

Andy Coulson and the unfolding phone hacking scandal

3.56 Liberal Democrats had been highly critical of the appointment by Mr Cameron of Mr Coulson. It is therefore unsurprising that the question whether he should be appointed to the position Director of Government Communications was raised with Mr Cameron by the Deputy Prime Minister, the Rt Hon Nick Clegg MP, in the early days of the coalition. Mr Clegg recalled asking whether it was the right thing to do although he stressed that neither he, nor Mr Cameron, knew then what is known now. He said:[278]

> *"A. Yes. That is my recollection. The background to it is that we, the Liberal Democrats, my colleague, for instance, Chris Huhne, had been very outspoken in our criticisms of Andy Coulson when he was appointed to work for the Conservative Party in opposition. It's self-evidently an issue. This was an individual who we had been highly critical of and had been critical of his appointment before the election, so, you know, it would have been very odd for us not to seek to straighten out our views now that we were suddenly and unexpectedly thrown together in government, as with so many issues.*
>
> *I genuinely cannot remember the precise wording, but, you know, I said to the Prime Minister, I asked him, "Is this the right thing to do, given the controversy around Andy Coulson?" given obviously the Prime Minister was aware of my party's views on it. The Prime Minister explained the reasons that he's given publicly why he felt that he'd been satisfied with the responses that he'd received from Andy Coulson and he felt, as he's put it, that he deserves a second chance.*
>
> *Of course, a lot of the information and allegations we now know were not known to me or indeed the Prime Minister then. It's quite important to remember that this conversation would have been quite different – we know now or think we know now that we didn't know then.*
>
> *And also it is important to remember that in a coalition, the Prime Minister has a right to make choices about who he appoints to his team which I can't and wouldn't ever seek to veto, in the same way that I am free to make appointments to my team which he can't veto.*
>
> *It was not a conversation which was based on the premise that somehow, you know, I would say, "You can't do that", it's just that wasn't the understanding of it."*

3.57 Mr Clegg was not the only person to raise the issue with Mr Cameron. The Prime Minister described "*a handful of people*" having done so, including from within the Conservative Party:[279]

> *"Q. Okay. Were similar concerns expressed to you directly*
>
> *by anybody else, to the best of your recollection?*

[278] pp95-96, lines 10-20, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[279] p3, lines 3-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf

A. There were – you know, some people did have concerns. I can't remember exactly who and when, but as I said, this was a controversial appointment. I've read in some of these books about a number of people who have made these points, but I don't recall many specifics, but clearly some people did have concerns, yes.

Q. And were they concerns expressed from within your own party?

A. I think there might have been one or two, I think there might have been a specific MP, I think Andrew Tyrie. That's not something I recall directly but something that has been pointed out to me, but he may have expressed concerns to me, but ...

Q. In terms of quantity, approximately how many people fall into this group of expressing concerns to you?

A. I couldn't put a number on it, but not – you know, a handful of people, I think it would be."

3.58 Lord Ashdown cautioned Ed Llewellyn, whom he knew well, to the effect that the appointment was a decision which the Prime Minister might well come to regret; but he did not have any new specific information about him. Mr Llewellyn saw no need to pass on Lord Ashdown's opinion (for an opinion is all that it was) to Mr Cameron at the time, although he did so in the summer of 2011 when the hacking scandal peaked. The point was not new and Mr Llewellyn must have been well aware that Mr Cameron fully understood the position and his decision was perfectly reasonable.[280]

3.59 Contrary to some assertions that concerns were raised by a wide range of different people, Lord O'Donnell did not receive any complaints about Mr Coulson as he made clear in his evidence:[281]

"Neither the Deputy Prime Minister nor the royal household raised any concerns with me or officials either before or during Mr Coulson's period of employment as a special adviser. I have to admit to being somewhat surprised to be asked about Buckingham Palace when they have already clearly said on no occasion did any officials from Buckingham Palace raise concerns to Downing Street and indeed it is outrageous to suggest this. Neither were any concerns raised with my by the Prime Minister or any other special advisers about Mr Coulson's conduct in previous employment."

3.60 The question of Mr Coulson's security clearance in Government is an issue which aroused much public comment. When recruited by the Conservative Party, Mr Coulson was the subject of a standard background check by a commercial organisation, Control Risks: this relies on publicly available information.[282] In Government he was vetted to a level known as SC, Security Clearance. He was not vetted to a higher level known as DV, Developed Vetting, although he was in the course of the lengthy process of being assessed for this level of clearance at the time of his resignation.[283]

[280] p78, para 236, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[281] p66, lines 9-19, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
[282] p79, para 240, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[283] p19, Question 30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf

3.61 The level of security clearance was not the decision of either Mr Cameron or Mr Coulson but the Civil Service.[284] SC is appropriate for long term, frequent access to secret material, or occasional/controlled access to top secret material. DV vetting is exceptional, conducted only where there is a "business need" and is required solely for those who have long-term, frequent/uncontrolled access to top secret material.[285] Lord O'Donnell made clear that it was not uncommon for people in Mr Coulson's position to start work without DV clearance but then come to require it. So far as Mr Coulson was concerned, he explained that a need for more frequent access to top secret material than SC clearance permitted had became apparent as a result of issues and stories concerning terrorism. He put it this way:[286]

> *"It quite often turned out that they would start off with that view – or, in this case, the Number 10 permanent secretary would have that view – and then, as events changed, they would realise – the first big terrorist event came along and then there would be a lot of papers which, by their nature, were all top secret, and then you would say, "Actually, this isn't working, we need to give access to this", or: "It would have been better if that person had access to these papers routinely, therefore we've decided ...". And this is what happened with Mr Coulson: we decided in the light of the terrorist incident, the airline bomb plot, that actually it made for sense for him to be DV'd so we could give him regular access to these papers.*
>
> *Up to then, it hadn't been an issue because I don't think he'd been that interested in those aspects of work which would have required them to have top secret access."*

3.62 Information concerning the recent Directors of Communication and Prime Minister's Official Spokesmen showed that, of six post holders, three had DV clearance when they took up their posts, two had it granted within around three months and the other just over seven months after taking up his post.[287]

3.63 In any event, the process of considering Mr Coulson for DV status would not have involved a detailed investigation of phone hacking at the NoTW; rather it is directed at whether he was at risk of blackmail. Lord O'Donnell said:[288]

> *"I think some people have different understandings of what DV'ing would reveal. It wouldn't have gone into enormous detail about phone hacking, for example.*
>
> *LORD JUSTICE LEVESON: No. It's concerned with whether you're likely to be a risk.*
>
> *A. Whether you're blackmailable, basically, yes, absolutely, and in terms of your financial position or your personal life."*

3.64 Upon his appointment as Director of Government Communications, Mr Coulson was required to declare any conflicts of interest. He still owned some shares in News Corp at that time. Their gross value by the time he gave evidence was around £40,000.[289] Lord O'Donnell confirmed

[284] pp5-6, lines 8-3, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[285] Letter, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Addendum-to-evidence-of-Lord-ODonnell-Letter-from-Cabinet-Office-on-vetting-of-officials.pdf
[286] p68, lines 7-24, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
[287] Letter, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Addendum-to-evidence-of-Lord-ODonnell-Letter-from-Cabinet-Office-on-vetting-of-officials.pdf
[288] p70, lines 11-18, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
[289] p54, lines 13-16, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf

that these should have been declared but were not.[290] Mr Coulson, realistically, did not seek to excuse his failure to do so. He first raised the point in his witness statement:[291]

> *"Whilst I didn't consider my holding of this stock to represent any kind of conflict of interest, in retrospect I wish I had paid more attention to it. I was never asked about any share or stock holdings and because I knew that I wasn't involved in any commercial issues, including the BskyB bid, it never occurred to me that there could be a conflict of interest".*

Later, he said in evidence:[292]

> *"This is by way of explanation, not excuse. My job in opposition was a busy one. My job in government was busier still, and I didn't take the time to pay close attention to my own circumstances in this regard, and I should have done."*

3.65 Significantly for the purposes of the Inquiry, Mr Coulson did not discuss the existence of his shareholding in News Corp with anybody in the Conservative Party or in the Coalition Government. There is no evidence that anyone else knew about it therefore, or ought to have asked about it.[293]

3.66 Questions as to the wisdom of the appointment of Mr Coulson did not go away. When the New York Times published the article of 1 September 2010 which, amongst other things, directly accused Mr Coulson of encouraging or knowledge of phone hacking, Mr Coulson issued an immediate denial.[294] Mr Cameron was made aware of the article but was prepared to rely on Mr Cameron's denial:[295]

> *"I don't recall exactly the conversations that took place. It was on the day I moved into Number 10 Downing Street after the birth of our daughter, so that's the memory I have from that day rather than anything around this, but I'm absolutely clear he made an outright denial and that was that".*

3.67 In the same month DAC John Yates reacted by offering to brief the Prime Minister on the response of the Metropolitan Police Service to the article in the New York Times. The offer was declined by Mr Llewellyn who made the Prime Minister aware of the approach.[296] Mr Cameron explained why Mr Llewellyn was right to decline the briefing, a decision which he said DAC Yates has since accepted was proper and understandable:[297]

> *"Q. But so we understand it, why was it not appropriate?*
>
> *A. Well, I think because there was the potential of an investigation following this allegation in the New York Times article, I think in terms of just the perception that*

[290] p72, lines 7-10, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf
[291] p11, para 46, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[292] pp54-55, lines 22-1, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[293] p55, para 2-7, Andy Coulson, *ibid*
[294] http://www.nytimes.com/2010/09/05/magazine/05hacking-t.html?pagewanted=all
[295] p7, lines 10-15, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf; note that although the transcript at p6 refers to an article dated 1 December 2010, the article was in fact dated 1 September 2010, see the footnote above for a link to the article
[296] p7, lines 21-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[297] pp8-9, lines 3-1, David Cameron, *ibid*

there would have been – if I was offered a special briefing by the Metropolitan Police, I think that would be inappropriate.

I'm sure the Metropolitan Police wouldn't have done anything inappropriate, but it would have given the appearance of at least being inappropriate, and so Ed Llewellyn declined the request. John Yates said, and I think the words are that that was understandable and sensible, I think he said, and Gus O'Donnell, the Cabinet Secretary, looked into this and he's judged that Ed Llewellyn responded absolutely correctly to this.

Q. Did you have any further conversations with Mr Coulson before his –

A. I think, sorry, John Yates said:

The offer was properly and understandably rejected."

These are the words that he used. So I think he understood that while it can be appropriate to brief ministers on operational issues, it wouldn't have been on this occasion. Sorry."

3.68 On 24 February 2010, before the election, the Guardian published an article alleging that, while Mr Coulson was the editor, the NoTW had *"employed a freelance private investigator even though he had been accused of corrupting police officers and had just been released from a seven-year prison sentence for blackmail"*.[298] Although the article did not name the investigator concerned, for legal reasons, it was a reference to Jonathan Rees who was then the subject of further criminal proceedings. Ian Katz discussed the issue first with Steve Hilton in February 2010 and then with Mr Llewellyn in October 2010. The information was not passed to Mr Cameron. He explained why to the House of Commons on 13 July 2011, evidence which he repeated to the Inquiry:[299]

"First, this information was not passed on to me, but let me be clear that this was not some secret stash of information; almost all of it was published in The Guardian in February 2010, at the same time my office was approached.

It contained no allegations directly linking Andy Coulson to illegal behaviour and it did not shed any further light on the issue of phone hacking, so it was not drawn to my attention by my office".

3.69 The editor of the Guardian did not raise the issue with Mr Cameron at meetings both in the month after the article was published and the following year.[300] Mr Cameron first became aware that Jonathan Rees had been employed by the NoTW on Mr Coulson's watch when the Guardian published a further more explicit story on 12 March 2011, seven weeks after Mr Coulson's resignation.[301] In those circumstances there can be no criticism of Mr Cameron for not raising the issue with Mr Coulson or taking action arising from it.

3.70 Matters eventually got to a point where, on 21 January 2011, Mr Coulson resigned. From his perspective, Mr Cameron described what happened:[302]

[298] http://www.guardian.co.uk/media/2010/feb/24/andy-coulson-news-of-the-world
[299] p84, para 261, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[300] p84, para 260, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[301] p83, para 259, David Cameron, *ibid*
[302] p9, lines 4-21, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf

> *"I had a number of conversations with him about his impending resignation and what followed from the New York Times article, which I know you've looked at, is the police then had an initial look to see if they should investigate again and said they shouldn't, then they had another look and again concluded that they shouldn't, and then the Crown Prosecution Service on 10 December said they weren't going to take it any further. So again, these weren't just assurances accepted by me, as it were, there were others that took this view.*
>
> *Then, really, this was the start of the process whereby Andy Coulson was becoming clear that, as he put it, when the spokesman needs a spokesman, it's time to move on. He was finding his job was impossible to do because of all these stories and the rest of it, and obviously I had a number of discussions with him about his departure."*

3.71 During the eight months in which Mr Coulson was the Director of Government Communications, he had very regular contact with the Prime Minister. His evidence gave a good insight into Mr Cameron's media operation. There were usually two meetings each day at which he would see the Prime Minister, one in the morning between 08:30 and 09:00hrs and the other in the afternoon at 16:00hrs. Mr Coulson provided a brief media summary as part of the morning meeting. The afternoon meeting involved an update and a look ahead. Mr Coulson corroborated the Prime Minister's evidence that Mr Cameron made a conscious decision to reduce his personal contact with the media after becoming Prime Minister so that he could concentrate on Government. Cabinet Ministers, Mr Coulson stated, were encouraged to do more. He described the approach as follows:[303]

> *"One of the biggest changes of approach from opposition to government with regard to communication and the media was the decision to reduce the amount of appearances by the PM. Cabinet members were encouraged to do more. We felt that Gordon Brown's habit of providing an almost constant commentary of interviews was the wrong approach and that David Cameron would aim to be less obsessed by day to day media demands. This had the benefit of creating more time for the real work of Government. It also created the impression and more important a reality, of a calmer, more professional Government.*
>
> *This was demonstrated by the fact that on arrival in No10, David Cameron also opted to swap Gordon Brown's private office, which resembled a newspaper newsroom complete with giant plasma screens showing 24 hour news channels, for the smaller office next to the Cabinet Room".*

3.72 In Government Mr Coulson continued his policy of meeting media proprietors, executives and seeking to cultivate and maintain a wide and deep range of contacts. This included contact with former News International colleagues, both formal and informal in nature. He stayed at Dorneywood with Mr and Mrs Osborne, and with Mr and Mrs Brooks, in 2010. Having worked together, Mr Coulson and Mr Osborne had become friends.[304] Mr Coulson later spent the night at the Brooks' with his family on 31 December 2010 to see in the New Year.[305] He moved

[303] p15, para 68, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[304] p69, lines 7-10, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf; p6, para 7.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[305] p18, para 86, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf

in a similar circle of politicians and media executives as Mr Cameron although he denied advising Mr Cameron to get as close as he could to Mrs Brooks.[306]

3.73 Mr Coulson's role on the first occasion that Rupert Murdoch met Mr Cameron after the election has already been described but he was also at the second, in New York; a dinner for the Prime Minister hosted by the Mayor of New York. He also met with Les Hinton and a number of News International editors as well as a wide range of other media contacts.[307]

3.74 Mr Cameron and Mr Osborne were unanimous that whilst working for the Conservative Party and later for the Coalition Government, Mr Coulson had discharged his duties professionally.[308] Mr Cameron said of Mr Coulson's performance:[309]

> *"I just make one other point, which is – because I recognise this is a controversial appointment, this has come back to haunt both him and me and I've said what I've said about 20/20 hindsight, but in doing the job as Director of Communications for the Conservative Party, and then Director of Communications in Downing Street, he did the job very effectively. There weren't any complaints about how he conducted himself. He ran a very effective team. He behaved in a very proper way.*
>
> *Of course, if that wasn't the case, then I think people would have an even stronger argument of saying, "Well, you took a risk, you employed this person and look what's happened." He did his job very well, and I think that is an important point to make."*

3.75 Mr Osborne, like Mr Cameron, has expressed regret at the appointment with hindsight. He stated:[310]

> *"I said on 25th July 2011 that "knowing what we know now, we regret the decision and I suspect that Andy Coulson would not have taken the job knowing what he knows now. But we did not have 20/20 hindsight when we made that decision." I hold this view because of the evidence that has since come to light about what happened at the News of the World that had not been uncovered by the original police investigation. I did not speak to Mr Coulson before making this statement, or since, so I was surmising what his view might be."*

The decision to hold a public inquiry

3.76 2011 brought no abatement in concern about phone hacking. On 26 January 2011 the Metropolitan Police Service launched Operation Weeting, following the provision of significant new information to them by News International, which effectively reopened its inquiries into voicemail interception.[311] The first of many arrests in connection with the

[306] p49, lines 12-14, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf
[307] p19, para 94, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Andy-Coulson.pdf
[308] p7, para 9.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf ; see also p57, lines 2-9, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[309] pp109-110, lines 16-4, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf
[310] p7, para 9.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-George-Osborne-MP.pdf
[311] p4, para 10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-DAC-Sue-Akers.pdf

investigation occurred in April 2011. The scope of police inquiries widened on 20 June 2011 when Operation Elveden commenced.[312] It set out to investigate allegations that police officers had been receiving payment for confidential information from NoTW reporters.

3.77 The tide of civil litigation against News Group News Ltd continued to rise, prompting significant public admissions and apologies in April 2011 to a number of public figures. Mr Miliband first called for an independent inquiry in April 2011.[313] On 12 May 2011, in open court, NGN admitted liability to wide ranging allegations in the civil proceedings brought by Sienna Miller.[314]

3.78 Matters came to a head in July 2011 when a full blown media storm erupted. It began on 4 July 2011 with the publication by the Guardian under the Headline: *"Missing Milly Dowler's voicemail was hacked by News of World"* written by Nick Davies and his colleague Amelia Hill.[315] News that the NoTW had intercepted Milly Dowler's voicemail caused immediate and profound public outrage. Mr Clegg put it this way:[316]

> *"A strong, free, diverse press is the lifeblood of a democratic society. Yet the evidence of widespread phone hacking at The News of the World, culminating in the revelation that Milly Dowler's phone had been hacked, led to widespread and justified public revulsion. In a very vivid way, illegal newsroom practices were shown to have impacted on the lives of ordinary people in the most distressing of circumstances."*

3.79 Events continued to move quickly after that. On 7 July 2011 James Murdoch announced the closure of the NoTW which was being abandoned by advertisers. On 8 July 2011, Mr Cameron announced that there would be a judge-led inquiry to investigate phone hacking at the NoTW and a second inquiry to look at the ethics and culture of the press. He described the moment as "carthartic" for both the press and politicians, a term to which he returned in his evidence:[317]

> *"We're here because of the truly dreadful things that happened not to politicians but to ordinary members of the public whose lives had been turned upside down when they've already suffered through losing their children, and had their lives turned upside down in a totally unacceptable way and this is, I think, a cathartic moment where press, politicians, police, all the relationships that haven't been right, we have a chance to reset them and that is what we must do."*

3.80 On the same day Mr Coulson, Clive Goodman and one other were arrested. The Guardian published the fact that it had discussed the NoTW's links with Jonathan Rees with Mr Cameron's aides. On 9 July 2011, DAC Yates expressed his "extreme regret" at not reopening Operation Caryatid. The last edition of the NoTW was published on 10 July 2011. On 11 July 2011 Mr Hunt announced the referral of the BSkyB bid to the Competition Commission,

[312] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-DAC-Sue-Akers1.pdf
[313] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf
[314] http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Exhibit-9-to-Mark-Thomson.pdf
[315] The article contains an inaccuracy, for which the Guardian has subsequently apologised, in that it is unlikely that the News of the World caused the false hope moment described by Mrs Dowler in her evidence. However, the article was correct in its assertion that Milly Dowler's voicemail was intercepted by the News of the World.
[316] p1, para 2, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
[317] p31, lines 9-18, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf

following the withdrawal of the UIL by News Corp.[318] The cumulative effect of these events aroused very great public concern. There was also considerable concern about who else had been the victim of phone hacking and other unethical practices by journalists, or those working at their instructions.

3.81 On 13 July 2011 Mr Cameron, after discussions with both Ed Miliband and Nick Clegg, announced this Inquiry to Parliament.[319] The terms of reference were agreed with Mr Miliband and Mr Clegg and later further discussed with the devolved administrations and others. Emphasising the need for a political consensus in response to the scandal, he explained:[320]

> *"In my view, it is important that politicians rise to the challenge to do the right thing for the country. A free and fearless press is an essential part of our democratic process and politicians must act to maintain this wider principle. The opportunity is for this Inquiry to produce recommendations that all political parties can get behind and get the balance of regulation right. That is why when I set up this Inquiry I agreed the Terms of Reference with the leaders of the Labour and Liberal Democrat parties."*

4. Reflections

4.1 Mr Cameron has worked closely with the media throughout his careers in politics and television. His experiences of the relationship between the press and the politicians in the 1990s and early 2000s before becoming Leader of the Opposition were evidently formative. Both in Opposition and in Government, his declared strategy has been to engage with a very wide range of broadcast and print media and to do so in depth, formally and informally.

4.2 He felt it necessary to make considerable efforts and to allocate a good deal of his time, especially in Opposition, to his media strategy. The scale of his disclosed contacts with media figures amply demonstrate that this was so. As Prime Minister, he took deliberate steps to reduce his personal contact with the media but, at a different level, the approach of maintaining wide and deep contacts with the media remained and was continued in Government.

4.3 The demands made of politicians both by the 24 hour news cycle and the increasing tendency to "high volume" newspaper coverage of events have become greater than ever during Mr Cameron's time at the top level in politics. Those demands are felt in concentrated form by directors of communication for political parties and, especially, by the Director of Government Communication.

4.4 Both Mr Cameron and Mr Osborne have, with hindsight, expressed regret at their decision to appoint Mr Coulson to that post. Mr Coulson's own assurances played an important part in that decision. He continues to stand by them. For obvious reasons concerned with the criminal investigations and prosecutions (both in England and Scotland), I have not asked any questions directed to the issue of what, if anything, Mr Coulson did know and when or whether the assurances that he has given are accurate. These are for another time. None of that, however, means that I cannot address the Terms of Reference.

[318] Part I, Chapter 6

[319] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf; http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110713/debtext/110713-0001.htm#11071354000003

[320] p43, para 128, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

4.5 The results of Mr Cameron's media strategy in Opposition were successful in winning the support of the centre right press and the endorsement of News International. The circumstances in which Rupert Murdoch and his close advisers decided to endorse Mr Cameron are complex. Mr Cameron went to great lengths to secure meetings face-to-face with Mr Murdoch and other News International executives and editors. The benefits of this may have played some part in the outcome but should not be overestimated. As Mr Osborne fairly observed, the Conservatives were not the only politicians dining with the Murdochs and their executives.[321] There were many factors other than personal contact.

4.6 The evidence does not, of course, establish anything resembling a 'deal' whereby News International's support was traded for the expectation of policy favours. All of those involved strenuously deny that there was a deal whether express or implied. The documents do not gainsay them. Nor do the Coalition Government's actions in Government.

4.7 Nevertheless, Mr Cameron frankly and, in my view, properly accepts that politicians have got too close to the media. In his words:[322]

> *"Yes. I mean, that's part of my evidence, really, is to say I think this relationship has been going wrong for, you know – it's never been perfect. There have always been problems and you can point to examples of Churchill putting Beaverbrook as a minister. There have been issues for years.*
>
> *But I think in the last 20 years, I think the relationship has not been right. I think it has been too close, as I explain in my evidence, and I think we need to try and get it on a better footing."*

4.8 The problem is public perception. This section of the Report has dealt with too many issues where the public, not knowing any more than it has (or, I might say, than what it reads in the newspapers), has been entitled to worry about the way things have been done and what has been going on. A way of conducting relationships with the media which leads to a situation in which a public Inquiry is needed to take an objective, not to say forensic, look at the matter in order to reassure the public cannot be considered as satisfactory or itself in the public interest.

4.9 Although it manifests itself in different ways, the problem is not unique to any individual politician or any one political party. It has affected previous administrations, both in office and whilst seeking power. As Mr Cameron has agreed, change is needed, and that means that political leaders need to show leadership in making that change. That is also my concluded view. I consider in the Conclusions and Recommendations section of this Part of the Report what, in my view, would support political leaders in making that change.

[321] p19, lines 16-24, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

[322] pp14-15, lines 21-5, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-14-June-2012.pdf; pp17,73, paras 47 and 218, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

CHAPTER 5
MEDIA POLICY: EXAMPLES FROM RECENT HISTORY

1. Purchase of The Times and The Sunday Times

Introduction

1.1 On 22 October 1980 Thomson British Holdings Limited (Thomson) announced its decision to withdraw from the publication of The Times, The Sunday Times and their associated publications and to cease publication of all the titles in March 1981 if a buyer could not be found by that time.[1] It is well known that in the end a buyer was found: Rupert Murdoch's News International (NI). The acquisition of these iconic titles immediately gave NI an important place in the national market for broadsheet newspapers. When combined with the company's existing tabloid titles, the News of the World and The Sun, it also conferred upon the company a very substantial share of the national newspaper market. The circumstances by which NI came to acquire these influential titles has been the subject of controversy ever since. This section of the Report examines that transaction for what it may tell us about the relationship between the press and politicians of the time.

The decision to sell

1.2 It is evident from the contemporary documents that Thomson's ownership of Times Newspapers had, by the autumn of 1980, become commercially disastrous. The sale marked a decision by Thomson to cut its losses and a conclusion that it had no realistic prospect of reversing the position. At the root of Thomson's problems was the state of industrial relations. So severe was the problem that publication had been suspended for 11 months in 1978/79 amidst disputes over procedures, guarantees of continuous production, a new wage structure, manning levels and the operation of new technology. Publication was resumed in November 1979 but many of the agreements reached between management and unions soon began to unravel. Industrial disruption in the shape of various forms of non-cooperation from sections of the workforce prevented the operation of new technology. In August 1980 there was a further strike by members of the National Union of Journalists (NUJ) which prevented publication of The Times and its supplements. During October 1980, The Sunday Times was damaged by action in the context of a dispute involving major matters of principle between members of the National Graphical Association (NGA) and the National Society of Operative Printers and Assistants (NATSOPA). That action alone, which affected production on two successive weekends, is estimated to have cost Thomson £500,000 in lost profits. Given the continuing industrial unrest, the conclusion recorded at the time by Thomson was that: "*...there was no possibility of an improvement in industrial relations at Times Newspapers, such as to permit the Titles to be produced on an economic basis under Thomson ownership*".[2]

1.3 The draft management plan for Times Newspapers produced in September 1980, but considered by Thomson to be "*very optimistic*", forecast continuing losses until 1982 and

[1] The last date set for publication in Thomson ownership of The Sunday Times and the Supplements was 13 March 1981 and a day later for The Times. p13, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-91.pdf

[2] p5, *ibid*

cash requirements totalling £34.4 million for the years 1980-1982.[3] Those bleak statistics came against the background of very substantial interest free loans made by Thomson to Times Newspapers which, by 28 September 1980 totalled £69.8.[4] At the time, the company described its reasoning in these terms:[5]

> *"...the Board of TBH concluded that, in Thomson's ownership, neither The Times nor The Sunday Times was economic as a going concern and that, in the interests not only of shareholders but also of the Group's employees, the present situation, if allowed to continue, would threaten the future security and development of the Group as a whole."*

Setting the deadline

1.4 Of some importance to the later political debate was the manner in which it decided to put the titles on the market. In particular, and as described later in this section, the March 1981 deadline for closure of the publications, unless a buyer could be found became fundamental to the Secretary of State's reasoning when he later exercised his discretion to permit NI's acquisition of the titles without a reference to the Monopolies and Mergers Commission (MMC).

1.5 At the time Thomson asserted that it had to balance a number of factors: (i) its obligations to shareholders, as part of a public company, having regard to the scale of Times Newspapers' losses and the demands on the cash resources of the Group; (ii) its desire to see the titles survive in other hands; (iii) the legal requirement to give 90 days' notice of potential redundancies and begin consultations with the trade unions concerned; and (iv) the legal necessity to give certain minimum periods of notice to employees under the terms of their employment.[6]

1.6 Thomson recognised that any potential purchaser would have to reach satisfactory manning and technology agreements with the unions. Thomson itself had been trying for years, without success, to achieve just that. It was convinced that: "*The prospect of achieving the agreements necessary to make the Titles economic exists only in the context that the alternative is the certain cessation of publication and the closure of the Titles*".[7] Having adopted the deadline, Thomson resolutely stuck to it. It appears to have worked. When writing to the Secretary of State on 23 January 1981 the company was able to state that since the announcement of the deadline production of the Times Newspapers titles had been efficient and uninterrupted.[8]

1.7 Putting back the deadline would not have been an easy matter. Following the 22 October 1980 announcement, Thomson gave notice of redundancy proposals both to the Department of Employment and to the relevant trade unions allowing for the statutory period of consultation. Notices to staff were issued at the end of November. Once issued, these notices could not have been withdrawn unilaterally.

[3] p6, *ibid*
[4] James Evans' memorandum to The Secretary of State for Trade, 23 January 1981, pp4-5, *ibid*
[5] p7, *ibid*
[6] pp7-8, *ibid*
[7] p8, *ibid*
[8] *ibid*

The bids

1.8 Seven proposals, or serious indications of interest, were received by S.G. Warburg & Company Limited (Warburgs) before the end of year deadline set by Thomson. They came from:

(a) NI;

(b) Associated Newspapers Limited (ANL);

(c) Pergamon Press Limited;

(d) Lonrho Limited;

(e) Sea Containers Inc (for The Times only);

(f) A consortium including Journalists of The Times (JOTT) (for The Times only); and

(g) Sir Harold Evans, editor of The Sunday Times, and his associates.

1.9 A number of other parties expressed but did not follow up an interest and two parties expressed an interest in the supplements only.

1.10 In evaluating the bids and, before that, when deciding with whom to engage in serious negotiation, Thomson applied a range of non-financial criteria which were agreed by the Directors of Times Newspapers Holdings Limited (TNHL). These were:[9]

(a) the new owner or owners should have (i) editorial credibility; (ii) commercial viability; and (iii) managerial skills industrially;

(b) the new owners should be seen to have no direct religious, sectional or political interests;

(c) the new owners should be of good reputation;

(d) the new owners should be asked if they would give a written guarantee of independence for the editors on similar lines to that which they have enjoyed under the Astor and Thomson ownership; if the appointment of the present editors was to continue then on what terms;

(e) the new owners should, for preference, be British but Commonwealth and North American would not be excluded; and

(f) the new owners should be asked if they had any views on staff involvement or consultation (this refers to JOTT), and would they agree a form of trust on similar lines to the National Directors to act in event of further disposals?

1.11 Other non-financial criteria upon which Thomson stated they placed considerable weight in evaluating the proposals of the various parties included:[10]

(a) their ability and determination to conclude complex and difficult negotiations with the unions;

(b) the financial and managerial resources required to sustain and develop the titles;

(c) the strength of their commitment to support the individual titles; and

(d) the views of the journalists.

[9] pp16-17, *ibid*
[10] pp17-18, *ibid*

1.12 Thomson's strategy was to negotiate with a single purchaser of all the titles as a continuing business without interruption to production. It decided not to pursue negotiations with other bidders unless a single purchaser and uninterrupted production proved impossible. The reasons given by Thomson for adopting this approach were that the separate acquisition of The Times would require its removal from the company's Gray's Inn Road complex, at some considerable cost, cause the loss of 2,000 jobs, almost certainly cease publication for a period, and risk industrial unrest which might seriously disrupt production of The Sunday Times.[11]

1.13 Fully understanding that any potential purchaser would only commit to the acquisition subject to a satisfactory deal with the unions, Thomson recognised the importance of maximising the chances of such an accommodation with the unions. The company decided that this was best achieved by ensuring that negotiations with the unions should take place with not more than one prospective purchaser of all the titles.[12]

1.14 The result of this approach was that, at the start of 1981, Thomson entered into serious negotiations with NI and ANL. Of the others who might have been eligible on these criteria, Lonrho did not in the end submit a specific proposal and, for reasons which are not fully explained in the contemporary documents, but which appear to relate to the fact that the company was owned by Robert Maxwell, Thomson chose not to negotiate with Pergamon Press Limited.

1.15 Internal discussion between Sir Denis Hamilton, Chairman and Editor-in-Chief of TNHL, Sir Harold Evans (as he now is) and William Rees-Mogg, then editor of The Times, resulted in their unanimous agreement that Mr Murdoch was the most suitable future proprietor. Their agreement to this effect is recorded in a memorandum to Thomson from Sir Denis, dated 16 January 1981.[13] It is right that I qualify the agreement set out in that document by reference to the oral evidence of Sir Harold, who indicated to the Inquiry that in fact his own support for Mr Murdoch was, quite naturally, secondary to his preference for his own bid. The explanation for the discrepancy between what is recorded in the document and Sir Harold's oral evidence seems to lie in Thomson's negotiating strategy. Of course Sir Harold preferred his own bid, but that was at this stage academic because Thomson was at that time only countenancing bids for all of the titles, a restriction which excluded Sir Harold's bid for The Sunday Times. Sir Harold's preference, amongst those who were bidding for all of the titles, was for NI. The memorandum gives eight numbered reasons for preferring Mr Murdoch. First, and perhaps foremost amongst them, was the assessment that: *"He is a highly effective manager. He, therefore, has the best chance of success on his proven track record. He has built up a big business entirely on his own. The company is in a tough spot. It needs a tough operator to survive."* It is also interesting to note reason number 5: *"He is neither greatly to the Left or greatly to the Right in his politics"*.[14]

1.16 In preferring NI's bid, Thomson was not selecting the highest bidder. ANL offered more money. However, its bid was thought by Thomson to fall short on other grounds, specifically the fact that ANL was not prepared to commit to the continuance of the titles. Thomson also took into account the capacity of ANL to carry through the transaction and subsequently to manage the titles, and the likely reaction of interested parties, including the journalists, to the ownership of the titles by ANL.

[11] pp14-15, *ibid*
[12] p15, *ibid*
[13] pp2-6, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-5.pdf
[14] *ibid*

1.17 Having emerged as Thomson's preferred bidder, the next step was for Mr Murdoch to appear before the Editorial Vetting Committee of Times Newspapers, consisting of the then Chairman of TNHL, three of the four then existing Independent National Directors and both of the then editors (Sir Denis Hamilton, Lord Dacre, Lord Greene, Lord Roll, Mr Evans and Mr Rees-Mogg). He did so on 21 January 1981. The purpose of the meeting was to evaluate would be an acceptable proprietor and at the heart of that process was establishing what assurances Mr Murdoch would be prepared to give on matters such as: maintenance of the titles, resources for their development; editorial independence and quality; board structures, especially continuance of the system of Independent National Directors; and restrictions on the acquisition of shares by persons other than the purchaser.[15]

1.18 The Vetting Committee was sufficiently impressed to recommend Mr Murdoch to the Board of TNHL as the preferred bidder. He secured the recommendation by providing a series of formal undertakings. The principal undertakings were published by TNHL on 22 January 1981 in a press release and covered the preservation and enhancement of the system of Independent National Directors; protection in relation to the appointment and dismissal of editors; limitation on the disposition of titles; and, in some detail, the maintenance of editorial independence.[16]

The Fair Trading Act 1973

1.19 A valid transfer of The Times and The Sunday Times to NI could not lawfully be executed without the written consent of the Secretary of State under s58 of the Fair Trading Act 1973. The provision was engaged because the circulation of NI's titles exceeded the limit stipulated in s58(1). In the normal course of events the Secretary of State was prohibited from giving his consent until he had received a report on the proposed transfer from the MMC. However, a number of exceptions to this rule were provided by the statute including, materially, s58(3)(a) which provided that:

> *"Where the Secretary of State is satisfied that the newspaper concerned in the transfer is not economic as a going concern and as a separate newspaper then if he is also satisfied that, if the newspaper is to continue as a separate newspaper, the case is one of urgency, he may give his consent to the transfer without requiring a report from the Commission under this section ..."*

23 January 1981 – Thomson apply for consent

1.20 By letter dated 23 January 1981, James Evans, Joint Deputy Managing Director of The Thomson Organisation Limited applied to the Secretary of State for Trade, the Rt Hon John Biffen MP (as he then was) for written consents for the transfer of The Times and The Sunday Times from TNHL to NI.[17] A memorandum, enclosed with the letter, explained the factual background in support of the application.[18]

1.21 The basis for contending that the case was one of urgency was the March 1981 deadline which Thomson had itself imposed. In addition to citing the original reasons for setting the deadline, the memorandum explained that it had resisted requests to extend the deadline and considered an extension to be impossible. Thomson steadfastly maintained its reliance

[15] p2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-7.pdf
[16] p3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-6.pdf
[17] pp2-3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-91.pdf
[18] pp4-31, *ibid*

upon its original reasons and cited five further reasons in support of its stance. They were as follows:[19]

> *(a) trade union opinion at a senior level is very strongly of the view that a deadline for closure as an alternative to sale is essential if the necessary new arrangements are to be made with their members, particularly at chapel level, to secure the necessary cost reductions vital to the financial future of the Titles;*
>
> *(b) since the announcement of October 1980 the staff of Times Newspapers have inevitably been under a very considerable strain due to the uncertainties of their future and to prolong this period of uncertainty could now easily lead to many of the staff seeking other employment thus jeopardising the ability of Times Newspapers to continue publication of the Titles;*
>
> *(c) in addition, if the March deadline was extended, even for a very limited period, it would be necessary to withdraw a very large number of notices already issued, particularly those which terminate simultaneously with the deadlines. Since notices cannot be withdrawn unilaterally by the employer and must be subject to the agreement of the individual employee, it is highly likely that the trade unions concerned would seek to exact a heavy price for agreement to the withdrawal of notices or any extension of the notice period. Other alternatives such as the offer of short-term engagements have been considered but give rise to legal consequences involving a cost exposure which it is impossible to risk. Even if some employees were willing to cooperate, a position could easily emerge in which an insufficient number did so and the company would then be faced with a contractual commitment to pay those employees for a further period yet be unable to produce the Titles.*
>
> *(d) in the consultations which have already taken place with the trade unions since 22 October 1980, there has been great pressure from the trade unions to discuss redundancy terms on the basis of closure. The company has declined to do so, mainly for the reason that so long as there is a possibility of sale it is not only inappropriate to do so but inadvisable. The terms of redundancy on closure are likely to be a very contentious issue and discussion of them would run a grave risk of causing disruption at a time when continuity of production is vital for the prospects of sale. It will be necessary, for legal reasons, to enter into discussions of redundancy terms on the basis of closure within a very short time. If there is a further period of uncertainty as to whether or not a sale can be achieved, this could jeopardise the negotiations now beginning for the improvements required as a pre-condition of sale and survival of the Titles;*
>
> *(e) further uncertainty could have very adverse trading consequences. While readers and advertisers have remained loyal to the Titles not only through the period of 11 months' suspension but also through erratic publication caused by industrial disruption, there are now signs that advertisers are becoming reluctant to commit ahead in terms of booking space except on a short-term basis, and this is a particular problem for The Sunday Times Colour Magazine because of its longer "lead" time to publication. In order to secure sufficient bookings for issues subsequent to 8 March, the Sunday Times Colour Magazine is now having to offer substantial discounts to advertisers. This has very*

[19] pp10-12, *ibid*

serious implications in view of the importance of the magazine to the financial position of The Sunday Times."

26 January 1981 – Mr Biffen's consideration of the application

1.22 Mr Biffen acted with great speed. On 26 January 1981, he met first Thomson and then Mr Murdoch, before attending a meeting of the Cabinet Ministerial Committee on Economic Strategy.[20]

1.23 The fact that Mr Biffen met Mr Evans, who acted on behalf of Thomson, on the morning of 26 January 1981, and the substance of their discussions, is evidenced by the letter which the latter sent to the former later the same day. Mr Biffen attempted to persuade Thomson to extend the deadline and indicated that it would be reasonable to hope for a report from the MMC by 25 March 1981. The letter sets out Thomson's substantive response to that request. The company remained immovable on the subject, making essentially the same points as are set out in their earlier memorandum of 23 January 1980 (discussed above) but also relying upon a condition in their agreement with NI that, if the Secretary of State's agreement had not been obtained by 12 February 1981, then the agreement would not have effect.[21]

1.24 Mr Biffen's meeting with Mr Murdoch is evidenced by an office minute prepared by Mr Biffen's officials. It is an important document, not least because it records Mr Biffen as being minded, at that time, to refer the transfer to the MMC:[22]

> *"1 The Secretary of State said that there was a presumption behind the legislation that he had to refer a newspaper merger automatically to the MMC unless particular financial and timing considerations applied which allowed him to exercise discretion over whether the merger should be referred or not. He said that he had still to come to a decision on whether these considerations applied in this instance though he admitted that he was prejudiced in favour of a reference in order to defuse any criticism of the bid".*

1.25 Mr Murdoch signalled to the Secretary of State his willingness to maintain his bid if Thomson extended its self-imposed deadline. Although he was at pains to explain that any such extension would create problems both for him and for Thomson. He thought that an extension of about two months would be required, on the assumption that the MMC reported favourably by 25 March 1981, because of the need thereafter to negotiate with the unions.

1.26 Mr Biffen maintained his preference for a referral to the MMC throughout the meeting. He does not appear to have ventilated any concerns about plurality. Rather, his concern appears to have been to avoid criticism. The final paragraph of the minute states:[23]

> *"8 The Secretary of State concluded that in his political judgment an MMC investigation would be the best means of defusing criticism. He considered that the MMC would be able to complete a report in about eight weeks and he hoped that Mr*

[20] p5, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-16.pdf
[21] pp2-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-10.pdf
[22] See http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/23_12_10_murdoch_meeting.pdf.
This document is dated 2 February 1981 but, since consent had been given by then, this must be a reference to the date upon which the document was produced. The fact that Mr Biffen met Mr Rupert Murdoch on 26 January 1981 is evidenced in the minutes of the meeting of the Cabinet Ministerial Committee on Economic Strategy.
[23] *ibid*

Murdoch would encourage Thomsons to extend their deadlines so as to allow such an investigation to take place".

1.27 Despite his clear preference for an MMC investigation, Mr Biffen did explore the alternative at the meeting, expressing the view that there would have to be *"...an extremely comprehensive set of assurances to allay the fears that had been expressed..."*. On that issue, Mr Murdoch provided reassurance: *"...he was happy to see the assurances that he had given on editorial independence given some statutory backing..."*

1.28 At 4.45hrs on the same day, Mr Biffen attended a meeting of the Cabinet Ministerial Committee on Economic Strategy, chaired by the then Prime Minister, Margaret Thatcher. Times Newspapers was one of two items discussed. In the intervening period between his meetings with Mr Evans and Mr Murdoch and the meeting of the Cabinet Committee, Mr Biffen had received Thomson's letter declining to extend their self-imposed deadline because he was aware of it by the time of the meeting.[24]

1.29 It is clear from the minutes that Mr Biffen understood the test which he was required to apply under s58(3)(a) Fair Trading Act 1973 and that his Cabinet colleagues correctly understood that the decision had to be taken by Mr Biffen and not collectively. Mr Biffen reported that: *"...On the basis of advice from his Department's accountants, he was satisfied that neither The Times nor The Sunday Times was economic as a going concern, though only in the case of The Times was the issue clear-cut. He was also satisfied the case was one of urgency ..."*. Consequently, discussion was focused on whether Mr Biffen should exercise his discretion to consent to the merger without prior reference to the MMC. The minute succinctly records how Mr Biffen appears to have regarded the choice before him:[25]

"...He (the Secretary of State), therefore had two alternatives open to him. He could make a reference to the MMC in the hope that the Thomson Organisation would then extend their deadlines, but with the risks of causing TBH to lose a substantial sum of money, of declaring around 4,000 redundancies, and of bringing about what might prove to be the permanent closure of The Times. Alternatively he could give his consent without a reference, subject to a condition which would in effect entrench the undertakings which Mr Murdoch had given, bearing on the independence of the papers and on editorial freedom, and ensure that they could not be changed thereafter without his consent."

1.30 In discussion it was thought unlikely that Thomson would refuse to extend their deadline in the event of a referral, but that there was little advantage in a reference and considerable risks and costs in making it. Thomson had taken the view that no suitable alternative purchaser had made a bid. Those who were pressing for a reference were mainly concerned to secure greater authority behind the undertakings on independence which had already been given. This concern should be met by entrenching the undertakings in the consent. The Opposition, it was thought, might be less inclined to press for a reference when they understood the potential consequences. It was left to Mr Biffen to make his decision.[26]

[24] pp2-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-10.pdf; p5, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-16.pdf
[25] p5, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-16.pdf
[26] *ibid*

27 January 1981 – Mr Biffen's decision and debate in Parliament

1.31 An Emergency Debate was held in the House of Commons on 27 January 1981 to discuss a reference of the transfer to the MMC. Contrary to the hopes expressed in Cabinet the previous day, the Opposition pressed vigorously for a reference. The Rt Hon John Smith MP pointed first to the concentration of newspaper power which would result from the transfer, describing it as: *"probably unique and unprecedented in our history"*;[27] second, to the special place of The Times and The Financial Times in national life; and third to the mechanism for scrutiny afforded under the Fair Trading Act 1973. As to that Act, he contended that The Sunday Times was economic as a going concern. The undertakings given by Mr Murdoch, he argued, removed rather than strengthened existing safeguards.

1.32 The financial issue was contested by Mr Biffen, who insisted that he had to look at the issue under the existing ownership and under present conditions. He was supported in his approach by the Rt Hon Peter Emery MP, who had been the Minister responsible for getting the Act onto the statute book.[28] Mr Biffen also made clear his view that there was a real possibility of closure if he chose to refer the matter to the MMC, pointing out that he had no power to compel the MMC to produce a report to an abridged timetable. He concluded:[29]

> *"After earnest consideration, and to avoid disruption and uncertainty, I have concluded that I should give my consent forthwith, and without a Monopolies and Mergers Commission investigation, to the transfer of Times Newspapers to News International, subject to certain conditions."*

1.33 The eight conditions referred to were firmly entrenched. Those relating to editorial independence were incorporated into the articles of association of the relevant companies. Any change to them required the Secretary of State's consent. All of the conditions, if breached, were potentially the subject of criminal proceedings and a custodial sentence. Sections 62(2) and 62(3) of the Fair Trading Act 1973 provided:[30]

> *"(2) Where ...the consent of the Secretary of State is given to a transfer of a newspaper or of newspaper assets, but is given subject to one or more conditions, any person who is knowingly concerned in, or privy to, a breach of that condition, or of any of those conditions, as the case may be shall be guilty of an offence".*
>
> *"(3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both".*

1.34 George Gardiner MP described the conditions in the debate as being: "*...as stringent as any that could conceivably arise from an investigation by the Monopolies and Mergers Commission*".[31] At the end of the debate, Mr Biffen quoted Sir Harold Evans who had said earlier in the day that: "*No Editor or Journalist could ask for wider guarantees of editorial independence on news and policy than those Mr Murdoch has accepted and which are not entrenched by the Secretary of State*".[32] It is right, of course, to point out, as Sir Harold did when he gave

[27] HC Hansard, 27 January 1981, vol 997 cols 780-826, http://hansard.millbanksystems.com/commons/1981/jan/27/times-newspapers
[28] p16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-12.pdf
[29] p6, *ibid*
[30] http://www.legislation.gov.uk/ukpga/1973/41
[31] p13, *ibid*
[32] p23, *ibid*

evidence to the Inquiry, that what he said was in the context of his still preferring his own bid to that of NI.[33]

1.35 The debate did not split strictly down party lines. Jonathan Aitken MP (Conservative), who, as the great-nephew of Lord Beaverbrook, had family connections with a newspaper empire spoke against the transfer, warning:[34]

> *"The plain fact is that Mr Murdoch has strewn assurances and safeguards on newspaper and television ownership like confetti, all round the world, and the more one examines those assurances the more one has to say that in far too many instances they have proved to be worthless."*

1.36 Mr Aitken was one of a number of MPs who criticised Thomson's self-imposed deadline and believed that there were other credible bidders. He put it graphically:[35]

> *"Lord Thomson and Mr Murdoch are putting a phoney pistol to the head of the Secretary of State and saying to him, in effect, "Stand and deliver without your reference to the commission." I believe he should have called their bluff, because there were plenty of other serious alternative bidders in the ring".*

1.37 From the other side of the political fence, Ron Leighton MP (Labour), who was a sponsored member of the printing union NATSOPA, made clear the support of the trade unions for the NI bid:[36]

> *"The printing trade unions and, I understand, a very large number of journalists take the view that the best chance of keeping the publications in existence is Rupert Murdoch – not Atlantic Richfield or Associated Newspapers ...it is our view that the most viable offer is the one from Murdoch".*

1.38 Two MPs alleged at the time that the decision was, in reality, that of the then Prime Minister. Firstly, Phillip Whitehead MP opined:[37]

> *"I detect the opinions of the Prime Minister. I think that it is the Prime Minister who has dictated that Rupert is owed a favour and that the proposal should not go to the commission. The Minister is an honourable man and a man somewhat given to private and public agonising."*

Mr Biffen rejected that suggestion.

1.39 Second, the Rt Hon Geoffrey Robinson MP said: "*In this his first major decision the right hon. Gentleman has failed to stand up to the Prime Minister. That is the reality...This is a straightforward pay-off for services rendered by* The Sun*."*[38]

1.40 In the result, the motion was defeated by 281 votes to 239 and the transfer took place without a reference to the MMC.

1.41 The debate was followed by a brief correspondence between Mr Smith and Mr Biffen, about the figures upon which the Secretary of State had relied. By letter dated 3 February 1981,

[33] p27, Sir Harold Evans, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-17-May-2012.pdf
[34] p9, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-12.pdf
[35] p10, *ibid*
[36] p18, *ibid*
[37] p11, *ibid*
[38] p15, *ibid*

Mr Biffen conceded that he had made an error in the House but, for reasons which were explained in the letter, stood by the overall conclusion that neither The Times nor The Sunday Times was economic.[39]

The decision not to commence judicial review proceedings

1.42 The reaction of journalists at The Sunday Times was such that initially a legal challenge by way of judicial review of Mr Biffen's decision seemed likely. In the result support for such action collapsed. Sir Harold Evans explained that this change of heart was the result of concern that, if a claim had been successfully brought, and a reference to the MMC ordered, The Times might have been lost.[40]

The continuing controversy

1.43 Allegations that the Minister might have taken into account irrelevant political considerations were not only raised in Parliament but repeated outside. In his diary entry for 14 June 1987, Lord Wyatt states that he told Mr Murdoch that:[41]

> *"I reminded Rupert during the evening how at his request and at my instigation she had stopped the Times acquisition being referred to the Monopolies Commission though the Sunday Times was not really losing money and the pair together were not."*

1.44 The entry for 1 December 1995 recites a conversation with Dr Irwin and Cita Stelzer, recording that he (Wyatt) had said:[42]

> *"I had all the rules bent for him over The Sunday Times and The Times when he bought them. Because of the strikes the Sunday Times was at that time losing a bomb, and so was the Times. Through Margaret I got it arranged that the deal didn't go to the Monopolies Commission which almost certainly would have blocked it."*

1.45 Sir Harold Evans was explicit in his suggestion to the Inquiry that there had in fact been something of a transaction in this matter between Baroness Thatcher and Mr Murdoch.[43] He also said that he was told that Baroness Thatcher had determined the titles must go to Mr Murdoch because she valued his support:[44]

> *"I was told by someone I know that Mrs Thatcher had determined it must go to Mr Murdoch because she valued his support. In this belief, I was supportive of Mr Hugh Stephenson at The Times, who had it from a friend in the Cabinet Office that Mrs Thatcher's real debt of gratitude was the crucial factor in doing it. Lord Donoughue, Bernard Donoughue, had it from the Cabinet Office that she owed him a debt. He had supported her in the last election, and would support him in the next. Mr Jim Prior*

[39] pp3-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-13.pdf
[40] p27, Sir Harold Evans, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-17-May-2012.pdf
[41] Wyatt, W, *The Journals of Woodrow Wyatt, Volume One*, p372
[42] Wyatt, W, *The Journals of Woodrow Wyatt, Volume Three*, p582
[43] p20, Sir Harold Evans, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-17-May-2012.pdf
[44] p29, Sir Harold Evans, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-17-May-2012.pdf

in an interview with Mr Bruce Page said of course it was a purely cynical ploy for political support."

Lunch at Chequers

1.46 More than 30 years after the events in question, in March 2012, and not long before Mr Murdoch gave evidence to the Inquiry, previously unpublished documents were released by the Churchill Archives Centre. These revealed that Mr Murdoch had visited Chequers for lunch with Baroness Thatcher on Sunday 4 January 1981. This was a surprise because Mr Murdoch had not told the author of *The History of the Times,* Graham Stewart, about it when interviewed in 1995. Sight of the documents, which he did not dispute, did not rekindle any recollection.[45] In the light of that, and of the allegations of influence made in 1981 and thereafter, these documents call for careful scrutiny.

1.47 Events are primarily recorded in a four page note for the record produced by Sir Bernard Ingham (as he became) the day afterwards.[46] The lunch was attended by Baroness and Sir Denis Thatcher, Sir Bernard and Mr Murdoch. It was at Mr Murdoch's request. There was discussion of President Reagan's then embryonic administration and of Australian politics. The main purpose of Mr Murdoch's visit though was *"...to brief the Prime Minister on his bid for Times Newspapers".* The deadline for bids had expired during the course of the previous week. The note records in outline the bid which Mr Murdoch's NI had made and his plans for turning the business around are set out in some detail. Mr Murdoch pointed out the scale of the financial risk that he was taking and the difficult economic climate in which he would have to operate. He also speculated about the other bids which he thought had been made (Sir Bernard had tried but failed to establish through the Department of Trade information about the bids).

1.48 The impression given by the note is that Mr Murdoch did most of the talking. Sir Bernard was careful to record the passive role played by Baroness Thatcher in the last paragraph of the document:[47]

"The Prime Minister thanked Mr. Murdoch for keeping her posted on his operations. She did no more than wish him well in his bid, noting the need for much improved arrangements in Fleet Street affecting manning and the introduction of new technology. Mr Murdoch made it clear that in his view the prime need, given the inevitability of progressing gradually, was to apply existing technology with reasonable manning levels."

1.49 The note was marked Commercial – In Confidence and Baroness Thatcher required that it did not go outside No.10.[48] Mr Murdoch sent a handwritten thank you letter, on 15 January 1981, reporting in relation to the sale that the field had narrowed down to two or three.[49]

[45] pp9-10, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[46] p3-6, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-14.pdf
[47] p6, *ibid*
[48] p2, *ibid*
[49] pp2-3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-15.pdf

Reflections

1.50 There appears to be little reason to doubt the difficulty of the situation faced by Thomson in the autumn of 1980. Electing to cut their losses was a commercial decision in the face of mounting losses and real industrial relations problems. The reasons which they recorded at the time explain why it was important for them to set a deadline. Other aspects of Thomson's behaviour fall well within the range of reasonable responses for an organisation in its position. Looked at from the company's point of view, Thomson's preference for a single bidder with the means to purchase the whole of Times Newspapers is understandable. The successful sale of either title individually could have jeopardised the fortunes of the other. Their choice of Mr Murdoch as preferred bidder, later endorsed by the Times Vetting Committee, is explicable on the merits of his bid. ANL, the other serious contender for a purchase of both titles, would not commit to maintaining them both. Mr Murdoch was thought to be a man capable of negotiating successfully with the trade unions. Indeed, he was the preferred choice of the trade unions. Most significantly for the purposes of this Report, there is no evidence that any political pressure was put upon Thomson to prefer NI's bid.

1.51 However, that there was a confidential meeting between the then Prime Minister and Mr Murdoch, the fact of which did not emerge into the public domain for more than 30 years, is troubling in its lack of transparency. It serves as a reminder of the importance of contemporary practice to make public the fact of such meetings. The perceptions at the time and since of collusive arrangements between the Prime Minister and the preferred bidder are corrosive of public confidence.

1.52 Not surprisingly, the contemporary documents do not evidence any form of express 'deal' between Mr Murdoch and anyone in the Government of the day, including the Prime Minister. The note of the meeting itself is careful to record that Baroness Thatcher did no more than wish Mr Murdoch well. The minutes of the Cabinet Ministerial Committee on Economic Strategy demonstrate that the committee was well aware that the decision was ultimately for Mr Biffen alone. They are corroborated by Mr Biffen's contemporaneous denial that he took irrelevant considerations into account.

1.53 Why then did Mr Murdoch seek an invitation to Chequers? The prospective deal was plainly of great importance to him. He no doubt believed that there was real value in meeting the Prime Minister face-to-face, to inform her of his bid and his plans in the event that it was successful, and importantly, to form a personal connection. He would have expected to make a good impression on Baroness Thatcher; he would have known of her respect for risk taking entrepreneurs, and that they would have thought alike on the merits of turning around a troubled newspaper company with industrial relations problems. Their world views had much in common.[50] There is no evidence that the approach made any difference to the outcome of events; nevertheless, Mr Murdoch was no doubt making an investment, not least in the context of the union confrontation which both would have seen in the future.

1.54 I have carefully considered what conclusions (whether as to fact or credibility), if any, I should draw from Mr Murdoch's inability to recall the meeting either when interviewed for the *History of The Times* or when he appeared before the Inquiry. It is perhaps a little surprising that he does not remember a visit to a place as memorable as Chequers, in the context of a bid as important as that which he made for Times Newspapers. However, perhaps that is all I need to say.

[50] p11, lines 13-17, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf

2. Response to the reports of Sir David Calcutt QC

Introduction

2.1 The Report has already considered the background to, and conclusions of, the Calcutt Reviews in some detail.[51] This section of the Report does not seek to repeat any of that detail but to examine the political response to the Calcutt Reviews.

The first Calcutt Report

2.2 Sir David Calcutt QC published his first report on Privacy and Related Matters in June 1990. It was highly critical of the existing Press Council and set out in clear terms the failings of that organisation. It recommended that the Press Council be abolished and replaced with a new self-regulatory organisation, the Press Complaints Commission. The report recommended that this new organisation should deal with the numerous and substantial concerns that had been raised around the behaviour of some parts of the press.

2.3 The report recommended that the new PCC be given 18 months to demonstrate that self-regulation could work effectively. Sir David recommended that, if this challenge could not be met, then an independent complaints-handling tribunal should be set up (which would have required legislation). The details of the recommendations are set out elsewhere.[52]

2.4 The response of the industry was swift but selective. The Press Council was disbanded, and the Press Standards Board of Finance (PressBoF) was created for the purpose of funding the PCC. The PCC itself was incorporated on 1 January 1991. However, many of the recommendations made in the first Calcutt report were not implemented by the PCC. For instance, the Code of Conduct was promulgated by the industry rather than the PCC itself, and the appointments to the PCC were made by the new Chairman, rather than by way of an independent appointments process.

The second Calcutt Report

2.5 Concern about the conduct of the press continued and was not dispelled by the PCC. The final straw appears to have been the publication in The Sun of the detail of intimate conversations between the Princess of Wales and James Gilbey, and the Prince of Wales and the Duchess of Cornwall (as she now is). On 9 July 1992, Sir David was asked by the Rt Hon David Mellor QC MP, Secretary of State for National Heritage, to conduct a second review and he did so, reporting in January 1993.

2.6 In summary, Sir David's second report made clear his view that the press was neither able nor willing to initiate reforms that might constitute a credible form of self-regulation in which the public could have confidence. He put it in this way:[53]

> *"The Press Complaints Commission is not, in my view, an effective regulator of the press. It has not been set up in a way, and is not operating a code of practice, which enables it to command not only press but also public confidence. It does not, in my view, hold the balance fairly between the press and the individual. It is not the truly independent body which it should be."*

[51] Part D, Chapter 1
[52] paras 5.12-5.16, Part D, Chapter 1
[53] David Calcutt QC, 'Review of Press Self-regulation', pxi, section 5

2.7 He therefore recommended that the proposals set out in his first report for a Press Complaints Tribunal be enacted as soon as possible. The detail of his recommendations is set out more fully above,[54] but can be summarised as having three main 'strands' as follows:

(a) the PCC should be disbanded and replaced by an independent Press Complaints Tribunal;

(b) the introduction of new criminal offences, making it a criminal offence to enter property with a view to obtaining personal information without consent, to place surveillance devices on private property without consent, or to photograph or record someone on private property without consent. Various defences were proposed; and

(c) consideration of a new tort of privacy.

2.8 Both the PCC and the industry opposed Sir David's analysis. The PCC suggested an alternative; namely amendments to the Code of Practice, new guidance for journalists and some changes to the way in which the PCC was run and governed.

The Political Response: David Mellor

2.9 In December 1989, some six months before Sir David's first report, Mr Mellor was a Home Office Minister of State, working to David Waddington MP, who was then Home Secretary. At that time, prior to the creation of the Department of National Heritage following the 1992 election, the Home Office was responsible for media policy. Mr Mellor gave a television interview in that month indicating that, in the light of Sir David's forthcoming report, the press were now drinking in the 'last chance saloon'. These were words the press were never to forget.

2.10 Mr Mellor became Secretary of State for National Heritage on 11 April 1992, just over a year after the PCC had been created. Shortly after commissioning Sir David Calcutt's review, in July 1992, Mr Mellor was the subject of a "kiss and tell" story, in which the actress Antonia de Sancha sold her story of his extra-marital affair with her. Conversations between Ms De Sancha and Mr Mellor had been recorded and were then published in The Sun. Although Mr Mellor survived in office, the press pursued details of his private life and published a number of further stories about him, including one which alleged that he had enjoyed two free holidays; one as the guest of the daughter of an official of the Palestine Liberation Organisation and one as the guest of the ruler of Abu Dhabi. Finally, after weeks of personal and negative coverage, Mr Mellor resigned on 24 September 1992.

2.11 Mr Mellor felt at the time that he had been hounded out of office by the press as a result of his comments and his formal request to Sir David to conduct a second review; asked by the Inquiry whether he believed that the timing of the adverse articles was deliberate, however, he said this: [55]

> *"No, I think it was coincidental, because interestingly, the News of the World had the first chance at the de Sancha story and elected not to publish it, so... I think it was just, you know, an inconvenient moment for one's private life to fall out of the cupboard."*

[54] Part D, Chapter 1

[55] p30, lines 7-11, David Mellor MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-26-June-2012.pdf

2.12 However, he did claim that coverage of the the 'kiss and tell' story had been personal and disproportionate, and that the press did appear to be pursuing a personal attack: [56]

> *"What shouldn't happen, though, is it then becomes a sort of vendetta and people then go around thinking because you are a wounded animal, rather like in those nature films, you know, the beast can sort of rip you to bits without any worry about fairness, truth or anything and you know, we come to the wretched Chelsea shirt. You know ... fan that I am of Chelsea Football Club, I have never owned a Chelsea shirt. Never felt the need to – and that was a total invention.... Insofar as my rather sad and pathetic little Chelsea shirt incident has any relevance... it shows a press that was out of control and had no concern with the truth whatsoever, no concern with the public interest. They were just having a laugh and I was stupid enough to put myself in a position where they could laugh at me, fool that I was".*

2.13 Although Mr Mellor took the view that the timing of the articles, shortly after he announced the second Calcutt Review, was coincidental, there is no doubt that there was a measure of press triumphalism at his resignation. The day after his resignation, The Sun's front page contained the headline "*From Toe Job to No Job*"[57] and Bill Hagerty, then Editor of The People, commented: "*This is the first time in ages that David Mellor has done the right thing*". [58]

Lord Brooke

2.14 Mr Mellor was replaced as Secretary of State for National Heritage by the Rt Hon Peter Brooke MP, now Lord Brooke. Lord Brooke was Secretary of State for National Heritage between September 1992 and July 1994. As such, he was Secretary of State for the period immediately following the publication of Sir David's second report and the first of two Secretaries of State with responsibility for responding to that report. He described this role in this way:[59]

> *"I should stress that my involvement in that response [the government's response to Sir David's second report] was my principal media responsibility during my 22 months as Secretary of State".*

2.15 It is important to note from the outset that although Sir David's second report was published in January 1993, the Government's response to it did not emerge until 1995, after Lord Brooke's time as Secretary of State. He explained:[60]

> *"the chronological narrative indicates how not once but twice we ran out of time to settle the genuine departmental differences between us".*

He concluded:[61]

> *"only historians can fully determine how, where or why we failed, which of course I regard as an embarrassment".*

[56] p31, line 19 and P35, lines 103, David Mellor MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-26-June-2012.pdf
[57] http://sunheadlines.blogspot.co.uk/2009/02/classics-toe-job-to-no-job.html
[58] http://news.bbc.co.uk/onthisday/hi/dates/stories/september/24/newsid_2529000/2529115.stm
[59] p1, para 2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf
[60] p11, para 2(h), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf
[61] p11, para 2(h), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf

The Inquiry was interested in understanding how and why there was no consensus, why the process took so long, and why so little was ultimately done. In order to answer these questions, it is necessary to consider the chronological narrative in a little detail.

2.16 Upon publication of the second report in January 1993, Lord Brooke made an oral statement to the House of Commons. Having made clear that a final response would have to await the report of the Select Committee on National Heritage on Privacy and Media Intrusion and the outcome of the debate on Mr Soley's Bill,[62] Lord Brooke indicated that the Government was broadly supportive of Sir David's recommendations relating to privacy, such as the case for new criminal offences to deal with specified types of physical intrusion, and that further consideration should be given to the introduction of a new tort of infringement of privacy as recommended. However, on the central recommendation that a Press Complaints Tribunal be set up, he put the Government's position this way: [63]

> *"I turn now to Sir David's recommendation that the Government should introduce a statutory regime for dealing with complaints against the press. That raises separate, and more difficult, issues which need to be carefully weighed. The Government agree with Sir David that the Press Complaints Commission, as at present constituted, is not an effective regulator of the press. It is not truly independent and its procedures are deficient. Sir David's detailed analysis of those shortcomings is compelling. We also recognise the strength of the case that he makes in his report for a statutory tribunal with wide-ranging powers. At the same time, we are conscious that action to make such a body statutory would be a step of some constitutional significance, departing from the traditional approach to press regulation in this country. In the light of those considerations, the Government would be extremely reluctant to pursue that route. A most persuasive case for statutory regulation would need to be made out."*

2.17 That was also the view of the press. The report of the Select Committee on National Heritage was published on 24 March 1993.[64] In summary, it recommended a new Protection of Privacy Bill, but rejected the recommendation for a press complaints tribunal concluding that "*unless future events show such a tribunal to be utterly unavoidable*",[65] it was preferable to rely on self-regulation.

Strand 1: The Press Complaints Tribunal

2.18 In rejecting the proposal of a tribunal, the Select Committee did propose the appointment of a Press Ombudsman (which would also have required legislation), on the basis that "*a regulatory level is needed beyond that of the Press Commission*". The Ombudsman, it was envisaged, would be able to provide an 'accessible and effective recourse' for 'anyone dissatisfied with the outcome of a Press Commission investigation, or whose complaint had been rejected without an investigation.'[66] Lord Wakeham (then the Chairman of the Cabinet Committee on Home and Social Affairs) opposed this proposal, describing it as "*Calcutt's statutory tribunal by another name*".[67]

[62] now Lord Soley
[63] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Brooke-Exhibit-1.pdf
[64] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Brooke-Exhibit-2.pdf
[65] Select Committee Report, para 39, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Brooke-Exhibit-2.pdf
[66] Select Committee Report, para 97, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Brooke-Exhibit-2.pdf
[67] p5, para 2(xv), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf

2.19 On 28 June 1993, Lord Brooke minuted Lord Wakeham saying that the White Paper would acknowledge the steps already taken to meet some of the Calcutt and Select Committee criticisms, but that the Government preferred to retain self-regulation. It was clear therefore from that date that the Government had decided to reject the proposals for a either a Press Complaints Tribunal, or a Press Ombudsman.

2.20 On 29 July 1993 the Lord Chancellor's Department, in conjunction with the Scottish Office, published a consultation paper. This floated the idea of a voluntary press Ombudsman scheme being set up within the PCC itself. In September 1993, Lord Brooke gave a speech to the Conservative Party conference, referring to the concept of a 'voluntary Ombudsman'. In November 1993, he gave a speech to the Institute of Public Relations, calling on the press to establish such a voluntary Press Ombudsman. Again, as will be seen, this was never something taken up by either the press or by Government.

Strand 2: criminal offences

2.21 On 14 January 1993, Lord Brooke made a statement to the House of Commons in which he said this about the new proposed criminal offences: [68]

> *"The Government accepts the case for new criminal offences to deal with specified types of physical intrusion and covert surveillance ... Subject to further examination of the details of the proposed offences ... The Government will bring forward legislation in due course".*

2.22 By May 1993, the Cabinet had agreed that the Criminal Justice Bill, to be introduced either that year or the following year, should include provisions on intrusion. Indeed, Lord Brooke told the Inquiry that, before a Cabinet meeting in June 1993, Sir John Major had expressed interest in seeing details of proposed criminal offences. At that meeting, the new proposed criminal offences were discussed. Lord Brooke told the Inquiry: [69]

> *"Criminal offences had been discussed on June 24th in terms of Parliamentary handling. I sought to reach agreement with the Home Secretary and that the offences should apply to those who profited from, or even used without profit, the results of illegal intrusion. The intrusion and the use of the material should thus be separate offences. The offences should only apply to personal information but the offences should be in the 1993-4 session of legislation, having been accepted as far back as 1990".*

2.23 On 18 August 1993, a Cabinet Office note on possible criminal offences on intrusion concluded by noting that the aim remained to publish a White Paper in September of that year, following a discussion at the first meeting of Cabinet after the summer break. However, the ambition of publishing the White Paper in September was not fulfilled.

2.24 In January 1994, Lord Wakeham met with the Lord Chancellor (Lord MacKay), Lord Brooke, the Home Secretary and a number of other senior politicians, to discuss the Calcutt recommendations. Lord Wakeham himself described this meeting as productive, and it appears that a common view was reached on the proposed criminal offences. By 8 February 1994, Lord Brooke was proposing to circulate a draft of the White Paper which recommended the introduction of the new criminal offences. This draft of the White Paper was sent to the Prime Minister on 3 March.

[68] HC Hansard, 14 January 1993, Col 1067
[69] p5, para 2(xviii), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf

2.25 On 7 March 1994, No 10 wrote to Lord Brooke asking for some further time to consider the White Paper, and on 31 March 1994 wrote again, asking him to recast the draft White Paper. The new draft was to make the case for the new criminal offences whilst balancing it with the arguments against; acknowledging the need for wide defence provisions against criminal offences but also the disadvantages of the offences with such defences included. This intervention marked a turning point in the history of the response to the recommended criminal offences.

2.26 The new draft White Paper was produced on 30 June 1994.[70] The Chancellor of the Exchequer expressed some disappointment that there had been a retreat on the idea of new criminal offences.

2.27 By the time of Lord Brooke's departure on 20 July 1994, it was clear that the Government's support for Sir David Calcutt's recommendation for new criminal offences to be introduced was beginning to wane. Indeed, as will be seen, no new criminal offences were in fact introduced.

Strand 3: civil offences

2.28 As referred to above, on 29 July 1993, the Lord Chancellor's Department, in conjunction with the Scottish Office, published a consultation paper. This proposed the introduction of a civil penalty for infringement of privacy. Lord Brooke told the Inquiry that the Lord Chancellor was known to be of the view that his proposed tort would render unnecessary any changes to the criminal law.[71]

2.29 In January 1994, the Lord Chancellor invited the Department of National Heritage to agree that there should be a statutory remedy for infringements of privacy, arising from their conclusions on the July consultation paper that the civil law should be put on a statutory footing.

2.30 On 3 March 1994 Lord Brooke provided a draft White Paper to the Prime Minister on that basis. By the end of that month, the Prime Minister had asked him to redraft it. On the issue of the new tort, the new draft was to say that, although a new tort was under consideration, the inclusion by the PCC of like provisions within its own Code of Conduct would be even better. Again, by the time that Lord Brooke left office, it was clear that the Government had also retreated from this recommendation, preferring instead to encourage enhanced self-regulation.

The Rt Hon Stephen Dorrell MP

2.31 In July 1994, the Rt Hon Stephen Dorrell MP was appointed as Secretary of State for National Heritage; he therefore inherited the amended draft White Paper.[72] The key conclusions of the White Paper were as follows:[73]

[70] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-1-S-Dorrell.pdf
[71] p5, para 2(xxv), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Brooke.pdf
[72] pp3-4, lines 18-16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf
[73] p5, paras 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Stephen-Dorrell-MP.pdf

"The Government accepts the [Select] Committee's analysis of the dilemma [posed by the need for a balance between freedom of expression and privacy] and agrees that, at the stage when Sir David Calcutt and the Committee reported, the necessary balance between these rights manifestly did not exist...

Since that time, however, the press has shown hopeful signs of greater self-restraint, and the PCC has improved its procedures and practices. There have been regrettable lapses by individual newspapers, and the Government is still to be convinced that the newspaper industry, through the PCC, is fully in control of its members and we have entered a new era of wholly responsible journalism. But it considers that statutory intervention at this stage would be out of proportion and possibly counter-productive. Nonetheless the Government would urge the industry to consider further the self-regulatory improvements set out in paragraphs 2.36 to 2.39 and in paragraph 4.19 ... Failure to implement these changes, particularly if any such failure coincided with further press abuse, will incline the Government to introduce, or give support to any Private Members' Bill introducing intrusion offences, a privacy tort, or both."

2.32 In written evidence to the Inquiry, Mr Dorrell indicated that his first instinct upon taking office was to take some time to reassess the various options. He noted as follows:[74]

"(a) I am personally hostile to any proposal for official regulation of freedom of expression;

(b) Quite apart from issues of principle, any proposal to regulate the activities of the press carries obvious political risks;

(c) I was reluctant to publish the draft White Paper which combined a theoretical willingness to legislate (about which I was dubious) with practical unwillingness to do so (which I thought was unconvincing)[75];

(d) I was conscious that there had been substantial debate before I took office between senior members of government, some of whom were more sympathetic to a regulatory response than I was."

2.33 In his oral evidence Mr Dorrell was asked to elaborate why, in his view, the Government was so keen to avoid replacing the PCC. His explanation was as follows:[76]

"I think it starts as an issue of principle ... it would be a step of considerable constitutional significance ... There was also, because this was a real political world with a real political set of decisions, there was the reality that if you were going to even contemplate going down that road, you would encounter huge opposition from the press themselves, based both on principle and it's often argued on self-interest, but it would be powerful, vigorous opposition, and that would, as a practical matter, have made it impossible for such a proposal to have been carried through the House of Commons. So whether you address it as an issue of principle or reality, it wasn't an option that merited very serious consideration".

[74] p6, para 15, Stephen Dorrell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Stephen-Dorrell-MP.pdf

[75] Mr Dorrell explained in oral evidence that "*I think it was time in my mind for the government to stop talking in terms of threats, which it had no willingness to carry out, and indeed no ability to carry out and everybody knew that those things were true*"; p8, lines 10-14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf

[76] pp3-4, lines 18-14, Stephen Dorrell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf

2.34 Mr Dorrell's written evidence indicates that, as of November 1994, the imminent appointment of Lord Wakeham as Chair of the PCC prompted a dialogue with the PCC about the options for improving the self-regulatory structure, and that this dialogue continued into the early weeks of 1995. He described his objectives at that stage as being to develop the policy outlined in the draft White Paper so that:[77]

(a) the Government could report that it had agreed improvements to the operations of the PCC which would justify its decision not to replace it; and

(b) it could also report a clear conclusion – namely that it intended to proceed with its commitment to legislate the proposed criminal intrusion offences, and that it did not intend to proceed with legislation to introduce a new tort of infringement of privacy.

2.35 This policy position was summarised in a minute sent by Mr Dorrell to the Prime Minister on 2 March 1995.[78] This minute prompted responses from three Ministers, all of whom favoured proceeding with the policy position set out in the original draft White Paper.

2.36 On 20 March 1995, Mr Dorrell produced a further minute for the Prime Minister. This brought a number of matters to his attention. In relation to the proposed tort of privacy, the minute revealed a real concern about taking on the press, reading as follows: [79]

> *"The tort would be the wrong thing at the wrong time. Most importantly, it would mean a major row with the press (the Daily Mail editorial of 16 March, annex B, is a good indication of the strength of feeling). By contrast, the press has never been in serious doubt that the criminal offences would be enacted"* (emphasis added).

2.37 The relevant Daily Mail editorial was headed "*Who are they to cry foul?*" and started with the words "*What is this profoundly unpopular government now doing?*" It went on to recite the names of a number of Ministers "*driven out of office by their own philandering and folly*" and concluded that the Prime Minister must know that "*in the current climate of sleaze and corruption any concerted political clamour for privacy legislation is liable to be dismissed as little better than a self-protection racket*".[80]

2.38 Mr Dorrell was asked whether he was concerned about press coverage of this nature. He explained: [81]

> *"I was told early in my political life: any fool can have friends, it takes a wise man to have the right enemies. You have to pick which battles you're going to fight. I'm not in favour of having government policy determined by press editorial, but nor am I in favour, in the real world, of government policy being determined blind to press editorial. You have to choose which arguments you're going to have. One of the elements of that choice is that there's not much point in the government committing itself to a course of action which, because of press hostility, it is profoundly unlikely to get through the House of Commons. That was in my judgment the position that would have been in if we'd contemplated going down the route of introducing legation and privacy.*

[77] p7, para 19, Witness Statement of Stephen Dorrell MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Stephen-Dorrell-MP.pdf
[78] p11-12, lines 21-14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Stephen-Dorrell-MP.pdf
[79] p15, lines 11-16, Stephen Dorrell MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-23-May-2012.pdf
[80] pp15-16, lines 17-13, Stephen Dorrell MP, *ibid*
[81] p16, line 16, Stephen Dorrell MP, *ibid*

Q: It seems that editorials from the more influential papers like the Daily Mail were certainly having an effect on your thinking?

A: Of course. That's part of the public discussion and I think it would be – for a politician to deny that the views of newspaper editorials are taking into account in policy making would be both implausible and actually wrong in principle."

2.39 A third minute was produced by Mr Dorrell for the Prime Minister on 24 April 1995. This minute referred to a request from the Prime Minister as to how the Government might present a "do nothing" option.[82] Mr Dorrell was asked about this:[83]

"Q: So can I take it from that that the Prime Minister was beginning to think in terms of a 'do nothing' option?

A: I think it's relatively hard to draw any other conclusion from this correspondence. The government was arguing itself to a standstill, and therefore there had to be – it was a reasonable question for him to ask. We had an obligation to reply to Calcutt. We also had an obligation to reply to a Select Committee report, which this response was by then two years behind schedule, so we had to bring the matter to a conclusion somehow."

2.40 The third minute accordingly discussed the "do nothing" option. It explored how such a decision could be presented. The practical options appeared to be: first, making no statement at all, second announcing that nothing was going to be done, or third making a statement which (a) confirmed the intention to legislate the intrusion offences *when Parliamentary time permits* (italics in the original) and (b) asserted the preference for self-regulation in the wider field of privacy law but underlined that continued public confidence in this approach depended on the effectiveness of the PCC. When asked why the words "when Parliamentary time permits" was in italics, Mr Dorrell confirmed that this was because the real intention was in fact simply not to enact these provisions.[84]

2.41 Mr Dorrell's minute expressed the view that the final option was the "*least bad choice*" and that although it would "*take a good deal of brazening out, given the history*", it could not "*be criticised as a substantive retreat, it avoids a head-on collision with the press and it gets the Select Committee off our backs*". He went on:[85]

"Q: Can I suggest that this political debate and the consideration of the announcing "do nothing" and the third option of saying that you're going to legislate when Parliamentary time permits, is that an example of a phenomenon which has been referred to by Tony Blair of not being able to be entirely frank for fear of how matters will be perceived?

A: I think that is a reasonable way of putting it, and I think it's pretty explicit in the minute. I was asked to dress up a 'do nothing' option. One way of doing nothing is to announce that you're going to do nothing, and I made it clear in the minute why, as a member of the government, that didn't seem to me to be an attractive way of announcing it, but clearly the option (c) amounts to the same thing.

Q: Indeed it wasn't your preferred way forward, but a variation of the 'do nothing' option was in fact what happened, wasn't it?

A: Substantively, yes".

[82] pp23-26, lines 3-19, Stephen Dorrell MP, *ibid*
[83] p22, line 9, Stephen Dorrell MP, *ibid*
[84] p26, lines 7-14, Stephen Dorrell MP, *ibid*
[85] p26, lines 1-19, Stephen Dorrell MP, *ibid*

2.42 Thereafter, Mr Dorrell produced a further draft White Paper, which went to a Cabinet Committee meeting which was held on 15 June 1995. This set out Mr Dorrell's preferred option, namely to legislate on the criminal offences but not the tort, and it encouraged the PCC to raise its game; but noted that the Government had no plans to replace it. No clear consensus appears to have been reached at that meeting, and Mr Dorrell explained in evidence that Ministers had differing views on the appropriate way forward.[86]

2.43 A number of discussions took place thereafter between No 10 and the Department of National Heritage, but matters were interrupted by the Prime Minister's decision to resign his position as Leader of the Conservative Party on 22 June 1995. Following Sir John Major's re-election, Mr Dorrell moved to the Department of Health.

2.44 Mr Dorrell was asked whether he considered that the Government's response to Sir David's second report had been a missed opportunity. Unlike Sir John Major, he did not think so: [87]

> *"My basic response to that is no I don't. First of all, at a purely mechanistic level, the ability to do anything fundamental in legislative terms I don't think was there because, as I have already said, I don't think in reality we'd have been able to carry legislation, so there was no opportunity, if that's what you wanted to do. But ... I am not persuaded that if we go down the legislative route here we don't create a problem, a cure that's worse than the disease".*

Virginia Bottomley MP

2.45 The results of the discussions referred to above were the White Paper, published on 17 July 1995, some two and a half years after the publication of Sir David's second report. The Rt Hon Virginia Bottomley MP, now Baroness Bottomley, as the new Secretary of State for National Heritage, was responsible for its publication. The key points of the White Paper were as follows:[88]

> *"(a) The Government does not find the case for statutory measures in this area compelling. It believes that, in principle, industry self-regulation is much to be preferred.*
>
> *(b) The Government has long recognised that there is, in principle, a case for the introduction of [new physical intrusion] offences ... The Government has however so far been unable to construct legislation which in practice would be sufficiently workable to be responsibly brought to the statute book.*
>
> *(c) In considering the results of the consultation [on the feasibility of introducing a new tort of the infringement of privacy] the Government draws two conclusions. First it does not believe there is sufficient public consensus on which to base statutory intervention in this area. Secondly it strongly prefers the principle of self-regulation ... It therefore has no present intention to legislate a new civil remedy".*

2.46 In summary, the PCC was to remain, and there was to be no new tort and no new criminal offences.

[86] p34, lines 5-17, Stephen Dorrell MP, *ibid*
[87] p37, lines 8-19, Stephen Dorrell MP, *ibid*
[88] Cmnd 2918, paras 2.5, 3.3-3.4 and 4.13

2.47 Baroness Bottomley summarised the position she inherited as follows: [89]

> *"Taking over in July 1995, I had little direct knowledge of the conditions prior to Sir David's report. There was confidence that John Wakeham, as Chairman of the PCC, was the man for the moment and would lead self regulation in an authoritative manner with, if necessary, greater menace than before".*

2.48 She therefore moved forward with the response to Calcutt largely as it had been prepared under her predecessor. She announced to Parliament that the Government would *"for the present allow Lord Wakeham's commission, and the press, to demonstrate that self-regulation can be made to work."*[90] All three of the Calcutt recommendations for legislation were rejected and instead Baroness Bottomley told Parliament that she had written to Lord Wakeham setting out *"further improvements that the Government wish to see both in the procedures of the PCC and in the code of practice itself."*[91] Those improvements included the creation of a compensation fund from which the PCC would compensate those whose privacy had been violated by the press and a number of changes to the Code to place greater weight on the protection of individual privacy.[92]

2.49 This was a complete victory for Lord Wakeham and the press, delivered through negotiation with the Government in relation to the improvements that could be delivered through self-regulation. Baroness Bottomley appeared to consider that the Government and Lord Wakeham had an understanding and she presumed it would be honoured on both sides. She said: "*I was satisfied that Lord Wakeham, who is not to be trifled with, had got the measure of the role. There were lists of improved reforms and mechanisms.*"[93]

2.50 This was demonstrated, for example, in February 1996, when a Private Member's Bill on protection of privacy was brought forward, Baroness Bottomley was keen to honour that agreement. In a letter to the Lord President of the Council she said: [94]

> *"More importantly, the Bill would cut across our policy on press regulation. It would be strongly resisted by the media, and would undermine the position of John Wakeham, whose authority as chairman of the Press Complaints Commission is predicated on the Government's assurance that it will not introduce legislation provided that he can make self-regulation work. For this reason alone, I think that the Bill should be blocked at Second reading."*

2.51 By the end of 1996, it was becoming clear that the PCC and the press had not delivered on all that the Government had asked, and expected, of it in 1995. An internal Department of Heritage review of press self-regulation for the Secretary of State concluded that[95]

> *"in certain crucial respects, and as shown by a series of unremedied press abuses, the weaknesses of self-regulation identified by the first review (covering July 1995-April 1996) have not been addressed, largely because the industry and Commission have not implemented various recommendations which you [Mrs Bottomley] made".*

[89] p1, para 2(a), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Rt-Hon-Virginia-Bottomley-of-Nettlestone-signed-30.04.12.pdf
[90] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-Rt-Hon-Baroness-Virginia-Bottomley_Privacy-Media-Intrusion-17-July-1995.pdf
[91] p3, *ibid*
[92] p5, *ibid*
[93] p2, para 3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-statement-of-Rt-Hon-Virginia-Bottomley-of-Nettlestone-signed-30.04.12.pdf
[94] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-Rt-Hon-Baroness-Virginia-Bottomley_letter-to-Anthony-Newton-MP-Re-Private-Members-Bill-12.02.96.pdf
[95] p2, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-Rt-Hon-Baroness-Virginia-Bottomley_letter-from-Lord-Wakeham-re-Press-Regulation-22.01.97.pdf

2.52 The Department of Heritage note recorded agreement with Baroness Bottomley that she should write to Lord Wakeham to seek assurances that there would be action on breaches without a complaint, as well as incorporation of guidance on the public interest. This note shines a very interesting light on the relationship that had hitherto existed between Baroness Bottomley and Lord Wakeham. Baroness Bottomley was warned that seeking assurances from Lord Wakeham which he was known not to be willing to give would be a distinct change of approach:[96]

> *"You should note that this will be a change of approach to the Press Complaints Commission. The two previous-exchanges with Lord Wakeham (i.e. the letters published in July 1995 in Privacy'and Media Intrusion, and those referred to in paragraph 1 above) were agreed in draft by the recipient before they were sent, so that, for example, your letters to Lord Wakeham tended to be limited to recommendations which he personally favoured, which he thought the industry would accept, or which he felt he could reject or defer in a plausible way. Equally, we could ensure that his letters to you were less evasive than they might otherwise have been. I think that the difficulty with this method is that your letters push mostly at open doors, whereas it is the closed ones on which he has not been very forthcoming and which are at the root of the present failures of self-regulation."*

2.53 It has not been possible to follow these policy developments from start to finish, but the evidence presented demonstrates first, that the 1995 Government response to Sir David Calcutt's report was developed on the basis of an understanding between the Government and Lord Wakeham (clearly acting on behalf of the press), and second, the limited extent to which even that understanding, so wholly in favour of the industry, was ultimately delivered by the industry or the PCC.

Lord Wakeham

2.54 Lord Wakeham said in evidence that he was appointed as a fixer, a man tasked with restoring the reputation of the PCC with leading figures within Government and of convincing the public of the effectiveness of the PCC.[97] In his evidence to the Inquiry, Lord Wakeham summarised the thinking of the industry in relation to his appointment in this way:[98]

> *"I think the newspaper industry did not want statutory control and that they accepted they needed someone to be the chairman with a bit of clout, who could stop statutory control by getting the standards up to an acceptable level, and this was my view of what I thought they probably wanted."*

2.55 Lord Wakeham's particular skills were certainly recognised at the highest levels of Government. Sir John Major said:[99]

> *"I think if you wanted someone who could guide the PCC to a better code of behaviour, it would have been difficult at the time to find anyone better than John Wakeham or more capable of being able to do it. Certainly he made some efforts to do it, but I think at the end John would concede there was more perhaps needed to be done than he was able to do. But it was perfectly credible to believe that he would achieve more than almost anyone in doing it."*

[96] pp1-2, para 3, *ibid*
[97] p19, lines 19-25, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[98] p19, lines 19-25, Lord Wakeham, *ibid*
[99] p76, lines 2-9, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

2.56 Sir John also made clear the political impact of Lord Wakeham's appointment (as well as the intelligence of the industry decision) in these terms:[100]

> *"I mean, those who were at all queasy about it would then say, "Look, here is one of our own, a very respected former Cabinet Minister who is actually chairing the PCC. Therefore, why don't we wait and see how well he gets on? Why rush ahead with legislation?" So his appointment did have a material effect upon views in the Parliamentary party."*

2.57 Lord Smith of Finsbury, the Secretary of State for Culture, Media and Sport between 1997 and 2001, noted that the appointment of Lord Wakeham as Chair of the PCC represented a sea change in that organisation.[101] He explained that Lord Wakeham moved to look seriously at how the powers of the PCC might be strengthened, stating that this was the first time that the PCC had demonstrated a preparedness to make real change. This, he suggested, led policy makers to be sufficiently impressed to remove the threat of concerted political action.[102] This he asserts:[103]

> *"effectively ensure[d] that the Calcutt proposal for statutory intervention did not have political legs."*

2.58 Certainly, Lord Smith gave evidence that on his assumption to office, press reform was no longer an issue accorded any priority.[104]

2.59 It may be argued that this was the purpose of Lord Wakeham's appointment; in the words of Lord Smith, to "*draw the sting*" of political pressure for greater and more far-reaching reforms. Lord Wakeham was regarded as an able political operator and "*was outstandingly skilful*" in his efforts at reforming the PCC.[105]

2.60 The purpose of his appointment, however, has been open to question. On the one hand, it is argued that it was to make use of his finely tuned political antennae to deliver the minimum reform necessary to placate the proponents of greater press reform and preserve as much of the industry influence and control of the system of press self- regulation as possible. On the other hand, it is contended that this was a genuine attempt at reform, that ultimately though well intended fell short of delivering real and effective change. The third possibility is that Lord Wakeham's tenure as Chair of the PCC fell somewhere between those two stools.

2.61 The role of Lord Wakeham is altogether more complex and nuanced than as the fixer he claims himself to be. He was also appointed as Chair to make certain that the PCC was satisfactory to the industry it sought to regulate. As the Report has noted, Lord Wakeham gave evidence that he was a strong supporter of both press freedom and self-regulation:[106]

> *"I don't think you could be a chairman of a body that was running a system of self-regulation unless you believed in self-regulation. I think that would be a bit difficult. And I can't imagine you being a very good chairman of a Press Council if you didn't believe in press freedom. I would have thought they were pretty self-evidently things that were required for the job."*

[100] p76, lines 15-21, Sir John Major, *ibid*
[101] p2, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Smith.pdf
[102] pp4-5, lines 18-9, Lord Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-22-May-20121.pdf
[103] p5, lines 7-8, Lord Smith, *ibid*
[104] p4, lines 18-25, Lord Smith, *ibid*
[105] pp4-5, lines 25-2, Lord Smith, *ibid*
[106] p15, lines 17-22, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf

2.62 The key to Lord Wakeham's success was that he provided the Government with a solution to what had increasingly become an intractable problem. By the time Mr Dorrell became Secretary of State, the Government may have privately abandoned proposals to implement the recommendations of Sir David Calcutt's second report. It seemed to those in Government, including Mr Dorrell, that the most effective way forward was through reform of the PCC itself. Lord Wakeham had the personality, status and apparent willingness to take that reform forward to the satisfaction of Government.[107]

2.63 It is testament to the political skills of Lord Wakeham that, in this particular context, the PCC emerged as a potential solution to the issue of privacy.[108] Additionally, it was fortuitous for Government that Lord Wakeham moved quickly to introduce reforms to make the PCC more credible. These included, for example, the strengthening of the position of the Privacy Commissioner, and the appointment of men of stature to key positions within that organisation, about which Lord Wakeham said:[109]

> *"Well, I suppose this is the flipside of me being appointed as the chairman. I mean, things were changing and here it seemed to me that it was important to try and get the Press Complaints Commission more highly respected and therefore to get the right people and have the right people appointing them seemed to me to be a move in the right direction.'"*

2.64 By the time that Baroness Bottomley took over as Secretary of State, it is clear that Lord Wakeham was successfully influencing Government policy, very much to the advantage of the PCC and the press without distinction between the two.

Sir John Major

2.65 The first Calcutt report was published a few months before Sir John Major became Prime Minister, but the second report was published in January 1993 when he had been in that position for a number of years and had, of course, been returned to power following his election victory in April 1992. Asked about his direct role in responding to Sir David's second report, he said this:[110]

> *"Well, I didn't acquire direct ownership of the issue, certainly not. It was one of 20 or 30 – there are 30 to 40 issues a day that cross a Prime Minister's desk. The fact of the matter is that he or she can almost never have direct ownership of an issue. It has to be sub-contracted to the appropriate Secretary of State and the appropriate Cabinet committee and that is what happened with the Calcutt Report ... The day-to-day detail of examination, of what is a very complex matter ... was predominantly in the hands of the Secretary of State, although when things were snarled up, they were reported back to me and I became sucked in, in terms of expressing an opinion and inviting people to go back and look at something again or recognising that it wouldn't work".*

[107] pp9-10, lines 20-23, Stephen Dorrell MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Stephen-Dorrell-MP.pdf
[108] p27, lines 17-25, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[109] p19, lines 12-18, Lord Wakeham, *ibid*
[110] p64, lines 1-19, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

2.66 Sir John was asked in evidence about the three 'strands' to the Calcutt recommendations. As to the recommendation for an independent tribunal, he noted:[111]

> *"The grounds of principle we had in mind was the freedom of the press to comment. That was why we regarded the idea of a statutory tribunal as very much as a last resort and something that we were not at the time attracted to."*

2.67 As to the proposed privacy tort, he noted:[112]

> *"There were several difficulties with the tort of privacy. One of the difficulties was that it was very easy to portray a tort of privacy as being a piece of legislation that favoured people who were relatively well off and relatively well organised but without complete access to legal aid for everyone would not be available to be used by the vast majority of people ... The other point about the tort of privacy was that it became apparent in the deliberations of the Cabinet subcommittee was that there was a very substantial philosophical difference within the Conservative Party, within ministers, as to the desirability of a tort of privacy.*
>
> *Some thought it would be very difficult to frame and might only be unfairly framed and that would be unfair on the media. Others thought it would provoke such hostility that it would dwarf everything else that the government were doing. To that extent, some of them were very wary. Others were simply philosophically unsure that it was the right time and right place to actually go down that route.*
>
> *There was a universality of opinion across the press that the tort in particular would be very damaging to investigative journalism. That was their view and they expressed it very forcibly in the columns of their newspapers ... It was a universality of opposition that we thought would spill out beyond opposition to that into opposition on wider areas of policy as well. The government would, in effect, become tainted. I think some colleagues felt that and there would be a general opposition to what the government were doing and not just an opposition focussed on that particular piece of legislation and that particular provision."*[113]

2.68 As to the proposed criminal offences:[114]

> *"I asked the then Secretary of State why he felt that the press weren't very concerned about the criminal clauses and he said that was what they had told him in discussion. I don't suggest that they were enthusiastic; I suggest that there wasn't a last-ditch determination by the media to have fought against that".*

2.69 Asked why, in general terms, the Government had been unable to implement any of the main Calcutt recommendations, he said as follows:[115]

> *"The principal reason, at the end of the day – not the only reason, but the principal reason, at the end of the day, why we were unable to enact Calcutt is that we could not have got it through the House of Commons. If you cannot get something through the House of Commons, you are powerless. That is the difference between – a government with a large majority can force something through. A government with a small majority – and in the 1990s we had a small majority to start with and it shrank*

[111] p65, lines 11-15, Sir John Major, *ibid*
[112] p69, lines 1-12, Sir John Major, *ibid*
[113] p72, lines 9-18, Sir John Major, *ibid*
[114] p69, line 23, Sir John Major, *ibid*
[115] p73, lines 3-16, Sir John Major, *ibid*

to a majority of one – makes you very dependent upon the whims and fancies of a handful of Members of Parliament in your own party, quite apart from the opposition you can expect from parties other than your own".

2.70 He also noted that the appointment of Lord Wakeham as Chairman of the PCC had also had a significant effect:[116]

"It would have been difficult at the time to find anyone better than John Wakeham or more capable of being able to do it ... I mean, those who were at all queasy about [statutory regulation] would then say: 'Look, here is one of our own, a very respected former Cabinet minister who is actually chairing the PCC. Therefore, why don't we wait and see how well he gets on? Why rush ahead with legislation?' So his appointment did have a material effect upon views in the Parliamentary party".

2.71 Asked about the 'do nothing' option contained in the minute of 24 April 1995, Sir John gave evidence as to why Mr Dorrell was asked to explore this option, and why it was the option eventually chosen:[117]

"We couldn't carry anything through Parliament, and at the time, I think we had a majority of – I think our majority had fallen to single figures by then. So we were talking about a majority of nine and arguably the most contentious piece of legislation that anyone could have seen for quite a long time."

2.72 In his written evidence, Sir John expressed the view that the failure to implement any of the Calcutt review recommendations was a 'missed opportunity'. Asked to elaborate on this in oral evidence, he said:[118]

"Well, I do. I do feel that. I think many of the things that have happened subsequently that have led to this Inquiry may not have happened if we had been able to enact, and I think in the interest if the good majority of the press, the press wouldn't have fallen into the disrepute in which the criminal activities have laid it. If these changes had been made, I don't think many of the things that subsequently happened would have happened. So in that sense it was a missed opportunity. But it was a missed opportunity which was unavoidable. It wasn't a missed opportunity because we shirked it. It was a missed opportunity because we couldn't do it" (emphasis added)

Reflections

2.73 The triumph of the 'do nothing option' demonstrates the way in which the press and the politicians have worked together on questions of media policy. In this case, the context was of a reactive policy: both the Government and the industry leaders were responding to external events.

2.74 First, doing nothing is both recognisable and perfectly legitimate in very many areas of policy and politics; there are many competing demands on the political agenda and public concern about press standards was, in a pre-internet age, afforded little publicity. Doing anything, particularly in this area, is always more difficult. Second, the press objected to the proposals both vociferously and comprehensively, deploying the megaphone at full volume. Third, they overtly attacked the authority of the Government to take any action at all in relation to the

[116] p76, lines 5-21, Sir John Major, *ibid*
[117] p83, lines 1-7, Sir John Major, *ibid*
[118] p83, line 18, Sir John Major, *ibid*

press, mired as it was in 'sleaze' allegations. Those allegations had of course been considerably amplified by the press itself; holding power uncomfortably to account, no doubt, but not necessarily disinterestedly. Fourth, without cross-party Parliamentary consensus and a powerful Government mandate, the lobbying by the press was impossible to withstand. Fifth, the PCC had appointed a Chair, in the person of Lord Wakeham, who was himself a skilled politician and advocate, and who had developed alternative proposals which appeared sufficiently plausible to be capable of being presented to the public as an adequate improvement. It is little wonder that Sir John Major, personally undermined and faced with a very small majority in the House of Commons, found himself with no alternative to the 'do nothing option'.

2.75 I have no doubt that the success of this strategy would have left an indelible impression on the press and politicians alike.

3. Human Rights Act 1998

Introduction

3.1 The Long Title of the Human Rights Act 1998 (the HRA) states that it is designed to "*give further effect to rights and freedoms guaranteed under the European Convention on Human Rights*". In the preface to the White Paper "*Rights Brought Home*", the Prime Minister explained that the HRA was intended to *"give people in the UK opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Court of Human Rights"*.[119]

3.2 A great deal has been written about the HRA, the debates in Parliament when the Bill was being passed, and precisely what it was intended to achieve. No such exercise is required in this context. This section of the Report seeks solely to ascertain the concerns of the press during the passage of the Bill through Parliament, and to set out the basis on which any amendments and concessions were made following lobbying efforts carried out directly or on their behalf.

3.3 It is clear that the initial publication of the Human Rights Bill by the incoming Labour Government led to substantial concerns being expressed by most sections of the press.

3.4 First, there was a general concern about a "judge-made" privacy law which the Human Rights Act in general might lead to. Initially at least, the press argued that in order to avoid this, they should be excluded from the ambit of the Human Rights Act entirely.

3.5 Second, but linked to the general concern, a number of specific concerns were expressed, in particular about pre-action restraint in privacy cases. Representations were made to the effect that pre-trial injunctions should be granted in privacy cases in only the most exceptional of circumstances. The press argued that in general terms the Bill should ensure that complainants make full use of the PCC rather than the courts.

3.6 As a result, what followed was sustained lobbying, and then detailed negotiations between government and Lord Wakeham, Chair of the PCC at that time. In summary, although the Government took the view that the press should not be excluded from the ambit of the HRA, these negotiations led to the enactment of section 12. This provides as follows:

[119] *Rights Brought Home* (Cm 3782), 1997, p1

"12 Freedom of Expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied –

(a) That the applicant has taken all practicable steps to notify the respondent; or

(b) That there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

(a) The extent to which –

(i) The material has, or is about to, become available to the public; or

(ii) It is, or would be, in the public interest for the material to be published;

(b) Any relevant privacy code.

(5) In this section –

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings)."

The Role of Lord Wakeham

3.7 Lord Wakeham, who had been a Conservative member of the House of Lords since 1992,[120] became Chair of the PCC in January 1995. Given his background, and his commitment to the principles of self-regulation and freedom of the press, it would be surprising if he did not have strong personal views about the Human Rights Bill. In the event, he led support of the case the press was advancing with enthusiasm and effectiveness. Questions arise as to whether in doing so he was speaking on behalf of the PCC (as its Chair), the press as a whole, or both. On that point, Lord Wakeham said this in his evidence to the Inquiry:[121]

"I must make it clear that throughout the discussions on the Bill, I never acted as a 'representative of the press'. My concern was always with the future of self-regulation, and the way in which the human rights legislation might undermine it."

[120] he was Secretary of State for Energy between 1989 and 1992, and Lord Privy Seal and Leader of the House of Lords between 1992 and 1994

[121] p14, para 45, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf

3.8 Asked about this in oral evidence, Lord Wakeham expanded as follows:[122]

> *"Q: Some commentators have said that it is simply inappropriate for the chairman of the regulator, who's meant to be, at the end of the day, an impartial mediator and complaints handler, to essentially lobby on behalf of the press in respect of government decisions that might affect the press' commercial interests ...*
>
> *A: I was never a regulator. I never said I was a regulator. I didn't pretend to be a regulator. My task was to try and raise standards in the press by means of a code and by self-regulation. You have to bear in mind that when I went there, the press had been governed previously by the Press Council, and there ... wasn't a code. We were the starting of the code. It was pretty crude when we started, and we refined it, but at no time was it a regulator's job. It was a job of raising standards in self-regulation.*
>
> *Q: Did you speak to the press industry when the human rights bill was going through Parliament? Did you speak to representatives of the press industry?*
>
> *A: I can't remember doing so. I can't absolutely swear that I never spoke to a journalist at any time about it, but I certainly wasn't representing them. My concern was for the public. The Press Complaints Commission, in my view, was the best way of protecting the public and I didn't want to see it destroyed in the way that it more or less has been in the last few years."*

3.9 Whether or not the PCC was a regulator in the full sense of that term, a question arises about how far Lord Wakeham as the Chair of the self-regulatory body charged with the responsibility for resolving press complaints should have been speaking out in support of the case which the press clearly espoused. He would doubtless have been aware of the position the press was taking on these issues regardless of whether he discussed them with journalists and editors. In any event, the connection between the role of the PCC in maintaining press standards and opposing the Human Rights Bill insofar as it related to the press is not immediately apparent.

3.10 Other witnesses disagreed with Lord Wakeham's recollection. Asked about a debate in the House of Commons during the second reading of the Bill, the Rt Hon Jack Straw MP gave evidence to the Inquiry as follows:[123]

> *Q: Then ... you make it clear that there were discussions which involved you, the late Lord Williams and Lord Wakeham ... "The new clause was drafted in consultation with Lord Wakeham and representatives of the national and regional press. They have given it a warm welcome." So the upshot is that part of the explanation for the genesis of section 12, a consultation, agreement if you like, which you reach with Lord Wakeham, who may well have been speaking for a large section of the press. Is that fair?*
>
> *A: Yes. He was certainly speaking for a large section of the press. Whatever his position in the House of Lords, he was chairman of the Press Complaints Commission ... I mean, it wasn't a piece of private enterprise by Lord Wakeham. There would have been no purpose served in busy ministers spending their time speaking to Lord Wakeham if this was just a sort of personal foible. He had a very influential position and he was tending to speak on behalf of the press ... I worked on the basis that if I could square Lord Wakeham, I'd square most sections of the press, which is what I wanted to do".*

[122] p46, line 5, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf
[123] p36, line 14, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

Concerns of the press and lobbying

3.11 In any event, regardless of whether he formally represented the interests and concerns of the press, it is clear that Lord Wakeham played a central role in advancing the arguments which the press would have wished to raise. On 12 January 1998 Lord Wakeham wrote to Lord Smith,[124] the Secretary of State for Culture, Media and Sport, expounding his principal concerns about the Bill:[125]

> *"... there are two central problems with the Bill. The first is the issue of prior restraint – and the new arsenal of weapons that will be available to the rich, the corrupt and those comfortable with the courts to gag newspapers. The second is whether the PCC should be a public authority within the terms of the Bill – and therefore the sort of legal entity which the newspaper industry never intended it to be".*

3.12 The issue of 'prior restraint' is explained below: in fact, it came to the fore slightly later in the chronological sequence. The second issue is technical, but may be boiled down to this. If the PCC was a public authority within the meaning of what is now section 6 of the HRA, then it would be unlawful for it to act incompatibly with any human right. It was believed, or feared, at the time – depending on one's point of view – that the effect of incorporating Article 8 of the Convention into domestic law would be to create a privacy law 'by the back door'. Subject to the application of section 6, the PCC would become bound to apply it.

3.13 Lord Wakeham made two speeches in the House of Lords during the Committee stage and the Third Reading of the Human Rights Bill. In written evidence, he explained that his view was that:[126]

> *"The Bill as drafted would damage the freedom of the press and badly wound the system of tough and effective self regulation that we have built up to provide quick remedies without cost for ordinary citizens. It would inevitably produce a privacy law, despite the Government's stated opposition to one".*

3.14 Initially, the press through Lord Wakeham tried to obtain a complete exemption from the HRA. Lord Wakeham accepted this in oral evidence, also noting that he did not expect that this would be considered acceptable:[127]

> *"Q: Did you initially seek to get the press a complete exemption from the provisions of the Human Rights Act?*
>
> *A: I certainly did, with absolutely no chance whatsoever of getting it through the House of Lords, but I wanted to raise the issue, which was important. I have to tell you that Parliament is in favour of strengthening restraints on the press whenever they find an opportunity, and if there's any legislation flows from the circumstances we're in, I have considerable reservations as how it would get on in Parliament."*

I

[124] now, the Rt Hon Lord Smith of Finsbury
[125] p12, para 103, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
[126] Lords Hansard, 24 November 1997, col 771, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Lord-Wakeham-Exhibit-E.pdf
[127] p45, lines 11-20, Lord Wakeham, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-15-May-2012.pdf

3.15 In oral evidence to the Inquiry, Mr Straw explained why Lord Wakeham's assessment that he had '*absolutely no chance whatsoever of getting it through the House of Lords*' was correct:[128]

> *"... Lord Wakeham went on to say that there was a second issue, which he described as far more serious, which was whether the PCC should be a public authority within the terms of the bill. In fact, the PCC was not a public authority within the terms of the Bill, but what the PCC were trying to secure was a situation where the media were outwith the impact of the Bill so you just drew a ring around them somehow and they be excluded from any adjudication on the conflict between Article 8 and Article 10 or anything else. Now, that was just impossible to meet, and I had to explain that to them, and we didn't meet it.*
>
> *It's also simply incorrect for anyone now to say that nobody knew that a Human Rights Act would lead to a law of privacy. Of course they did. They said so. But as I brought out in my Gareth Williams lecture, we all knew it was going to do that. That was discussed endlessly in Parliament."*

3.16 I now turn to the issue of 'prior restraint', in relation to which Lord Wakeham also made strong representations. What this issue amounted to concerned the legal test the High Court should apply in granting without notice injunctions in privacy cases: in essence, Lord Wakeham's contention was that it should be more difficult for privacy claimants to obtain such injunctions than would ordinarily be the case because the right to freedom of expression would always be in play.[129] Here, it is fair to point out that the reasons he advanced back in 1998 were broadly similar to the reasons he gave to the Joint Committee on Privacy and Injunctions in 2011:[130]

> *"My concern was to stop privacy cases by and large coming to the courts at all. I wanted people who felt they were done down by the press to go to something less than court. You only have to look in the papers the other day; it cost a footballer half a million pounds to bring a privacy action, which he lost. That is of no use to the vast majority of my old constituents ... I wanted section 12 to try to encourage the use of the Press Complaints Commission and therefore people would not come to court nearly as much so we could deal with it...."*

3.17 On this issue Lord Wakeham received a sympathetic ear from Government. The Inquiry heard evidence that extensive negotiations took place between Lord Wakeham, Lord Smith and Mr Straw who was then the Home Secretary. Mr Straw explained in oral evidence to the Inquiry why he took the view that these negotiations were both necessary and appropriate:[131]

> *"I was very anxious to achieve a consensus on this legislation because I have a principle which is that major constitutional change should only go through if there is some kind of greater legitimacy, either through a consensus in Parliament or through a referendum, and the Conservatives were opposing the bill at second reading and I was anxious to see whether we could reach an accommodation so we could get their endorsement to it. Also I thought a part of what Lord Wakeham and the PCC were saying was reasonable. [On the issue of prior restraint] ... I thought they had a point there".*

[128] p32, lines 8-25, Jack Straw MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

[129] the text of section 12 is set out above. It is a procedural provision which applies only to the grant of interim injunctions where the proposed respondent to the application is neither present nor represented. The test in s12 is higher than the legal test which ordinarily applies to the grant of such injunctions

[130] hearing of Joint Committee on Privacy and Injunctions, Monday 17 October 2011

[131] p31, lines 17-25, Jack Straw MP, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

3.18 During the Committee stage debate in the House of Commons,[132] Mr Straw explained that the need for a more onerous legal test reflected a principle already recognised by the European Court of Human Rights:[133] "*The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest*". Mr Straw added that in the light of this principle, the Government believed that:[134]

> *"The courts should consider the merits of an application when it is made and should not grant an interim injunction simply to preserve the status quo ante between the parties".*

3.19 Lord Wakeham gave evidence as to precisely how section 12 of the HRA came about, including the nature of his involvement in its genesis. In written evidence, he explained as follows:[135]

> *"... I believe Jack Straw understood ... [my views] more clearly ... When the Bill moved from the Lords to the Commons in the spring of 1998, he moved swiftly to try to deal with some of the issues that were raised and what became Section 12 was the result. Jack worked closely with me on the wording of the amendment, and we eventually agreed it at a hastily arranged meeting at Heathrow Airport.*
>
> *I believe Section 12 was the best compromise that was likely to have been achieved in the circumstances. It tried to tackle the issue of prior restraint and in Jack Straw's phrase in the House of Commons, 'preserve self regulation'. But it has – as the recent rows over super-injunctions have shown – only been partially successful."*

3.20 The evidence of Lord Wakeham and Mr Straw therefore appears to be consistent. Mr Straw also accepted that the Government agreed to the inclusion of section 12 having regard to the concerns of the press. On 2 July 1998 the Bill had reached its second reading in the House of Commons. Mr Straw was asked at the Inquiry about a debate which took place on that day:[136]

> *"Q: You were debating what was then clause 13, which became section 12, and ... you told the Commons: "As the Committee will know, there was concern in some sections of the press that the bill might undermine press freedom and result in a privacy law by the back door." And then you say that was not the government's view and you've dealt with the issue.*
>
> *A: Yes.*
>
> *Q: But on the issue of prior restraint and what became section 12, the third paragraph, you say: "We recognise the concerns expressed in the press. As I have made clear, for example in respect of the bill's impact on the churches, we are anxious to deal constructively with them. In the light of those concerns we decided to introduce a new clause specifically designed to safeguard press freedom. We thought long and hard about it...".*
>
> *A: Yes."*

[132] 315 HC Official Report (6th series) col 536 (2 July 1998).
[133] in Application 13585/88: *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, para 60
[134] 315 HC Official Report (6th series) col 536 (2 July 1998).
[135] p15, paras 46-47, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Second-Witness-Statement-of-Lord-Wakeham.pdf
[136] p36, line 14, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

3.21 Even so, it would be going too far to conclude that the Government introduced what became section 12 on account of the concerns of the press and for no other reason. Taking Mr Straw's evidence as a whole, he made it clear that there were other reasons for 'raising the bar' in relation to the grant of without notice interim injunctions. Press concerns may have been a factor to which the Government had regard, and there may have been a form of compromise as to the precise wording of the provision; this appears to have been a case in which the thrust of overall Government policy and the interests of the press came into alignment.

3.22 I do not overlook the evidence of Mr Blair who placed a somewhat different interpretation of these events:[137]

> *"Q. Was it the position that News International – I suppose together with everybody else – were lobbying for complete press immunity from the Human Rights Act?*
>
> *A. Yes, that's right. They wanted no suggestion that you would move outside the bounds of the PCC and self-regulation.*
>
> *Q. And were you generally supportive of that position?*
>
> *A. Yes, that was – I mean, my – my view was that if you were to deal with this, you had to deal with it head on, as it were, not through the Human Rights Act, which would be a sort of side way of dealing with it. Also, at that time, I think I'm right in saying it was Lord Wakeham who was head of the PCC, who was something actually I thought was doing quite a good job of that, and the PCC were pretty fierce on this, on behalf the whole of the media, really, not any one particular part of it.*
>
> *Q. Was the position reached that following, if I can put it in these terms, pressure from Lord Irvine – of course then your Lord Chancellor, who I think was responsible for piloting the act through Parliament generally, certainly of course through the Lords – that he persuaded you that your position was incorrect and we ended up with a compromise, which we see in the form of Section 12 of the Act?*
>
> *A. That's right.*
>
> *Q. In terms, though, of what your position was, what was the problem in allowing a privacy law to develop incrementally through Article 8, which is what would have happened – indeed has happened in any event – with the introduction of the Act in the form in which we now see it?*
>
> *A. As I say, I felt we should still be with the self-regulation argument, and I knew that we were going to have quite a big battle over it if we changed that position. In the end, we did come to a compromise, and I think that compromise was perfectly sensible, by the way."*

3.23 I can quite understand how from Mr Blair's perspective, section 12 appeared to be a compromise; he after all was supportive of the press case for complete exemption from the scope of the HRA. But the evidence of Lord Wakeham and Mr Straw clearly demonstrates that complete immunity was unrealistic and unacceptable, not least from the point of view of public opinion.

[137] pp96-97 lines 4-16, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

Aftermath

3.24 A number of academic commentators have taken the view that the press concerns about the application of the HRA and any satisfaction they may have gained from section 12 were misplaced. They argue that irrespective of the HRA, judges were already developing the common law of breach of confidence to protect privacy. They also argue that the Government did not intend by section 12 to include any provision which required the courts to do more than apply the principles set out in the Convention, and that it would have been pointless to attempt to do so in any event, as the UK's international obligations would permit persons who took the view that domestic law inadequately protects their rights to bring a claim against the UK in the European Court of Human Rights.[138]

3.25 However, evidence given to the Inquiry by a number of media lawyers was to the effect that the procedural provisions of section 12 have, in fact, afforded considerable protection to the press. Mark Thomson, of Atkins Thomson Solicitors, put it this way:[139]

> *"It is important to note that section 12 of the HRA has made the threshold tests for interim injunctions harder to obtain than before – in effect, a potential claimant has to show that he or she would be more likely than not to succeed at trial on proving the threatened publication is unlawful. Despite what the press say, for an interim court measure, that is a high threshold, and one which is meant to reflect the importance of freedom of speech. This point was recognised by Jack Straw and Professor Phillipson in their evidence before the Select Committee."*

3.26 Mr Straw gave similar evidence to the Joint Committee on Privacy and Injunctions, on 17 October 2011:[140]

> *"Lord Wakeham has kindly reminded me of what I said [at the time] ... it was words to the effect that the introduction of section 12 should make these interlocutory injunctions pretty rare, and people in general would go to the Press Complaints Commission. We can argue about the extent to which they are relatively rare. There has been a lot of publicity about individual ones, but they are fewer in number than is imagined".*

3.27 Nonetheless, it is necessary to keep this in perspective. As already pointed out at paragraph 3.18 above above, section 12 of the HRA broadly reflected principles laid down by the European Court of Human Rights in Strasbourg.

Reflections

3.28 It is clear that the press in general, and Lord Wakeham in particular, lobbied heavily against the Human Rights Bill insofar as it related to the press and related freedom of expression issues. It is also clear that section 12 of the HRA was seen at the time as a form of compromise between competing interests. Even so, the robust evidence received from Mr Straw suggests that, although press/Wakeham lobbying had an influence on the ultimate course of events, there were other sound reasons for enacting section 12.

[138] Lester A and Pannick D, *Human Rights Law and Practice*, (2009), P84.
[139] p7, para 27, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Mark-Thomson.pdf
[140] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Exhibit-3-to-Mark-Thomson.pdf

3.29 Section 12 did not of course create a complete immunity for the press from the ambit of the HRA. Following the comment that Lord Wakeham made to the Joint Committee on Privacy and Injunctions to the effect that he was disappointed that section 12 had not achieved what had been hoped and that he wanted to encourage the use of the PCC,[141] there was the following exchange:[142]

> *Q (Lord Greenford): Do you think you succeeded in making freedom of expression superior to the right of privacy?*
>
> *Lord Wakeham: No, I do not. I think there was a balance, but the balance was not even-steven. What I thought I had achieved was what Jack Straw said in the House of Commons when he introduced section 12; I thought he got it exactly right at that time. It has not worked out like that, and I am disappointed."*

3.30 On the other hand, Professor Gavin Phillipson told the Joint Committee:[143]

> *"Can I just add that there was nothing in section 12 to suggest that cases should be steered off to the Press Complaints Commission? Section 12 tells the courts what to do. It does not say anything about whether or not someone would prefer to go to the PCC and there is nothing in it to say that injunctions will be rare. It simply says that injunctions will be granted only if the court thinks that the claimant has the stronger case. If the claimant has the stronger case they will get the injunction".*

4. Data Protection Act 1998

Introduction

4.1 On 10 May 2006, the Information Commissioner published his report to Parliament entitled "*What Price Privacy? The Unlawful Trade in Confidential Personal Information*".[144] The background to, and the contents of, this report and the follow-up report entitled "*What Price Privacy Now*?" are both covered in greater detail in Part H above in the context of a broader discussion of the work of the Information Commissioner. This section of the Report is devoted to narrower questions relating to the way in which s77-78 of the Criminal Justice and Immigration Act 2008 came to be enacted, but not implemented and, in particular, how far press influence was brought to bear on Government policy in relation to these amendments to the Data Protection Act 1998 (DPA).

4.2 In this context, it is unnecessary to address any, save one of the issues raised in the Information Commissioner's reports to Parliament. The first report, *What Price Privacy?*, made the case for increasing the maximum penalty for the offence of misuse of personal data in breach of s55 of the DPA from a fine to a custodial sentence of two years. The Foreword to *What Price Privacy?* encapsulated the matter thus:[145]

> *"The crime at present carries no custodial sentence. When cases involving the unlawful procurement or sale of confidential personal information come before the courts, convictions often bring no more than a derisory fine or a conditional discharge. Low*

[141] para 3.16, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Exhibit-3-to-Mark-Thomson.pdf
[142] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Exhibit-3-to-Mark-Thomson.pdf
[143] *ibid*
[144] pp1-48, Information Commissioners Office, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG8.pdf
[145] pp4-5, *ibid*

> *penalties devalue the data protection offence in the public mind and mask the true seriousness of the crime, even within the judicial system. They likewise do little to deter those who seek to buy or supply confidential information that should rightly remain private. The remedy I am proposing is to introduce a custodial sentence of up to two years for persons convicted on indictment, and up to six months for summary convictions. The aim is not to send more people to prison but to discourage all who might be tempted to engage in this unlawful trade."*

4.3 In order to give effect to these recommendations, primary legislation would need to be enacted to alter the maximum penalties laid down in s60 of the DPA for breaches of s55. The ICO noted that a follow-up report would be published within six months in order to monitor progress on the recommendations made.

4.4 At least initially, the Government appeared to be amenable in principle to introducing a custodial sanction in line with the ICO's recommendation. The Foreword of *What Price Privacy?* concluded with the observation that preliminary discussions with the Government had been encouraging:[146]

> *"These concerns, and the need for increased penalties, have been raised with the Department for Constitutional Affairs. The positive response that I have received so far is encouraging. These are early and welcome indications of progress on the possibility of Government action."*

4.5 On 24 July 2006, the Department for Constitutional Affairs (DCA) published a consultation paper on increasing the penalties for breaches of s55.[147] This sought views on whether the proposed custodial sentences would act as an effective deterrent to those who deliberately or recklessly misused personal information. The consultation period ended on 30 October 2006.

Responses to the consultation document

4.6 The majority of respondents welcomed the introduction of custodial sentences. They indicated that the introduction of such sentences would provide a greater deterrence to potential offenders, provide public reassurance that offenders would receive the appropriate sentence, and achieve parity with a number of disparate pieces of legislation which dealt with similar offences.

4.7 However, although the ICO's recommendations were not specifically targeted at the press, it was the press that co-ordinated the vociferous formal objections to them. In response to the consultation, the press strongly argued that the introduction of such penalties would have a 'chilling effect' on journalism and that this was contrary to the principle of freedom of expression.

4.8 Notwithstanding these objections, the Government's position remained that the introduction of custodial sentences was both appropriate and in accordance with the views of the majority of respondents to the consultation document. By the time the ICO's follow-up report, *What Price Privacy Now? The First Six Months' Progress in Halting the Unlawful Trade in*

[146] p5, Information Commissioners Office, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG8.pdf

[147] Department for Constitutional Affairs, *Increasing penalties for deliberate and wilful misuse of personal data*, http://www.dfpni.gov.uk/consultation_misue_of_personal_data.pdf

Confidential Personal Information[148] was published in December 2006, the ICO considered itself to have achieved some success. Not only had the consultation paper received a majority of favourable responses, but *What Price Privacy Now?* had attracted a significant amount of public attention and media coverage. The follow-up report concluded that the ICO would:[149]

> *"...continue to press the government to introduce the option of a prison sentence and see this progress report as supporting that goal."*

4.9 On 7 February 2007, the Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton QC, made the following statement in the House of Lords:[150]

> *"I have today published the Government response to the consultation paper "Increasing Penalties for Deliberate and Wilful Misuse of Public Data" (C/P9/06)… The response sets out how we will reform section 60 of the Data Protection Act 1998 to ensure that there is robust protection for personal data, and to strengthen individuals' right to privacy…. The Government believe that the existing financial penalties are not sufficiently protecting people's personal data.*
>
> *…*
>
> *In summary, following careful consideration of the responses received, we are proceeding with the proposals to introduce custodial sentences to section 60 of the Data Protection Act. The Government are clear that custodial penalties will be reserved for the most serious breaches of the Act. We will seek to introduce an amendment to the Act as soon as parliamentary time allows."*

The Criminal Justice and Immigration Bill

4.10 By clause 75 (later clause 129) of the Criminal Justice and Immigration Bill, it was proposed to amend s60 of the DPA to increase the penalties for offences under s55 of the Act, to allow for a period of imprisonment of up to six months following summary conviction and up to two years following conviction on indictment. It is important to note that, at that stage, the Government did not have in mind any other alteration to the law such as the introduction of a subjective element to the existing public interest defence.[151]

4.11 The Bill received its Second Reading in the House of Commons on 8 October 2007, and at that stage Clause 75 did not appear to be generating any serious controversy. As at 27 November 2007, the Government was still actively rejecting any suggestion that this clause could have a 'chilling effect' on the press, and were pressing ahead with the relevant amendments.[152]

4.12 However, in early 2008 it became clear that the press was organising a serious and concerted campaign against the proposals. The Rt Hon Jack Straw MP was Secretary of State for Justice during the relevant period.[153] His written evidence records that he received a number of representations from members of the press particularly in January 2008, and that a number of meetings to discuss the press concerns were held.[154]

I

[148] Information Commissioners Office, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG9.pdf
[149] *What Price Privacy Now?*, 13 December 2006, p30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Exhibit-CG9.pdf
[150] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RTF-Exhibit-30.pdf
[151] pp42-43, lines 24-6, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[152] House of Commons General Committee, Session 2007-2008, 14th Sitting, 27 November 2007, Cols 585-587, http://www.publications.parliament.uk/pa/cm200708/cmpublic/criminal/071127/pm/71127s02.htm#07112811000157
[153] he was appointed to that post in June 2007
[154] paras 83-84, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf

4.13 By February 2008, and following continued vociferous representations from the press, the Government was proposing to withdraw clause 75 (now clause 129) completely. The ICO expressed deep regret at this proposed course of action.[155] A letter from Mr Richard Thomas dated 4 March 2008 noted that:

> *"The representations against the measure from media organisations have not been convincing. In effect, they are arguing against a criminal offence which has been on the statute for many years. They object to tougher sanctions against activities which they say do not exist or are not widespread. The louder their protests against stronger penalties, the more it suggests questionable practices. The offence is only committed when there is deliberate or reckless disclosure of personal data without the consent of the organisation which holds it. The implication of their case is that they wish to be able to break the law...*
>
> *This is a pernicious, and largely hidden, illegal market and I am determined to stop it."*

4.14 Mr Thomas met the Prime Minister on 5 March 2008 to discuss the proposed withdrawal of clause 75. Mr Thomas's notes of the meeting record that the Prime Minister "*accepted that a strong sentence is needed to deter all those involved",* but "*at the same time, he is concerned to strike the right balance with protecting freedom of the press, especially in relation to legitimate investigative journalism. Now that some time has been bought (between Committee and Report stages in the Lords) he wants a compromise position to be achieved to minimise media concerns.*"[156]

4.15 The compromise which was in the end achieved saw the replacement of clause 75 with two provisions, each of which required secondary legislation to be activated: the first providing an additional defence to the offence in s55 of the DPA as to subjective belief in the journalism in question being in the public interest; and the second providing for an increase in the maximum penalties under s55 to terms of imprisonment in line with the original proposals, but only after consultation. These provisions were enacted in the form of ss77 and 78 of the Criminal Justice and Immigration Act 2008 and, as has already been noted, the relevant secondary legislation has not as yet been introduced.

4.16 The Government's official position therefore changed radically during this period. It is clear that pressure from the press as a whole was brought to bear, but cause and effect is not necessarily established by narrating the relevant sequence of events. The influence of press lobbying, and the Government's reasons for their change of policy, therefore fall to be examined.

Evidence of lobbying behind the scenes: reasons for the policy change

4.17 Not merely did representatives of the press makes strong public representations against the introduction of a custodial sentence, but a number of significant meetings took place behind the scenes. The issue was clearly one which the press had taken to heart, and the nature of the relationship of a number of key players with politicians was such that ready access was available.

[155] pp1-3, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-39.pdf
[156] p1, Richard Thomas, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/RJT-Exhibit-40.pdf

4.18 The Prime Minister, Mr Brown, dined with Les Hinton, Murdoch MacLennan and Paul Dacre on 10 September 2007. Mr Hinton, then Executive Chairman of News International, did not give evidence to the Inquiry. Mr MacLennan gave evidence on 10 January 2012 but was not asked to deal with this occasion. The accounts I received from Mr Brown and Mr Dacre are different in emphasis if not in substance. Mr Brown's account of the dinner was as follows:[157]

> *"A. I remember the issue. I told them, as we started the dinner, what my own view was. I didn't ask them for their view, I'm afraid. Maybe I should have. I told them what my view was, that there should be a public interest defence, and therefore it wasn't a question of them lobbying me. I was informing them that this was my view, but that Michael Wills, who was an excellent minister, and Jack Straw, who was doing a great job on this, were consulting people about how we could implement this in a way where there was a public interest defence but we weren't going to back off entirely the potential need for legislation.*
>
> *Q. Mr Dacre's account doesn't quite match that, Mr Brown. Under tab 34, he gave a speech to the Society of Editors conference on 9 November 2008. So it's about 16, 17 months after the relevant date.*
>
> *A. Yes.*
>
> *Q. He says:*
>
> *"About 18 months ago [he means on 10 September 2007] I, Les Hinton of News International and Murdoch McLellan [sic] of the Telegraph, had dinner with the Prime Minister Gordon Brown. On the agenda was our deep concern that the newspaper industry was facing a number of very serious threats to its freedoms."*
>
> *Then he said:*
>
> *"The fourth issue we raised with Gordon Brown was a truly frightening amendment to the Data Protection Act."*
>
> *This is the amendment –*
>
> *A. I don't think there's any disagreement in these accounts. He had it on his agenda for the meeting. They raised it, but I told them as they raised it: "Look, this is my view." I didn't say, "I'm waiting to hear your view"; I told them: "This is my view." I remember this distinctly. I had already made up my mind before I went into the meeting, and I told Jack and Michael that there should be a public interest defence and that we should probably postpone the implementation of this clause. Look, at that time, of course, we didn't have all the information we now have about the abuse of this – of data by the media. At that time, there was no suggestion that there was anything other than what was called the rogue hacker. But again, my instinct is still the same, that there ought to be a public interest defence. I know it's uncomfortable, because you are balancing off two freedoms, as we said at the beginning. You have this right that I would defend for people to have privacy, and you have this right of the media, I would say the individual, to express themselves and for the media to do this through a freedom of speech and therefore a willingness or ability to investigate things that are wrong, and you are balancing off these two freedoms. It seemed to me that we may end up with the custodial sentences, and that was an option that was left to us. We said we'd come back to this, but at that time we thought that – let us look at whether a public interest defence can be introduced into this legislation, which is what we did."*

[157] pp74-76, lines 10-19, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf

4.19 During the course of his oral evidence to the Inquiry, Mr Dacre touched on his lecture to the Society of Editors in 2008 but was not asked to address in detail the exact circumstances in which the DPA issued was raised and discussed on this occasion; there was evidently not thought to be an issue about it at that time. His understanding was that Mr Brown was hugely sympathetic to the industry's case and promised to do what he could to help.[158]

4.20 Mr Brown's recollection was that the initiative came from him, rather than that he was responding to press influence or pressure. Mr Dacre's was more along the lines that he and his press colleagues had proved to be persuasive.

4.21 A few questions perhaps arise. First, if Mr Brown was as sympathetic to the press case as Mr Dacre claimed, why was the Government were still pressing ahead with a Bill introducing a custodial sentence without a revised public interest defence as late as 27 November 2007? Secondly, Mr Brown's testimony did not touch on the issue of the custodial sentence which was, after all, at the centre of the press concerns; he referred instead to the need for a public interest defence. This overlooks the fact that s55 of the DPA in its un-amended form already contained such a defence, admittedly one cast in objective form.

4.22 Lastly, Mr Brown's assertion that, in September 2007, his knowledge as to the extent of data abuse was somewhat limited ("*we didn't have all the information we now have about the abuse of this – of data by the media. At that time, there was no suggestion that there was anything other than what was called the rogue hacker*")[159] may be a mis-recollection of the background events that triggered the move to amend the legislation. The contents of the ICO's two reports were the reason for Parliament debating amendments to the statute in the first place: there was no doubting what they said. The 'rogue hacker' issue was relevant to the standing of the press and the extent to which journalists were likely to break the law but it had no bearing on the Motorman case: there was no question of increasing the penalty for offences under RIPA and both Clive Goodman and Glenn Mulcaire had, in fact, been sentenced to terms of imprisonment.

4.23 Accordingly, the impact of the private dinner of 10 September 2007 on the evolution of Government policy at this time is difficult to tell. Mr Dacre clearly believed that it made a difference; an examination of the chronology suggests that official Government policy remained unchanged.

4.24 Responsibility for the policy and the navigation of the legislative amendments through Parliament lay with Mr Straw as Secretary of State for Justice. As has been pointed out, and as was scarcely unusual, Mr Straw was also subject to behind-the-scenes lobbying by senior members of the press, including Mr MacLennan, Mrs Brooks, Guy Black and Mr Dacre, the latter of whom Mr Straw had known from their university days and with whom he enjoyed a 'respectful' relationship.[160]

4.25 Mr Straw's written evidence recorded that as a result of the representations made by the press (which included those received at a meeting that he had with Mr Dacre, Mr MacLennan and Mrs Brooks), and despite the Government's commitment to bringing in custodial sentences, he proposed to ministerial colleagues that the relevant clause should be withdrawn from the Bill to enable all parties to work out a compromise.[161] Interestingly, at no stage during his written or oral testimony did Mr Straw indicate that he had had any conversation with the Prime Minister which referenced the latter's preference for a public interest defence.

[158] see the full text of Paul Dacre's speech: http://www.pressgazette.co.uk/node/42394
[159] pp75-76, lines 24-3, Gordon Brown, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-11-June-2012.pdf
[160] para 32, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Jack-Straw-MP.pdf
[161] para 85, *ibid*

4.26 In oral evidence, Mr Straw explained why the Government's position changed. Having referred to meetings he had had with various parties, Mr Straw was asked:[162]

> *"Q: If we can look at the text of the letter dated 12 February 2008, you write to Mr. Dacre. Under the heading "Data Protection Act", you say:*
>
> *"We're not proposing to criminalise any conduct which is currently against the law. However, we do understand your and the media's concerns more generally about the introduction of custodial sentences for breach of section 55. We have no wish to curtail legitimate and responsible journalism, and when the proposed penalties were designed it was not considered that they would have that effect. We're not aware that section 55 has caused any problems such as a chilling effect since the DPA came into force. The penalties were proposed and strongly argued for by the Information Commissioner to strengthen the protection of individuals' rights to respect for their privacy... But I have reviewed your proposals in light of the important points which you and others have made. As I explained when we met, I was increasingly minded to consider inclusion of provision for the reasonable belief of someone at the time an offence was committed. I understand that there will still be considerable anxiety about the potential impact of this measure and that there is, therefore a case of reconsidering it in slower time."*
>
> *Then you say*
>
> *"Alongside this, I am faced with the overwhelming need to achieve royal assent for the bill by 8 May 2008, when the existing legal restrictions against prison officers taking industrial action otherwise terminate. Taking all these factors into account, I'm making a further recommendation to colleagues and I will be back in touch".*
>
> *So you're faced here, Mr. Straw, with a double pincer movement. On the one hand, you have the press stirring up trouble, making the arguments you'd expect them to make, and we can analyse those in a moment, and you would say, perhaps even more importantly, you had to get the bill through by a particular date because there were other provisions in it which were absolutely vital. Is that it?*
>
> *A: Yes... I'm afraid that other issues then became subordinate to it. That's life, that's politics.*
>
> *...*
>
> *Q: Mr. Straw, we understand this is, as it were, a classic case study in realpolitik. Royal Assent had to be obtained by a certain date for reasons extraneous really to the merits of section 55. Had it not been for that consideration and/or the pressure you were under by the press, would your policy position have been either adhere to the original position, in other words just up the sentence to include a custodial penalty, or were you in fact persuaded by the merits of the argument that the subjective/objective test should be introduced?*
>
> *A: .... I'd like to say that even in slower time I would have made the same judgment about the subjective defence that was inserted, but I can't say for certain ... I am absolutely clear that the two went together, and I mean I regret the fact that that I didn't bring in the amendment to section 55 before the election, and I think it ought to have been brought in by now, but there we are"*

[162] pp46-51, lines 13-25, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf

4.27 The immediate cause of the compromise, which ultimately was fashioned in the form of ss77 and 78 of the 2008 Act, was the political reality of the need to enact the whole statute before 8 May 2008, in the face of a threat of industrial action by prison officers. Mr Straw in particular formed the political judgment that this could only be achieved by compromise, notwithstanding that this had, at least, the appearance of yielding to pressure. Although the Government had a sufficient majority in the House of Commons to force through this legislation in its original form, it had never had a majority in the House of Lords, and there clearly was a risk that the Peers might decide to block or delay the Bill on this very point.[163] By then, the press had very publicly made it an issue, which was no doubt part of their overall strategy.

4.28 Mr Straw was also asked to explain whether he had been persuaded by the logic and overall merits of the press case, or whether political imperatives predominated. Understandably, and very frankly, Mr Straw found that a difficult question to answer given the difficulty in disentangling cause from effect: as he put it, *"because I became persuaded, if you follow me, so you have to work out why you were persuaded..."*.[164]

Reflections

4.29 The evidence leaves no room for doubt that the press brought its full resources and influence to bear on an issue about which it clearly felt very strongly. In that respect, it was acting no differently from any other interested party with political influence in relation to proposed policy or legislative changes. Their case was highly stated, and to a degree they had the Government over a barrel on timing. The merits of the argument are dealt with in detail in Part H.

4.30 The dinner engagement of 10 September 2007 must have made it clear to Mr Brown just how seriously the press was prepared to campaign on this issue, and one way or another he made it clear to his interlocutors that he might be prepared to move on aspects of the policy. Having said that, the DPA amendments was only the fourth item on Mr Dacre's agenda and, as has already been pointed out, the Government adhered in the short term to its policy.

4.31 But Mr Brown would have been aware of how high the stakes had become, and that if the passage of the amendments through Parliament became problematic, for any reason, then he was taking a significant political risk. These risks became more acute in January 2008 as pressure mounted, press lobbying intensified and deadlines loomed. Furthermore, there was at least some presentational attraction in the argument that the increase in the sentencing options should be matched by a broadening of the scope of the public interest defence.

4.32 However, if anxiety about the passage of the Bill prior to 8 May 2008 might explain the compromise at that time, it does not explain why in the two years that followed the passage of the legislation until the general election, the legislation was not, in fact, commenced. Nobody has suggested that the policy had changed because something had happened to cause the Government to consider that the legislation had been misconceived. A more plausible explanation may be that the impetus that had been provided by the *What Price Privacy?* reports had been lost and, for understandable reasons, the fast approaching general election meant that a further battle with the press over implementation was the last thing that the Government wanted.

[163] p50, lines 2-19, Jack Straw, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-16-May-2012.pdf
[164] p50, lines 3-4, *ibid*

4.33 I am not in a position to reach a decision as to the reasons why, four years on, legislation that Parliament saw it fit to enact has still not been commenced. Its commencement is now said to be dependent on the recommendations that I make notwithstanding that the focus of the ICO is not on journalists but others who commit egregious breaches of the data protection legislation.

5. Communications Act 2003

Introduction

5.1 The Communications Act 2003 (the 2003 Act) represented a major and controversial landmark in New Labour's media policy. Its main features in relation to plurality and media ownership have already been outlined earlier in this Report.[165] The Act had a protracted legislative history covering a wide array of media issues. This sub-section of the Report focuses on the genesis of those parts of the Act which relate to newspaper ownership, particularly foreign ownership, and cross media ownership involving national newspapers and terrestrial television. So far as terrestrial television is concerned, for reasons which will become clear, the focus is on Channel 5. In particular, this sub-section seeks to examine the relationship between politicians and the national press as it relates to the legislative process.

5.2 Legislation was considered and in due course enacted in the context of a rapidly changing media landscape. Digital media and satellite television, in particular, were both growing prodigiously. At the start of the story, the position was that (save for EU and EEA countries) foreign ownership of, *inter alia*, analogue terrestrial television was prohibited.[166] Moreover, cross media ownership was the subject of quantitative limits including a rule which stipulated that no proprietor of a national newspaper could be a participant with more than a 20% interest in a body corporate which was the holder of a licence to provide a Channel 3 service, or Channel 5, or a national radio service.[167] Consequently, Rupert Murdoch, could not have acquired Channel 5, had it been for sale, on not just one but two separate regulatory grounds: the ban on foreign ownership and the 20:20 rule.

5.3 By the time that the 2003 Act became law, the position on both fronts had been reversed. There was no ban on foreign ownership and the 20:20 rule, insofar as it applied to Channel 5, had been dropped. It is true that a public interest plurality test had been inserted which would have had to be applied to any bid by Mr Murdoch for Channel 5 but that was only as the result of determined campaigning against the Government by Lord Puttnam. The regulatory door had been opened, by the Labour Government, for Mr Murdoch, amongst others, to bid for the terrestrial channel, if it came up for sale. How did the change come about? Is there any merit in the suggestion (made at the time) that there was a 'deal', between Mr Murdoch and the then Labour Government?[168] What influence, if any, did the media have on this policy? These are the issues to be explored.

5.4 Many of the arguments deployed by diverse interests during the course of the consultations and debates which took place remain pertinent to the question of media plurality today but are not fully explored here. Current and future plurality issues are considered later in the Report.[169]

[165] Part C, Chapter 4
[166] Para 1, Part II, Sch 2, Broadcasting Act 1990
[167] Para 2, Part IV, Sch 2, Broadcasting Act 1990. Para 5(a) afforded the Secretary of State the power to vary the percentage by Order.
[168] Owen Gibson, http://www.guardian.co.uk/media/2002/may/10/broadcasting.politics; pp11-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ53-to-Witness-Statement-of-Tessa-Jowell2.pdf
[169] Part I, Chapter 9

The Legislative Process

5.5 The development of policy on media ownership and the resulting legislation which gave life to the policy, rested jointly with the Department for Culture, Media and Sport (DCMS) and the Department for Trade and Industry (DTI). The Secretary of State for Culture, Media and Sport was initially Chris Smith, now Lord Smith, and, later, Tessa Jowell. Stephen Byers, and later Patricia Hewitt, were their counterparts at the DTI. Tony Blair was consulted at key stages and was involved in the decision making on a number of issues as to the direction of the legislation.

5.6 Striking features of the legislative process were both the length of time it took and the extensive consultation, scrutiny and debate which occurred, each indicators of the importance and sensitivity of the subject matter. A Communications White Paper *A New Future for Communications* Cm 5010 (the White Paper) was published in December 2000 by Lord Smith and Stephen Byers but the Act did not receive Royal Assent until 17 July 2003. In between there were extensive consultations, a draft bill published in May 2002, pre-legislative scrutiny by a Joint Committee (described by Ms Jowell as a relatively unusual process), as well as considerable debate in both Houses, notably consideration of a number of amendments by the House of Lords.[170]

5.7 Of some significance is the fact that Ms Jowell felt it necessary, shortly after her appointment as Secretary of State for Culture, Media and Sport, to ask Mr Blair in terms whether or not he had reached a 'deal' with Mr Murdoch on the reform of cross media ownership rules. It demonstrates that even within the Cabinet there was suspicion that an arrangement might have been reached:[171]

> *"Q. Can I start by asking you whether you had any conversations with the prime minister of the time when you took up the portfolio?*
>
> *A. Yes, I did. From memory, it was, I think, the day after or within a couple of days of being appointed, once I had had time to assess what the priorities were for me as an incoming Secretary of State, what was in the in-tray.*
>
> *...*
>
> *I saw the Prime Minister, as I say, within a couple of days of my appointment, and I had a conversation with him which was, I think, necessary, and I asked him whether or not any deal had been done with Rupert Murdoch on the reform of the cross-media ownership rules. He gave me an absolute assurance, which I completely accepted, that there had been no prior agreement, so that it – to a great extent, I had no constraints on the conclusions I might reach..."*

5.8 Mr Blair confirmed Ms Jowell's account of the conversation and that there was no implied deal with Mr Murdoch. He was not surprised by his Minister's question, a fact which says something at least about contemporary perceptions about the relationship between Mr Murdoch and Mr Blair:[172]

> *"Q. Were you surprised that she asked you that question?*

[170] p4, p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tessa-Jowell-MP.pdf
[171] pp3-4, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[172] pp106-107, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

A. Not particularly, I mean, you know, we're talking 2002, are we, around about? Yeah. By then, this issue to do with me and Rupert Murdoch and so on, so it didn't surprise me that she asked that question."

5.9 Throughout there was a good deal of lobbying by interested parties. Amongst the many lobbyists were News International and BSkyB. Views were received through written submissions, formal meetings, if requested, correspondence and participation in conferences and seminars.[173] News International contended that competition law was all that was required adequately to regulate the industry:[174]

"They want all restrictions on foreign ownership removed and would prefer media markets to be regulated solely through competition legislation, which they felt could be further improved by the removal of the special newspaper regime that currently exists."

5.10 News International was not alone in their view. All broadcasters, except Channel 4, maintained that there should be no restriction on ITV/Channel 5 joint ownership save for competition law.[175] Bloomberg LP forcefully pressed the case for the removal of the foreign ownership rules,[176] as did Telewest. DMGT complained, via a letter to Charles Clarke, then Minister Without Portfolio and Party Chairman, about the competitive disadvantage which it felt arose from the domestic regulatory regime:[177]

"The fact is that foreign media companies are able to use the more relaxed regulatory climate of their home countries to build the kind of powerful domestic base that enable them, through acquisition, to become major global players. The irony is that these foreign firms are then able to acquire major British media companies that are denied to the Daily Mail & General Trust – an all British company – because of this country's regulatory climate".

It contended:

"For the future, DMGT wants clear, consistent rules and an open and transparent regulatory environment..."

Policy objectives

5.11 The policy objective was to: "*preserve plurality of media ownership while not placing unnecessary and unreasonable restrictions on growth and the workings of the market.*"[178] The key principles were described as being: ensuring universal access to a choice of high quality services; deregulation to promote competitiveness and investment; self-regulation wherever appropriate, backed by tough measures to protect plurality and diversity; and ensuring that public service principles remain at the heart of British broadcasting.[179]

[173] pp7, 9-10 (a list of those with whom meetings were held), http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Tessa-Jowell-MP.pdf
[174] Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ7.pdf; see also News International's full response to the White Paper, pp2 – 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ19-to-Witness-Statement-of-Tessa-Jowell.pdf
[175] p3, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ20.pdf
[176] Bloomberg's consultation response to the White Paper, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ25-to-Witness-Statement-of-Tessa-Jowell.pdf
[177] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ30-to-Witness-Statement-of-Tessa-Jowell.pdf
[178] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ30-to-Witness-Statement-of-Tessa-Jowell.pdf
[179] pp2-3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ30-to-Witness-Statement-of-Tessa-Jowell.pdf

5.12 A briefing note from the period succinctly sets out the then Government's thinking on democracy, plurality and diversity:[180]

> *"Our democracy and our cultural vitality depend on the availability of a range of different media voices, views and styles. The ownership of our newspapers, television and radio is therefore of the utmost importance. That is why the Government is concerned to ensure that citizens can receive a diversity of media content from a plurality of sources.*
>
> *"Diversity is about having a wide range of content and in the White Paper, a New Future for Communications, we set out the commitments to public service broadcasting and positive content regulation that we believe will be sufficient to ensure this diversity.*
>
> *"Plurality is not about content but the source of that content, the "voice" behind it – the owner. A plurality of voices should:*
>
> – *ensure no individual has excessive control over the democratic process;*
>
> – *provide a plurality of sources of news and editorial opinion, preserving the culture of dissent and argument on which our democracy rests;*
>
> – *prevent the emergence of any one source able to control the news agenda by the inclusion / omission of particular stories;*
>
> – *maintain our cultural vitality by ensuring that different companies exist to produce different styles of programming and publishing, each with a different look and feel.*
>
> *"We therefore need regulation that is specifically directed to ensure plurality and that is why we have imposed rules on media ownership".*

5.13 The evidence discussed in more detail below is consistent with the pursuit of these policy objectives throughout, although there was considerable debate about the best kind of rule to apply and the precise formulation thereof so as adequately to protect plurality whilst at the same time minimising the impact upon economic growth and the market.

Foreign ownership of terrestrial television

5.14 At the start of the legislative exercise the Government's position was that the existing prohibitions on foreign (non EU/EEA) ownership of, *inter alia*, analogue terrestrial television should be maintained. The purpose of this prohibition, as expressed in the Communications White Paper, was to help ensure that European consumers continued to receive high quality European content. It was further felt that "*without reciprocal reforms in countries like the US or Australia that put restrictions on British companies, we cannot justify lifting our ban at the present time".*[181] However, the downside to the rule was that it excluded investment from many countries, notably a number of countries with developed economies, and vibrant media industries, including the United States, Australia and Japan. As Ms Jowell explained:[182]

[180] p2, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ13.pdf
[181] p6, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ13.pdf
[182] p11, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf

> *"So the very important and balanced judgment that we had to make was the extent that we could open up the possibility of American investment, Japanese investment, Australian investment in our British media without prejudicing the quality and without jeopardising plurality."*

5.15 News International lost no time and lobbied energetically on the issue from an early stage. It took issue with the status quo in its formal response to the White Paper.[183] Les Hinton wrote to Ms Jowell and Kim Howells (then the newly appointed Parliamentary Undersecretary of State at DCMS) in June 2001 to congratulate them upon their appointments and sought a meeting. He met Mr Howells on 26 July 2001, following up first with a brief letter the same day in which he wrote: "*I am particularly delighted to hear that, contrary to the White paper, the Government is prepared to consult on the foreign ownership prohibitions"*[184] and then with a longer letter dated 8 August 2001 fully articulating News International's position on this issue and on cross media ownership.[185] The letter contained a thinly veiled threat to litigate relying upon Article 10 of the ECHR (freedom of expression), read with Article 14 (prohibiting discrimination) and concluded:

> *"Foreign ownership prohibitions are unnecessary, anachronistic and discriminatory. Furthermore, they are an insult to those foreigners such as Roy Thomson and Max Beaverbrook, whose contributions made Fleet Street what it was – not to say to those foreigners who are currently active in this industry."*

5.16 The Government initially was not persuaded. As the consultation document was launched Ms Jowell briefed the Prime Minister in November 2001 in the following terms:[186]

> *"Foreign ownership of broadcasting: our working assumption is that we stick to the line in the White Paper that there will be no lifting of foreign ownership restrictions. We invite views on whether we should develop reciprocal arrangements with those countries which might lift restrictions on UK companies, or put this issue on the table for WTO discussion."*

5.17 The documentary evidence shows that arrangements had been made for both Ms Jowell and Patricia Hewitt to meet Mr Hinton on 26 November, although the indications are that that meeting was subsequently postponed.[187] Ms Jowell was again due to meet Mr Hinton on 23 January 2002, although it is unclear whether this meeting in fact went ahead.[188] There was no documentary record of such a meeting having taken place amongst the DCMS' disclosure and so the meeting may not in fact have gone ahead.

5.18 The first sign of a shift in the Government's position on foreign ownership appears in an internal briefing document prepared for Ms Jowell on 30 January 2002, following consideration of responses to the formal consultation process, which had been launched in November of the previous year. On the issue of foreign ownership an official recommended removing the existing restrictions on foreign ownership. The recommendation was founded in an analysis

[183] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ19-to-Witness-Statement-of-Tessa-Jowell.pdf
[184] p1, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ6.pdf
[185] pp1-7, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ8-to-Witness-Statement-of-Tessa-Jowe.pdf
[186] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ12-to-Witness-Statement-of-Tessa-Jowell.pdf
[187] p2, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ11.pdf
[188] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ19-to-Witness-Statement-of-Tessa-Jowell.pdf

of the consultation responses and fully reasoned. The author of the document noted that all the major British companies (TV and radio) had argued for reciprocity. Foreign companies (News International, Bloomberg, Telewest) had called for the restrictions to be removed. Some independent voices had argued for the retention or strengthening of the rules to maintain levels of high quality European content. Six considerations were set out in support of the recommendation:[189]

> *"1. Tier 1 and 2 requirements will guarantee original production, independent production and UK regional production and programming. Non-EEA companies could bring welcome inward investment.*
>
> *"2. There is arguably no difference in principle between French or German ownership, which we currently allow, and US or Australian ownership which we ban. To remove the ban is to remove an anomaly. Other European countries (eg Germany, Spain, the Netherlands) have removed foreign ownership rules without any obvious adverse effect.*
>
> *"3. Foreign owners are already allowed into the newspaper market, where there has been no obvious loss of "British" content.*
>
> *"4. The Radio Authority argue that foreign ownership will dilute the "local" nature of services, but there seems no reason why a large US company should have any more reason than a large UK company to degrade the service offered in any local area.*
>
> *"5. Foreign ownership can be difficult to identify, eg in the case of Sky, which the ITC do not consider to be a foreign-controlled company.*
>
> *"6. A position of reciprocity would in effect add up to a ban on American companies, given that the US is extremely unlikely to remove their rules on foreign ownership in the foreseeable future."*

5.19 Ms Jowell did not accept the recommendations uncritically. An internal minute of 7 February 2002 evidences the fact that she called for a note from the Radio Authority on foreign ownership. The official who considered that note did not feel that it provided a strong case for maintaining a ban on non-EEA ownership. The internal minute also records preliminary legal advice about the strength of the ECHR challenge which had been threatened by News International (see 1.14 above) and Bloomberg. The view of the Department's lawyers was that the matter was not clear cut and that the argument advanced against the secretary of state would involve an extension of the current law if it were to prevail.[190]

5.20 In the result, both Ms Jowell and Ms Hewitt were persuaded that the best course was the abolition of the restrictions on foreign ownership and recommended the same to the Prime Minister in a joint letter to him about media ownership rules dated 7 March 2002.[191] After discussion, Mr Blair accepted the recommendation.[192] In due course the decision was accepted by the Cabinet and incorporated into the Draft Communications Bill which was published on

[189] p11, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ20.pdf; see also the briefing note on the effect of foreign ownership rules at p19, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ24-to-Witness-Statement-of-Tessa-Jowell.pdf

[190] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ21-to-Witness-Statement-of-Tessa-Jowell.pdf

[191] p2, *ibid*

[192] Evidencing the fact of the decision, see p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ45-to-Witness-Statement-of-Tessa-Jowell1.pdf

7 May 2002. On the issue of foreign ownership, in the course of her statement about the Bill, Ms Jowell told the House:[193]

> *"We also intend to scrap the inconsistent rules that prevent the non-European ownership of some broadcasters. It makes no sense that French, Italian or German companies can own television and radio licences, but Canadian, Australian or United States companies cannot. The resultant inward investment should allow the UK to benefit rapidly from new ideas and technological developments. New blood and new competition will help to give our industry the edge."*

5.21 In her evidence to the Inquiry, Ms Jowell, also explained how the change in policy thinking in relation to foreign ownership was interrelated with Ofcom's emerging content regulation role:[194]

> *"...we were very concerned to avoid a situation where we lifted the restriction on foreign ownership of terrestrial television in a way that invited dumping of low quality content. So the decision on relaxing foreign ownership really moved alongside the development of our thinking on the content regulation role of Ofcom.."*

5.22 The history above has been set out at some length because it demonstrates an entirely proper and reasoned approach to a significant policy decision. News International lobbied with characteristic determination (something that they would not have needed to do had there been a pre-existing deal). The records show that in fact the change of policy on foreign ownership occurred as a result of the consideration of responses to a formal consultation process. Indeed further views were sought from the Radio Authority, and preliminary legal advice taken about whether or not maintenance of the ban on foreign ownership would be discriminatory as alleged by News International and Bloomberg, before the Ministers made their recommendation to Mr Blair. These are not the actions of persons seeking to advance a particular agenda, but those of persons seeking to make an informed decision.

5.23 The reversal of position is consistent with a trend towards incorporating more, rather than less, deregulation as the policy developed. Both the removal of the ban on foreign ownership and the relaxation of the 20:20 Rule in relation to Channel 5 (see below) exemplify this trend. The Ministers plainly took account of, and were influenced by, the responses to the consultation process. It was the responses of large foreign owned media companies which proved more persuasive.

Channel 5

5.24 Consideration of the relaxation of the 20:20 rule in relation to Channel 5 first requires some background. At the material time, Channel 5 was not for sale. Nor had either BSkyB, or News Corporation, indicated a firm intention to bid for the channel if it did come onto the market. BSkyB was, however, potentially interested as is evidenced by an internal Sky memo, obtained by DCMS through an undisclosed means, in which the possibility, amongst others, of a bid for Channel 5 is countenanced.[195] The memo is striking because it also appears to

[193] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ50-to-Witness-Statement-of-Tessa-Jowell1.pdf
[194] p12, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[195] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ15-to-Witness-Statement-of-Tessa-Jowell.pdf

show that representatives of BSkyB had previously met James Purnell[196] and discussed what would happen if BSkyB bid for a Channel 3 licensee:[197]

> *"For the record, shortly after Carlton made its bid for UN&M and Granada made its bids for both Carlton and UN&M, Irwin and I met with James Purnell. He confirmed that the Government would not rely on the 20:20 Rule to block a takeover bid by Sky for a Channel 3 licensee (and one would assume that the same approach would apply to Channel 5). James anticipated that any such bid by Sky would be referred to the Competition Commission (as was the case with bids by the ITV companies for each other). Assuming that the Competition Commission did not find such a bid by Sky to be against the public interest, the Secretary of State would use the statutory power to amend the 20:20 Rule to ensure that it did not block that bid"* (emphasis added).

5.25 It is not necessary to determine whether or not Mr Purnell did in fact say what is attributed to him in the note because whatever he did say was overtaken by events when the rule fell to be considered at the highest levels of Government as described below.

5.26 After publication of the draft Communications Bill, BSkyB's potential interest in Channel 5 was confirmed by Tony Ball, then chief executive of BSkyB, who told the Guardian that a takeover of Channel 5: "*could be interesting if the price was right*".[198]

5.27 Channel 5 was in some difficulty because it had not lived up to financial expectations and was rapidly losing money. It was entirely realistic to believe that it might be offered for sale to a large media organisation. One of its significant shareholders, United Business Media plc (UBM), had expressed the view to Ms Jowell, that its future best lay as a part of a larger media organisation and had gone so far as to identify BSkyB amongst others as a potential buyer. Lord Hollick, on behalf of UBM, wrote:[199]

> *"...As you know we own 36 per cent of Channel 5 which you visited recently. I was responsible for persuading the then Government to consider the award of a further terrestrial franchise in the early 1990s. At the time I told the Government and the ITC that I anticipated that Channel 5 would have a brief and hopefully profitable career, as a stand-alone station but would soon become part of a larger broadcasting and media enterprise where its small but innovative and different voice would thrive. I had three particular options in mind; it should either become ITV 2 (to provide ITV with competitive bulk equivalent to the BBC), Sky 5 (where it would merge with Sky 1 and become the terrestrial arm of Sky), or Cable 1 (where it would become the terrestrial arm of the cable companies).*
>
> *Channel 5 has indeed made a bright start and its ratings have exceeded our expectations but unfortunately its financial performance has fallen far short of the plan and with its fifth birthday approaching it is still losing well over £50 million per year. The strategic and economic case for a merger of Channel 5 into a larger media*

[196] Mr Purnell was a special adviser from 1997 until his election as a Labour MP in 2001 and became Secretary of State for Culture, Media and Sport in 2007. See also, http://www.ippr.org/staff-profiles/58/603/james-purnell
[197] pp2-3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ15-to-Witness-Statement-of-Tessa-Jowell.pdf
[198] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ53-to-Witness-Statement-of-Tessa-Jowell2.pdf; see also the speculation in The Sunday Express, p38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ53-to-Witness-Statement-of-Tessa-Jowell2.pdf
[199] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ26-to-Witness-Statement-of-Tessa-Jowell.pdf

> *organisation which would both strengthen its service to viewers and substantially reduce the administrative and programme acquisition costs it is burdened with by operating on a stand-alone basis, is now overwhelming...”*(emphasis added)

5.28 Quite properly, Ms Jowell responded to UBM assuring Lord Hollick that his comments would be considered closely but being careful to state: “*You will appreciate that I cannot discuss the detail of our thinking at this stage ...*”[200]

5.29 Channel 5 had a very small audience share and did not enjoy universal coverage.[201] Nevertheless, the concern in some quarters was that if it was acquired by News Corporation, or BSkyB, then with the benefit of heavy investment it could grow in influence and audience share and be used to cross-advertise BSkyB’s satellite channels. The scenario was taken seriously enough to have been specifically covered in Ms Jowell and Ms Hewitt’s briefing ahead of their appearance before the Joint Pre-Legislative Scrutiny Committee.[202] It is in this context that the Government’s modification of the 20:20 rule falls to be considered.

5.30 Despite a general wish to deregulate, the direction initially and jointly taken by Ms Jowell and Ms Hewitt in relation to Channel 5 was in favour of maintaining the 20:20 rule. Thus, on this point, their joint recommendations to Mr Blair, made by letter dated 7 March 2002, following the formal consultation, and in preparation for the publication of the draft Bill, were:[203]

> *“Cross media ownership – removing most media-specific rules, leaving it to competition rules to prevent undue dominance; maintaining restrictions on significant cross-ownership of newspaper and TV assets;...”* (my emphasis)

and were detailed in annex 3 thereto as meaning:[204]

> *“A continuing restriction on large newspaper groups and subsidiaries (News International and Sky, Trinity Mirror, and possibly Associated Newspapers in the near future) owning any significant share of ITV or Channel 5 companies. Other newspaper group, with less than 20% of the national market, would now be able to invest in terrestrial TV without the acquisition having to pass a public interest test.”* (my emphasis)

5.31 The change in direction came as a result of discussions, shortly thereafter, with Mr Blair, and is evidenced by a discussion paper sent to him by Ms Jowell and Ms Hewitt. It is notable that Mr Blair was not seeking to impose a particular solution, rather he was seeking further to explore different options. The recommendation specifically to remove all restrictions on the ownership of Channel 5 came from the Secretaries of State and not from the Prime Minister:[205]

> *“At our meeting this week, you asked for some further discussion of the merits and defects of the different approaches we could take to the rule preventing anyone owning 20% of both the national newspaper market and a Channel 3 or Channel 5 service. Our original recommendation was to keep this rule. Three other options are discussed in the pages that follow. Of these, we would recommend Option 3, which*

[200] p1, *ibid*
[201] p15, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[202] p69, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ58-to-Witness-Statement-of-Tessa-Jowell.pdf
[203] p2, *ibid*
[204] p10, *ibid*
[205] p1, *ibid*

removes all restrictions on the ownership of Channel 5, to allow free investment and growth in that channel, while protecting the independent voice provided by ITV, by far our largest commercial public service broadcaster."

5.32 Having said that, Ms Jowell, recalled that this exploration of deregulatory options was itself the result of Mr Blair encouraging her to go further than she might otherwise have gone:[206]

"I have no detailed recollection of the conversation at that meeting ten years ago, save to say that the Prime Minister's instincts in relation to this were, I think, more deregulatory than mine. He pushed me further than I might have gone myself on exploring deregulatory options, but that was a constructive part of the process."

5.33 As to the recommendation, it was itself carefully reasoned in the discussion paper:[207]

"OPTION 3 – KEEP A 20% RULE FOR ITV, BUT NOT FOR CHANNEL 5

Possible effect

- *News Corporation/BSkyB own Channel 5; ITV companies (or perhaps eventually a single ITV) separately owned by a separate media giant with no British newspaper interests – Bertelsmann, or Disney perhaps.*
- *Channel 5 would be free to benefit from all sources of additional investment, allowing it to grow over time into a more serious competitor to ITV. ITV will also be able to benefit from new sources of investment, as long as that investment doesn't come from the British newspaper industry.*

Advantages

- *This suggestion would be proprietor-neutral – it allows anyone to buy and invest in Channel 5.*
- *ITV would survive as a voice independent of newspapers' editorial agendas, but will still be able to benefit from new sources of investment.*
- *There are some obvious justifications for making a distinction between ITV and Channel 5:*

  C5 doesn't cover the whole of the UK population, has low viewing figures and few public service broadcasting commitments.

  ITV has a much more defined public service role, and comprises 15 regional licences that cover the whole country. These regional licences are already the focus of a 20% rule, and cannot be joint-owned with more than 20% of a region's press.
- *We could try to protect the independence of Channel 5 by maintaining or even strengthening its public service requirements.*

[206] p21, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[207] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ42-to-Witness-Statement-of-Tessa-Jowell1.pdf

Drawbacks

- *Although Channel 5 is small in terms of viewing figures and influence now, with increased investment it may grow its share of both over the coming years, to remove the most obvious distinctions between it and ITV.*

POSSIBLE STEPS TO STRENGTHEN REGULATION OF CONTENT

Whichever option we choose, Channel 5 might be owned by a large newspaper group, and its audience share may grow. To address any concerns we might have over the quality of news and programming, there are some steps we could take to regulate content, rather than ownership..."

5.34 There was a further meeting with Mr Blair and it was agreed to remove the restriction against sizeable newspaper companies owning Channel 5:[208]

"We have met twice to discuss the reform of media ownership rules. This letter summarises the decisions we have taken. Our approach will be deregulatory wherever possible, but we will retain a set of simple rules to prevent too great a concentration of ownership and political influence. Where we propose to remove rules (for example to allow sizeable newspaper companies to own Channel 5) content regulation will be able to maintain the quality, impartiality and diversity of programming and competition law will tend to encourage dispersed ownership and new entry..."

5.35 The then Prime Minister's thinking was obviously influential in this decision, as Ms Jowell readily acknowledged:[209]

"He was in favour of this option and he agreed with me on the safeguards that should accompany a decision to pursue this option to lift the ownership bar created by the 20 per cent on Channel 5".

and, later:[210]

"Q. I'm not for a moment suggesting that this wasn't a considered decision and that these things can happen as policy and legislation develops, but my question was: was it the influence of the Prime Minister's thinking that set you on a course of thinking that led to you changing your mind?"

"A. Well, of course, it did, because he's the Prime Minister, and, you know, when you develop – you're a Secretary of State and you're developing policy and the Prime Minister has a slightly different view from the one that you're advancing, you take that seriously."

5.36 The safeguards referred to in the first of the quotations above concerned content regulation and the ability to require that Channel 5 took a nominated news provider in the event that the channel grew significantly. Their inclusion indicates that consideration was clearly being given to the plurality ramifications of the altered stance on Channel 5:[211]

[208] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ45-to-Witness-Statement-of-Tessa-Jowell1.pdf
[209] p25, Tessa Jowell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-21-May-2012.pdf
[210] pp26-27, Tessa Jowell, *ibid*
[211] p25, Tessa Jowell, *ibid*

> *"But the safeguards I wanted to ensure was that if Channel 5 exploded on the back of new investment from being a tiny and rather marginal terrestrial company, that Ofcom would be in a position to (a) require that they took a nominated news provider and that they would be in a position to exercise the content control that ITV, for instance, was accountable for–or accountable to–"*

5.37 In the course of denying the existence of any implied deal, Mr Blair confirmed his preference for deregulation, explained that he thought that Mr Murdoch was more interested in Channel 3, and emphasised his wish to encourage very large foreign media companies to enter the United Kingdom's market:[212]

> *"Q. In terms of the substance of the matter though, do you feel that the Communications Act reflected in any way an implied deal with Mr Murdoch or not?*
>
> *"A. No, absolutely not. For a start, the thing that we did which was boost Ofcom is a thing that he absolutely disliked. And contrary to what's often written about this, Channel 5 was not his – I mean, I never thought he was (inaudible) Channel 5. Channel 3 would have been a far better fit for him, and that he was unable to do. I mean, my thing with this Communications Act – because I did talk to the ministers about it several times, my thing was very much to do with trying to open up the media ownership thing.*
>
> *...*
>
> *"And I actually remember during the course of this piece of legislation, I actually wanted to see if there were major media companies, I mean people the Time Warners of this world, Viacom, I think, Axel Springer, other big organisations that if you had a more open media policy would be prepared to come in, because what concerned me always was that you needed – it wasn't necessary just to have other media ownerships, it was necessary to have other media owners with heft, with the ability to put major investment in, and frankly with the type of global media position that I could see the world moving to."*

5.38 There can be no doubt that the relaxation of the 20% rule was good news for Mr Murdoch, and that the decision to relax the rule was personally influenced by Mr Blair. However, it does not follow from those bare facts that there was any explicit arrangement to that effect; nor even that the latter pushed this point specifically in order to favour News Corp in the hope of maintaining its support. The evidence demonstrates a more complex position. There was a clear desire to deregulate within the Government, the only differences being as to how far deregulation should go. Mr Blair was ready to go further than Ms Jowell was initially prepared to go and she in turn was prepared to go further than her predecessor Lord Smith.[213] Ultimately, this was an area in which a balance had to be struck between plurality safeguards and market freedom and in which there was considerable room for differing views as to what was best for the country.

5.39 The decision was not unqualified good news for Mr Murdoch. As Mr Blair pointed out, the 2003 Act contained much which News Corp did not like, not least insofar as it related to Ofcom. In relation to the 20% rule, the final decision to remove the rule only in relation to Channel 5, but not in relation to the more influential Channel 3 did not go anything like as far as News Corp had been seeking. Whilst it would be wrong to say that Mr Murdoch had no interest in Channel 5, the evidence does not demonstrate that it was a priority.

[212] pp107-108, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

[213] p5, Lord Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-Smith.pdf

5.40 This is an example of media policy being personally influenced by a prime minister and, as such, points to the importance of the personal access which many senior media figures have had to our Prime Ministers. There may not be a deal, actual or implied, but access to communicate one's views in person to a Prime Minister who can directly influence policy is potentially a very important advantage.

Lord Puttnam's amendment and the media plurality test

5.41 In relation to acquisitions by national newspaper owners of terrestrial television interests, before the enactment of the 2003 Act, a public interest test was applicable in three circumstances:[214]

(c) Any application by any newspaper owner to hold a licence for GMTV, Channel 5, or any national radio service;

(d) Any application to hold a regional Channel 3 licence or a local radio licence, by any national or relevant local newspaper owner; and

(e) Digital programme services could not be provided for three months after the award of the licence to a national or relevant local newspaper owner unless a plurality test was met.

5.42 These rules were not thought to be helpful by DCMS and DTI. They initially consulted on the possibility of incorporating an alternative public interest test into cross media ownership decisions, in terms which were summarised by Ms Jowell, when writing to Mr Blair, as follows:[215]

> *"...We ask for views on whether the cross media ownership limits should be abolished, retained or reformulated. If they are retained in some form, we ask whether they should be permeable, with decisions above the threshold of the formula subject to a plurality test, and whether such decisions should be taken by the Secretary of State or by OFCOM."*

5.43 Government thinking was at that stage concerned with whether to apply a plurality test above a quantitative ownership threshold so as to make the threshold permeable. It was not the overarching test that was ultimately adopted following Lord Puttnam's intervention. Even this limited proposal met with disfavour when the responses to the consultation paper had been considered. DCMS officials noted that most respondents rejected the idea of a media plurality test and recommended against such a test:[216]

> *"Plurality tests are not well supported by the industry because they are inherently uncertain. Given that we are offering significant deregulatory reforms in most areas, and setting rules only where we feel we need to draw a line at what is acceptable in terms of plurality, there seems little point in offering additional flexibility where it is not wanted."*

[214] p30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ38-to-Witness-Statement-of-Tessa-Jowell.pdf
[215] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ12-to-Witness-Statement-of-Tessa-Jowell.pdf
[216] p10, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ20.pdf

5.44 The notion of some kind of plurality test was nevertheless explored further, and at Ms Jowell's request, the idea of expanding the plurality test in the newspaper regime to apply to all mergers (including cross-media mergers) that involve newspapers was the subject of a detailed ministerial submission prepared for her and Ms Hewitt in February 2002.[217] The fact that this paper was sought at all tends to suggest that the Ministers had open minds and were genuinely seeking to explore the options.

5.45 The joint recommendation which ultimately went from the Secretaries of State to the Prime Minister did not propose the inclusion in the draft Bill of a plurality test to be applied to cross media acquisitions. On the contrary, it recommended the abolition of the three extant public interest tests which applied to the acquisition of other media by a newspaper proprietor (see 1.41 above):[218]

> *"The three existing rules that together make any purchase of any broadcasting service by any newspaper proprietor subject to a public interest test will be removed. The scope of these tests is not clear; they discourage newspaper owners from attempting levels of consolidation that would not necessarily dilute plurality; and they distort the market by encouraging existing owners who wish to sell to accept bids from non-newspaper owners who will not have to wait to pass a public interest test (a parallel may be drawn with the recent purchase of the Express newspapers by a non-newspaper owner who was not subject to any test under the special newspaper regime)."*

5.46 Plurality was instead to be ensured by quantitative limits on cross media ownership and competition law. The rules were to be the subject of automatic review by Ofcom no less than every three years. Insofar as it relates to national newspapers, their relevant proposals were summarised as follows:[219]

> *"Cross-media ownership*
>
> *"The existing patter of rules to be stripped down to those rules we feel are essential:*
>
> – *A rule preventing those with more than 20% of the national newspaper market buying a significant stake in Channel 3 or Channel 5...*
>
> *"Other rules to be removed:*
>
> *Rules that stipulate public interest tests for any acquisition of any broadcasting licence by any newspaper company to be scrapped ...*
>
> *"...*
>
> *"Review of ownership rules*
>
> – *All rules to be subject to automatic review by OFCOM no less than every 3 years OFCOM to make recommendations to the SofS, who can amend rules by secondary legislation."*

5.47 At this stage, on cross media ownership, the large media companies were heading towards getting most, but not all, of what they wanted. Within Government there was (and always remained) a refusal to accept that competition law alone would suffice to ensure plurality in

[217] pp1-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ35-to-Witness-Statement-of-Tessa-Jowell1.pdf
[218] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ38-to-Witness-Statement-of-Tessa-Jowell.pdf
[219] pp4, 7 *ibid*

the media. The ministers' underlying political thinking is well summarised in their joint letter to Mr Blair:[220]

> *"We believe that the case for deregulation is powerful. There has been an explosion of media choice in recent years giving people a wide range of sources of news, information, entertainment and other services. Meanwhile, the existing rules have hampered some companies from expanding and developing while others find themselves much freer. These anomalies are not good for investment, jobs or diversity of products for the consumer.*
>
> *However, we also believe that the media are different from other industries, which means that Competition law alone is insufficient. They are a uniquely powerful force in democracy and debate and there is a long history of some media owners using national newspapers in particular to promote their views. We need a significant degree of plurality of ownership for democracy to work, and competition law can't guarantee this for us. Our line is therefore to regulate ownership on top of competition law, but only where absolutely necessary – imposing a simple set of barriers to excessive concentration.*
>
> *We are therefore proposing substantial deregulation, both within each media sector (radio, TV, local newspapers, and national newspapers) and also between them, subject to retaining reduced but still significant controls on cross-ownership of national newspapers and major terrestrial TV channels."*

5.48 A revealing part of the joint submission made by the Secretaries of State to the Prime Minister is the annex listing potential commercial winners and losers on the proposals as they then stood. The "Big Winners" are stated to be terrestrial television companies, most non-EEA companies, the biggest radio groups and the smaller national newspaper groups. News International is not amongst the "Big Winners" but is placed is the "Smaller Winners" category along with the largest national newspaper groups, their subsidiaries and the regional-only newspaper groups.[221] It must be noted that this assessment was at that stage on the assumption that the prohibition on a News International purchase of Channel 5 would remain and the ultimate outcome was more favourable for News International than that contemplated at this time. Nevertheless, the assessment tends against any suggestion that the Government of the time was seeking specifically to benefit News International and is consistent with its policy of deregulation for wider economic and consumer benefit.

5.49 As has been discussed above, the 20% rule, as it applied to Channel 5 was not in the event included in the draft bill, as a result of discussions with Mr Blair. On the subject of cross media ownership, the Secretaries of States' recommendation to reduce the system to its essentials was accepted and no media plurality test was incorporated into the draft bill for application to cross media acquisitions.[222] This approach was consistent with the desire to provide predictable rules for business and with the greatly relaxed approach to newspaper mergers set out in the draft Bill, the effect of which was summarised as follows:[223]

[220] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ39-to-Witness-Statement-of-Tessa-Jowell.pdf; see also Tessa Jowell's speech to the House of Commons upon publication of the draft bill, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ50-to-Witness-Statement-of-Tessa-Jowell1.pdf
[221] pp11-14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ38-to-Witness-Statement-of-Tessa-Jowell.pdf
[222] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ45-to-Witness-Statement-of-Tessa-Jowell1.pdf
[223] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ45-to-Witness-Statement-of-Tessa-Jowell1.pdf

> *"A reformed newspaper merger regime will be less onerous and more targeted, applying post-acquisition only in cases where there is significant concern on competition or plurality grounds. Criminal sanctions will be removed. Final decisions, at least on plurality grounds, will rest with Ministers."*

5.50 The absence of a plurality test generally applicable to media mergers in the draft bill became the subject of some controversy. At the pre-legislative scrutiny stage, the Joint Committee made 148 recommendations.[224] Amongst these, the Committee recommended the incorporation of a plurality test for media mergers to be incorporated into the general merger regime introduced by the Enterprise Act 2002 (and thus applicable to media mergers which were also qualifying mergers for the purposes of that Act). They also expressed concerns about the proposed exclusion of Channel 5 from the 20:20 rule and the lifting of the ban on foreign ownership.[225] The core recommendation about plurality incorporated a widely drafted test and read:[226]

> *"We recommend that the general merger regime, as introduced by the Enterprise Bill, be amended by the Communications Bill to permit the OFT and the Competition Commission to have regard to plurality, as well as the issue of substantial lessening of competition, in reaching decisions on media mergers. For these purposes, we recommend that plurality be specified as a consideration in respect of which the Secretary of State may serve a public interest intervention notice and that plurality be defined as:*
>
> *The public interest in – (i) the maintenance of a range of broadcast media owners and voices sufficient to satisfy a variety of tastes and interests; (ii) the promotion and maintenance of a plurality of TV, radio and other broadcast media owners, each of whom demonstrates a commitment to the impartial presentation of news and factual broadcast programming; and (ii) the promotion and maintenance, in all media including newspapers, of a balanced and accurate presentation of news, the free expression of opinion and a clear differentiation between the two"."*

5.51 DCMS and DTI considered the Joint Committee's recommendations, accepting most of them and they also considered the responses of interested parties to the draft Bill. On the question of a media plurality test, they were unmoved by the Joint Committee's recommendation. A contemporary joint briefing produced by officials for Ms Jowell and Ms Hewitt succinctly recorded their position:[227]

> *"[The Government's view is that the only way to guarantee sufficient levels of plurality on a cross-media basis is to set clear, specific limits on ownership through a number of key rules.*
>
> *"Since these rules – which will apply to all mergers – are directed at the same objectives as a general plurality consideration, we do not see the need to provide additionally for a general plurality test in the Enterprise Bill merger control regime]."*

[224] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ62-to-Witness-Statement-of-Tessa-Jowell.pdf
[225] pp10-11, *ibid*
[226] p27, *ibid*
[227] p18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ68-to-Witness-Statement-of-Tessa-Jowell.pdf

5.52 There were also concerns that the proposed test would effectively impose a form of content regulation on newspapers.[228] The Communications Bill, when it was introduced, did not include a media plurality test.

5.53 Lord Puttnam was not prepared to let the matter rest and led a campaign for, amongst other things, a media plurality test, against the relaxation of the 20:20 rule in relation to Channel 5, and against the lifting of the ban on foreign ownership. He met Ms Jowell on 11 June 2003 when the position, on these issues, recorded the plurality test as being to the fore:[229]

> *"Lord Puttnam thought a plurality test would resolve his own concerns about foreign ownership and Channel 5. He accepted, however, that he couldn't speak for anyone else. The SoS said she would be concerned about a double bind of ownership rules plus plurality test, and was not convinced that the industry would buy it, given the uncertainty involved. Puttnam said his conversations with industry leaders suggested they were not unduly bothered by such uncertainty. He is not hung up about the precise wording – the extract from the PCC Code is deliberately provocative. SoS agreed we'd look at his ideas and discuss with our lawyers."*

5.54 There was some limited counter lobbying from the industry but the political tide was turning against the Government.[230] As the Bill approached its first day of Lords Report, Ms Jowell and Ms Hewitt wrote jointly to Mr Blair, informing him that the Government faced defeat on the three issues which this sub-section of the report has focused upon: foreign ownership, Channel 5, and a media merger plurality test. They invited him to agree to make a concession on a plurality test, it having been indicated to them both by the Conservatives and Lord Puttnam that such a move would win their backing on foreign ownership and Channel 5. The thinking behind recommending the concession reflected the increasingly deregulatory course which the policy had taken and was stated to be:[231]

> *"Until now we have resisted calls for a plurality test on the basis that our mix of content regulation and core ownership rules should protect plurality. In Parliament, it has argued that because the Bill is so deregulatory we should equip ourselves with the means of investigating further those rare cases where we have removed ownership rules but where some concerns remain. We can see the logic in this, although such a concession only makes sense if the wider liberalisation central to the Bill is retained."*

5.55 There then followed a period of internal policy debate about the form which a plurality test should take and, including amongst other things whether it should be a narrow test or a wide test, accompanied by guidance and applied only exceptionally in practice.[232] There was

[228] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ69-to-Witness-Statement-of-Tessa-Jowell.pdf
[229] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ87-to-Witness-Statement-of-Tessa-Jowell.pdf
[230] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ93-to-Witness-Statement-of-Tessa-Jowell1.pdf
[231] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ94-to-Witness-Statement-of-Tessa-Jowell.pdf
[232] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ96-to-Witness-Statement-of-Tessa-Jowell.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ98-to-Witness-Statement-of-Tessa-Jowell.pdf http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ97-to-Witness-Statement-of-Tessa-Jowell.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ99-to-Witness-Statement-of-Tessa-Jowell2.pdf; http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ107-to-Witness-Statement-of-Tessa-Jowell.pdf

a further discussion between Ms Jowell, some of her officials, and Lord Puttnam on 26 June 2003 which, on the issue of media ownership, as recorded at the time, had all the hallmarks of a negotiation:[233]

> *"Andrew McIntosh repeated that at Report stage we would signal our concern about plurality in general and our intention to consider Puttnam's plurality test amendment. Puttnam said that would not be enough to satisfy him. He was clear that only the exact text of his amendment (as scrutinised by Lord Grabiner) would work for him. He also circulated a new, additional amendment that would prevent any removal of ownership rules relating to Channel 5 until a plurality test had come into being.*
>
> *The Secretary of State asked for clarification that if we introduced a plurality test we would withdraw his opposition to our proposals on Channel 5 ownership. He agreed that if we can reach a common position on plurality he will not push the Channel 5 amendment – he would take his name off it and would encourage Lord McNally and Lord Crickhowell to do the same. He will repeat this offer, making clear its conditional nature, at Report.*
>
> *On foreign ownership, he said he would support the Government. He will take his name off the amendment, and will stand up and oppose those who argue for reciprocity."*

5.56 If this meeting produced the outline of a compromise between the Government and Lord Puttnam, it still left a real issue between them as to the scope of the plurality test which should be put in place. Internal e-mails between officials recorded their understanding of the position bluntly and with an emphasis on the impact for News Corp:[234]

> *"TJ had now spoken to Puttnam – he will push his amendment to a Division regardless of what we say. He will only accept a plurality test that makes absolutely sure News Corp can't buy Channel 5. He will also vote against us on C5, though not foreign ownership."*

5.57 No consensus had been reached on the wording of a plurality test before Lord Puttnam's amendment was debated in the House of Lords on 2 July 2003.[235] The amendment moved at the start of the debate was in these terms:[236]

> *"MEDIA PLURALITY PUBLIC INTEREST CONSIDERATION*
>
> *(1) Section 58 of the Enterprise Act 2002 (c.40) (specific considerations) shall be amended as follows.*
>
> *(2) After subsection (2B) (which is inserted by section 368 of this Act) there shall be inserted – "2(C) The public interest in the promotion and maintenance-"*
>
> *(a) of a plurality of media owners committed to a balanced and impartial presentation of news and to a balanced presentation of comment, and*
>
> *(b) of a wide range of voices such as to satisfy a variety of tastes and interests is specified in this section.*

[233] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ100-to-Witness-Statement-of-Tessa-Jowell.pdf
[234] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ101-to-Witness-Statement-of-Tessa-Jowell.pdf
[235] HL Hansard, Vol 650, col 886 – 955, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[236] HL Hansard, Vol 650, col 908, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2

(3) In subsection (3), after the words "any consideration", there shall be inserted "(other than the consideration specified in subsection (2C))"."

5.58 Lord Puttnam explained that the Joint Scrutiny Committee's proposed plurality test lay at the heart of its conclusions and recommendations about media ownership. The committee regarded it as one of three non-negotiables and the test needed to be: *"...sufficient to look across all media and make determinations in the best interests of the citizen..."*[237] On the question of the underlying rationale of the amendment he said:[238]

> *"Much has been made in the past few weeks of the underlying rationale of the amendment. I have heard it referred to as "the Murdoch clause"; it has even been described as something that attempts to demonise sections of the media. That is not and never has been the case. The Secretary of State was entirely right in insisting that the Bill and the amendment were entirely "proprietor neutral". It is more to do, as I see it, with attempting to make our democracy proprietor neutral."*

5.59 He later summarised the aim of his amendment as *"...a move towards making the "Berlusconi-isation"* of British democracy an impossibility.[239] Lord McIntosh, for the Government, supported the principle behind the amendments but expressed concerned about the details:[240]

> *"Taken to one possible logical conclusion, the text of the amendment could have the effect of stopping broadcasters from being impartial and allowing them to have "views and opinions" ...*
>
> *The amendments would also seem to encourage the introduction of content regulation into newspapers ..."*

5.60 Lord McIntosh summarised the main points in favour of a plurality test: it would allow for the gradual dismantling of media ownership rules over time; it would be flexible enough to cope with changed circumstances (in this regard he posited the growth of Channel 5 to approach that of Channel 3 in size and reach); and it would allow judgments on media mergers, based on the particular circumstances of the case (in contrast to the cliff edge effect of the 20:20 Rule).[241]

5.61 Turning to the test to be applied, Lord McIntosh promised that a plurality floor would be maintained:[242]

> *"It will be for Ministers to determine whether the merger causes sufficient plurality concerns for it to be blocked, or for conditions to be attached. Similarly, the test must also recognise that there is a minimum level of plurality which must be maintained."*

I

[237] HL Hansard, Vol 650, col 909, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[238] HL Hansard, Vol 650, col 910, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[239] HL Hansard, Vol 650, col 911, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[240] HL Hansard, Vol 650, col 912, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[241] HL Hansard, Vol 650, col 912 – 914, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[242] HL Hansard, Vol 650, col 914, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2

5.62 Significant limitations on the circumstances in which the Secretary of State would, in practice, intervene were signalled:[243]

> *"We propose that the power be wide enough to capture all media mergers, including cross-media mergers. We would intend as a matter of policy normally to apply the test in practice only to those areas where the current rules are being removed completely. This means that, usually, the Secretary of State would consider intervening on plurality grounds only in the following areas: national newspapers with more than 20 per cent of the market/Channel 5; national newspapers with more than 20 per cent of the market/national radio service, Channel 3; Channel 3/national radio; Channel 5/ national radio; and national radio/national radio."* (emphasis added).

5.63 On the delicate question as to the practical effect of the Government's intended test, Lord McIntosh would give no specific guarantee:[244]

> *"The noble Lord, Lord Puttnam, asked whether this test would "effectively rule out" a major national newspaper owning Channel 5. The answer is that the test will ensure that the Secretary of State can investigate any merger which threatens plurality. It will clearly prevent unacceptable levels of cross-media dominance. But it is inherent in the nature of a test that one cannot predict the outcome in advance of any individual case. It will be necessary to analyse and consider all the relevant circumstances at the time on a case-by-case basis."*

5.64 Guidance was intimated in order to afford industry some degree of certainty and, in particular, to set out in more detail those areas whether the test would generally be applied and the factors that would be considered. Wider application of the test in "extreme and rare" cases was, understandably, not ruled out.[245]

5.65 These assurances proved sufficient for Lord Puttnam who withdrew his amendment.[246] Subsequently, the amendment to the Enterprise Act 2002, effected by the Communications Act 2003, inserting the media plurality test, was in these terms:[247]

> *"Media public interest considerations*
>
> *"After subsection (2) of section 58 of the Enterprise Act 2002 (considerations specified as public interest considerations for the purpose of the main merger regime) there shall be inserted –*
>
> *"(2A) The need for-*
>
> *accurate presentation of news; and*
>
> *free expression of opinion;*
>
> *in newspapers is specific in this section.*

[243] HL Hansard, Vol 650, col 914 – 915, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[244] HL Hansard, Vol 650, col 915, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[245] HL Hansard, Vol 650, col 915, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[246] HL Hansard, Vol 650, col 924, 2 July, 2003, available at http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-05.htm#30702-05_head2
[247] S375(1) Communications Act 2003. See also s375(2), s376(3) and s377 of the Act

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section –

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003."

5.66 Had it not been for Lord Puttnam's amendment, the deregulatory effect of the 2003 Act would have been even more extensive than it was. In particular, there would have been no restriction, other than ordinary competition law, to prevent News Corp from acquiring and then investing heavily in Channel 5 and thereby becoming an even more powerful media presence in the United Kingdom.[248]

Reflections

5.67 The evidence does not support an inference of an agreement between Mr Murdoch and Mr Blair. Not only did Mr Blair flatly deny any such deal but the contemporary papers, discussed in detail above, reveal very considerable thought, genuine debate and reasoned decision making during the development of the policy underpinning the 2003 Act.

5.68 Mr Blair's approach to the 2003 Act was driven by the views which he expressed in his evidence (as held at that time – they changed later) including his desire to deregulate and to encourage foreign investment in what was a rapidly changing and globalising market. The approach was congruent with, but not necessarily a product of, his strategy to foster better relations with some sections of the media than his predecessors had enjoyed.

5.69 The amount of consultation and dialogue involved during the development of the policy was noteworthy. There was considerable industry lobbying. Some of this was not transparent. I make no criticism of those involved; standards of transparency were in keeping with the times. Both on its own and when collected with other examples, the significance and value of transparency is increasingly obvious.

5.70 The views of large media companies were undoubtedly taken into account but so were those of others with contrary views. The evidence has not demonstrated bias or unfair advantage resulting from media lobbying. Insofar as media representations were preferred over competing representations the documents show that it was the result of a proper weighing of the opposing arguments, and consistent with the deregulatory policies of the decision makers.

[248] Tessa Jowell had made clear to BSkyB that OFCOM's plurality duty under s.3 of the Act was not intended to be used to block a merger otherwise compliant with the media ownership rules. p7, Tessa Jowell, https://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-TJ83.pdf

CHAPTER 6
MEDIA POLICY: THE BSKYB BID

1. Introduction

1.1 On 15 June 2010 News Corporation (News Corp) announced its bid to acquire those shares in British Sky Broadcasting plc (BSkyB) which it did not already own and thus triggered a need for the Secretary of State for Business, Innovation and Skills (BIS), the Rt Hon Vince Cable MP, to consider the media plurality test introduced by amendment into the Enterprise Act 2002 at s58(2C).[1] As is well known, Dr Cable's consideration of the bid became the subject of public controversy on 21 December 2010 as a result of comments which he made to undercover reporters from the Daily Telegraph about Rupert Murdoch and News International (NI). Those comments, which gave at least the appearance of bias against News Corp, prompted the Prime Minister immediately to intervene and transfer responsibility for considering the bid to the then Secretary of State for Culture, Media and Sport, the Rt Hon Jeremy Hunt MP.

1.2 The choice of Mr Hunt itself prompted questions from some quarters because he had previously commented in positive terms about the bid and was believed to be well disposed towards News Corp.[2] The bid returned to the public spotlight in July 2011, after the phone hacking scandal had broken in earnest, when an Opposition Day Motion was tabled: "*This House believes that it is in the public interest for Rupert Murdoch and News Corp to withdraw their bid for BSkyB*".[3] In these very adverse circumstances News Corp withdrew the bid shortly before the debate.[4]

1.3 Significant further evidence about the bid, and in particular the relationship between politicians and the press in relation to it, came to light during the course of the Inquiry. Exhibit KRM18 to Mr Murdoch's witness statement contained 161 pages of email traffic evidencing News Corp's lobbying effort. On their face, these emails appeared to show direct private contact between Mr Hunt and News Corp's then Director of Public Affairs, Europe, Frédéric Michel. Mr Michel gave evidence to the effect that, in fact, the overwhelming majority of the contact was with others at the Department of Culture, Media and Sport (DCMS), predominantly Adam Smith, then a Special Adviser (SpAd) to Mr Hunt. These documents, together with text and telephone records which were subsequently sought by, and disclosed to, the Inquiry demonstrate a sustained behind the scenes lobbying campaign by News Corp, in support of its bid wholly to own BSkyB, which the Inquiry investigated by calling relevant witnesses.

1.4 The publication of KRM18 by the Inquiry aroused very considerable public interest and immediately sparked a political debate. On 24 April 2012 Mr Hunt wrote to the Inquiry requesting that his evidence be taken earlier than had been programmed, but the Inquiry explained that it needed to hear all relevant testimony bearing on the issues before Mr Hunt could fairly and properly provide his own account. The Speaker of the House of Commons permitted urgent questions to be put to the Prime Minister about Mr Hunt on 30 April

[1] see Section 4 of this Chapter for a discussion of the circumstances in which the cross media plurality test came to be enacted.
[2] p84, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf ; see 4.39 below for Mr Hunt's public comments
[3] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110713/debtext/110713-0003.htm#11071379000002
[4] p8, paras 3.17-3.18, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf

2012. In those circumstances it was necessary for the Inquiry, on more than one occasion, to make absolutely clear why it was taking evidence about the bid, its approach and, just as importantly, those questions which fell outside its remit. On 23 April 2012 I said:[5]

> *"I understand the very real public interest in the issues that will be ventilated by the evidence. I also recognise the freedom that permits what is said to be discussed and the subject of comment in whatever way is thought fit, and I shall approach the relationship between the press and politicians from an entirely non-partisan judicial perspective, which I have no doubt is the reason that I was given this remit. I would hope that this approach will be made clear".*

1.5 On 10 May 2012 I explained what I would and would not be looking at and why:[6]

> *"I will look at the facts surrounding the News Corp bid for the remaining shares of BSkyB. I will do so in order to investigate the culture, practices and ethics of the relationship between the press and the politicians. It was because of the need to examine the facts fairly that on 25 April I spoke about the need to hear every side of the story, and although I had seen requests for other inquiries and other investigations, it seemed to me that the better course was to allow this Inquiry to proceed. That may cause me to look at the Ministerial Code and its adequacy for the purpose, but I will not be making a judgment on whether there has been a breach of it. That is simply not my job and I have no intention of going outside the terms of reference that have been set for me.*
>
> *For the avoidance of doubt, I see the significance of the way the bid was handled both by the Secretary of State for Business Innovation and Skills and the Secretary of State for Culture, Olympics, Media and Sport as evidencing manifestations, to return to the terms of reference, of the relationships between a media interest and politicians and the conduct of each".*

1.6 The publication of KRM18 led to calls for other inquiries and other investigations. On 25 April 2012 I expressed the view that it would better to allow the Inquiry to proceed:[7]

> *"In due course, we will hear all the relevant evidence from all the relevant witnesses, and when I report, I will then make findings that are necessary for me to fulfil the terms of reference the Prime Minister has set for me. In the mean time, although I have seen requests for other inquiries and other investigations, it seems to me that the better course is to allow this Inquiry to proceed. When it is concluded, there will doubtless be opportunities for consideration to be given to any further investigation that is then considered necessary".*

1.7 I returned to the subject of other inquiries and investigations on 15 May 2012 in the light of significant activity in Parliament arising from the publication of KRM18 during the intervening period. I fully recognised on that occasion the sovereignty of Parliament to determine its own proceedings, but explained how a Parliamentary investigation of the same events as were being investigated by the Inquiry, conducted in advance of, or concurrently with, the Inquiry's

[5] p2, lines 4-13, Lord Justice Leveson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[6] pp58-59, Lord Justice Leveson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-10-May-2012.pdf; p5, lines 5-11, Lord Justice Leveson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-15-May-2012.pdf
[7] p2, lines 7-17, Lord Justice Leveson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf

work risked making it impossible for the Inquiry to investigate this part of the evidence in accordance with its duty of fairness pursuant to s17(3) Inquiries Act 2005.[8] In the event, Members of Parliament decided not to proceed in parallel with the Inquiry, and the Inquiry has continued as intended.

1.8 This subsection of the Report does not seek to provide a comprehensive history or critique of the bid. Rather, it considers the relationship between the national press and politicians during the course of the bid and the conduct of each, including the ways in which the relationship was conducted.[9] It explores the relevant interactions, how the competing parts of the press sought to advance their interests, and how the politicians conducted the process of applying the cross media public interest plurality test. It seeks to identify the issues of concern which arose during the process of applying the statutory test with a view to identifying lessons to be learned. These lessons are directly relevant not only to the future conduct of the national press and politicians in relation to one another but also to the question as to how best to ensure the maintenance of sufficient plurality in the media.

1.9 Scrutiny of the bid in this way raises many questions. Perhaps the most important question is what role, if any, should politicians play in cross media plurality decisions? Also for consideration are: how did the statutory test work? Was it necessary? Does it require alteration or change? How and why did the problems with process at both BIS and DCMS occur? What can be done to prevent a recurrence of such problems? Consideration is also given to whether or not there was an explicit arrangement between Mr Murdoch and any Conservative politician in relation to the handling or outcome of the bid. It is right though to state at the outset that in fact the evidence did not come close to proving any such arrangement.

Context

1.10 Total control of BSkyB *"...had long been an aspiration, since the merger with BSB"*[10] for News Corp. At the launch of the bid, News Corp's interests in the United Kingdom included a 39.1% stake in BSkyB and 100% ownership of NI. News Corp also wholly owned HarperCollins, one of the top four book publishers in the UK.[11] These holdings were but a part of a global media business with interests in many parts of the world, including shares in a number of European satellite broadcasters. News Corp was already generally regarded, for plurality purposes, as having control of BSkyB.[12]

1.11 James Murdoch explained why News Corp nevertheless wished to acquire the remaining shares:[13]

> *"...News Corporation wanted to expand its holding in BSkyB in order to simplify the operating model of the business, to have fewer, bigger businesses, and to focus on cash flow and invest in upstream content and creative industries. It was intended to*

[8] pp1-14, Lord Justice Leveson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-15-May-2012.pdf
[9] in the case of News Corp, a global media company which owns British national newspapers through News International
[10] p72, lines 18-19, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[11] p48, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[12] p20, lines 16-19, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[13] p5, para 3.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf

> *consolidate BSkyB with our interests in the other Sky businesses around the world to create the first state of the art, global, 21st century, digital pay television business, which would have centred in the UK. The proposed deal with driven by considerations relating to the way television is made and consumed around the world and the benefits of consolidation. We see competition increasingly on an international scale and our aim was to combine our interests in a number of our Sky businesses in order to compete more effectively with multinational telecoms companies and large technology businesses that have begun to distribute audio-visual programming, and enjoy certain benefits of scale and scope that the individual Skys might not."*

1.12 He expanded on the international dimension, demonstrating as he did so, the truly global perspective from which media companies of the size of News Corp view the market:[14]

> *"The proposed transaction would have brought enormous benefits to industry, to the Sky business and its consumers and to the wider economy. We had hoped to combine our interests in the Sky businesses in the UK, Italy, Germany, India and New Zealand to build a world class company, with its headquarters in the UK, I am aware that some people in the UK thought that Sky was too big, but we felt that it would be helpful to be bigger in order to compete with other international companies such as Google, Apple and large telecoms companies, all of whom are much larger than BSkyB and have been investing in the audio-visual business heavily on a global rather than national basis."*

1.13 There can be little doubt that the acquisition, if it had gone ahead, would have afforded News Corp with a significant commercial opportunity to develop a large integrated multi-platform media company. The prospect certainly alarmed competitors in both the newspaper and television industries who vigorously opposed the bid. They were joined in that endeavour by two very active campaigning groups, Avaaz and 38 Degrees.

1.14 Although BSkyB is a satellite television broadcaster, its proposed acquisition was of undoubted relevance to the national newspaper industry. It offered the prospect of increased cooperation between NI's titles and BSkyB, both of which would have been wholly owned by News Corp had the deal gone ahead. Competitors feared that both subsidiary companies would benefit from economies of scale, might be able to gain commercial advantage by bundling their products, and (subject to the rule requiring impartial television news coverage) share each other's content.[15]

1.15 The commercial context in which the bid took place is important. Regulation of media ownership must strike the right balance between, on the one hand, avoiding the over concentration of media power into too few hands and, on the other, attracting investment and promoting innovation in a technologically very dynamic industry.

1.16 The precise timing of the bid was related to some extent to the general election held in May 2010. News Corp deliberately waited until after the election before launching the bid. James Murdoch told the Inquiry that this was to avoid the bid becoming a political football.[16] He also explained that more broadly the timing of the bid had primarily been influenced by the global

[14] p12, *ibid*

[15] For News Corp's response seeking to rebut to such fears: pp220-230, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf

[16] on the other hand, Rupert Murdoch said it was a pure coincidence that the bid was announced a month after the General Election: p16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

financial crisis and was determined by the need for News Corp to amass the very substantial funds necessary to make a cash offer. A third and final factor was the timing of the BSkyB board's summer meeting:[17]

> *"A. I think it was to wait until the election was completed, regardless of the outcome, such that a transaction of this size, some $12 million [sic], didn't become a political football, and that was the goal. But the primary driver for the timing was really (a) the affordability of it, being able to do it. We had taken some time to really husband our resources carefully. It was contemplated that it would be an all cash offer and that took a little while to save up, if you will, after – over a number of years. Also, there was a gap because in 2009 you'll recall, with the financial crisis, with the uncertainty around the environment, you know, large scale mergers and acquisitions activity was a hard thing to get your head around.*
>
> *Q. Yes.*
>
> *A. And furthermore, in 2009 – and forgive me, Mr Jay, but it's important because I think I know where you're going, but every summer the BSkyB board, the independent directors, meet together to talk through long-term strategy and the like, and we wanted to do it ahead of that, or around that time when the board was all scheduled to have a few days together, so it could be done completely and properly with the board."*

2. The plurality test and quasi-judicial procedure

The statutory framework

2.1 The proposed merger met the threshold for consideration by the European Commission under the EU Merger Regulation. Consequently, News Corp and BSkyB were required to notify the proposed transaction to the European Commission for clearance. Following negotiations between the parties, they notified the European Commission at the start of November 2010.[18] Clearance was then forthcoming on 21 December 2010.[19]

2.2 Domestically, the first formal decision for the Secretary of State was to consider whether or not to exercise his discretion to issue a European Intervention Notice (EIN) under s67(2) of the Enterprise Act 2002. The discretion afforded by that statutory provision is as follows:

> *"The Secretary of State may give a notice to the OFT (in this section "a European intervention notice") if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned."* (emphasis added)

2.3 The public interest considerations which fell to be considered in this case were those commonly referred to as the "*broadcasting and cross media public interest considerations*" contained in s58(2C) of the 2002 Act. They are:[20]

[17] pp70-71, lines 23-20, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[18] p5, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[19] p7, para 3.10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-James-Rupert-Jacob-Murdoch.pdf
[20] p32, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-1-to-Witness-Statement-of-Vince-Cable-MP.pdf

> *"(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;*
>
> *(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and*
>
> *(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003."*

When Dr Cable in due course did decide to issue an EIN, the particular plurality concern which he identified in the notice was that set out at (a) above.[21]

2.4 The issue of an EIN triggers an obligation upon the OFT to report to the Secretary of State and, as happened in due course in this case, media plurality is considered to be a public interest consideration, then Ofcom is also required to prepare a report. Once in receipt of the reports it then falls for the Secretary of State to decide whether or not to refer the case to the Competition Commission for detailed scrutiny. In the present case this was the decision which fell to Mr Hunt, after responsibility for the bid was transferred to him on 21 December 2010, and it is considered in more detail later in this section of the Report.[22]

2.5 The alternative to issuing an EIN was for the Secretary of State simply to permit the acquisition to proceed, subject only to the European Commission's competition decision. In other words, simply to allow the acquisition without further specific scrutiny of the possible consequences of the transaction for media plurality.

The guidance

2.6 As promised by the Labour Government when the media plurality test was inserted by amendment into the 2002 Act, and as is provided for by s106A of the 2002 Act, guidance was published by the then Department of Trade and Industry (DTI) in 2004 (the Guidance) with a view to explaining the considerations specified in section 58(2A) to (2C) to persons who are likely to be affected by them; and indicating how the Secretary of State expected the legislation to operate in relation to such considerations. The Guidance, whilst not binding, is intended to provide an indication of how the media public interest merger regime will operate in practice, and the approach which the Secretary of State is likely to adopt in considering cases. The Secretary of State should have regard to the Guidance and should only depart from it with good reason. Ultimately, as the Guidance makes clear, each transaction falls to be looked at on its merits on a case-by-case basis.[23]

2.7 In relation to a decision to intervene on a media public interest consideration, the Guidance provides in relation to procedure that:[24]

[21] European Intervention Notice, 4 November 2010, p245, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[22] subsection 5 below: Handling of the Bid by Jeremy Hunt and DCMS
[23] p32, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-1-to-Witness-Statement-of-Vince-Cable-MP.pdf
[24] pp17-18, *ibid*

"...If the Secretary of State is going to take a view on whether or not to intervene in the case on public interest grounds, the parties to the merger will be informed of this and invited to submit any views they have on this in writing. In taking a view on whether to intervene the Secretary of State will have regard to all available information which, depending on the case, may include:

- *submissions from the parties to the merger (as invited by the Secretary of State);*
- *complaints made to the Press Complaints Commission and judgments made;*
- *any previous regulatory decisions which include relevant information or judgments;*
- *published articles raising matters of relevance; and*
- *any third party representations received; but*
- *she will not receive advice from OFCOM on whether to intervene (though she may receive and/or seek information from them in order to inform her decision)."*

and (insofar as is relevant):

"...The Secretary of State will not normally conduct a public consultation on whether she should intervene in a case, but will welcome and take account of any representations she receives. She may also seek the views of a few interested parties if time permits".

2.8 The exchange of submissions and the oral presentation of a party's case (in whatever form) are not envisaged in this Guidance and, unless the Secretary of State chooses to go further than the Guidance indicates, those making submissions are not afforded, at this stage, the opportunity to reply to the arguments made against them.

2.9 Guidance about the substantive interpretation of the plurality of persons considered, specified at s58(2C)(a), and the provision to which Dr Cable ultimately referred when he did issue an EIN, is to be found in chapter 7 of the 2004 Guidance. Amongst other things, it makes clear that the plurality of persons test "*...is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons...*" and that "*...the Secretary of State considers that sufficient plurality in this context refers to the number of persons controlling media enterprises, taking into account as appropriate relative audience shares*" (emphasis added)[25]

2.10 Of particular relevance to the bid for BSkyB was the policy on intervention in broadcasting and cross-media public interest cases set out in section 8 of the Guidance. This policy considerably narrows in practice the application of the otherwise widely worded public interest test applicable in broadcasting and cross-media public interest cases:[26]

"In principle, the Secretary of State may intervene in any relevant or special merger situations involving media enterprises, including cross media mergers, where she believes that the broadcasting and cross-media public interest considerations are relevant.

The Secretary of State's policy is that, save in exceptional circumstances, she will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003. These are: ...

...

[25] p32, *ibid*
[26] p37-38, *ibid*

In addition, the Secretary of State's policy is that, save in exceptional circumstances, she will not intervene in respect of mergers in areas where there are no media ownership restrictions and none were removed by the Communications Act 2003 (e.g. mergers involving satellite and cable television and radio services).

...

In exceptional circumstances, the Secretary of State may consider it necessary to intervene in mergers in areas where there continue to be media ownership rules or where there have never been such rules. The Secretary of State will only consider intervening in such a merger where she believes that it may give rise to serious public interest concerns in relation to any of the three considerations. During Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels would be coming under single control, or if someone were to take over all the music channels. The Secretary of State may consider intervention if a prospective new entrant to local radio ownership has not shown a genuine commitment to broadcasting standards in other media or countries. The Secretary of State is not currently aware of any other types of cases in which exceptional circumstances might arise. She has also taken the view that an adverse public interest finding by a previous regulatory authority into a proposed merger is not necessarily in itself an exceptional circumstance meriting intervention; such cases should be considered in light of the reasons for the adverse finding and if the law has been changed to allow the sort of concentration resulting from the merger." (emphasis added)

2.11 The proposed acquisition by News Corp, a company connected with a newspaper proprietor, NI, of a satellite television company, BSkyB, was not a case where media ownership restrictions either existed or had been removed by the 2003 Act. Under the policy, intervention was therefore only appropriate in exceptional circumstances and if the Secretary of State believed that the proposed transaction may give rise to serious public interest concerns in relation to any of the three public interest considerations. It was not one of the transactions expressly envisaged as exceptional at the time when the Guidance was drafted.

2.12 News Corp was not alone at the outset of the bid in thinking that there was a strong case for not referring the bid when regard was had to this test. They did not see as exceptional a merger which involved the acquisition by it of the remaining shares in a company in which it already had a significant stake and exercised considerable control. Opponents of the bid differed and argued (insofar as is relevant) that there would in fact be a significant increase in control with real consequences for plurality.

I

Quasi-judicial procedure

2.13 Both Dr Cable and later Mr Hunt recognised that they were exercising a statutory power in a quasi-judicial capacity. What then are the requirements of a quasi-judicial procedure? Counsel for News Corp rightly referred in their helpful closing submissions both to the seminal case of *Council of Civil Service Unions v Minister for the Civil Service,*[27] which is authority for the proposition that the requirement is to act with "procedural propriety", the precise requirements of which may depend upon the specific legislative context in which the decision is taken; and then *R v Home Secretary ex p Doody*[28] in which Lord Mustill (with whom the

[27] 1983 UKHL 6; 1985 1 AC 374
[28] 1993 UKHL 8; 1994 AC 531

rest of their Lordships agreed) distilled six broad principles of fairness from the authorities at p560:

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that*
>
> *(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
>
> *(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*
>
> *(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
>
> *(4) An essential feature of the context is the statute which creates the discretion, as regard both its language and the shape of the legal and administrative system within which the decision is taken.*
>
> *(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*
>
> *(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

2.14 From these broad principles it follows that there is a degree of flexibility as to the precise approach adopted by a quasi-judicial decision maker, so long as in the particular circumstances of the decision the procedure adopted conforms to the broad principles and the decision is free from either actual or apparent bias. Bias, whether actual or apparent, will taint and usually vitiate a decision. The test for apparent bias is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased: *Porter v Magill.*[29] It is important to recognise the significance of the words "a real possibility of bias" because they set the threshold for a finding of apparent bias well below a finding that there is, or has been, actual bias.

2.15 The requirement for an independent and impartial tribunal does not mean that a person cannot have a prior opinion on the matter in question, so long as that opinion can be and is put aside and is not such as to gives rise the appearance of bias. As Dr Cable put it:[30]

> *"Yes. I think the key phrase is that an intervention decision must be taken with an independent mind, and I have given illustrations earlier in my political career of having encountered quasi-judicial decision-making before. I think with an independent mind doesn't mean with a blank mind. Most people in public life have views, opinions. Probably, if they're politicians, those opinions and views have been on the record, and the requirement on me and people in this position is to set those on one side for the*

[29] 2001 UKHL 67; 2002 2 AC 357, para 103

[30] pp7-8, lines 22-9, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

sake of making this decision, to consider representations, the evidence, the facts, and decide on that and only on that."

2.16 An obvious but important feature of the quasi-judicial function which the Secretary of State exercises in relation to the regulation of media mergers is that the decision is his alone and is not a matter for collective cabinet decision. It is not a political decision.

2.17 Crucially, the decision maker must address the appropriate test, taking into account all relevant evidence and, equally as important, ignoring all irrelevant evidence. Thus, when applying the media plurality test, wider political and economic considerations are irrelevant and must be ignored.

2.18 It is against these requirements that the conduct and consideration of the bid first by Dr Cable and then by Mr Hunt, their advisers and officials, fall to be measured.

Precedent and experience

2.19 The media plurality test had been applied only once previously, in 2006, when BSkyB had acquired shares in ITV plc.[31] There was therefore limited practical experience of its application, no firmly established practice for conducting the test, and the guidance had barely been tested. There was, though, in the Department of Business, Innovation and Skills (BIS), significant experience in quasi-judicial decision making in other contexts and Dr Cable himself had had some experience of quasi-judicial decision making, albeit many years before when he was a Glasgow city councillor.[32]

2.20 Another case, the acquisition of Channel 5 by Northern & Shell, was being considered at around the same time as the BSkyB bid. Dr Cable decided not to intervene in that case, distinguishing it from the bid for BSkyB:[33]

"In my view, a less robust case for intervention existed in relation to Channel 5 and Northern & Shell. Channel 5 is substantively different to BSkyB in that it is not a source of news – the news programmes that are broadcast on Channel 5 are provided by Sky News. Channel 5 is not central to news provision in the UK. In addition, Northern & Shell newspaper titles (the Daily Star, Daily Express and the Sunday Express) have a significantly lower market share – in the region of 10 to 14%, compared to 37% for News International titles. On an assumption that there was only a limited prospect that Channel 5 would develop the capability to provide news to other broadcasters in a similar way to ITN and Sky News, the prospect of a negative impact on plurality turned on the extent to which plurality might be damaged by a possible closer alignment between news broadcast by Channel 5 and news as covered by the Northern & Shell titles.

I considered advice in this matter and decided that, while it was open to me to intervene in this case, I should not do so. Bearing in mind the nature of the enterprises involved, and taking into account the Guidance, I did not consider this was an exceptional case in respect of which intervention on public interest grounds was appropriate. There

[31] p5, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf. This transaction was the subject of a Competition Commission report, appeals to the Competition Appeal Tribunal and thereafter to the Court of Appeal

[32] pp2-3, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

[33] p13, paras 51-52, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf

were insufficiently strong grounds for believing the merger would actually reduce the number of sources of news available to people in a way that was detrimental to the public interest."

2.21 DCMS had no experience of applying the media plurality test but it did have some experience of conducting quasi-judicial decisions in relation to the National Lottery and gambling.[34]

3. June 2010 – December 2010: The Rt Hon Dr Vince Cable MP and the Department for Business, Innovation and Skills

Initial reaction

3.1 News of the bid broke early on 15 June 2010. The Press Association reported it in terms which make clear the commercial sensitivity of the regulatory process and which are a reminder that this is an area in which a balance has to be struck between regulation and free operation of the market:[35]

> *"BSkyB said today that it had rebuffed an initial attempt by Rupert Murdoch's News Corp to take full control of the UK satellite broadcaster.*
>
> *The 700p-a-share approach for the 61% of BSkyB that NewCorp does not currently own values the FTSE 100 Index company at around £12 billion.*
>
> *BSkyB said the proposal significantly undervalued the business and called for an offer in excess of 800p a share, in part to compensate shareholders for the wait they would face while regulatory clearance was sought..."* (emphasis added)

3.2 James Murdoch immediately requested and was granted a telephone call with Dr Cable. In his evidence Dr Cable described himself as having been in listening mode during this conversation.[36] He denied giving any indication of his views: *"I gave no indication of my views on the bid one way or another"*.[37] The short formal minute of the conversation made by his officials is consistent with this.[38]

3.3 Dr Cable's account was disputed by both James Murdoch and Mr Michel. In an internal email, Mr Michel quoted Dr Cable as having said that: "*there would not be policy issue in this case*" and opined: *"We should have recorded him!"*[39] James Murdoch addressed the issue in the course of answering a broader question about a supportive statement about the bid made by Mr Hunt: "*...this is one part of the government, saying: "Look, we don't see any issues here, we'll probably be – it's going to be fine", which is consistent with what Mr [sic] Cable had told me on the telephone*".[40]

[34] pp11-12, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf
[35] p2, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[36] p27, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[37] p14,para 54, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[38] p3, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[39] p3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[40] p107, lines 7-10, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf

3.4 It is not necessary to resolve this conflict in the evidence for two reasons. First, whether or not Dr Cable expressed a provisional view, he later came to a very different conclusion and he did so on the basis of reasons which were both proper and well supported. Second, whatever else the remaining evidence about the bid shows, it certainly does not reveal any appearance of bias on the part of Dr Cable in favour of News Corp.

3.5 An internal BIS email suggests that in the conversation on 15 June 2010 Dr Cable had not ruled out meeting James Murdoch. His subsequent decisions not to do so were to become a source of frustration to News Corp:[41]

> *"At the end of the call this week James suggested he and the SoS meet up at some point, SoS vaguely agreed. They now want a slot in the diary".*

3.6 Initially, Dr Cable's officials considered that it would be unreasonable to refuse a meeting although they contemplated that the Secretary of State would once more be in listening mode:[42]

> *"It seems reasonable to assume that since the phone call earlier this week, the two companies are closer to reaching a deal and that James Murdoch wants to update the SofS and, in the light of their experience in the ITV share acquisition case, would want an indication from the SofS as to whether he would use his powers of intervention.*
>
> *It therefore would perhaps seem unreasonable to refuse their request. The SofS should however, be in listening mode and I would suggest that he should follow the lines to take (background would remain the same) as provided in my e mail of late Tuesday evening. It might help if a CCP official could sit in."* (emphasis added)

3.7 Dr Cable decided not to, and the efforts of Mr Michel to secure a meeting for his principal were rebuffed:[43]

> *"...Also I understand that Frederic Michel's office called my private secretary on a number of occasions to try to arrange a meeting but after considering advice I decided to decline any meeting".*

3.8 Dr Cable explained why:[44]

> *"Well, the name Frederic Michel didn't register on my radar, but I was aware that there was a request to have a meeting, and I didn't wish to be disrespectful to Mr Murdoch. I do meet major investors. But in this case I thought there were compelling reasons not to meet him. First of all, there was a legal risk because the subject which he clearly wished to talk about was something couldn't talk about, that if I did meet him this might be perceived by other parties to be partial in his direction, and I would therefore have to see them, and there were lots of them, so potentially very large numbers of meetings which, by definition, couldn't have any substance, and – but I think the key reason was I didn't actually think it was necessary, because they had an opportunity to, through Hogan Lovells, to put their opinions in writing, their submissions. They did so on several occasions."*

[41] p8, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[42] p7, *ibid*
[43] p14, para 54, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[44] pp28-29, lines 16-8, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

3.9 Dr Cable had been invited to News Corp's summer party, due to be held the next day on 16 June 2010, and had been intending to attend that function. Mr Michel's email reporting the telephone conversation between James Murdoch and Dr Cable appears to record that at that stage Dr Cable was still intending to go to the function: *"Cable said he was coming as planned tomorrow".*[45] In the result, because of the bid, Dr Cable decided that it would not be appropriate to attend and did not do so.[46] Thus, from an early stage Dr Cable decided to avoid personal contact with News Corp either directly in connection with the bid or at all. It was open to him to decide whether to intervene on the basis of written submissions. He was not obliged to give Mr Murdoch an oral hearing. It was also prudent for the decision maker not to be seen to be socialising with one party to the bid whilst the decision was pending.

3.10 The first lines to take, worked up by officials for Dr Cable, wisely advised him not to rush to a decision: "*...recommendation is not to intervene at this stage, or at least until more is known and until the merger has been notified to the EC"*.[47]

3.11 Preliminary advice on the substantive decision followed shortly thereafter. Subject to consideration of any arguments put forward to the contrary by interested parties, it recommended against intervention:[48]

> *"Our initial view is that there is no reason to make a public interest intervention in this proposed transaction since it appears to involve no change in practice to the extent to which people have access to a wide range of views and opinions. Nevertheless, interested parties may put forward a case for intervention and will need to consider carefully any arguments that may be put forward on the matter. Accordingly, in any public statements BIS makes on the matter, it is important to reserve the Secretary of State's position and not appear to have already reached a conclusive decision".*

3.12 In coming to this view, officials had spoken about the proposed transaction with colleagues at Ofcom, DCMS and the OFT. Both Ofcom and the OFT are recorded initially to have been unconcerned by the bid, contrary to their eventual positions. The officials at DCMS had properly identified that the intervention decision was not a matter for them:[49]

> *"We have spoken about the transaction with colleagues at Ofcom, DCMS and the OFT. Ofcom indicate that while the transaction may give Newscorp increased influence over BSkyB's output , they already treat Newscorp and BSkyB as one entity for the purposes of the media ownership rules provided under the Communications Act 2003. DCMS officials had no points to make relevant to the decision on whether or not an intervention might be appropriate – a decision that falls to be taken solely by the BIS Secretary of State. The OFT indicated they did not consider the transaction likely to raise substantive competition concerns."*

Submissions to Dr Cable

3.13 There is no statutory duty to consult in relation to a decision on whether to intervene on public interest grounds and Dr Cable chose not formally to invite submissions or to meet

[45] p3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[46] p28, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf ; p14, para 54 http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[47] p6, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[48] p14, para 9, *ibid*
[49] p14, para 10, *ibid*

interested parties (including News Corp as mentioned above). Nevertheless, he did inform people that it was in order to send him substantive submissions.[50] Whether as a result of this or entirely of their own volition, many people and organisations sought to make their views on the question known to the Secretary of State. He did not initiate any exchange of those submissions which he did receive.[51]

3.14 The first such approach came on 23 June 2010 when Brendan Barber, General Secretary of the TUC wrote to express *"grave concerns"* about the bid and sought a meeting to discuss the issue: *"...I would welcome the opportunity for myself and colleagues representing workers in the media industry to meet with you to discuss this urgent matter further..."*.[52]

3.15 A response, which took some time to prepare and went through a number of drafts, was sent on 2 August 2010. It explained the decision which the Secretary of State had to make, referred to the Guidance, and invited the TUC to submit written arguments on the matter.[53] That approach was subsequently followed when responding to numerous others who intimated their opposition to the transaction but did not address the specific question which Dr Cable had to decide.

3.16 On 20 July 2010 Hogan Lovells, solicitors acting for News Corp, submitted an 8-page document which it described as a preliminary briefing and which methodically argued against intervention.[54] Their thinking chimed with that of BIS officials whose reaction is recorded in an internal email:[55]

> *"The Hogan Lovells analysis accords with our own assessment of the position – which is:*
>
> *(i) that the transaction appears to make no substantive difference to the state of plurality of persons with control of media enterprises since News Corp is already deemed to have the power to influence the output of BSkyB and*
>
> *(ii) that our published guidance on use of the power to intervene suggests this is not a case in which we would expect to use the power to intervene save in exceptional circumstances. We remain open to argument on the matter but there would need to be substantive information on which to base different conclusions about the case for a public interest intervention".*

3.17 There followed a growing number of submissions against the bid, urging Dr Cable to intervene, from media companies and others. On 30 July 2010, Enders Analysis (Enders) produced a 20-page submission, packed with statistics, which considered the UK TV and newspaper markets, and News Corp's strategy for growth (as seen by Enders), before identifying three specific plurality concerns which are set out in full below because the same or very similar points were made in many of the other submissions objecting to the bid:[56]

> *"First, products currently separately offered by BSkyB and News Corp titles may be combined in bundles, discounted or provided without charge. For instance, BSkyB*

[50] p8, para 30, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[51] p31, lines 22-23, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[52] p9, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[53] pp71-72, *ibid*
[54] pp64-82, *ibid*
[55] p37, *ibid*
[56] pp47-67, 85, *ibid*

could bundle News International titles with monthly entertainment to its millions of customers in the UK. If this happens, long-held reader loyalty to titles such as The Mirror, The Daily Telegraph and even The Daily Mail could be severely tested. In other words, reader loyalty would be measured by a new and entirely different yardstick than previous competitor options, such as temporary price discounts or a new supplement. Strategic initiatives of this nature could lead to a much more rapid decline in competitor newspaper circulations than we have assumed, boosting News Corp's newspaper market share above 40% by 2014. Magazine publishers already know something about this: Sky distributes 7.4 million copies every month of its magazine to subscribers of its TV services, making Sky the largest circulation magazine in the UK based on ABC data.

Second, the widespread availability of fast broadband is encouraging the rapid convergence of press and television. Today's newspaper websites contain increasing numbers of video clips and extended interviews. Once the News Corp purchase has been completed, stories from Sky News (especially video) will presumably be carried more and more frequently on News Corp websites. Links to newspaper stories could appear at the bottom of the Sky News screen. Progressively, News International papers and BSkyB channels, particularly Sky News, may merge into one stream of fact and opinion. If this occurred, plurality would decline, even if the combined organisation continued to maintain newsrooms that are nominally separate.

Third, the loss of independent BSkyB shareholders will allow News Corp greater opportunity to influence tacitly or otherwise, the editorial coverage of Sky News and other BSkyB channels. The 2006 investigation by the regulators of the BSkyB purchase of ITV shares found no evidence of proprietor intervention in Sky News under its current shareholding structure, but this could change under full ownership. Today, the presence of strong independent directors of the company, many of whom have substantial external reputations, helps protect independence and diversity of what appears on screen, particularly on news programmes."

3.18 The Enders submissions arrived on 2 August 2010,[57] on the same day as an internal email records that Dr Cable was questioning News Corp's submissions (and by implication the views of his own officials) as well as expressing an interest in what others thought about the proposed transaction. The document marks the start of a gradual turning of the tide against News Corp on the question of intervention:[58]

"The SoS is of the view that News Corporation's lawyers can hardly be considered an independent source of advice. The SoS has read strongly argued views to the contrary. He is somewhat concerned to read that "OFT does not expect the merger to give rise to competition concerns". Does this not suggest that they have prejudged the issue? Or have they already carried out an evaluation?"

The SoS has also queried what other representations have been received, Have [sic] other media groups written letters? The BBC? Are we expecting representations from these and others?"

3.19 In his evidence to the Inquiry, Dr Cable stated:[59]

[57] p74, para 5, *ibid*

[58] p68, *ibid,* it is not clear whether the "strongly argued views to the contrary" is a reference to the Enders report which had arrived that day or to the numerous letters from MPs (on behalf of constituents) and members of the public which had by then been received: p73, paras 2-3, *ibid*

[59] p10, para 38, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf

> *"...In the light of the more substantive representations which began to come in, I began to believe that there were genuine substantive concerns about the merger and that the case for intervention should be explored very thoroughly before reaching conclusions on the matter."*

3.20 The internal response of Dr Cable's officials was to stick to their original view, and point to their experience of the plurality test in the only previous case in which the test had been applied:[60]

> *"...Our own analysis of these questions leads to the conclusion that intervention appears unlikely to be appropriate in this case – as briefly set out in my original briefing note submitted on 25 June. The Hogan Lovells submission on behalf of Newscorp draws much the same conclusions for the same reasons. This is not surprising. We all have direct experience of using the powers to intervene in media mergers having done so in respect of BSkyB's acquisition of a 17.9% stake in ITV plc and this heavily contested case examined very thoroughly before the courts the limits of the Secretary of State's powers.*
>
> *...*
>
> *...On an initial reading, however [the Enders submission] appears unlikely to raise points that could lead us to reach different conclusions about the merits of an intervention by the SofS in either of these cases."*

3.21 Guardian Media Group (GMG) also wrote in opposition to the bid on 30 July 2010.[61] British Telecom (BT) followed on 13 August 2010 with a nine page submission[62] and Trinity Mirror on 16 August 2010.[63] Replies were sent to each of these organisations and to Enders. GMG, which had written only a short letter, was referred to the Guidance and invited to submit arguments which took the Guidance into account. The other parties' submissions were acknowledged and they were advised also to make submissions to the EU Commission's DG Competition because many of the points which they had raised appeared to BIS to relate to potential competition impacts.[64]

3.22 On 25 August 2010 Dr Cable met Brendan Barber of the TUC at a regular quarterly meeting. The minutes record that Mr Barber raised the question of the bid but Dr Cable's evidence, which is consistent with the minutes, confirms that the Secretary of State was careful not to give Mr Barber an oral hearing (which would have been inconsistent with his approach towards other interested parties) and simply responded by reiterating the request for written submissions. The minutes state:[65]

> *"BB said that the reported Newscorp acquisition of BSkyB was a serious issue for media unions. BB said that there were practical, industrial issues on the media plurality issue which the unions were concerned about. SoS said that there was a careful process to be followed, and that he had no pre-conceived judgments, but he said he would be willing to hear any genuine representation and consider the evidence."*

[60] p73-74, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf See also the background note: p91, *ibid*
[61] p45, *ibid*
[62] pp79-87, *ibid*
[63] pp92-94, *ibid*
[64] pp107-114, *ibid*
[65] p97, *ibid*

and Mr Cable's evidence was:[66]

> *"...I have regular quarterly meetings with the TUC and the matter was raised at my meeting with them on 25 August 2010 but I declined to discuss the matter further..."*

3.23 Officials next worked up a submission dated 3 September 2010 with advice for Dr Cable who, officials believed, was keen both fully to understand the situation and to know: *"What would a representation which does provide valid grounds for him to intervene look like?".*[67] They did not find the arguments straightforward: *"The arguments are complex and we recommend a further discussion before you make a decision"*.[68] It was at this point that the low statutory threshold for intervention was expressly drawn to Dr Cable's attention:[69]

> *"In summary, we believe that the substantive arguments as to why this merger might be deemed to result in insufficient plurality of persons with control of media enterprises are not strong. Nevertheless, the legislation provides a deliberately low legal threshold for taking a decision to issue an intervention notice. You need only believe it is or may be the case that the specified public interest consideration is relevant to a consideration of the merger. The prospect of legal challenge arising at this initial intervention stage appears low since the process involved is relatively short and would not involve significant burdens on the parties to the merger. However, issuing an intervention notice initiates a formal statutory process and places you in the position of taking formal decisions in accordance with the requirements of the Enterprise Act 2002. The nest stage in that process would be for you to decide whether or not to refer the merger on public interest grounds to the Competition Commission. At this second stage, the evidential threshold is higher and the prospects of legal challenge much greater. The evidence you would have on which to base that decision may well be substantively the same as the evidence you have already received in submissions from the parties to the merger and from interested third parties."*

Counsel's advice

3.24 Counsel with relevant expertise was instructed on 9 September 2010 and she advised in conference on 16 September 2010. Legal privilege in that advice was very helpfully waived and the Inquiry has had the benefit of sight of the instructions to counsel, notes of the conference and subsequent emails recording further advice given subsequently as events unfolded.[70] Counsel took a very different view to that initially taken by officials within BIS. Her advice marked a turning point insofar as advice given to Dr Cable is concerned, pointing very clearly in favour of intervention.

3.25 Counsel advised that it was entirely open to the Secretary of State to conclude that it is, or may be the case that media plurality is, or may be, relevant to the proposed acquisition. It would be difficult to argue, in the face of submissions from Enders and others, that media plurality could not be a consideration. The fact that the European Commission would investigate any potential market distortion would not be a good enough reason for not intervening, if it appeared there may be concerns about media plurality. Deciding not to intervene would be a conclusive determination of the question of media plurality and would carry a greater risk

[66] p15, para 57, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[67] pp101-102, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[68] p116, *ibid*
[69] p116, *ibid*
[70] pp129-138; 142-143; 151-155; 178-179; 238, *ibid*

of successful challenge than a decision to intervene. So far as the Guidance was concerned, this merger may be regarded as exceptional since it involved a large number of news outlets coming under complete common control (because Sky News provided news to Channel 5 and local radio) and was analogous to the example given in paragraph 8.8 of the Guidance. As for the prospects of challenge, News Corp would be unlikely to challenge a decision to intervene and, if it did, then it would be more likely than not to be unsuccessful. On the other hand, the chances of a decision not to intervene being successfully challenged were higher than the chances of the opposite decision being successfully challenged.[71]

Further submissions to Dr Cable

3.26 Meanwhile, submissions advocating intervention continued to arrive. BT wrote again on 16 September 2010. The author of that letter, Ian Livingstone, CEO of BT Group, referred to having spoken briefly to Dr Cable about the bid: *"We spoke briefly about this when we met recently and I thought it would be helpful if we clarified a few points again as you still be considering the matter"*[72] before summarising and augmenting BT's previous submissions. The BBC expressed its concerns by letter on 20 September 2010.[73] It is clear that it was not possible for Dr Cable entirely to insulate himself from contact with interested parties as this reference to meeting Mr Livingstone and the meeting with the TUC referred to above demonstrate. However, it is hard to see how such encounters could have been avoided. It is all but inevitable that a person in Dr Cable's position (and later Mr Hunt's) would come across interested parties during the course of their other duties. That is the nature of the environment in which this quasi-judicial decision making was being conducted.

3.27 The submissions received by BIS, arguing in favour of intervention, were not copied to News Corp by BIS. Nor was News Corp given any formal written indication by BIS as to the gist of the case against it. News Corp did obtain a copy of the Enders submission because it had been posted on the internet. On 20 September 2010, as is evidenced by an email of that date, Hogan Lovells, on News Corp's behalf, intimated to BIS that it wished to respond to the Enders submission. They did so in writing in a very detailed letter dated 29 September 2010,[74] arguing that Enders' submission misunderstood and presented a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations; relied on unsupported and speculative assertions concerning the effects of the proposed transaction; and was founded on selective and in certain instances, misleading public interest considerations in relation to the proposed transaction.

3.28 On the day on which these further submissions arrived Dr Cable, with the assistance of his officials, was in fact preparing lines to take on News Corp predicated on a decision to intervene:[75]

> *"As discussed, the SoS has amended the lines to take on Newscorp. It now reads:*
>
> *I have received various representations on this issue from a variety of [media] groups. It is my statutory responsibility to ensure that issues of media plurality are carefully considered in takeovers. Given the [serious] concerns [about plurality] raised with me in this case, I have asked the independent experts at Ofcom to investigate the matter*

[71] pp151-155 *ibid*
[72] pp144-145, *ibid*
[73] pp146-147, *ibid*
[74] pp166-176, *ibid*
[75] p163, *ibid*

and report back to me. [I will not comment any further on this case until I hear back from Ofcom]..."

3.29 The arrival of News Corp's further submissions prompted BIS to take further advice from counsel and to prepare a submission for the Secretary of State to consider with the further submissions. Counsel remained of the view that the grounds to challenge an intervention were not particularly strong given the significant discretion available to the Secretary of State in deciding whether to intervene, and the non-determinative nature of that decision.[76]

3.30 Officials continued to make ready for a decision to intervene: a draft statement to Parliament was prepared on 8 October 2010.[77] On the same day, an opinion from solicitors Slaughter & May, supporting intervention, was submitted by an alliance of communications and media companies ("the Alliance") comprising: the BBC, BT, GMG, ANL, Trinity Mirror and Northcliffe Media.[78] Four of these companies had previously made individual submissions in opposition to the bid.

3.31 A draft copy of the same advice was later submitted by the Financial Times (FT) on 14 October 2010 together with a letter supporting intervention.[79]

3.32 As with the Enders submission, News Corp was not provided with a copy of, or informed of the gist of the Slaughter & May advice by BIS. However, it obtained a copy of the draft advice and sent detailed written submissions in rebuttal to BIS on 27 October 2010.[80] They were put to counsel but they did not cause her to change her advice:[81]

"Counsel confirmed on Friday that nothing in the latest submission from Hogan Lovells caused her to change her previous assessment of the legal case for intervention and risk of challenge – the existence of uncertainty about the impact on the public interest does not preclude intervention to require a more substantive initial assessment of such impacts".

3.33 The campaigning group 38 Degrees delivered a petition with 18,956 signatories on 14 October 2010.[82] Officials considered that Dr Cable ought not to meet the group so as to "*preserve his impartiality in considering the merits of the case*"[83] and Dr Cable did not do so.

3.34 Support for News Corp's position was expressed by Capital Research and Management, an American based investment management organisation which had client mutual funds holding an approximately 5% stake in BSkyB.[84] Further support, in the form of a report by Berenberg Bank, appears to have arrived after the decision had been taken but before it was announced and was forwarded to Ofcom.[85]

[76] pp178-183, *ibid*
[77] pp184-186, *ibid*
[78] pp187-200, *ibid*
[79] pp189-200, *ibid*
[80] pp218-231, *ibid*
[81] p238, para 1, *ibid*
[82] pp161 & 201, *ibid,* p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC2-1-to-Witness-Statement-of-Vince-Cable-MP.pdf
[83] p160, *ibid*
[84] p216, *ibid*
[85] pp253, 256-274, *ibid*

The decision to intervene

3.35 Dr Cable decided to intervene. His decision was made public on the morning of 4 November 2010. News Corp was informed the evening before the announcement of the timing but not the substance of the decision.[86] The timing of the decision followed formal notification of the proposed transaction to the European competition authorities by the parties to the deal. The Secretary of State explained his decision in these terms:[87]

> *"Having regard to the Guidance, my view was that as the merger involved a situation where several significant sources of news would be coming under common control the situation was at least akin to examples given in the Guidance as to when such exceptional circumstances might arise. As such my intervention in this case represented a reasonable and appropriate use of my power to intervene.*
>
> *I took a decision to intervene which was on the basis of my belief that there was or may have been a public interest consideration specified in Section 58(2C)(a) of the Enterprise Act relevant to the consideration of the merger, namely to ensure that there is sufficient plurality of persons with control of media enterprises in the UK. This decision was one for me, and me alone, to take on the information before me. The decision I took was that it was appropriate to require Ofcom to undertake an initial investigation to enable the substantive arguments to be explored more fully."*

3.36 Dr Cable did not seek to hide his concern about the political influence of the Murdochs, although he maintained that he recognised at all times the legal parameters of the decision he was taking. He continued:

> *"Having considered all the evidence and submissions, it seemed clear to me that the proposed merger did raise genuine concerns affecting the public interest and that these should be properly considered. In my opinion as a politician, I also believed that the Murdochs' political influence exercised through their newspapers had become disproportionate. The accusation that leading political figures in the Conservative Party and the Labour Party had offered disproportionate access to the Murdoch's [sic] was widely made, as was the perception that both parties had shown excessive deference to their views (as expressed through News International newspapers). But in both respects I recognised that I could only act within the constraints of the legislation as described above."*

3.37 The effect of the EIN which Dr Cable issued on 4 November 2010 was to require both the OFT and OFCOM separately to investigate the proposed transaction and report to him by 31 December 2010.[88] The OFT's remit was to advise on considerations relevant to making a reference to the Competition Commission on competition grounds and to decide whether it believed that a European relevant merger situation would be created if the transaction was executed. It also had a discretion to advise and make recommendations on the sufficiency of plurality of persons with control of media enterprises (because that public interest consideration was identified as relevant in the EIN) and to summarise any representations about the case which it received and which related to that issue.[89] Ofcom had no discretion and was required to report with advice and recommendations on the effect of the media plurality consideration identified in the EIN on the case, as well as to summarise any representations

[86] p249, *ibid*
[87] p12, para 47, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[88] p245, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[89] Article 4, Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003

about the case which it received relating to that media plurality issue.[90] In the result OFT and Ofcom reported to Mr Hunt and not to Dr Cable because responsibility for the bid was transferred whilst they were both investigating.

3.38 Hogan Lovells engaged BIS in correspondence about the reasoning for the decision but, in line with counsel's earlier prediction, News Corp did not go so far as to seek judicial review of the decision to intervene.[91]

3.39 This process, whilst entirely proper, was confused by the fact that people made submissions at different times, and there was a lack of transparency arising from the fact that the representations made were not published by BIS (although in some cases they were published by those making them). Neither was it necessary for Mr Cable to explain the reason for his decision once he had reached one. A more formal, streamlined process in the future with more transparency both about the arguments being made and the reasons for the decision, might help to avoid any potential concerns about bias or appearance of bias.

Media lobbying behind the scenes

3.40 Of particular interest to the Inquiry was the behind the scenes lobbying activity related to the bid. The interactions between those acting on behalf of media companies and politicians concerning this multi billion pound proposed media transaction provide a good example of how easily the relationship can become unhealthy. Under this subheading, the Report seeks, in relation to the bid whilst it was Dr Cable's responsibility, to examine who was lobbying behind the scenes, why they were doing it behind the scenes, whom they were targeting, what were they seeking, how were they going about achieving their aims, and with what results.

3.41 The evidence makes abundantly clear that News Corp mounted a determined lobbying campaign in support of its bid from the outset which went well beyond the written submissions which it made to Dr Cable. As a matter of generality, James Murdoch explained:[92]

> *"I think in any situation, any business is going to – yes, is going to try to advocate the merits of its case, be it an investment case or a regulatory case, to a wide audience of policy-makers who may or may not be in a position to have some input into it".*

3.42 The day to day lobbying effort was led by Mr Michel. In relation to the duties of public affairs executives James Murdoch was clear that:[93]

> *"...Mr Michel's job was to engage with special advisers and at a political level with Westminster, to put it broadly. That is what a public affairs executive does...."*

3.43 Mr Michel did not act alone. James Murdoch was also speaking to politicians about the bid, when the opportunity presented itself, and the evidence showed the interaction of others from time to time. Internally, a number of senior people are seen copied into Mr Michel's emails reporting back his contacts with politicians, SpAds and officials.

[90] Article 4A, *ibid;* p277, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[91] pp286-287, 298-300, 303-305, 307-309, *ibid*
[92] p98, lines 16-20, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[93] p6, lines 11-14, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf

3.44 In addition to his single conversation with Dr Cable, James Murdoch spoke to a number of senior politicians about the bid. The first of these was Mr Hunt to whom he spoke on 15 June 2010 (the day on which the bid was launched and James Murdoch also spoke to Dr Cable). When asked whether the bid was discussed, James Murdoch could not remember but he realistically thought that it would have been:[94]

> *"I don't. I don't remember. I think – but I mean, it was in those days around the announcement of the bid, so I'd be surprised if it weren't [discussed], and I would have taken the same position that I took publicly and that we took with anyone who would listen."*

3.45 Mr Hunt confirmed that the bid had been discussed. Both at that time and in his evidence he did not hide his opinions which were broadly sympathetic to the bid. He was, of course, entitled to hold an opinion about the bid and it was entirely unsurprising that the Secretary of State for Culture, Media and Sport should have a view about a proposed transaction of this scale in the media sector:[95]

> *"I have always been open about the fact that I was broadly sympathetic to the proposed acquisition prior to taking responsibility for it.*
>
> *I expressed those views when James Murdoch called me to tell me about the planned acquisition in June 2010."*

3.46 Throughout the bid, Mr Michel maintained a dialogue with DCMS about the proposed transaction. This communication was conducted principally, but not exclusively, through one of Mr Hunt's special advisers, Adam Smith. That contact (and contact with BIS and others) is primarily recorded in Mr Michel's emails, but also in text messages; and it is further evidenced by telephone records provided to the Inquiry. At the outset of a consideration of his evidence, it is necessary to make two important observations about Mr Michel's emails.

3.47 First, Mr Michel's emails reporting this contact to his colleagues are very often worded as if he has had direct conversations with Mr Hunt. As was made clear when the emails were disclosed to the Inquiry, and as was confirmed by Mr Michel in a statement exhibiting a detailed supporting analysis, that was generally not the case. In particular, he maintains that he had no conversation with Mr Hunt between 24 December 2010 and the end of July 2011 relating to the BSkyB bid, beyond two formal meetings which he attended as part of the News Corp team (and which are considered later in this section of the Report). Other contact during this period was limited to seeing him very briefly before a dinner and to some personal text messages (which are also considered later in this section of the Report). Mr Michel wrote as he did as a form of shorthand:[96]

> *"At no point between 24 December 2010 and the end of July 2011 did I have any direct conversation with Jeremy Hunt relating to the BSkyB proposal beyond the two formal meetings I attended with the News Corp team referred to above.*
>
> *Given the absences of direct interaction with Jeremy Hunt which I have just described, it may appear surprising that within the emails in Exhibit KRM18 there are emails after 24 December 2010 the language of which suggests that I had frequent contact*

[94] pp108-109, lines 24-3, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[95] p6, paras 28-29, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf
[96] p3, paras 18-20, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Frederic-Michel1.pdf

with Jeremy Hunt on the BSkyB proposal. In the emails I use language such as "spoke to Hunt", "had a call with JH", "JH said", "Jeremy said" and other variations. I often use the wording "JH confidential" as a heading for emails.

I want to make absolutely clear that such phrases are no more than shorthand for what I was told by someone within Jeremy Hunt's office, almost invariably his special adviser Adam Smith. For the purposes of these emails, I did not distinguish between Jeremy Hunt's advisers and him personally. His advisers were there to assist and advise Jeremy Hunt and it was my understanding that when they told me something, it was always on behalf of the Minister and after having conferred with him. It was on this basis that I relayed the information to my colleagues in the emails, using this form of shorthand." (emphasis added)

3.48 Second, the terms in which Mr Michel relayed information were often not as accurate or precise as they might have been, and he did not always clearly distinguish between what he had been told and his own thoughts. A number of witnesses commented upon this, or took issue with specific examples, particularly Mr Smith: "*...I do not always recognise them to be an accurate reflection of conversations which I had with Mr Michel*".[97] In some instances there was clear exaggeration. Further, Mr Michel is often relating the thoughts of one person about what another is thinking or likely to do, in circumstances where it might either be speculation or simply wrong. For this reason, Mr Michel's emails have been treated with real caution. Even so, they remain of very considerable evidential significance by providing an insight into News Corp's media lobbying effort.

3.49 Mr Michel himself explained: *"...Sometimes I would add some elements that can be helpful for the team*".[98]

3.50 Rupert Murdoch's evidence was:[99]

"Q. Were you not surprised by the degree of apparent closeness between Mr Michel and Mr Hunt's office?

A. No, and I don't want to say anything against Mr Michel, but I think there could have been a little bit of exaggeration there".

3.51 Dr Cable, when dealing with one of Mr Michel's early emails said:[100]

"Would you just allow me to make a general comment on this reference to people close to me, because there are continued references to so-called advisers, people who are close to me. I have no idea who these people are. Nobody was authorised to speak on my behalf, and there are whole sets of comments like this which I don't recognise, so – just so I don't have to repeat that in response to every question".

3.52 On the day that the bid was launched, Mr Michel wrote in an email that he had "*Had a call from Hunt's adviser"* who "*Said there shouldn't be media plurality issue and believed the UK Government would be supportive throughout the process [despite what the Standard for*

[97] p20, para 59, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf; pp20-50, *ibid*

[98] pp42-43, lines 25-1, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf

[99] pp17-18, lines 24-3, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-26-April-2012.pdf

[100] p41, lines 15-22, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

example is suggesting this evening].”[101] Mr Smith did not deny that a conversation took place but he did deny saying that the UK Government would be supportive throughout the process and took issue with other parts of the email.

3.53 A second email stated that *“Jeremy just called”,* and recorded that in an interview for the FT Mr Hunt had said that the bid was: *“matter for competition authorities but he didn’t see any problems”*.[102] Mr Hunt’s actual words were: “*It does seem to me that News Corp do control Sky already. So it isn’t clear to me that in terms of media plurality there is a substantive change, but I don’t want to second guess what regulators might decide”.*[103] The impact of this public comment had later to be taken into account by the Prime Minister before deciding to transfer the decision to Mr Hunt.

3.54 The above contacts were the start of a pattern of behind the scenes lobbying extending far wider than the actual decision maker, or even his department, but also to DCMS, no doubt because of its media portfolio and, in due course, to a number of others across Government and beyond.

3.55 At this early stage of the bid, it is contact with BIS that was the primary objective of Mr Michel’s efforts. By 23 June 2010 Mr Michel was following up James Murdoch’s telephone call of 15 June 2010 to Dr Cable and working on procuring a meeting between the two. As James Murdoch emphasised in his evidence, it was a face-to-face meeting at which to put his case that he really wanted: *“...all we wanted to do was to be able to sit down in a proper way ...Please sit us down and let us make our case*”.[104] This must have been a priority for Mr Michel but he received a disappointing response from BIS, in keeping with Dr Cable’s decision not to meet the parties, which he reported by email to James Murdoch in these terms:[105]

> *“Vince has been advised by his team it would be better to meet with you once things have settled down on the Sky process in order to avoid any media questions on the purpose / content of the meeting.*
>
> *Vince is keen to meet for a catch-up as you both discussed on the phone”.*

3.56 The email is not to be read as meaning that Mr Michel had direct contact with Dr Cable, in view of the shorthand that the former was prone to use. It may be that the reference to meeting for a catch-up as discussed on the phone relates to the conversation between Dr Cable and James Murdoch on 15 June 2010, in which a BIS official had understood Dr Cable to have *“vaguely agreed”* to meet James Murdoch.[106]

3.57 The lobbyist did not have to report to James Murdoch a meeting with Mr Hunt on 28 June 2010 because Mr Michel, James Murdoch, together with Matthew Anderson of News Corp, were all present. For his part, Mr Hunt was not accompanied by officials and the meeting was not minuted, although he thought that the bid would have been discussed. He explained that it was one of a number of such meetings that he held with industry leaders during the early days of his tenure at DCMS:[107]

[101] p4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[102] p5, *ibid*
[103] p6, para 30, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf
[104] p5, lines 7-8, 12-13, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[105] p9, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[106] p8, Dr Vince Cable http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-2.pdf
[107] p10, lines 12-25, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

> *"A. Yes. I was told by my officials that it was entirely proper to have meetings where there were officials present who took minutes, and meetings where there weren't officials present and minutes weren't taken and it was entirely my discretion and I had that meeting with Mr Murdoch. I also had meetings with other officials, with the chairman of the BBC Trust, the head of ITV and a number of other people when I'd just become Secretary of State.*
>
> *Q. Do you believe that the BSkyB bid was discussed on that occasion?*
>
> *A. I would be very surprised if it wasn't discussed, because obviously it would have been top of Mr Murdoch's mind. I don't remember any particular discussions..."*

3.58 By 28 July 2010, Mr Michel was reporting contact with "*people very close to VC*" asserting that:[108]

> *"-he is keen to be seen as the most pro-competition SoS and as we know he is very much anti-regulation*
>
> *-on our particular issue, he strongly believes the deal doesn't change the market situation or would have any impact on media plurality".*

3.59 Whether those views really were the views of Dr Cable about the bid at the time is unlikely, Dr Cable denied that they were.[109] The views recorded are consistent however with the views of at least some of the officials within the Department at that time and with the advice that Dr Cable was receiving.

3.60 When the journalist Robert Peston asserted on 15 September 2010 that Dr Cable was likely to issue an intervention notice, Mr Michel turned to DCMS to try and check the position. He texted Mr Hunt directly, who replied that he did not know anything. Mr Michel then reported that reply to colleagues in his idiosyncratic shorthand and in terms which went beyond those of the text which he had received: "*Jeremy Hunt is not aware and thinks it's not credible at all. He is checking now*".[110] He must have thought that there was a least a chance of obtaining some confidential information about the bid this way, although there is no evidence that he did in fact do so.

3.61 Mr Michel's emails to his News Corp colleagues indicate that he began to try a new tack soon afterwards by engaging key Liberal Democrat politicians. On 20 September 2010 he reported:[111]

> *"Had chat with Don Foster; DCMS spokesman for Libdems this morning. Very relaxed about the bid can't see plurality review taking place".*

3.62 A week later Mr Michel had "*Talked to Vince's main economic adviser, who sits in the Lords, over the week-end. He is leading on this for him.*" The peer had been reassuring (although by that time Dr Cable was in fact well on his way to deciding against NewsCorp): "*I was told there is absolutely no reason to believe he would want a referral*". Mr Michel was planning on keeping lines of communication open and sharing News Corp's arguments.[112] The peer was

[108] p6, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[109] p41, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[110] p25, Frederic Michel http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM81.pdf; and p7, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[111] p8, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[112] p10, *ibid*

probably Lord Oakeshott.[113] Dr Cable was clear in evidence that in fact no one was leading for him. Whatever Lord Oakeshott actually said, it must have been in a personal capacity.

3.63 That is not to say that Dr Cable had had no contact with Lord Oakeshott. He explained how he had spoken to Lord Oakeshott and a number of Liberal Democrats including Don Foster, who also features in Mr Michel's emails. Dr Cable emphasised that he only ever sought background and context from these colleagues and that he did not seek their views on the actual decision that he had to make:[114]

> *"Well, because I just wanted background understanding of the legislation and how it had originated. I had no background in media policy...*
>
> *I wasn't seeking their opinion on whether the merger was good or bad or whether I should intervene, but I did think it was useful to have a background understanding of the kind of questions you have just been asking me."*

3.64 On 8 October 2010 Mr Michel reported seeing *"... an adviser to Cable's team on business issues"* and relayed details in a lengthy email. Whoever this was gave Mr Michel the impression that there was a strong political influence playing on the pending intervention decision:[115]

> *"-at the moment, they are assuming Vince will refer because of the political pressure, the heavy media debate and the need for him to be seen as bringing scrutiny to a Murdoch transaction.*
>
> *-there is real unease in Libdem ranks over Coulson and the relationship to NI. Simon Hughes, deputy leader, is on a mission to make this an NI issue. The more it is linked to NI/NoW, the more it will stay political and toxic..."*

3.65 The assumption quoted above turned out to be correct as to the result but is not as to the reasons for it. Significantly though, it fuelled a growing belief on the part of Mr Michel that the wider political agenda was important and that advantage might be had if News Corp was to assist Dr Cable politically. The conversation also gave rise to renewed tactical thinking as to the best way to refine the lobbying effort. As Mr Michel recorded later in his email report:[116]

> *"-<u>the adviser was very clear that if we try to aggressively push Cable, it will have a negative impact. But changing the narrative in the main media would help him politically a lot and help him inside the Cabinet</u>.*
>
> *-advised to brief all the key lib-dems in coming weeks and go through the impact of the transaction is the key since it was made clear that the media agenda has had a very negative influence on the decision-making process*
>
> *-Many people around Cable are from the left or Labour and are briefing against us. We need to engage with them behind the scenes even more.*
>
> *-Its the right timing as Parliament is back Monday.*

[113] p45, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf; Dr Cable thought that Lord Newby's comment might also have been relayed but p17, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf suggests that Mr Michel did not meet Lord Newby until later

[114] p13, lines 8-10, 17-20, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

[115] p12, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

[116] p12, *ibid*

NB: the Coulson/NI issues are agitating Cable's political base in a major way and there is absolutely no upside in trying to use NI in any lobbying. I am seeing the Chief Exec of the LibDem Tuesday on it.

-regarding items we could help Cable with: we should try to help him make his pro business arguments, for example supporting his campaign to bring flexibility to migration cap and work with his team (I can get the people in the City who are helping him to come see us).

Cable needs help in working with the City and we can have a two-way beneficial conversation with him." (emphasis added)

3.66 Political and media considerations were irrelevant to the decision which fell to be taken by a specific minister in accordance with a test prescribed by statute. But News Corp clearly believed that Dr Cable might have been capable of being influenced by these extraneous factors and Mr Michel was beginning to contemplate how the company's corporate muscle might be deployed in order to try and influence the decision by helping Dr Cable politically. Dr Cable was clear that in fact he maintained his focus on the correct test.[117] Had he been influenced as intended, then the proper exercise of the media plurality test would have been vitiated by irrelevant considerations.

3.67 In the meantime, Mr Michel and Rebekah Brooks had met Mr Hunt and Mr Smith at the Conservative Party Conference on 5 October 2010. Mr Michel reported it to James Murdoch as: "*...a very useful meeting with Jeremy Hunt today on the bid ...".*[118] Mr Hunt recalled how: "*...I think they expressed some concern that they weren't getting a sympathetic hearing from Vince Cable, but not much more than that"* and thought that he: "*...would have said that my own view broadly speaking was that I didn't think there was a plurality issue, so I would have probably expressed some surprise that Vince Cable may have thought there was more of a problem*".[119] The opportunity was plainly used to lobby Mr Hunt in the hope that it might have led somehow to influencing Dr Cable.

3.68 Mr Michel followed up the encounter by sending Mr Smith information about the bid for Mr Hunt.[120] The provision of information which News Corp thought relevant to the bid to Mr Smith, for Mr Hunt, was to become a feature of their relationship. On this occasion the material was passed on to Mr Hunt and his reaction to it communicated back to Mr Michel by email: "*Jeremys [sic] response to this – "persuasive"".*[121] The effect was not a profound change of mind. Mr Hunt was not hostile to the bid. But Mr Michel clearly thought it important to keep Mr Hunt abreast of the issue and on his radar.

3.69 On 12 October 2010, Mr Michel again spoke to "*Vince's main adviser"* and reported the conversation back to colleagues by email. The email set out advice to target Lord Oakeshott and how to go about it. There was fresh mention that the referral decision would be a political one and advice to keep briefing certain politicians:[122]

[117] pp50-60, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf; pp14-15, Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[118] p11, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[119] p11, lines 18-22, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[120] pp13-16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf; pp36-37, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM81.pdf
[121] p17, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[122] p18, *ibid*

"-he had one strong advice (as mentioned previously): the most influential person for Vince now is Lord Oashekott [sic], who is a difficult character and hates lobbying (and doesn't like our empire either ...) and who Vince talks to more than 10 times / day.

It was suggested that we should try a very soft approach with him; get him meet with James Harding to get his views on some of BIS key items, like migration cap, and get me to pop in at some stage to give him an update on the current battle we face and inform his views. It would be a much better setting than a direct lobbying conversation. Do we think it's ok?

-the referral decision will be a political one, especially if tuitions [sic] fees debate gets nasty in Vince's party and he need something to reassure his base ...

-he also recommended to keep briefing senior lib-dems and key Cabinet members as we have started to do, to push things with Vince".

3.70 Dr Cable confirmed that he consulted Lord Oakeshott on other issues but not about the bid: "*...I consulted him on other issues, banking for example, but certainly not on this issue*" as "*... one of several people I rely on for general advice*". He also denied speaking to Lord Oakeshott ten times a day or that wider political considerations were relevant to the intervention decision.[123] But the perception as relayed by Mr Michel continued to portray the decision as political and, consequently, it was regarded therefore as one which might be influenced by wider political considerations.

3.71 Mr Michel took forward the effort to identify key Liberal Democrats when, on 18 October 2010, he reported back on a meeting with Lord Clement-Jones, the Liberal Democrat spokesman in the House of Lords for culture, media and sport, explaining which Liberal Democrats he planned to target next, plainly in the belief that they were people to whom Dr Cable might talk to about the bid:[124]

"...His party is very keen to look at this as a political decision.

...

We had a good chat re-key [sic] influencers around Cable. He has a little set of people around him he will call to ask for opinion and many Lib-Dem, Labour MPs will be writing to him to apply further pressure.

...

It won't do any harm to explain our case to selected individuals who Cable is likely to call:

Lord Newby – I will meet

Lord Oakeshot- said he would be VERY receptive to a message from Patience on this: Matthew can discuss asap?

Lord Razzal – I will meet

Chairman of Business Committee, Adrian Bailey – will meet" (emphasis added).

3.72 Dr Cable did not recall any Liberal Democrat MPs writing to him about the bid and told the Inquiry for the purposes of the intervention the only "*little set of people*" around him were his

[123] pp51-2, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[124] p19, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

officials and lawyers. He did confirm though that the modus operandi revealed in the email was an example of the kind of commercial lobbying which happens a lot:[125]

> *"Yes. I mean lots of this happened, and one just has to learn to recognise it for what it is. But yes, I –and part of my role as being Secretary of State is to be open to people with opinions, and to engage with them.*
>
> *...I suppose Mr Michel was an example of a lobbyist at work. I'm not making judgments about him and how he operated, but that is commercial lobbying indeed".*

3.73 Mr Michel moved next from the strategy of targeting politicians who it was thought might be contacted by Dr Cable to a more direct, proactive and specific approach. Two politicians emerged whom Mr Michel hoped would actively contact Dr Cable to impress upon him the economic benefits of the bid should it succeed. On 1 November 2010 he reported:[126]

> *"Mission accomplished.*
>
> *-Libdem MP, former Sky employee, with major Sky customer centres in his constituency and around, will contact Vince Cable to ask him to bear in mind the economic / investment point of view rather than getting influenced by political games, especially in times of austerity and very difficult economic environment for those areas. He will also emphasise the opportunity for Cable to show the maturity of the Libdems as coalition partners, working for the long-term, and will draw from the Coalition government experience lib-dems have had in Scotland. He agrees with the need for this to be looked at by Brussels rather than scrutinised again on plurality ground in the UK.*
>
> *-Alex Salmond is very keen to also put these issues across to Cable and have a call with you tomorrow or Wednesday. His team will also brief the Scottish press on the economic importance of News Corp for Scotland."* (emphasis added)

3.74 The desire to deploy economic arguments of this sort, based on the economic importance of a business within a community, was wholly inappropriate. Such arguments were irrelevant to the decision which the Secretary of State had to make and could not lawfully be taken into account. Any decision influenced by them would have been impugned if the subject of judicial review. At best Mr Michel and News Corp completely failed to appreciate this. Mr Salmond's role is considered further below.[127]

3.75 In the days leading up to and immediately after the announcement of the decision to intervene, Mr Michel had further exchanges with a person or persons whom he described as an "adviser" or "main adviser" to Dr Cable.[128] Mr Michel seemed optimistic that he might be able to meet with officials but his hopes were dashed on 8 November 2010 when he reported to James Murdoch:[129]

> *"Just had a private call with Vince's main adviser.*
>
> *He said he believed there were huge risks for me to meet with him to talk about anything that has to do with the "OfCom business", which he rules out completely.*

[125] pp54-55, lines 24-11, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[126] p20, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[127] See Subsection 6 below: News Corporation and Alex Salmond
[128] pp21, 23-25, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[129] p25, *ibid*; see also email from Giles Wilkes to the same effect on the same day at p31, *ibid*

Too much scrutiny. They also want to be able to say they took an independent view. Asked me to be in touch regularly in coming weeks, if only to provide him with any evidence / materials we would like Vince / him to read".

3.76 Mr Michel's persistence yielded some useful information when he got an indication (rightly as it turned out) as to the imminence of the decision (but not its substance). On 2 November 2010 he reported that he had been told by Baroness Rawlings, the Government's DCMS spokeswoman in the House of Lords, that: "*she believed Cable was preparing to make a decision within a few days of our filing becoming public."*[130]

3.77 On the morning of the intervention announcement itself, Mr Michel was in contact by text with Dr Cable's adviser whom is reported to have texted that News Corp had: "*put a v strong case which will stand you in good stead on this*".[131] It is possible that the adviser was referring to the coming steps in the process, because the intervention decision had gone against News Corp.

3.78 Mr Michel continued to lobby despite the set back which the intervention was for News Corp, hoping no doubt to increase the chances that the next decision in the process would be more favourable to his employer. On 9 November 2010 he met with Rupert Harrison, a Special Adviser to the Chancellor of the Exchequer, and the terms of his email report to James Murdoch suggests that he had recently also spoken to Vicky Pryce and David Laws. Whatever he was actually told, (as to which I expressly make no finding not least because it has not been the subject of evidence) what Mr Michel reported did not in fact reflect what actually happened:[132]

"Vince made a political decision, probably without even reading the legal advice, as confirmed also to us by Vicky Price and David Laws yesterday

I underlined the impact such regulatory process has for us financially; the signals it sends to major global potential investors. Rupert said the case would be made to BIS".

3.79 A text message from Mr Michel to Mr Harrison on the same day also raises the issue of the Treasury making a case to BIS. It records the former asking the latter if the Rt Hon George Osborne would send a letter to Dr Cable on the merger and its economic importance. Mr Michel went so far as to offer assistance with the content:[133]

"Rupert, just spoke with James. It would be helpful if George were to send a latter to Vince on our Sky merger and its economic importance, separate from the Ofcom process. Do you think it is a possibility? I can of course help with the content. Best, fred [sic]."

3.80 Mr Osborne made clear that the invitation to write to Dr Cable was not acted upon:[134]

"[Rupert Harrison] says –and I believe him – that there was a general discussion that was not focused on the BSkyB bid. There is a reference in the email to making the case to BIS. He's checked and there is no contact that he's been able to see, between the

[130] p22, *ibid*
[131] p24, *ibid*
[132] p26, *ibid*
[133] p13, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM171.pdf
[134] p37, lines 12-24, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

Treasury – between Mr Harrison and the business department. So that certainly was not – if it was raised – was not followed up.

He makes the point to me that he wouldn't have known whether Dr Cable had read the legal advice or not, because he wouldn't have had a conversation with Dr Cable..."

3.81 Mr Michel displayed particular tenacity in trying to secure a meeting. After being rebuffed in relation to a meeting about the bid on 8 November 2010, he entered into a protracted email exchange with Giles Wilkes, one of Dr Cable's SpAds, seeking instead a more general meeting.[135] Mr Wilkes agreed in principle to such a meeting but would not agree to it taking place whilst decisions about the bid were pending. When asked when would be good for him, he replied: *"Let us assume it is when a google of "Vince Cable, "News International" and "Sky" doesn't turn anything up!"* Mr Michel persisted by seeking to elicit whether there had been meetings with any of the other interested parties: "*So that means no other possible interested parties in the transaction have met with you at all since June [Telegraph, FT, Associated, BT, BBC. etc.]?* To which he received this reply:[136]

"As it happened, I don't think I've talked about this issue with any of them. Of course, in briefing at Conference, I had to wander into a room full of media people, and people from the media contacted me on other matters. And I know someone senior at Sky in a personal capacity, but we have studiously avoided discussing this since it became such a hot issue.

I'm sure we're both equally interested in staying within the bounds of proper conduct – forgive my caution".

3.82 Mr Michel concluded the exchange with a mollifying response before reporting to James Murdoch that: "*Vince is "very disciplined" about this*".[137] That was on 15 November 2010. Mr Michel let the matter rest but he did not give up. He resumed the attempt on 14 December 2010 after Ofcom had published an issues letter:[138]

"Just spoke to Vince's main adviser.

Neither date I put forward for a meeting with Vince (7th or 10th Jan) is likely to work. Vince is out of the country at that time, on current plans.

I was told that he has yet to get "his full views on the advisability of a meeting – he is very keen to observe all the correct form and may therefore regard the possibility with an element of concern until extremely thoroughly briefed on all possible consequences.

I think meeting, if it happens, will be in mid-January. Let's see."

3.83 Unlike Dr Cable, at this stage Mr Hunt had no objection to meeting News Corp, although he came to change his mind. When Mr Michel contacted him directly by text on 9 November 2010 seeking a meeting for James Murdoch, Mr Hunt agreed.[139] But before the meeting took place Mr Hunt received advice from his officials. The advice, which had been approved by in-house legal advisers, recommended against the meeting because DCMS had no formal role in the intervention decision:[140]

[135] pp29-32, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[136] p29, *ibid*
[137] p33, *ibid*
[138] p41, *ibid*
[139] pp45-49, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM81.pdf
[140] p4, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JS11.pdf

> *"There is no role in the process for the DCMS so we would recommend that you do not have any external discussions on the BSkyB media merger nor write to SoS BIS about it. If you want to contribute, you could write a letter stating facts backed up with evidence, provided it recognises the final decision is for the Business Secretary of State acting alone. However this carries risks to the robustness of the decision".*

3.84 Mr Hunt cancelled the meeting, explaining to the Inquiry that although he did not think that contact would have been wrong, it risked creating a parallel process:[141]

> *"This was probably the first time that I heard the phrase quasi-judicial or had some kind of exposure to what the implications of quasi-judicial meant, and we had a meeting in the diary initially and I decided to cancel that meeting not because I thought it was wrong to have contact with News Corporation, but because I thought they were probably wanting to have the meeting with me that Vince Cable had refused to have with them, and that therefore to have that meeting would be to create a parallel process where another government department is getting involved in the process in a way that might not be seen to be appropriate."*

3.85 The position was reported to James Murdoch by Mr Michel on 15 November 2010 by email:[142]

> *"Jeremy tried to call you. He has received very strong legal advice not to meet us today as the current process is treated as a judicial one (not a policy one) and any meeting could be referred to and jeopardize the entire process. Jeremy is very frustrated about it but the Permanent Secretary has now also been involved".*

3.86 Use of the phrase "very strong legal advice" is an overstatement of the true position, which was a recommendation by officials which had been cleared by lawyers.

3.87 Mr Hunt was indeed frustrated and for essentially economic reasons. He told the Inquiry:[143]

> *"I may have been frustrated. I was worried about a bid in my sector that could potentially mean that thousands more jobs would be created, and the main protagonist was concerned about the process they were having to go through, so I may well have been worried."*

3.88 Mr Michel continued in his email to propose that his principal should instead telephone Mr Hunt. It is:[144]

> *"My advice would be not to meet him today as it would be counter-productive for everyone, but you could have a chat with him on his mobile which is completely fine, and I will liaise with his team privately as well."*

3.89 It is surprising that Mr Michel, whose own belief appears to have been that Mr Hunt had received very strong legal advice not to meet James Murdoch, thought it appropriate to

[141] pp18-19, lines 19-5, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[142] p28, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[143] p22, lines 20-24, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[144] p23, lines 1-4, *ibid;* p28, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

encourage telephone contact. The displeasure of James Murdoch to this news is apparent in his reply to Mr Michel: "You *must be fucking joking. Fine. I will text him and find a time*".[145]

3.90 The call went ahead. Mr Hunt recalled: "*I just heard Mr Murdoch out, and basically heard what he had to say about what was on his mind at that time.*"[146] He agreed that he had probably been sympathetic but emphasised that he been careful to observe propriety:[147]

> *"Well, I wouldn't have given him any reassurance about the media plurality decision that Vince Cable was taking because that was not my –that was not anything I could get involved with, and I would have made that clear to him, so I probably gave him a sympathetic hearing, but I wouldn't have said that I can get involved in that decision because I had taken and accepted the advice that I couldn't."*

3.91 James Murdoch's evidence was: "*I believe he called me to apologise for cancelling the meeting but – I don't have a specific recollection, but I think that's what's in the records.*"[148]

3.92 Jonathan Stephens, the Permanent Secretary at DCMS, subsequently explored the legal position further, obtaining in house legal advice which fully addressed the relationship between DCMS and BIS in relation to the bid:[149]

> *"Whilst there is nothing legally which formally precludes the Secretary of State CMS from making representations to the Secretary of State BIS to inform the latter's decision as to whether to refer the public interest considerations in this merger to the Competition Commission, it would be unwise to do so. This is because the task of assessing the impact of the merger on media plurality is expressly given to Ofcom, and because the Secretary of State CMS will almost certainly be able to see neither the report itself nor the underlying materials. Furthermore, and partly as a consequence, any representations made by the Secretary of State CMS are likely to raise the risk of challenge to a decision made by the Secretary of State BIS because it will appear to be purely political in nature (although, of course, it may well not be in fact, and thus be of limited assistance to him in making his assessment."*

3.93 Whatever the detail of the telephone call on 15 November 2010 there is no evidence that Mr Hunt sought to communicate it to Dr Cable. Mr Hunt correctly accepted that he should not become directly involved in the quasi-judicial process.[150] In evidence, he recognised with hindsight that it would have been better for the conversation to have been heard and minuted by his officials.[151] I agree.

3.94 Mr Michel soon pursued the private liaison with Mr Hunt's team which he had proposed to take. In an email dated 23 November 2010 he relayed:[152]

I

[145] p11, lines 17-18, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[146] p25, lines 2-3, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[147] p26, lines 13-20, *ibid*
[148] p11, lines 12-14, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[149] p12, para 16, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JS11.pdf
[150] p24, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[151] p24, *ibid*
[152] p35, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

> *"I will have a session with Hunt's adviser next Wednesday to update on Ofcom process and next steps.*
>
> *Jeremy has also asked me to send him relevant documents privately".*

3.95 Having established this private channel of communication with DCMS about the bid before the decision was unexpectedly transferred to Mr Hunt, Mr Michel later sought vigorously to exploit it once the decision had been transferred.

3.96 Before the transfer, News Corp fruitlessly continued their lobbying of prominent Liberal Democrats, still believing that it might indirectly influence Dr Cable. On 19 November 2010 Mr Michel reported to James Murdoch:[153]

> *"Was told today by Cable's adviser to approach any meeting with Lord Oakeshott as a proxy for Vince Cable, an intro. discussion on the substance of Rubicon and possible way forward.*
>
> *Again, given his position of Chair of Cable's business advisory council, he is the most influential person on any decision Vince will make"* (emphasis added)

3.97 James Murdoch had seen a prominent Liberal Democrat, Paul Marshall. Mr Marshall informed James Murdoch (forwarding an email via Mr Michel) that:[154]

> *"I have relayed the substance of our conversation to Vince's office, but as you know, Vince is highly independent-minded so I can make no promises as to his greater willingness to hold a meeting..."*

3.98 On 2 December 2010, Mr Michel had conversations with an adviser to the Deputy Prime Minister and an adviser to the Prime Minister. In relation to the former he reported to James Murdoch:[155]

> *"Honest discussion on the importance for us of getting Labour on board / comfortable with the transaction as it will influence Cable a lot*
>
> *he will insist on the need for Vince to meet with us once Ofcom report published*
>
> *need to support Nick when he makes announcement on copyright which goes against his election promise – timing end January – will be very tough for him with youth voters again".*

3.99 Tim Colborne, a SpAd working to Mr Clegg confirmed that he was the adviser in question, but disputed the accuracy of Mr Michel's email. Mr Colborne's note of the meeting recorded discussion on three topics: the Digital Economy Act; the BSkyB decision making process; and the broadcast landscape more generally. On the topic of BSkyB he said:[156]

> *"My recollections of the discussions in relation to BSkyB are that Frederic Michel asked me about how the process was going, and I informed him that I had no involvement in it, and knew nothing about how it was proceeding. I have never had a role in relation to the BSkyB bid, which was exclusively a matter for the relevant Secretary of State (who at that time was the Secretary of State for Business, Innovation and Skills). I*

[153] p34, *ibid*
[154] p36, *ibid*
[155] p38, *ibid*
[156] p3, paras 9-10, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Tim-Colbourne.pdf

further informed him that even if I had known, it would not be appropriate for me to speak to him about it. Frederic Michel went on to explain how the decision-making process was supposed to work...

I do not recognise Frederic Michel's own account of this meeting as set out in his email to James Murdoch. I have no recollection of an "honest discussion on the importance for us of getting Labour on board", and I completely reject the suggestion that I offered to "insist on the need for Vince to meet with us once [the] Ofcom report [was] published". I would not have offered to do so, and did not do so. When making handwritten notes of meetings, I always mark action points with an asterisk. There were no action points arising from this meeting."

This is, perhaps, but one example of the need for real caution in relation to the accuracy of Mr Michel's communications.

3.100 About his conversation with Mr Cameron's adviser, Mr Michel recorded only one line relating to the bid: *"On Sky transaction: recognised need to look at it only from a plurality point of view"*.[157] This was a correct statement of the approach which the decision maker was required to take but it is at odds with the belief expressed in Mr Michel's earlier emails that wider political issues would influence the decision.

3.101 When Ofcom published an issues letter, Mr Michel set about gauging the reaction. On 14 December 2010, he reported to James Murdoch in terms which show that he had not given up on a meeting:[158]

"Very good debrief with Hunt on the Issues letter. He is pretty amazed by its findings, methodology and clear bias.

He very much shares our views on it.

We are going to try to find a way for you to meet with him one/one before Xmas."

3.102 On this occasion Mrs Brooks too was passing on information, conveying to Mr Michel what she said was Mr Osborne's response:[159]

"Same from GO – total bafflement at response."

3.103 Mr Osborne did not remember mention of the bid in conversation, and had not read Ofcom's letter, but he did not doubt Mrs Brooks' account that it had taken place and he remembered the occasion, a dinner in a restaurant. Neither did he take issue with Mrs Brooks' evidence that he looked perplexed:[160]

"I have read the Ofcom issues letter in preparation for appearing before you today and I think that is the first time I've ever read that letter. Certainly it jogs no memory and I've done a search of my private office of whether the Ofcom issues letter was brought to my attention, and there's no – we can find no evidence that it was.

So I'm perfectly prepared to accept that there was a conversation; I just have no memory of it, and perhaps the reason I was perplexed or baffled was because I hadn't actually read the Ofcom issues letter".

[157] p38, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[158] p40, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[159] p40, *ibid*
[160] pp28-29, lines 11-21, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

3.104 Mr Osborne was clear that the process was quasi-judicial and he did not seek to influence Dr Cable's decision. Indeed, he made plain to the Inquiry the political reasons why he did not have a strong view as to the outcome of the bid:[161]

> *"I didn't have a strong view about its merits because as far as I could see, it was just going to cause us trouble one way or the other. Indeed, so it has proved to be, and I just thought it was either going to offend a group of newspapers and indeed broadcasters who we wanted to have good relations with if it was rejected – sorry, if it was accepted, and if it was rejected, it was going to offend another bunch of people who we want to have good relations with.*
>
> *So I regarded the whole thing as a political inconvenience and something we just had to deal with and the best way to deal with it was to stick by the process".*

3.105 Mr Michel reported having seen Mr Foster from whom he said had had: *"Some important feedback"*.[162] Amongst the many emails reporting Mr Michel's conversations with Liberal Democrats, recited above, that of 19 December 2010, relaying a conversation with Mr Clegg's Chief of Staff, Jonny Oates, stands out because the view recorded is unequivocally focused on the correct test and the correct procedure:[163]

> *"Just had a private chat with Clegg's chief of staff regarding the ongoing process.*
>
> *He was very surprised when I pointed out to him that Cable will be tempted to take a decision with a lot of political influence.*
>
> *For him, the referral is not a matter for "lib-dems", it is a matter for the Secretary of State in accordance with his statutory obligations.*
>
> *Said he was unclear therefore why News Corp is seeking out the views of people who have no locus in the decision making process and thinking that their views indicate that the decision will be "political.*
>
> *For him, senior lib-dems who are going around giving us advice / recommendations are not representative of Vince's mindset and way of making decisions. This is similar to what Vince's adviser told me on Friday night: until the end, Vince will be keen to make up his own mind and not be influenced by anyone.*
>
> *I told him it was hard to believe given all the feedback we are getting.*
>
> *Contrary to my assertion, he said the Secretary of State will take the decision on its merits in accordance with his statutory obligations. If we have concerns, we should express them directly with BIS or Ofcom."*

3.106 The evidence, discussed earlier in this Section, shows that Dr Cable did focus on the statutory test, took specialist legal advice and made up his own mind. However, insofar as Mr Oates' intention was to reassure News Corp that the bid was being considered with scrupulous fairness by Dr Cable, what happened next entirely changed the perspective.

[161] pp30-31, *ibid*
[162] p40, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[163] p42, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

4. 21 December 2010: Dr Cable's comments and the transfer of function

The comments and their context

4.1 In the course of his work as a constituency MP, on Friday 3 December 2010, Dr Cable conducted a constituency surgery. Two undercover journalists pretended on that occasion to be constituents and local mothers concerned about the impact of proposed Child Benefit changes on their families. More broadly, they sought, and then actively questioned Dr Cable about, his views on the coalition Government.[164] He spoke freely about the bid and "the Murdoch press" saying (amongst other things):[165]

> *"You may wonder what is happening with the Murdoch press ...I have declared war on Mr Murdoch and I think we're going to win" and "I didn't politicise it, because it is a legal question, but he [Mr Murdoch] is trying to take over BSkyB, you probably know that ...He has minority shares ...And he wants a majority. And a majority-control would give him a massive stake. I have blocked it, using the powers that I have got. And they are legal powers that I have got. I can't politicise it, but for the people who know what is happening, this is a big thing. His whole empire is now under attack. So there are things like that, that being in Government ...All we can do in opposition is protest".*

4.2 Dr Cable did not deny making the comments but wished to explain two factors which he said had influenced what he had said. First, he described what had happened in his constituency office, and how it affected the words he chose, in this way:[166]

> *"First, on that evening there were high levels of tension in the office due to disturbances outside caused by a group of protestors who had tried to force entry, and were verbally threatening staff and residents. They were later confronted by the police. I had invited in a small group of protestors and had just finished a highly confrontational discussion with them. My own lack of concentration in the subsequent interview had a lot to do with this abnormal and tense environment. I volunteered strong views on the BSkyB takeover since that, together with university finance, was the issue uppermost in my mind. I should also draw attention to other comments that were made, recorded and reported by the journalists which caused me some embarrassment but do illustrate this factor further. I talked about a "big battle" going on over immigration caps, and "big arguments" on banks, tax thresholds, and civil liberties. I used the word "war" several times. These comments show how this high level of tension had spilled over into the language I used throughout the conversation, and not just when discussing one particular topic".*

I

[164] pp16-17, para 63, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf

[165] p16, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf; see also p1, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH13-MOD300008089-MOD300008106-docs551-565.pdf, which includes the comment, "*I am picking my fights, some of which you may have seen, some of which you may [sic] haven't seen*". See also http://www.telegraph.co.uk/news/politics/liberaldemocrats/8217253/Vince-Cable-I-have-declared-war-on-Rupert-Murdoch.html

[166] p17, para 64a, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf

4.3 He expanded upon this evidence orally:[167]

> *"I think it needs – in order to explain the rather emotional way in which I dealt with this and the very strong language, I think it is important to understand there was, I think, a near riot taking place outside my constituency office, people were trying to force entry, we had the police present trying to calm the situation. In order to prevent the disorder getting out of control, I invited in some of the protesters into my office. We had a very long discussion, very angry people upbraiding me about Afghanistan and Palestine and student fees and capitalism and other things, and somebody was waving a camcorder in my face, a few inches from my face, so I was struggling to keep my temper in this situation. So at the end of that interview, when I'd finally seen them out, I was in an extremely tense and emotional frame of mind, and the two women, who I thought were constituents coming to see me about a constituency problem, were the next people that I saw. As I've tried to explain here – I'm normally very calm in dealing with different situations – I did offload onto them a lot of pent-up feelings, not just about the BSkyB case that I was dealing with, but about my colleagues in government and a variety of other issues in language that I wouldn't normally use, in what I thought was a private, confidential conversation."*

4.4 Dr Cable next described a very different kind of influence, namely a sense that he was being intimidated by the threat of retribution through the newspapers owned by NI. He put it in these terms in his witness statement:[168]

> *"Second, the confrontational way in which my personal views of News Corporation, were expressed was due to reports coming back to me of how News Corporation representatives had been approaching several of my Liberal Democrat colleagues in a way I judged to be inappropriate. The reports suggested that News Corporation representatives were either trying to influence my views or seeking material which might be used to challenge any adverse ruling I might make, following the completion of the Ofcom report. These colleagues expressed some alarm about whether this whole affair was going to lead to retribution against the Liberal Democrats through News International newspapers. As it happened evidence of these reports was later borne out in an article by Toby Helm in the Observer on 23 July 2011 (which I have included in exhibit "VC1"). This added a sense of being under siege from a well organised operation. Coming from a party that had hitherto been at best ignored by News International, this was a new and somewhat unsettling experience. I could not help contrast this behaviour with that of other parties to the case who were content to make written submissions or other cases (like Northern & Shell).*
>
> *My references to a "War on Murdoch" were making the point, no doubt rather hyperbolically, that I had no intention of being intimidated. Clearly, I should not have volunteered my unprompted opinion, even in a private, confidential conversation in a constituency surgery. I subsequently apologised."*

4.5 He developed this evidence orally, explaining that there were two concerns about the activities of Mr Michel and others. First, he felt that the bid was being politicised. Second, that he and his party were being threatened with retribution:[169]

[167] pp63-64, lines 8-7, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[168] p17, paras 64b-65, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[169] pp64-65, lines 18-23, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf

> *"Well, perhaps preface my answer by saying I was describing the – the interview in my office took place a month after the intervention notice, and I was describing a series of reports I'd had from colleagues, often second or third-hand, but nonetheless plausible reports, of significant numbers of my Parliamentary colleagues in the Lords and in the Commons having had interviews with Mr Michel and possibly others, and I was concerned, indeed I was more than concerned, I was angry, which is what came out in my response, at the way this was being dealt with.*
>
> *I was concerned on two levels. First, there was a systematic attempt to politicise the process, to imply that somehow or other the whole process was governed by the Liberal Democrats, which it wasn't, and I think in his email exchange, Jonny Oates – it is there, I think 1681 – does describe his own interpretation of what was going on as a systematic attempt by News International representatives to politicise the process. And secondly, and actually more seriously, I had heard directly and indirectly from colleagues that there had been veiled threats that if I made the wrong decision from their point of view of the company, my party would be – I think somebody used the phrase "done over" in the News International press, and I took those things seriously, I was very concerned. I had myself tried to deal with the process entirely properly and impartially, and I discovered that this was happening in the background. I frankly stored up my anger at what was taking place, but in that very special and tense situation, I rather offloaded my feelings."*

4.6 After Dr Cable had given evidence, a fellow Liberal Democrat MP, Norman Lamb, came forward to the Inquiry further to explain the sense of threat. In particular, he recounted two meetings with Mr Michel which he said took place in Portcullis House, Westminster, on 10 June 2010 and 27 October 2010. He described a range of subjects being recounted on both occasions, including the proposed takeover of BSkyB. His recollection of the first meeting was "*fairly vague*". That meeting took place five days before the bid was announced. In his witness statement, Mr Lamb stated that the proposed takeover had been discussed.[170] In his oral evidence he clarified that, on that occasion, what was mentioned was a potential, not actual, bid.[171] Mr Michel was *"certain that we did not discuss the BSkyB bid at this meeting"* because it had not been announced and he would not have mentioned it if he had been aware of an imminent announcement.[172]

4.7 Much more significantly, of the second meeting he stated:[173]

> *"During the second of these meetings – on 27 October, 2010 – Mr Michel again raised with me the position with regard to the proposed takeover of BSkyB. He argued strongly, on the basis of the legal position, that there were no grounds for a referral. During the discussion he raised the issue of News International newspaper coverage given to the Liberal Democrats. He said he felt that the coverage since the election had been very fair. He specifically mentioned The Sun and indicated that it had given the Liberal Democrats reasonable coverage since the general election.*
>
> *He then implied that if the decision surrounding the bid did not fall in their favour, it would be a pity if things were to change and they were no longer able to report in such*

[170] p1, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Norman-Lamb-MP.pdf
[171] pp2-4, Norman Lamb, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-26-June-2012.pdf
[172] pp1-2, para1.1.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Third-ws-of-Frederic-Michel.pdf
[173] pp1-2, paras 3-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Norman-Lamb-MP.pdf

a positive way. I cannot remember the exact phraseology used but the message was very clear. I chose not to respond. I took the view that this was part of the lobbying operation in the run up to a decision on the bid.

I was very concerned by what I heard and reported it to Nick Clegg and also to Vince Cable.

We were all very clear that nothing of this sort should influence in any way how the bid was considered" (emphasis added).

4.8 Mr Lamb's account of the meeting on 27 October 2010 was corroborated by a manuscript note which he made some time after the event: *"I can't confirm that it was definitely the same day, but it would have been within days of the meeting taking place"*; he produced this for the first time on the day on which he gave his oral evidence. It was one of a number of notes which he had made during the early days of the coalition Government *"...of interesting things that had happened."* and it was concisely expressed:[174]

"Wed 27/10

0900 meeting Fred Michel News International. An extraordinary encounter. FM is very charming. He tells me News Int. papers will land on VC's desk in next 2 weeks. They are certain there are no grounds for referral. They realise the political pressures. He wants things to run smoothly. They have been supportive of Coalition. But if it goes the wrong way he is worried about the implications. It was brazen VC refers case to Ofcom – they turn nasty. Then he talked about AV – how Sun might help the debate – use of good graphics to get across case.

James M has met Nick – worth working on him to he could be receptive to case. Times will give it fair hearing.

So refer case and implication was clear. News Int turn against Coalition and AV."

4.9 A further manuscript note evidenced Mr Lamb reporting the conversation to Mr Clegg on 2 November 2010. Its representation of Mr Clegg's reaction casts an interesting light on political perceptions of the power and conditionality of press support:[175]

"...He is horrified by what I tell him of Fred Michel's meeting last week re News International.

- we will lose the only papers who have been positive."

4.10 Mr Michel was hoping that he might through Mr Lamb secure a meeting with Dr Cable. He described the meeting as *"very friendly and open"*[176] and recalled explaining to Mr Lamb the growing frustration at News Corp and the sense of unfairness at not being able to make its case at a meeting. He explained at some length in his third witness statement what was said about media coverage, strongly denying that any threat was made, and positing that there must have been a misunderstanding: *"...It seems to me that Mr Lamb has, in his own mind, linked various topics of conversation in a way that was certainly never intended by me...."*.[177]

[174] pp5-7, Norman Lamb, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-26-June-2012.pdf; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-to-Witness-Statement-of-Norman-Lamb-MP-Part-1.pdf; p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-to-Witness-Statement-of-Norman-Lamb-MP-Part-2.pdf

[175] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Exhibit-2-to-Witness-Statement-of-Norman-Lamb-MP.pdf

[176] p2, para 1.2.2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Third-ws-of-Frederic-Michel.pdf

[177] p4, para 1.2.15, *ibid*

4.11 The Deputy Prime Minister recalled that Mr Lamb had spoken to him, stating:[178]

> *"At one point, I was – it was brought to my attention by Norman Lamb, a friend and colleague of mine, a Liberal Democrat MP, that he had been – the way he described it at least – told that it would be good for the Liberal Democrats to be open to the bid, otherwise we would expect unfavourable treatment from the Murdoch press, and Norman was quite agitated about that.*
>
> *I have to say, since we hadn't received particularly favourable treatment in the first place, I didn't think it was a hugely credible threat, and anyway it was part of so many rumours and counter-rumours and claims and counterclaims that I just said to him, "Look, we just must not be knocked off-course from allowing this process to proceed in an independent, objective and quasi-judicial manner."*
>
> *And throughout all of this, I was very conscious that if I had any role at all, it was just to make sure that Vince Cable, as the relevant Secretary of State, was given the kind of time and the space to discharge his quasi-judicial functions and was insulated from political influence one way or the other."*

4.12 Mr Clegg did not recollect Dr Cable speaking to him about veiled threats or bullying from News Corp or NI.[179]

4.13 I am in no doubt that Mr Lamb took what Mr Michel said on 27 October 2010 about media coverage to be an implied threat and, given the impact that it had on him, whatever Mr Michel said could legitimately have been understood as such a threat. That explains why he reported it as such to both Mr Clegg and Dr Cable. However, I am prepared to accept Mr Michel's evidence that, however it might have appeared and however clumsily he might have spoken, he was not, in fact, intending to threaten Mr Lamb or the Liberal Democrats. His modus operandi, which is very well evidenced in the voluminous emails and texts messages which he sent, as well as the evidence of others who dealt with him, tends to support his denial.

4.14 Mr Michel went about his work in a different way. He mounted charm offensives, flattered and sought to persuade others of the merits of his employer's bid. In his internal emails, there is no mention or hint that he was looking for other ways to pressurise or persuade, let alone deploy a threat. Further, his later strategy, so far as the bid is concerned, is recorded in his internal emails to colleagues, already discussed, and did not involve threatening the Liberal Democrats. Rather, he wanted News Corp to curry favour with Dr Cable by supporting him and the Liberal Democrats generally. His surprise at the interpretation put upon his words by Mr Lamb was genuine. I am reinforced in my conclusion by Mr Clegg's reaction that it was "*not a hugely credible threat*" and the absence of evidence that the Liberal Democrats were in fact "*done over*" by News International's titles as a result of Dr Cable's decision to intervene. It was not suggested that they were.

4.15 That the bid was discussed in politicised terms between Mr Michel and Liberal Democrat MPs is plain and is evidenced not only by Dr Cable's recollection but also by Mr Michel's own reports of his lobbying efforts.[180] Whether politicised discussion was in fact the result of a deliberate effort to politicise the decision by Mr Michel and News Corp is not at all clear. News Corp believed, on credible grounds, that it had a strong position on both competition

[178] pp51-52, lines 5-1, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[179] p76, lines 2-4, Nick Clegg, *ibid*
[180] see Media Lobbying Behind the Scenes above

and plurality grounds. James Murdoch explained that the timing of the bid was deliberately chosen, inter alia, to avoid the issue becoming a political football before the election.[181]

4.16 It is impossible to say, without further and disproportionate investigation, whether it was Liberal Democrat politicians, Mr Michel, or a mixture which led to the politicised conversations which took place. Still less is it possible to say whether that politicisation was a deliberate strategy or simply a failure to focus on the quasi-judicial nature of the decision and the strict legal test which had to be applied. What can be said with confidence though is that Dr Cable believed that pressure was being exerted by those whom he described as "*News International representatives*" (although actually representatives from News Corp).

4.17 The significance of the context in which the comments were made is that they consequently fall to be understood as Dr Cable's unguarded and emotional reaction to his role in the bid. In his own words he *"offloaded his feelings"*. That Dr Cable's words were of this nature is further made clear because he was not technically correct when he said that he had blocked the bid. Formally, he had only issued an intervention notice.

4.18 Context may explain Dr Cable's comments, but, given his responsibilities, it does not excuse them. He did not pretend otherwise, either at the time or to the Inquiry, recognising that his words had given rise to an appearance of bias. He told the Inquiry:[182]

> *"No, I do understand in my case that the remarks I made did create a perception of bias and therefore made it difficult for me to continue. I fully understand that. It doesn't mean to say I would have been biased; I wouldn't have been. But nonetheless there was a perception issue and that had to be taken into account by the Prime Minister".*

4.19 Dr Cable also rightly recognised that the transfer of responsibility for the bid was the inevitable result of his own words:[183]

> *"Q. ...Do you have any observations to make on the, as it were, transfer of responsibilities to another department or not?*
>
> *A. Well, I was angry with myself at what had happened, but given what you just said about perception of bias, I understood that there was no alternative in this case."*

4.20 His remarks, once published, made the perception or appearance of bias inevitable, as in due course was therefore the removal of his responsibilities. It is, however, important to underline that if what he said had not been recorded by a journalist but had, in fact, been heard by a constituent (as he believed was the case), it is certainly possible that what he said could have returned to impact on the bid after he had decided it: his constituent might then have gone to the press. This only serves to underline the very difficult position faced by those charged with making judicial or quasi-judicial decisions.

[181] pp70-71, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-24-April-2012.pdf
[182] p85, lines 1-7, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[183] p85, lines 16-21, Robert Jay QC, Dr Vince Cable, *ibid*

The story breaks

4.21 The Daily Telegraph published a story about their reporters' conversation with Dr Cable online on 20 December 2010[184] and there was further coverage both online and on paper on 21 December 2010. Surprisingly, the initial coverage on 20 December 2010 and the morning of 21 December 2010 did not refer to Dr Cable's comments about the bid. There was suspicion that the Daily Telegraph did not want to cause trouble for a Secretary of State who had made a decision to intervene which was, of course, in the interests of the Telegraph Media Group (TMG). There can be little doubt that the TMG was not supportive of the bid and that its opposition was based upon commercial grounds. Aidan Barclay, Chairman of TMG, subsequently wrote to James Murdoch in these terms:[185]

> *"I am sure you are aware that the Telegraph was not supportive of the News Corp proposed takeover of BSkyB. We took this position as a result of what we believed were and are genuine commercial concerns..."* (emphasis added)

4.22 However, the Daily Telegraph denied that it was trying to hide the information and maintained that it deliberately held back parts of the transcript of the conversation in order that it could publish a further instalment and thereby get the maximum return on the story. Whatever the motive, the information did not stay out of the public domain for long. A whistleblower passed a full copy of the transcript to the BBC's Robert Peston who, at 2:30 pm, published the passages which had been excised by the Daily Telegraph on his blog; subsequently, the Daily Telegraph did publish them.[186] As for the motive in withholding what would have been the most explosive part of the story, on the basis that this sub-issue was not fully explored and is not essential to the narrative, I make no finding, save only to observe that if that had been the plan, the whistleblower (who obviously had access to the full details of the story) apparently did not know about it .

4.23 Before continuing with the events of 21 December 2010, it is appropriate to record that the use of subterfuge by the Daily Telegraph directed to Dr Cable was not an isolated incident. It was one of a number of instances in which undercover Daily Telegraph reporters sought to elicit unguarded comments from Liberal Democrat MPs. The results were the subject of articles on 21, 22 and 23 December 2010 and provoked a complaint to the PCC from Tim Farron MP, President of the Liberal Democrats. The complaint was upheld, albeit with an important qualification concerning Dr Cable:[187]

> *"For the Commission to have sanctioned this method, it would have had to be convinced that a high level of public interest could reasonably have been postulated in advance. It did not believe that the Telegraph – although acting no doubt with legitimate intent – had sufficient grounds, on a prima facie basis, to justify their decision to send the reporters in. The complaint was therefore upheld.*
>
> *The Commission did feel that the newspaper had uncovered material in the public interest regarding the remarks made by Vince Cable about the News Corporation bid*

[184] Holly Watt, Robert Winnett and Heidi Blake, http://www.telegraph.co.uk/news/politics/liberaldemocrats/8215462/Vince-Cable-I-could-bring-down-the-Government-if-Im-pushed.html
[185] p1, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JRJM-3.pdf; Mr Barclay also confirmed the commercial nature of the concern in evidence, p66, lines 4-19, Aidan Barclay, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[186] Robert Peston, *What Vince Cable said about Rupert Murdoch and BSkyB*, 21 December 2010, http://www.bbc.co.uk/blogs/thereporters/robertpeston/2010/12/what_vince_cable_said_about_ru.html
[187] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-VC1-4-to-Witness-Statement-of-Vince-Cable-MP.pdf

for BSkyB, which had led to him being divested of his role in that decision. However, there had been no suggestion that the intention of the newspaper had been to explore how he had been handling the bid (it made clear in its coverage that Mr Cable [sic] had spoken "despite not being asked about the issue"), and the newspaper itself had chosen not to make it a focus of its first day's coverage. The test for the Commission was whether there were grounds in the first place to justify the subterfuge: the Cable disclosures about Sky were not relevant to that."

The response to the story

4.24 21 December 2010 had already been an important day for consideration of the bid. At midday, the European Commission unconditionally approved the bid from the European Union competition perspective.[188] That news prompted communication between James Murdoch and Mr Hunt. The former tried to call the latter who texted at 12:46hrs:[189]

"Sorry to miss ur call. Am on my mobile now. Jeremy."

4.25 James Murdoch replied at 12:52hrs:[190]

"Have to run into next thing. Are you free anything after 2.15? I can shuffle after this".

4.26 A further exchange of texts concluding at 12:56hrs agreed 16:00hrs as a convenient time to speak.[191] At 12:57hrs, Mr Hunt texted again, by this time he had self evidently heard about the European Commission's decision:[192]

"Great and congrats on Brussels, just Ofcom to go!"

4.27 The terms of his message were not impartial and are consistent with his broad sympathy for the bid which he had never hidden. It is a matter of importance, however, that the text message was sent before Mr Peston's story had been posted and whilst responsibility for the bid still rested with Dr Cable.

4.28 News of Mr Peston's story travelled fast. At 15:50hrs, Sue Beeby, the second of Mr Hunt's two SpAds, emailed details of Dr Cable's comments to Mr Hunt.[193] Ten minutes later, at 16:00hrs, Mr Hunt and James Murdoch spoke by telephone, as previously arranged. James Murdoch was described as being "*totally horrified*" by the Secretary of State's comments.[194]

4.29 Mr Hunt sought to consult a senior Cabinet colleague, Mr Osborne, texting at 16:08hrs: "*Cld we chat about Murdoch Sky bid? am seriously worried we are going to screw this up. Jeremy*".[195] He followed that with a second text also timed at 16:08hrs which read: "*Just been*

[188] pp18-82, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[189] p9, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH16-MOD300008147-MOD300008166-docs581-596.pdf
[190] *ibid*
[191] *ibid*
[192] *ibid*
[193] p1, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH13-MOD300008089-MOD300008106-docs551-565.pdf
[194] pp37-38, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[195] p12, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH16-MOD300008147-MOD300008166-docs581-596.pdf

called by James M. His lawyers are meeting now & saying it calls into question legitimacy of whole process from beginning, "Acute bias" etc".[196]

4.30 He also emailed Andy Coulson at 16:10hrs asking: "*Could we chat about this? Am seriously worried Vince will do real damage to coalition with his comments...*"[197] In the result, Mr Hunt did not think that he did speak to Mr Coulson.[198] Nor did he think that he had any conversation with No 10 at that stage.[199]

4.31 By the time that Mr Osborne received Mr Hunt's two text messages he was already in a 16:00hrs meeting with Mr Cameron and others discussing what was to be done about Dr Cable's comments.[200] He probably did not see the text messages until after the meeting.[201] The meeting itself had originally been a routine meeting to review the day's events and to look ahead but, in the result, it was used to react to news of Dr Cable's comments:[202]

> *"...Every day, at 4 o'clock, there is a Prime Ministerial meeting to review what's going on that day and look ahead, and I attend that meeting when I'm in London and my diary allows me to do so. So I was going over to Downing Street anyway. The meeting had, in effect, been cancelled and the meeting had become a discussion of what to do about Dr Cable's remarks, and I was part of that discussion, with the Prime Minister, his most senior civil servant and his political advisers..."*

4.32 Mr Cameron highlighted the gravity and urgency of the situation before explaining the thinking which pointed towards transferring responsibility for the bid to the Secretary of State for Culture, Media and Sport:[203]

> *"...Such a situation had the potential to damage the Government's credibility and it was important to act quickly to address the issue. I had rapid discussions with my senior advisers, including the Permanent Secretary, as to the best way forward, as it was clear that Vince Cable could no longer continue in the decision-making role given the nature of the his comments.*
>
> *I consider a range of options for how to handle this matter. I did not want to dismiss Vince Cable from his position as, while he had behaved inappropriately by speaking as he had on this particular issue, he dealt with many other issues effectively as Secretary of State and was providing a valuable contribution to the Coalition Government. Jeremy Heywood, the Permanent Secretary at Number 10, suggested the option of transferring responsibility for media competition issues, including the option of transferring responsibility for media regulation. It seemed to me that this was the most logical, straightforward and effective option and it made sense for the policy issues of media competition and media regulation to be the responsibility of one department."*

I

[196] *ibid*
[197] p1, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH14-MOD300008107-MOD300008132-docs-566-572.pdf
[198] p37, lines 8-10, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[199] pp39-40, Jeremy Hunt, *ibid*
[200] pp43-44, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[201] p47, lines 10-17, George Osborne, *ibid*
[202] pp43-44, lines 22-16, George Osborne, *ibid*
[203] p54, 168-169, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

4.33 Mr Osborne graphically described the political pressures that had been unleashed by the publication of Dr Cable's unedited remarks in Mr Peston's blog only 90 minutes earlier:[204]

> *"I think that – on the day, I remember the pressure was enormous to do something about the political crisis that had been unleashed on the government out of the blue at 3 o'clock in the afternoon. Obviously, we had no idea that Dr Cable had said these things. They weren't in the Telegraph's report of the story that morning, which had itself caused some problems, and we had to deal with – I mean, the pressure in government, in modern government, is to – is you have to make sure you have answers to some the [sic] tough questions that the media are throwing at you, even if it comes in the middle of the afternoon, just as you're doing other things."*

4.34 Mr Osborne recalled that the original suggestion to transfer responsibility for the bid to Mr Hunt came not from a politician but from (now Sir) Jeremy Heywood, then the Downing Street Permanent Secretary. He too emphasised a desire not to remove Dr Cable from his post altogether, expressing on his part concern about the impact that such a step might have had on the coalition:[205]

> *"The principal concern in the meeting – and certainly my principal concern, what I was seeking to say in the meeting – was that this was not something which should lead to the resignation of Dr Cable. I thought what Dr Cable had said was wrong but I didn't think it merited his resignation, and frankly I also had concerns about the impact of such a resignation on the Coalition and the unity of the government.*
>
> *So I was looking for a solution, as indeed were other people in the room, that did not involve someone else becoming the Secretary of State for Business and Dr Cable leaving the government or indeed Dr Cable moving to another portfolio, because that would trigger a wider Cabinet reshuffle which was not something we felt, just before Christmas, with, as I say, the Coalition in its first year, something we wanted to see, and indeed we thought Dr Cable was doing a good job as business secretary, other than on this particular issue of what he'd said about the Murdochs. So we were looking for solutions that did not involve Dr Cable resigning or moving from business secretary, and Jeremy Heywood suggested the solution of moving the responsibility for media plurality to the department for culture, media and sport. So it was, in a way, a structural solution within Whitehall to the problem, and my recollection is once Mr Heywood had proposed that, we thought that was a good solution and would help keep Dr Cable in government whilst removing from him the responsibility for media plurality, and it, I think, also struck us all as rather commonsensical that it would move to the department that was, after all, called the department for media and already had responsibilities for media regulation."*

4.35 By around 16:30hrs telephone advice was being sought from the Treasury Solicitor, (now Sir) Paul Jenkins about the issue. Sir Paul, who was at home on leave, spoke to a number of officials, including the Cabinet Secretary, Lord O'Donnell, during the course of the next hour. He confirmed, from a legal perspective, the prevailing view that Dr Cable could not properly retain responsibility for the bid, and went further by advising against delegating the decision to a junior minister at BIS:[206]

[204] p50, lines 13-24, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[205] pp44-46, George Osborne, *ibid*
[206] pp2-3, para 6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Paul-Jenkins-taken-as-read3.pdf

"...I confirmed to Sir Gus that it was my opinion that Dr Cable could no longer properly discharge his functions under the Enterprise Act 2000 in relation to the BSkyB bid because, whilst seized of the matter, he had made statements of a kind that tainted, irrevocably, his ability to discharge his functions in a quasi-judicial manner...

...I also advised Sir Gus that, in the particular circumstances of the case, the option of delegating the decision-making responsibility to a junior Minister in the Department for Business, Innovation and Skills would give rise to significant legal risks and this option was not pursued."

4.36 Sir Paul regarded the emerging alternative candidate for the decision, Mr Hunt, as the obvious choice:[207]

"In these circumstances the obvious alternative was for the functions to be transferred to another Secretary of State; and the obvious Secretary of State was the Secretary of State for Culture, Media and Sport. I was aware from the discussions that the Prime Minister was considering this as the natural option".

4.37 There was an awareness of the need to check whether responsibility for the bid could properly be transferred to Mr Hunt. Accordingly, Sir Jeremy contacted the Permanent Secretary at DCMS, Jonathan Stephens. Like Sir Paul, Mr Stephens was also at home, starting his Christmas leave. Mr Stephens recalled being asked whether Mr Hunt had publicly made any comment which might appear to have pre-judged the issue. He was only aware of what his Secretary of State had said on 15 June 2010, the day on which the bid was announced. He caused checks to be made by his officials and with Mr Hunt's SpAds before passing on Mr Hunt's public comments to Sir Jeremy, whom he knew to be consulting lawyers and the Cabinet Secretary.[208]

4.38 Witnesses were understandably unable to recollect the precise terms in which Mr Hunt's relevant public statements were communicated to the Treasury Solicitor, who was asked to advise. For his part, Sir Paul put it this way:[209]

"I was provided with the gist of the comments made by Jeremy Hunt by Sir Gus over the telephone. I have now seen the comments attributed to Jeremy Hunt collected at paragraph 172 of the Prime Minister's statement. I believe that the gist as relayed to me fairly summarised the content of those comments".

4.39 The comments to which Sir Paul was referring to in the quotation above, as set out in Mr Cameron's witness statement, are these:[210]

"a. An interview in the Financial Times, published on 16 June 2010, where he was quoted as saying:

It does seem to me that News Corp do control Sky already, so it isn't clear to me that in terms of media plurality there is a substantive change, but I don't want to second guess what regulators might decide."

b. An interview in Broadcast magazine where he was also quoted as saying:

[207] p3, para 7, *ibid*
[208] p4, para 19, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf
[209] p4, para 9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Paul-Jenkins-taken-as-read3.pdf
[210] pp55-56, para 172, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

Rather than worrying about Rupert Murdoch owning another TV channel, what we should recognise is that he has probably done more to create variety and choice in British TV than any other single person.

c. The description of Jeremy Hunt in the same Broadcast magazine article, which was displayed on his constituency website, as:

like all good Conservatives Hunt is a cheerleader for Rupert Murdoch's contribution to the health of British television."

4.40 Sir Paul did not consider that these matters precluded Mr Hunt from taking over Dr Cable's decision making function in relation to the bid and advised the Cabinet Secretary accordingly. His reasons were recorded in a note produced by Lord O'Donnell for Mr Cameron the next day. In his evidence Sir Paul explained:[211]

"...I took the view that senior politicians in the office of Secretary of State should be credited with the ability to put aside such personal views, expressed before their holding of a decision-making power, so that they can approach the decision-making process, on advice and with a fresh mind. I did not think that Jeremy Hunt's comments were of a nature that indicated that they could not be put aside; nor that a reasonable and informed person would conclude that they could not be put aside. I acknowledge that there will be occasions when a politician does make such a comment but I do not think this was one".

4.41 Sir Paul's advice was accepted and cemented the provisional decision to transfer Dr Cable's functions in relation to the bid from BIS to DCMS and Mr Hunt.

4.42 Meanwhile, at 16:58hrs, after the meeting in Downing Street, but whilst legal advice was still being taken, Mr Osborne replied to Mr Hunt's earlier text messages by referring to the then still provisional decision to transfer responsibility for the bid to Mr Hunt: "*I hope you like the solution!*"[212]

4.43 By the time he received Mr Osborne's text, Mr Hunt knew something of what was happening and, in particular, that Downing Street was checking whether public comments sympathetic to the bid were an obstacle to his assuming responsibility for the bid.[213] Not only were these comments being considered by the Cabinet Secretary and Treasury Solicitor, they were also scrutinised by the Legal Director at DCMS, Patrick Kilgarriff. Mr Kilgarriff's views on the comments about the bid made by the Secretary of State on 15 June 2010 were recorded in an internal email which Mr Hunt forwarded to Ed Llewellyn, the Downing Street Chief of Staff at 17:30hrs.

4.44 It is clear from the terms in which Mr Kilgarriff couched his email that whilst he did not think Mr Hunt's comments precluded him from making a decision about the bid, he did foresee that they might prove to be controversial and the subject of challenge. Consequently, he was

[211] p5, para 12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Paul-Jenkins-taken-as-read3.pdf

[212] p48, line 16, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf; p13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH16-MOD300008147-MOD300008166-docs581-596.pdf

[213] pp39-40, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

alive to the fact that a carefully reasoned decision, based on the all the relevant evidence was going to be needed. He rightly foresaw the need for particular care. He put it this way:[214]

> *"When did JH say it? I assume it was shortly after News Int announced its intention to buy out the other shareholders in Sky. Therefore at a time when JH was not responsible for policy in this area. If so, it is not helpful and tends towards an element of pre-judging the issue. That said, the view is far from definitive as is demonstrated by the wish not to second guess decision making by regulator and "it isn't clear to me" so unhelpful and enough to draw comment and perhaps challenge but probably not fatal when a well reasoned decision is made with conclusions based on all the relevant evidence"* (emphasis added).

4.45 It was common ground that the only comments sought and then put to the Treasury Solicitor for consideration and advice were public comments made by Mr Hunt. Sir Paul was not aware, when he advised, that in fact Mr Hunt had sent a memorandum detailing his views about the bid to the Prime Minister's office on 19 November 2010 and another earlier memo had touched upon the subject on 18 June 2010. Nor was Sir Paul aware that Mr Hunt had spoken to James Murdoch on 21 December 2010 and had, only hours before responsibility for the bid had been transferred to him, congratulated James Murdoch by text on the bid's clearance by the European competition authorities.

4.46 Both of the memoranda were updates of a sort which had been encouraged by Mr Cameron from all of his Front Bench since his days in Opposition.[215] Reference to the bid in the June 2011 memorandum was of a passing nature but had prophetically recognised the bid as a political elephant trap:[216]

> *"I have met or spoken to most of the big media owners – Michael Lyons / Mark Thompson, [sic] James Murdoch, Archie Norman / Adam Crozier. Following a steer by Nick Clegg, I am sending signals publicly and privately that our rhetoric will be more generous to the BBC than it was in opposition. But the issues that matter to our own supporters – BBC salaries and profligate use of licence fee money – will be sortable when we have the licence fee negotiations next year. I steered clear of commenting on News Corp's plans to buy out the 61% of Sky they do not own on the grounds it was a competition issue for regulators and not for ministers – but there are likely to be further elephant traps in the media landscape which we must be careful to avoid."* (emphasis added)

4.47 The second note leaves Mr Hunt's sympathetic views about the bid, and the reasons for them, in no doubt. Crucially, there was nevertheless a very clear recognition that approving the bid was not a Government issue, that the decision had to be kept at arm's length, and that any meeting with Dr Cable had to be confined to policy issues and not to the decision on the bid:[217]

> *"A lot has been happening in my sectors so here goes with a brief update:*

[214] p2, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH14-MOD300008107-MOD300008132-docs-566-572.pdf
[215] p57, para 178, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[216] pp57-58, para 181, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf
[217] pp58-59, para 182, *ibid*

> *NewsCorp/Sky bid James Murdoch is pretty furious at Vince's referral of Ofcom. He doesn't think he will get a fair hearing from Ofcom. I am privately concerned about this because NewsCorp are very litigious and we could end up in the wrong place in terms of media policy. Essentially what James Murdoch wants to do is repeat what his father did with the move to Wapping and create the world's first multi-platform media operator, available from paper to web to TV to iPhone to iPad. Isn't this what all media companies have to do ultimately? And if so, we must be very careful that any attempt to block it is done on plurality grounds and not as a result of lobbying by competitors.*
>
> *The UK has the chance to lead the way on this as we did in 80s [sic] with the Wapping move but if we block it our media sector will suffer for years. In the end I am sure sensible controls can be put into any merger to ensure there is plurality, but I think it would be totally wrong to cave in to the Mark Thompson [sic] / Channel 4 / Guardian line that this represents a substantial change of control given that we all know Sky is controlled by NewsCorp now anyway.*
>
> *What next? Ofcom will issue their report saying whether it needs to go to the Competition Commission by 31 December. It would totally wrong [sic] for the government to get involved in a competition issue which has to be decided at arms length. However I do think you, I, Vince and the DPM should meet to discuss the policy issues that are thrown up as a result."* (emphasis added)

4.48 It is not perhaps surprising that Mr Cameron did not remember the existence of the note when he was considering how to react to publication of Dr Cable's comments on 21 December 2010, more than a month later. Had he done so, I have no doubt that he would have asked for it to be considered by the Treasury Solicitor along with Mr Hunt's public comments about the bid:[218]

> *"The issue here is I don't particularly remember this note, and crucially, I didn't recall its existence on the day of 21 December when we were making this decision, and I say that frankly. Obviously if I had recalled it, I would have fed it into the system, as it were, but as I'm sure we'll come to, it's pretty clear from the legal advice we have that that wouldn't have actually made any difference to the outcome."*

4.49 Mr Cameron's retrospective conclusion was, in fact, borne out by the Treasury Solicitor. The statement made by Sir Paul to the Inquiry was, indeed, that if had he known about the 19 November 2010 memorandum, it would have made no difference to his advice:[219]

> *"I am quite clear that my advice to Sir Gus would not have been any different had I seen the note at the time. Jeremy Hunt appears to have been providing his personal opinion to the Prime Minister at a time when he had no decision-making powers in respect of the bid. Just as in his public statements he offers personal views on the plurality issues. Just as in his public statements he also acknowledges that these are in effect regulatory issues to be taken quasi-judicially. I thus do not think there is anything in the note to indicate that Jeremy Hunt could not have properly set aside his personal views and considered the bid on the basis of the evidence, advice and expert opinion before him once he had inherited the relevant powers."*

[218] p16, lines 17-24, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[219] pp5-6, para 15, Paul Jenkins, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Paul-Jenkins-taken-as-read3.pdf

4.50 It is noteworthy that Mr Hunt's suggestion that there should be a meeting between Mr Cameron, Mr Clegg, himself and Dr Cable to discuss policy issues thrown up as a result of the bid was not acted upon, as Mr Cameron was able to confirm:[220]

> *"I do not recall responding to Jeremy Hunt's note either in writing or by speaking to him about it. The meeting he suggested take place did not happen and I do not recall any arrangement being made for it to happen..."*

4.51 Turning to Mr Hunt, he acknowledges that he did not volunteer the fact that he had been in contact with James Murdoch on 21 December 2010 and had congratulated him on the European Commission's decision by text, nor did he raise the existence of his 19 November 2010 memorandum. Put shortly, he did not think that they demonstrated any view substantively different to that which he had publicly expressed:[221]

> *" Q. Were you asked, though, about anything which was not in the public domain, but which might embarrass you should it enter the public domain?*
>
> *A. No.*
>
> *Q. Do you feel that such matters should have been volunteered by you?*
>
> *A. Are you talking about my memo to the Prime Minister?*
>
> *Q. Well, the memo to the Prime Minister, the conversation with Mr Murdoch and the text message we've looked at about the congratulations for Brussels, just Ofcom to go. It's the accumulation of pieces of evidence. It's that material, Mr Hunt, basically.*
>
> *A. I think that all that material is entirely consistent with the overall position that I'd taken that I was sympathetic to the bid and I didn't think there was a media plurality issue, I didn't think we should second-guess the regulators and I thought that due process should be followed.*
>
> *Q. Isn't there a difference, though, between what was stated publicly at interview with the Financial Times and the sort of material we've been looking at? Do you see there as being possibly any difference?*
>
> *A. I don't think there's a substantive difference because substantively my position in all those communications is the same: I, broadly speaking, had the view that BSkyB was already controlled by the Murdochs so I didn't think there was a change in plurality, but I believed that due process had to be respected, so I do not think there's a particular difference."*

4.52 It is not in the least surprising that the Secretary of State for Culture, Media and Sport had an opinion upon a major media issue, in this case the bid by News Corp, or that he should have contact with a major player in his sector of responsibility, such as James Murdoch: on the contrary, it would have been more surprising had he not had a view or, indeed, contact with Mr Murdoch. Moreover, what Mr Hunt was saying in private to Mr Murdoch and writing to the Prime Minister was not inconsistent with what he was putting into the public domain. He did, though, go into more detail, his comments were much nearer in time to the transfer to him of responsibility for the bid and he was more emphatic in his support for the bid in private. The mere fact of his private statements increased the quantity (and quality) of what he had said and written on the subject.

[220] p59, para 183, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-David-Cameron-MP.pdf

[221] pp40-41, lines 12-15, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

4.53 In relation to a decision which was as politically charged as this one, and a decision about the handling of a process which was quasi-judicial and therefore legally challengeable on grounds of appearance of bias, it would have been prudent for Mr Hunt to have reminded those at No 10 of the fact of his 19 November 2010 note and to have volunteered the extent of his private contact with James Murdoch. The additional information, provided openly and transparently, could then have been taken into account and fully informed advice given.

4.54 It is not necessary for me to decide whether or not knowledge of Mr Hunt's contact with James Murdoch would have made any difference to the advice given by the Treasury Solicitor. He has confirmed that knowledge of the note would not have made a difference and the way in which he explained his view makes it is reasonable to infer that he would have maintained that position had he also known about the private contact with James Murdoch. I accept, however, that this is entirely speculative and to have pressed Sir Paul to speculate further as to what his advice might have been ex post facto would have been unfair. More important, for the purposes of the Inquiry, it is entirely unnecessary because whatever the answer, the wider point for the future conduct of politicians (and especially those in power) remains the same. Ministers must be especially vigilant in matters relating to media policy, especially quasi-judicial decisions, and indeed to any circumstance in which they are called upon to exercise discretion which might impact on those with whom they have or have had a relationship, whether working or personal. In short, they must put themselves above suspicion.

4.55 The decision which Mr Cameron made, subject to legal advice, and its timing were entirely understandable. There were enormous pressures on the Government to act quickly. The media storm would only have gathered strength if decisive action had not been taken. News Corp were understandably deeply concerned by Dr Cable's words and a solution which restored confidence in the decision making process was urgently required. There were sound reasons not to remove Dr Cable from office, articulated by Mr Cameron and Mr Osborne in evidence. The Secretary of State for Culture, Media and Sport was the obvious candidate to entrust with the decision because of his portfolio. Finding a suitable decision maker who did not have a prior view one way or another about the bid would most likely have proved to be a wild goose chase. Almost every leading politician has a view, one way or the other, about Rupert Murdoch's companies and it is often strongly held.[222] The evidence does not begin to support a conclusion that the choice of Mr Hunt was the product of improper media pressure, still less an attempt to guarantee a particular outcome to the process, a subject to which this Report returns following consideration of Mr Hunt's handling of the bid.

4.56 The question of Mr Hunt's disclosures at this point does, however, raise one further point of interest. Had he disclosed the full extent of his relevant interactions at the outset, an opportunity would have arisen for those responsible for doing so to offer him more specific advice on the conduct of the bid process and on managing the risks of appearance of bias, tailored to the specifics of the circumstances. That might have made a difference, but I say no more than that.

[222] pp60-61, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

5. December 2010 – July 2011: The Rt Hon Jeremy Hunt and the Department for Culture, Media and Sport

5.1 The delicacy of the task for which Mr Hunt assumed responsibility should not be underestimated. From a political perspective the decision was inherently controversial, "*a hot potato*" as the Prime Minister put it.[223] From a procedural point of view, Dr Cable's apparent bias had caused News Corp considerable concern about, and lack of faith in, the process up to this point, as is plain to see from its solicitors' subsequent correspondence.[224]

5.2 Mr Hunt's own comments about the bid, whilst not enough to prevent him from taking on the task, were such as to generate unease on the part of opponents to the bid. Consequently, as both Mr Kilgarriff and Mr Stephens had astutely recognised, there was a need to take particular care going forward.[225] Mr Hunt had to be scrupulously fair to both sides and had to be seen to be so. He was walking a tightrope.

5.3 This Report first considers the formal handling of the bid by Mr Hunt and DCMS before separately considering the lobbying which was happening concurrently behind the scenes and the various unsolicited submissions and representations which were made to the Secretary of State.

5.4 The handover of responsibility was executed promptly. It involved the transfer of 70 or so staff from BIS to DCMS and a high level meeting on the morning of 22 December 2010.[226] Mr Stephens described these immediate steps, identified the main DCMS attendees at the meeting, and emphasised that the requirements of a quasi-judicial process were addressed at the meeting:[227]

> *"Given the circumstances surrounding the transfer of responsibility, I was particularly conscious of the need to establish robust processes to support the Secretary of State's new responsibilities. I also had to oversee the immediate transfer of some 70 or so staff from BIS to DCMS, with their responsibilities and budgets. I identified Jon Zeff, then Director, Media, as the lead policy official and he ensured that the relevant BIS officials and lawyers were present at a meeting the next day (the 22nd December) with the Secretary of State. I also attended that meeting, along with Jon Zeff, a DCMS lawyer, and Adam Smith...*
>
> *At that meeting BIS officials briefed the Secretary of State on his functions and responsibilities, the decision already taken and the next steps. In particular they reinforced the advice in the Department's submission to the Secretary of State of 12th November that this was a quasi-judicial process and set out what that required..."*

I

[223] p12, David Cameron, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-14-June-2012.pdf
[224] pp7-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH4.pdf
[225] p22, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf; p2, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH14-MOD300008107-MOD300008132-docs-566-572.pdf
[226] there is no suggestion that any of the staff transferred had been working on the bid. Assuming that to be the case, there was no continuity provided in that way
[227] pp4-5, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf, and note at p14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JS11.pdf

5.5 Mr Hunt was sure that the term quasi judicial was used when his role in the process was outlined at the meeting. He had not himself exercised a quasi judicial role before.[228] But he was well aware of the sensitivities:[229]

> *"LORD JUSTICE LEVESON: [I]t was abundantly clear to you, wasn't it that enormous care had to be exercised? One of the things in the note from BIS was a reference to the fact that the Secretary of State for BERR – the decision to intervene in the Lloyds HBOS merger [-] was judicially reviewed on the basis that his discretion had been fettered by comments by the Chancellor, so great sensitivity around all these decisions?*
>
> *A. Absolutely right."*

The OFT and Ofcom reports

5.6 The OFT reported to Mr Hunt on 30 December 2010, predictably concluding that the proposed transaction, if executed, would constitute a European relevant merger situation. This formally confirmed that the Secretary of State did have jurisdiction to make a reference to the Competition Commission under Article 5(3) of the Enterprise Act (Protection of Legitimate Interests) Order 2003 ("the 2003 Order") to address any media plurality concerns if he believed that the relevant statutory conditions were satisfied.[230]

5.7 The following day, Ofcom delivered its keenly anticipated report on plurality, recommending a fuller second stage review by the Competition Commission.[231] Ofcom put its advice and conclusion in this way:[232]

> *"Ofcom's advice, based on the evidence and reasons set out in this report and summarised in the executive summary, is that it may be the case that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences. In reaching this view we do not rely on the dynamic effects discussed in full in Section 6.*
>
> *Therefore we believe there is a need for a fuller second stage review of these issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest, and we advise the Secretary of State accordingly."*

5.8 Ofcom's work had drawn into focus a wider issue concerning the adequacy of the regulatory framework and in particular the lack of a mechanism with which to address a threat to plurality arising from the organic growth of a company. Whilst this lacuna was not immediately relevant to the bid, the recommendation is highly relevant to the Terms of Reference and

[228] pp49-50, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[229] p58, lines 15-23, *ibid*
[230] pp123 – 130, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[231] pp131 – 286, *ibid*
[232] p145, *ibid*

is further analysed below.[233] For present purposes it is sufficient to note and endorse the recommendation which Ofcom made in Chapter 7 of its report:[234]

> *"Under the current statutory framework, a media public interest consideration of plurality can only be triggered when there is a proposed merger involving media enterprises. The future market developments considered in this report suggest that the current statutory framework may no longer be fully equipped to achieve Parliament's objective of ensuring sufficient plurality of media ownership.*
>
> *The market developments identified include the risk of market exit by current news providers, or a steady organic growth in audience shares and increase in ability to influence by any one provider. For example, in a situation where a company grows organically through entirely legitimate business strategy which does not involve any anti-competitive behaviour but finds itself in the relevant media market with 90% share of audiences. While this may not have raised competition concerns, it very clearly may raise plurality concerns.*
>
> *While there is a clear statutory framework for remedying competition concerns which may arise in the context of a merger, the same is not true of concerns related to plurality more generally. This means that if a transaction is found not to operate against the public interest in relation to plurality at the time, there is no subsequent opportunity or mechanism to address or even to consider any plurality concerns which develop over time.*
>
> *...*
>
> *We therefore also recommend that the Government consider undertaking a wider review of the statutory framework to ensure plurality in the public interest. Specifically, we believe there may be value in providing for intervention where plurality concerns arise in the absence of a corporate transaction involving media enterprises and which are not safeguarded by the current media ownership rules."* (emphasis added)

Procedural arrangements and meetings with James Murdoch

5.9 Mr Hunt's formal task, having received the above reports, was to decide whether or not to refer the proposed transaction to the Competition Commission. The applicable test was (and is) that provided by article 5(3) of the 2003 Order which states:

> *"3) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that –*
>
> *(a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation;*
>
> *(b) one or more than one public interest consideration mentioned in the European intervention notice is relevant to a consideration of the European relevant merger situation concerned; and*
>
> *(c) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest."*

[233] Part I, Chapter 9

[234] pp221 – 145, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf

5.10 As is the case at the intervention stage, the test at the referral stage contains a discretion. The discretion allows a low threshold for intervention. Mr Hunt was bound by article 5(5) of the 2003 Order to accept the decision of the OFT on jurisdiction which, in any event, was uncontroversial. That disposed of the consideration under article 5(3)(a) of the test. In effect it remained for him to decide whether or not to follow Ofcom's recommendation to refer the bid to the Competition Commission in this case.

5.11 Before addressing the substantive decision, Mr Hunt had first to consider procedure. In particular, Allen & Overy, solicitors acting on behalf of News Corp, had lost no time in writing to him on 23 December 2010, complaining in strong terms about his predecessor's handling of the matter and requesting to know how Mr Hunt intended to proceed.[235] DCMS replied promising a redacted copy of Ofcom's report when it was available and assuring News Corp that it would be given: "*reasonable opportunity to make written and oral representations before the Secretary of State takes his decision...*"[236]

5.12 Allen & Overy wrote again on 5 January 2011 pressing for progress and expressing fears about how long the process might take.[237] By this time The Treasury Solicitor (TSol) was acting for the Secretary of State and replied, explaining that he did not wish to delay the decision, and that Mr Hunt was prepared to meet News Corp.[238] It is entirely understandable, in the exceptional circumstances that the bid had come to him, that Mr Hunt should have done so.

5.13 The meeting with News Corp took place on 6 January 2011. Mr Hunt had conferred with his officials and legal advisers the previous day in preparation, and an aide memoire was prepared for him.[239] The Secretary of State was accompanied at the meeting by Mr Zeff, Mr Kilgarriff, Adam Smith and his Private Secretary. News Corp was represented by James Murdoch, Mr Michel and others. A detailed note was taken and it was expressly recorded that those present would be open about the fact of the meeting:[240]

> *"It was agreed that subject [sic] of these discussions would be kept confidential at this stage but both sides would be open about the fact meetings that [sic] had taken place. It was expected that the OFCOM and any News Corp submissions would be released no later than the SoS' decision on referral."*

5.14 According to the minute Mr Hunt broke the news at the meeting that he was minded to refer the proposed transaction to the Competition Commission, explaining that Ofcom's recommendation, together with advice which he had received from counsel, had caused him to reach this provisional view. He referred to the "*very low*" threshold set by the statutory test. A redacted copy of the Ofcom report was to be provided to News Corp the following day and the company was to have a week to make written submissions, if it so wished, before Mr Hunt made a final decision. These submissions were not to be a re-submission of News Corp's evidence to Ofcom. If, as a result of such submissions, or certain clarifications which Mr Hunt wished to seek from Ofcom, Mr Hunt became minded not to refer the deal then other interested parties would be given the opportunity to state their cases.

[235] pp85-86, *ibid*
[236] p87, *ibid*
[237] p292, *ibid*
[238] p295, *ibid*
[239] pp299-301, *ibid*
[240] pp296-298, *ibid*

5.15 Amongst a number of points, News Corp expressed serious concerns about Ofcom's work, and warned that the practical effect of a referral would be to decrease the likelihood of the sale being completed and reserved its legal rights. Those speaking on behalf of the company also made clear its fallback position, which was that a further meeting would be sought if its written submissions were not successful, in order to discuss those submissions and potential remedies as necessary. By remedies News Corp was referring to undertakings in lieu of referral ("UIL") which the Secretary of State has the power to accept under the Enterprise Act:[241]

> *"The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as she considers appropriate undertakings to take such action as he considers appropriate."*

5.16 The terms of the Departmental aide memoire, which are realistic, give an insight in to the thinking in DCMS; it suggests that Mr Hunt was not going to be easily moved from his provisional view but that he was open to a further meeting to discuss any written submissions which News Corp might produce:[242]

> *"I have carefully read the Ofcom report and I find it very difficult on the basis of what I have seen to date to see any grounds which would allow me to not refer this case to the Competition Commission, especially given that the threshold for referring is relatively low.*
>
> *...*
>
> *I will consider carefully any arguments you subsequently put to me and would be happy to have a further meeting on the substance of the report. But my feeling at this stage is that that [sic] you will have to identify some very serious flaws in Ofcom's facts or analysis before I could consider not referring..."* (original underlining)

5.17 Formal "minded to" letters were sent by Mr Hunt to both News Corp and BSkyB on 7 January 2011 enclosing both the OFT report and a redacted version of Ofcom's report. The letters explained that the Secretary of State was minded to refer the matter but, as is required by the Enterprise Act 2002,[243] consulted the relevant parties likely to be adversely affected by the decision if it was confirmed. In this case the letters did so by inviting written submissions and offering a meeting.[244]

5.18 On 10 January 2012, Mr Hunt, Mr Smith and officials met Ed Richards, the CEO of Ofcom. This was to seek clarification on various aspects of the Ofcom report.[245]

5.19 On 13 January 2011, BSkyB made detailed written submissions to the Secretary of State, urging him to reject Ofcom's advice and to permit the transaction to complete without a referral.[246] These submissions were followed very shortly afterwards by those of Allen & Overy, on behalf of News Corp, which were delivered on 14 January 2011 in both confidential

[241] para 3, Schedule 2, of the 2003 Order
[242] pp299-301, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[243] s104 Enterprise Act 2002
[244] pp302-307, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[245] pp313-315, *ibid*
[246] pp318-324, *ibid*

and redacted format. Their very detailed submissions amounted to a sustained full frontal attack on the Ofcom report, tantamount to an allegation of bias:[247]

> *"News [sic] believes that Ofcom has failed to approach the effects of this Transaction with an open mind and has carried out a review process with the intention of identifying concerns. Ofcom has been noticeably more receptive to submissions made by third party complainants than it has been to submissions made by News and has chosen to present the evidence in a one sided way (in some cases selectively omitting relevant evidence)".*

5.20 Conspicuously, the submissions did not conclude by throwing down the gauntlet to the Secretary of State, although they were careful to preserve News Corp's legal position. Instead they culminated by indicating a willingness on the part of News Corp to give UIL which would "*remedy, mitigate or prevent all of the effects adverse to the public interest which Ofcom erroneously identifies may result from the Transaction*".[248] It was on this potential alternative to a referral which News Corp thereafter focused its effort, following up its submissions of 14 January 2011 with draft UIL under cover of a letter dated 18 January 2011.[249]

5.21 News Corp's proposal was to "spin off" Sky News as an independent company so as to guarantee its continued editorial independence and to commit to a long term carriage agreement so as to ensure the commercial viability of the hived off entity. The arrangements were summarised by Allen & Overy in a covering letter expressed in these terms:[250]

> *"The attached UIL proposal involves a commitment from News that Sky News will be spun off as an independent UK public limited company (Newco), with its shares publicly traded. Shares in Newco would be distributed to the existing shareholders of Sky, as far as possible, in the same proportions as their existing shareholding (so that News will retain only the same shareholding in Sky News as it currently has in Sky, 39.1%).*
>
> *The corporate governance structure of Newco will also replicate the effect of the existing governance structure of Sky, which has been in place for a number of years. In particular, after closing:*
>
> *(a) The voting agreement dated 21 September 2005 between the Sky [sic] and News which prevents News from exercising more than 37.19% of the votes will be replicated in respect of Newco;*
>
> *(b) a majority of the board of Newco shall comprise non-executive Directors determined by the board to be independent;*
>
> *(c) material transactions between Newco and News/Sky will require the approval of Newco's Audit Committee, which will consist exclusively of independent non-executive Directors. In addition Newco's constitutional documents will provide that such transactions may, depending on materiality, require an independent fairness opinion or Newco independent shareholder approval (by virtue of Newco applying controls that have equivalent effect to those imposed by Chapter 11 of the Listing Rules).*

[247] p349, *ibid*; see in general pp325-379, *ibid*
[248] p349, *ibid*
[249] pp380-385, *ibid*
[250] p2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-33.pdf

There will also be a number of commercial agreements between News/Sky and Newco, including a long-term carriage agreement which will provide Newco with a significant and committed long term revenue stream. None of the commercial agreements between News/Sky and Newco will give News /Sky any right to influence the editorial content of Sky News.

A business plan for Sky News and a latter from News' financial advisers regarding the suitability of Sky News for admission to trading will be made available to the Secretary of State in due course."

5.22 The thinking behind the proposal was that by preserving a separate legal identity for Sky News and by safeguarding its editorial freedom, Ofcom's plurality concerns would be sufficiently addressed. Allen & Overy argued:[251]

"Ofcom states in paragraph 5.46 of the Report that: "As a result, today [Sky News] makes a strong and positive contribution to plurality. [...] The proposed transaction would result in Sky ceasing to be a distinct media enterprise from News Corp." The attached UIL proposal, under which Sky News would be spun off as an independent legal entity, will fully safeguard the status quo as regards the editorial independence of Sky News and will ensure that Sky News remains as a distinct media enterprise and independent broadcast voice. This fully addresses all of the concerns identified by Ofcom in its Report and relied upon by Ofcom in recommending to the Secretary of State that he refer the Transaction to the CC.

The UIL will therefore remedy, mitigate or prevent any purported effects resulting from the Transaction which have been identified by Ofcom as potentially adverse to the public interest."

5.23 Mr Hunt's initial reaction was that the UIL was: "...*a pretty big offer. I mean they were basically saying – this was a decision I had about news plurality, and they were saying that they would exclude the one news organisation that's part of BSkyB from the whole deal."*[252]

5.24 On 20 January 2011, a second high level meeting between Mr Hunt and James Murdoch took place to enable News Corp to expand upon its written submissions and to speak to its proposed UIL. Both parties took the meeting very seriously. Mr Hunt was accompanied by a number of DCMS officials, independent specialist counsel, and both of his SpAds. Mr Murdoch brought Mr Michel and others. At the outset Mr Hunt explained that he was still minded to refer the case to the Competition Commission, notwithstanding News Corp's written submissions. He maintained that the low threshold for referral combined with the clear disagreement between Ofcom and News Corp was leading him to the view that a referral for further investigation was the reasonable approach. He would though be prepared to consider UIL as an alternative to referring the matter.

5.25 Undeterred by Mr Hunt's clear indication that he was minded to refer, the minutes show that News Corp maintained its furious rebuttal of the Ofcom report with a lengthy series of points, although there is no indication that they moved Mr Hunt from his provisional view. The Secretary of State was much more receptive in principle to the UIL, which were discussed next, but he was not prepared to be rushed when it came to the detail. He concluded that:

[251] *ibid*

[252] pp71-72, lines 4-8, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

"...he was prepared to explore the proposal but would want to look very closely at the detail, including the implications for financial viability of an independent Sky News."[253]

5.26 Next steps were outlined. They involved publication of redacted versions of the Ofcom report and of News Corp's written submissions. Mr Hunt would announce that he was minded to refer the bid to the Competition Commission but that he was first going to explore the potential remedy offered by News Corp. Mr Hunt would start this process by reverting both to Ofcom and the OFT for further advice. The involvement of these regulatory bodies at every turn, even when not required by statute, was to become the hallmark of Mr Hunt's formal approach to the bid. An undertaking that the representations and UIL reflected the position of BSkyB was sought together with fully worked up UIL. The Secretary of State made it clear that in the event that he was minded to accept the UIL, there would be a statutory public consultation.

5.27 Mr Hunt described Mr Murdoch as "*very cross*" about the continued involvement of Ofcom because "*...he considered that was tantamount to wanting to kill the deal, because he believed that Ofcom would use every mechanism at their disposal ...*".[254] It is certainly the case that this was one of a number of steps which Mr Hunt took during the process which were not to News Corp's liking.

5.28 At a meeting between lawyers on 21 January 2011, Allen & Overy advanced arguments which appear to have been designed to reduce the role of OFT and Ofcom, or even to dissuade the Secretary of State from reverting to them. The firm also argued that early publication of the Ofcom report would harm the process. These arguments, although properly made, were not accepted and are mentioned because they are illustrative of the procedural history and the careful approach of DCMS and its advisers in relation to News Corp.[255]

Consideration of the proposed UIL: advice and consultation

5.29 Fully worked up draft UIL were provided by News Corp on 24 January 2011 and the next day Mr Hunt made a written statement to Parliament explaining the timeline and process which he had followed up to that point, as well as making public the fact that he was minded to refer the bid to the Competition Commission but was first considering the UIL offered by News Corp. His meetings with News Corp and Ofcom were covered and the statement was accompanied by publication of the December reports from OFT and Ofcom, the latter in redacted form, the Secretary of State's "minded to" letters and the resulting submissions from both BSkyB and News Corp (in redacted form). On their face, the written ministerial statement and associated press release appeared to be models of transparency. But, as is explored further below, there had in fact been a considerable volume of private communication with News Corp going on behind the scenes which is not mentioned in the statement.[256]

5.30 Formal letters were sent by Mr Hunt both to Ofcom and the OFT on 27 January 2011. Ofcom was asked, pursuant to s106B Enterprise Act 2002, "*...for advice on the extent to which you think that the enclosed News Corp undertakings in lieu (UIL) address the potential impact*

[253] p388, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[254] pp73-74, lines 17-20, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[255] pp58-59, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH4.pdf
[256] pp426-431, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf; see Lobbying Behind the Scenes below

on media plurality identified in Ofcom's report..."[257] The OFT was asked, pursuant to s93 of the same Act, *"...to consult both merging parties with a view to discovering whether those undertakings are in your view practically and financially viable, so that they would be acceptable to me..."*.[258] The day before these letters were sent, Operation Weeting commenced. At that stage, Mr Hunt regarded phone hacking at News International as having no bearing on his consideration of News Corp's bid. He said in evidence "*...my perspective at this point is: this is a police matter*".[259]

5.31 Both regulators were asked to respond within 14 days and both met that deadline with responses dated 11 February 2011. Ofcom recognised the proposed UIL as a significant step by News Corp and regarded UIL, in principle, as a solution to its plurality concerns. However, it did not consider that the UIL proposed by News Corp afforded sufficiently tight governance arrangements to meet those concerns and it outlined four governance requirements which it felt had to be met:[260]

> *"The Board of Newco should consist of a majority of independent directors, "independent directors" being directors who have no other News Corporation or News Corporation associated interest;*
>
> *The Board of Newco, including the independent non executive directors, should have a combination of both senior editorial and business experience/expertise;*
>
> *The Chairman of Newco, should be an independent non executive;*
>
> *There should be a sub-committee of the Board of Newco to oversee editorial independence and integrity of Newco's services ("the Board Editorial Committee").*"

5.32 Ofcom had been in contact with News Corp which had responded to Ofcom in terms indicating a willingness to meet the first two concerns and proposing an alternative solution in respect of the fourth: an alternative which was described by Ofcom as "*a promising basis from which to work*".[261] The sticking point was the third of the points listed above, the requirement for an independent Chairman. On that point, Ofcom's advice was:[262]

> *"Without such an undertaking, it would be open to the Newco Board to appoint a Chairman who is affiliated with News Corporation. Given the nature of Newco and its relationship with News Corporation as set out above, we consider this would undermine the effectiveness of the proposed UIL in meeting our plurality concerns and the credibility of the undertakings.*"

5.33 The OFT set out a number of additional undertakings which it considered that it would be necessary for News Corp to give in order to ensure that the UIL were practical and viable in the short to medium term. It also identified an "*essential structural limitation*" in that the carriage agreement at the heart of the scheme was of finite duration, warning that: "*The OFT, however, considers that the finite duration of the carriage agreement, in particular, entails*

[257] pp434-435, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[258] pp436-437, *ibid*
[259] p83, lines 24-25, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[260] p3, and see more generally the whole document, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-53.pdf
[261] p220, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[262] p5, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-53.pdf

a material risk to the long term viability of Newco and hence the UIL."[263] Ofcom appears to have been less concerned about this factor, considering the proposed ten year duration for the carriage agreement to be long term in the context of the industry dynamics of the media sector.[264] Otherwise Ofcom did not have anything to add to the OFT's assessment.

5.34 DCMS officials advised Mr Hunt to permit more time to see whether News Corp was prepared to amend its UIL so as to meet the regulators' concerns.[265] Mr Hunt did so but set News Corp a very tight deadline of 24 hours in which to indicate in principle that it would make the necessary changes.[266] It amounted to an ultimatum, the core part of which was worded in the following terms:[267]

> *"There are therefore four critical matters which need to be resolved if I am to consider accepting your undertakings:*
>
> *The Board of Newco would need to be independently chaired. I agree with Ofcom's assessment that, without such an undertaking, the Newco Board could appoint a Chairman who is affiliated with News Corporation which would undermine the spirit and potentially the practical effect of undertakings designed to address concerns about plurality.*
>
> *There needs to be a non-reacquisition commitment as set out by the OFT. Whilst I understand that it is proposed that this could lapse after 10 years, I quite understand the OFT's concern that there should not be a "carve-out" in the event of a third party bid for Newco.*
>
> *The key contracts would need to be approved by me. At a minimum this would cover the carriage agreement and the brand licensing agreement. I would anticipate asking Ofcom and the OFT to advise me on these contracts at the appropriate time.*
>
> *There needs to be more clarity around the definition of "material transactions" (as identified in para 8.11 of the OFT report) and the assets to be transferred (paragraph 9.7 – 9.14).*
>
> *There are also a number of other important issues where there is agreement in principle, or a large measure of agreement, and these too would need to be agreed and incorporated into the undertakings in lieu.*
>
> *If you are unwilling to agree to the necessary changes, I will refer the merger to the Competition Commission. If, on the other hand, you will accept that in principle these changes can be made, and confirm that to me within 24 hours, I will formally ask Ofcom and the OFT to continue their discussions with News Corp with a view to producing as soon as possible a set of finalised undertakings in lieu which I can consider. If I then propose to accept those finalised undertakings in lieu of a reference, they can then be published and consulted on as the legislation requires."*

5.35 The consequences for News Corp, and James Murdoch personally, of accepting these further restrictions were not insignificant as Mr Hunt explained to the Inquiry:[268]

[263] p7, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-54.pdf
[264] p7, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-53.pdf
[265] p75, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf
[266] pp1-2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-55.pdf
[267] p2, *ibid*
[268] p76, lines 2-23, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

"Q. In other words, [the Chairman of Newco] wouldn't be Mr James Murdoch?

A. That was a very, very significant thing for Mr Murdoch. I mean you know, News Corporation thinks that one of its primary functions is what it says on the tin, is news. He first of all didn't think he should have to spin off Sky News at all because he didn't believe there was a plurality issue with the original proposal, and this was going to cost him hundreds of millions of pounds more; but secondly, he was at the time chairman of BSkyB, and that included being chairman of Sky News, and he thought he would – he wanted to continue to be chairman. I think that was pretty important to him. And Ofcom did not want that, and so they – so that was then presented to me.

There were other things that Ofcom – there were other concerns. There was a concern that they wanted to have very strict measures in place to stop News Corporation buying additional shares above 39 per cent. James Murdoch was very concerned, for example, that a commercial rival would come in and purchase the other 61 per cent of the shares and that might mean that he lost control of Sky News forever..."

5.36 The short deadline prompted a swift response from James Murdoch who indicated by letter dated 16 February 2011 that News Corp was willing to agree to the suggested changes and enclosed draft amended UIL.[269] This assent caused Mr Hunt formally to write to both OFT and Ofcom on 17 February 2011 asking them to agree a set of undertakings with News Corp and Sky so that he could make a final decision.[270]

5.37 On 1 March 2011 the OFT reported back to the Secretary of State communicating the news that satisfactory amendments had been proposed and enclosing draft UIL bearing the same date.[271] Its conclusions were expressed in these terms:[272]

"In light of the amendments proposed by News, and subject to prior approval of the key agreements, as described above, the OFT advises the Secretary of State that the Revised UIL are likely to be practically and financially viable in the short and medium term (that is, no more than 10 years).

The OFT also advises the Secretary of State that the amendments made to the Revised UIL do not address the essential structural limitation identified in the Report, that the UIL offered are unlikely to be practically and financially viable over the long term. The relevance of this limitation ultimately depends on the time horizon which the Secretary of State, advised by Ofcom, considers relevant to ensure the effectiveness of the UIL in addressing any media plurality concerns. The OFT notes that Ofcom's advice of 11 February 2011 sets out its views on the dynamics of the industry."

5.38 The same day Ofcom expressed its view that the revised proposed undertakings did address the concerns which it had expressed in its 31 December 2010 report. Ofcom had also seen the latest report from the OFT and expressed its agreement with it.[273]

[269] p1, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-56.pdf
[270] p1, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-58.pdf; p1, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-591.pdf
[271] pp1-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-73.pdf; pp6-15, Rupert Mudoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-74.pdf
[272] pp3-4, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-73.pdf
[273] p5, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-72.pdf

5.39 Accepting the advice, Mr Hunt proceeded to the next step which was to announce, on 3 March 2011, a statutory consultation exercise soliciting views as to whether the proposed UIL were sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by the merger. The Notice of Consultation allowed until 21 March 2011 for responses.[274]

5.40 There was an enormous response to the consultation exercise from an extraordinary variety of respondents. Solicitors Slaughter and May, who had been in regular correspondence with DCMS about the bid before having this formal opportunity to make submissions, lodged detailed submissions on behalf of the Alliance.[275] BT, despite itself being a part of the Alliance made an individual submission. Lord Prescott and Tom Watson MP separately wrote to urge the Secretary of State to act upon the emerging evidence of criminal wrongdoing at the News of the World (NoTW), a theme which was to take on a growing significance in relation to the bid. They were amongst around 140 MPs who wrote to DCMS. The trade unions BECTU and the NUJ both responded, as did the TUC. Academics and individuals and companies from within the media industry added their voice, as did significant numbers of ordinary members of the public. Organised email campaigns instigated by pressure groups Avaaz and 38 Degrees resulted in tens of thousands of responses. Solicitors DLA Piper, acting for Avaaz, made detailed written submissions. Other not-for-profit or campaigning organisations also responded. The consultation even elicited a number of responses from the United States of America written by those who were unhappy with News Corp's activities in that country. When the consultation period ended, DCMS had received 38,687 responses, of which about 37,700 were the product of the internet campaigning.[276] Most were hostile to the UIL.[277] By the time the response to the consultation was announced, the number had grown still further.

5.41 Whilst the consultation was taking place, Mr Hunt and his officials were thinking ahead and, in particular, considering how best to meet key opponents of the bid. The internal e-mail of an official on 14 March 2011 recorded his thinking:[278]

> *"Many thanks for briefing SoS this morning on the Newscorp/BSkyB merger.*
>
> *On the consultation and the process of analysing the responses, SoS was clear that we should take the necessary time to examine the substantive points raised about the UIL. His priority was to ensure that the final UIL are robust and viable in the long term. We must take care to avoid possible loop holes.*
>
> *[On] meetings, SoS wanted to be, and be seen to be, even handed with both proponents and opponents of the merger. To that end SoS agreed he would consider requests for meetings once written evidence had been submitted. In particular, SoS wanted the alliance of bodies working through Slaughter and May to be aware of this position and his willingness to meet, given the representations they have made throughout this process."*

[274] pp1-7, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-77.pdf
[275] pp137-152, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf
[276] p255, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf
[277] p78, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[278] p265, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf

5.42 Mr Hunt continued to make maximum use of the assistance available to him from Ofcom and the OFT writing to both on 18 March 2011, before the consultation had closed. He sought their advice on those responses which were material to the practical and financial viability of the proposed UIL, enclosing some at that juncture. The remaining material representations and a summary of all consultation responses were to follow. Mr Hunt also sought the regulators' advice in relation to the detailed provisions on carriage, brand licensing and certain operation agreements set out in the proposed UIL which were later provided by News Corp.[279]

5.43 On 24 March 2011, the Secretary of State met with members of the Alliance. He was supported at the meeting by his Private Secretary, both of his SpAds, Mr Zeff, Daniel Beard of counsel, an in-house lawyer and a member of the DCMS Media Team. Ofcom and the OFT were represented, at the suggestion of the Alliance. For the Alliance there were representatives from Trinity Mirror, Guardian Media Group, Telegraph Media Group, Associated News and Media, and Slaughter and May. The Alliance explained the basis of its opposition to the UIL and support for a referral to the Competition Commission which the Secretary of State then discussed with them.[280]

5.44 DCMS had asked the Alliance's public affairs advisers, Weber Shandwick, not to attend. Internal DCMS emails evidencing the debate which led to this decision reveal that there were differences of opinion. It is striking that amongst those arguing against their attendance was Adam Smith who wrote: "*No public affairs advisors from News Corp were in any of our meetings with them. It was News employees plus lawyers wasn't it? So I still feel they shouldn't be there".*[281] This view overlooked the fact that News Corp was relying upon its own in house public affairs team, of which Mr Michel was a part, and that Mr Michel had attended both meetings with the Secretary of State about the bid earlier that year.[282]

5.45 There followed a period during which three Labour politicians, Ivan Lewis MP (Shadow Secretary of State for Culture, Media and Sport), Lord Prescott and Mr Watson all pursued correspondence with Mr Hunt about the bid. Mr Lewis wrote on 30 March 2011 raising a number of questions about the bid and asking whether the Government would, in the light of the experience, remove politicians from such decisions in the future: "*In light of the very real issues of impartiality that have arisen in relation to this case will you consider including provisions in the Bill which would remove politicians from having any quasi-judicial role in relation to specific plurality and cross media ownership decisions?"*.[283] The Secretary of State replied on 19 April 2011 but, on the last point, he did so in non-committal terms.[284] The future role of politicians in media plurality and cross media ownership decisions is an important issue and is discussed further later in this Chapter.[285]

[279] pp1-2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-781.pdf; pp1-2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-791.pdf; pp1-2, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-80.pdf

[280] p28, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

[281] p78, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH8.pdf

[282] p3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Frederic-Michel1.pdf

[283] p40, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

[284] p84, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

[285] See the Conclusion to this Chapter and Part I, Chapter 9

5.46 On 11 April 2011, Lord Prescott followed up the letter which he had written on 15 March 2011 during the consultation period with a second letter.[286] He developed and updated the point which he had made earlier about the unfolding story of phone hacking at the News of the World. During the intervening period, on 8 April 2011, News International had admitted that its previous investigations had not been thorough enough and indicated that it would be settling some civil cases. In particular, Lord Prescott asked the Secretary of State to delay his decision whilst the Metropolitan Police investigated and warned against approving the bid. Mr Hunt replied the next day. His stance, at that stage, on phone hacking was that: "*The phone-hacking allegations are of course very serious, but they are matters for the criminal courts. They have no bearing on the separate matter of media plurality, and my decision on the merger could be challenged if I allowed these allegations to colour my view.*"[287] He also referred to s67(5) of the Enterprise Act 2002 which he considered prevented him from widening the scope of the intervention.

5.47 Both of the points which Mr Hunt raised in response to Lord Prescott were the subject of further thinking and advice at DCMS. So far as the phone hacking allegations were concerned, on 18 April 2011, an official advised Mr Hunt that they might have some relevance to the decision on UIL, if the wrongdoing was known about and endorsed or ordered at a senior level within News Corp. The advice was put in these terms:[288]

> *"The phone-hacking issues as currently admitted by News Corp cannot properly be considered by you when making your decision on the matters of plurality which were the subject of the public interest intervention. However, it is the nature of undertakings that they depend to a certain extent on trust. Our advice is therefore that those activities may be relevant to your decision, but only to the extent that they suggested that you could not reasonably expect News Corp to abide by their undertakings, for example if the wrong-doing was known-of and endorsed or ordered at a senior level within News Corp. This might also be relevant to the level of risk you want to assume in relation to the operational agreements (see above)."* (emphasis added)

5.48 At that stage, Mr Hunt did not believe that the evidence went so far as to give rise to a question of trust within News Corp, as opposed to NI:[289]

> *"But the advice we got on 18 April did say that the one way that phone hacking could impinge was if they thought there was an issue of trust, so that accepting undertakings basically meant that you had to be confident that you could trust the people that you were doing a deal with over those undertakings.*
>
> *So at that stage it was a matter about News International. It wasn't a matter that there was any evidence at all that it affected News Corporation executives that we were dealing with. We thought they had a problem with a company that was part of News Corporation group, but there was no evidence, and we didn't think we'd have any legally robust basis to suggest at that stage there was an issue of trust."*

[286] pp70-72, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[287] p73, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf; DLA, on behalf of Avaaz, had made legal submissions arguing to the contrary, pp88-89, 290, *ibid*
[288] p79, *ibid*
[289] pp84-85, lines 16-4, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf

5.49 On or about 18 April 2011, the scope of the intervention was raised by the Secretary of State within his Department. Insofar as is material, an email of that date from Paul Oldfield, the Secretary of State's Principal Private Secretary, read:[290]

> *"Actions for our Comms meeting this morning*
>
> *...*
>
> *SoS asked whether we could/should look to invoke the PI test re "fit and proper person" re Newscorp / Sky merger..."*

A related email between Jon Zeff and Rita Patel, referring to that quoted above, put it this way:[291]

> *"See below, SoS raised two points*
>
> *...*
>
> *B) wants to make sure we've thoroughly kicked the tires on scope for invoking the standards limb of the pi test.*
>
> *Someone has suggested to him that we could instigate a new reference because information has come to light (on phone hacking) which wasn't available to vince c when he took the original decision. I was doubtful but agreed to check."*

5.50 In the result Mr Hunt did not seek to widen the scope of the intervention. Whether he had the power to do so would have been an interesting legal question.[292] He stuck to the line which he had adopted in correspondence, namely that s67(5) prevented him from doing so. Of course, whether or not he had the power to amend or replace the original EIN, Ofcom at all times had the power to remove BSkyB's broadcasting licence if it believed that that company was not a fit and proper person to hold it. In September 2012, that was a question which Ofcom did ultimately address concluding, after James Murdoch had stepped down as Chairman, that it was a fit and proper person. Of significance to the Inquiry's consideration of the bid is the fact that, by asking the questions and raising the issues recorded in the internal emails quoted above, Mr Hunt demonstrates an open mind and a desire to act properly.

5.51 There was a further exchange of letters when, on 24 May 2011, Lord Prescott copied an article from the Guardian reporting criticism of News Corp by former US Vice President Al Gore.[293] Mr Hunt replied on 27 June 2011 pointing out the limited remit of his decision, and assuring Lord Prescott that he would only accept UIL which were legally robust and enforceable and which addressed the media plurality concerns.[294]

5.52 Meanwhile, on 19 April 2011, Mr Watson also wrote to Mr Hunt, following up a letter which he had sent on 24 January 2011, before the consultation. His first letter had raised phone hacking at the NoTW (to the extent then known) and urged Mr Hunt to widen the scope of his intervention to include News Corp's commitment to broadcasting standards. He had concluded:[295]

[290] p80, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[291] *ibid*
[292] see the discussion in The Phone Hacking Scandal and the Withdrawal of the Bid subsection below
[293] pp101-103, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[294] p175, *ibid*
[295] p425, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf

> *"So egregious are these breaches that I am surprised that you have not already commissioned Ofcom to test News Corp's commitments to broadcasting standards. I request that you do so now as a matter of urgency."*

5.53 Mr Hunt had replied to the earlier letter on 8 February 2011 pointing out (as he later did to Lord Prescott) that s67(5) of the Enterprise Act 2002 prevented him from making a further intervention in the case.[296] Mr Watson's second letter updated his first because News Group News Ltd had, in the meantime, admitted liability in some of the civil claims arising from voicemail hacking. He repeated his call for a widening of the scope of the intervention, suggesting an amendment to the original EIN and argued that any UIL given by News Corp would be unreliable:[297]

> *"Clearly News's [sic] illegal activities render them unsuitable to own Sky and I believe you ought to specify this as a public interest consideration. If it is the position under the enterprise Act that there may be only one intervention notice given to the OFT then the notice should be amended to add reference to the broadcasting standards commitments mentioned above particularly in the context of News's [sic] admission of guilt; and the matter should be referred once more to Ofcom to carry out further investigations in this regard. You should dismiss the UIL being offered by News since they patently cannot be relied upon and the matter should be referred to the Competition Commission for a detailed investigation."*

5.54 Mr Watson wrote again on 10 May 2011 to communicate the fact that "*other criminal trials have been launched that strengthen my original concerns"* and to chase for a response.[298] Mr Hunt responded on 17 May 2011 explaining that an EIN, once issued could not be amended, but that Ofcom has the power at any time to remove a broadcasting licence from a broadcaster it does not believe to be a fit and proper person. He only had power to refer the case to the Competition Commission on plurality grounds but assured Mr Watson that he would only accept UIL if they were legally robust and enforceable.[299] The internal emails referred to above corroborate that this was indeed Mr Hunt's intention.

5.55 Mr Watson sought to continue the correspondence with a further letter on 21 June 2011 seeking a full list of News Corp shareholders but events soon overtook this request.[300]

5.56 The fact that the regulators were making "*good progress*" in their dealings with News Corp, which had "*now responded positively to virtually all the key issues and (eventually) provided all the documentation requested*" was reported to the Secretary of State on 13 May 2011.[301] Ofcom and the OFT had been joined in their scrutiny of the commercial agreements which would give effect to the proposed UIL by solicitors Pinsent Masons, instructed by the Secretary of State to scrutinise them from the commercial perspective of Newco. Their work added an additional dimension to the checking process.[302]

[296] p2, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf
[297] p87, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[298] p90, *ibid*
[299] p98, *ibid*
[300] p146, *ibid*
[301] p94, *ibid*
[302] *ibid*

5.57 It took until 22 June 2011 for the OFT and Ofcom to complete and deliver their advice. The OFT had not been moved fundamentally by the responses to the consultation but it had acted on a number of suggestions for the improvement to the UIL which News Corp had eventually adopted. The OFT put it this way:[303]

> *"The Reviewed Responses do not, individually to collectively, provide reasons for the OFT to change the fundamental tenor of its March Advice.*
>
> *However, the Reviewed Responses do provide suggestions as to how the 1 March UIL could be improved so as to improve the practical and financial viability of the proposed UIL. The OFT has discussed these improvements with News, and News has been willing – ultimately – to accept all of the amendments which the OFT regards as material and desirable..."*

5.58 The resulting amendments to the UIL were listed in an Annex to the advice.[304] Where suggestions or comments had not been taken forward, the OFT explained why. The advice made clear that none of the amendments could address the essential structural limitation identified in its December 2010 report which meant that, in its opinion, the UIL were unlikely to be practically and financially viable over the long term.[305] As for the carriage and brand licensing agreements, they had been discussed and amended in places with the result that the OFT was satisfied, stating that:[306]

> *"In light of the changes made, the OFT advises that the Revised Carriage Agreement and Revised Brand Licensing Agreement are consistent with the Revised UIL and the OFT's previous advice with regard to their practical and financial viability".*

5.59 Ofcom similarly reported the strengthening of the UIL in response to issues identified in the responses to the consultation exercise. As to the long term viability of the UIL, it stood by its previous position that ten years in the media industry was long term. It pointed out that if News Corp sought to reacquire Sky News at the end of the period then the public interest test under the Enterprise Act 2002 might be triggered if the threshold criteria were met. Ofcom put it thus:[307]

> *"As we have previously advised, we agree that the proposed UIL are not a permanent solution and that their effectiveness may start to diminish in the run up to the end of the 10 year period. We consider that a carriage agreement of a 10-year term in the context of industry dynamics in this sector is long term. This is because we consider there is likely to be significant evolution of the market and consumers' use of news and current affairs over the next decade. As a result, the situation with regard to plurality may be significantly different in 10 years time.*
>
> *As set out above, at the end of the 10 year period, the prohibition on acquisition and the carriage agreement come to an end. If News Corporation wished to acquire the remainder of the shares in Newco after the end of the 10 year period, a media public interest test may be triggered if the threshold criteria in the Enterprise Act 2002 are met.*

[303] p149, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[304] pp153-157, *ibid*
[305] p150, *ibid*
[306] p151, *ibid*
[307] p168, *ibid*; Ofcom also repeated its call for a review of the statutory framework to ensure plurality in the public interest in the longer term

In order for the Secretary of State to have sufficient flexibility for dealing with plurality issues we would, however, refer to our previous advice that the Government should consider undertaking a wider review of the statutory framework to ensure plurality in the public interest in the longer term. We believe that the current system is deficient in failing to provide for intervention to be considered where plurality concerns arise in the absence of a relevant corporate transaction involving media enterprises, for example as a result of organic growth."

5.60 As had the OFT, Ofcom raised those responses to the consultation which it had not acted upon and explained why it had not done so. On the question of the carriage and brand licensing agreements, Ofcom was satisfied with revised versions of the agreements dated 15 and 16 June 2011 respectively. Overall, Ofcom was satisfied, concluding that:[308]

"For all the reasons set out above and in our previous letters of advice, we consider that the revised proposed undertakings offered by News Corporation would address the plurality concerns identified in our report of 31 December 2010."

5.61 The Secretary of State accepted the advice of the regulators and prepared to make a further written ministerial statement. Before doing so he took advice from his officials on what could and could not be published. It is clear from internal DCMS emails that Mr Hunt wanted to publish as much as he could, although in the result it was not practicable to publish the carriage and brand licence agreements for reasons of commercial confidence. Mr Hunt's Principal Private Secretary recorded in an email dated 27 June 2011 that:[309]

"SoS said he would like to press ahead with statement on BskyB on Thursday. SoS said he would like to publish all docs (inc brand licensing and carriage agreements – even if redacted) and would like to press News Corp for those docs this week. We discussed having a quick handling meeting this afternoon to discuss draft statement etc..."

Provisional acceptance of the amended draft UIL and further consultation

5.62 The Written Ministerial Statement was made on 30 June 2011. It communicated Mr Hunt's decision which was that he was minded to accept the revised UIL, and he was satisfied with the carriage and brand licensing agreements as amended. He announced a further and rapid consultation, allowing seven days for further views on the revised UIL.[310] The statement was very carefully crafted to emphasise not only that he had engaged both Ofcom and the OFT to a greater extent than he was obliged to, but also to make clear that he could have accepted the original UIL and was exercising his discretion to require more of News Corp. It began:[311]

"I am today publishing the results of the consultation on the undertakings in lieu I launched on 3 March alongside the subsequent advice I have received from Ofcom and the OFT. The consultation did not produce any information which has caused Ofcom and the OFT to change their earlier advice to me. I could have decided to accept the original undertakings. However a number of constructive changes have been suggested, and as a result, I am today publishing a revised, more robust set of undertakings and will be consulting on them until midday Friday 8 July.

[308] p171, *ibid*
[309] p174, *ibid*
[310] p262, *ibid*
[311] p259, *ibid*

As previously, I was not required to involve independent regulators in assessing the revised undertakings. However I have again done so, and sought their independent advice. I am today also publishing that advice, which after careful consideration I have decided to accept."

5.63 In addition to the advice, Mr Hunt published the proposed Articles of Association for "Newco", the revised UIL and a summary of the responses to the consultation.[312] The Ministerial Statement explained the process and the developments which had taken place in consequence of the consultation responses, including all of the changes which he was now minded to accept. It then went on to deal with a number of issues which had often been raised in the responses to the first consultation including the emerging phone hacking allegations against the News of the World. At this stage, Mr Hunt unequivocally adopted the stance that the allegations were immaterial. There was no mention of their potential relevance to the reliability of the undertakings. The material part of the statement explained why Mr Hunt was then of the view that the allegations should not influence his decision:[313]

"Some respondents also argued that News Corp could not be relied upon to abide by the requirements set out in the undertakings, citing previous guarantees and assurances given by News in the past, and the current hacking allegations against the News of the World.

I have taken the view that News have offered serious undertakings and discussed them in good faith. In all the circumstances and given that the implementation of those undertakings will be overseen by the Monitoring Trustee and thereafter monitored and if necessary enforced by the OFT, I believe that there are sufficient safeguards to ensure compliance with the undertakings. Furthermore, the various agreements entered into pursuant to the undertakings will each be enforceable contracts. Therefore whilst the phone hacking allegations are very serious they were not material to my consideration."

5.64 Mr Hunt regarded the substantive protections afforded by the revised UIL to be very considerable, describing them in these terms:[314]

"So it was a further strengthening of these UILs in a way that made Sky News massively more independent of James Murdoch than it was then or indeed is now."

5.65 The statement concluded, as it had started, in terms designed to engender trust and confidence in the process:[315]

"I am committed to maintaining the free and independent press for which this country is famous. I have sought and published independent advice throughout this process. I have listened carefully to points made in the consultation and amended the undertakings where appropriate. I have also gone for maximum transparency whilst taking reasonable account of commercial confidentiality considerations. I continue

[312] pp178-231, 232-256, *ibid*; pp4-57, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/KRM17-Document-121.pdf; pp117-145, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

[313] p261, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

[314] p80, lines 4-6, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf. Note that James Murdoch has subsequently stepped down as Chairman of BSkyB, resigning on 3 April 2012 three days after Mr Hunt gave this evidence

[315] p261, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

to believe that, if I allow this deal to proceed, Sky News will be able to continue its high-quality output and in fact will have greater protections for its operational and editorial independence than those that exist today."

The phone hacking scandal and the withdrawal of the bid

5.66 By this stage, it looked as if the deal was close to being approved. That state of affairs was to change very rapidly. The consultation, which lasted until midday on Friday 8 July 2011, took place during a tumultuous week for News International. The phone hacking scandal came to a head and, on Thursday 7 July 2011, James Murdoch announced that the NoTW was to close. There was, once more, an enormous response to the consultation, as Mr Hunt confirmed in his evidence:[316]

"Q. And you received in that short period of time 156,000 responses. Virtually all were, again, anti, weren't they?

A. Yes."

5.67 On the day that the consultation closed, a post on the DCMS website made clear that the Secretary of State would now also be considering the impact of the closure of the NoTW on media plurality. On this point it read:[317]

"The Secretary of State will consider carefully all the responses submitted and take advice from Ofcom and the Office of Fair Trading before reaching his decision. Given the volume of responses, we anticipate that this will take some time. He will consider all relevant factors including whether the announcement regarding the News of the World's closure has any impact on the question of media plurality." (emphasis added)

5.68 On the following Monday, Mr Hunt sought the advice of both Ofcom and the OFT on the developments. He asked the OFT whether any of the past week's revelations caused it to reconsider any of its previous advice:[318]

"However, given the well-publicised matters involving the News of the World in the past week, and which have led to the closure of the paper, I should be grateful if you could let me know whether you consider those revelations and allegations cause you to reconsider any part of your previous advice to me, or otherwise gives rise to concerns, on the credibility, sustainability and practicalities of the undertakings offered by News Corporation."

5.69 In particular, Ofcom was asked whether the events that followed its letter of 22 June 2011 changed in any way the advice it had offered as regards three areas:[319]

"The closure of the News of the World in the last week is a significant change to the media landscape. I would be grateful if you could indicate whether this development (and/or the events surrounding it) gives you any additional concerns in respect of plurality over and above those raised in your initial report to me on this matter received on 31 December 2010.

[316] p82, lines 14-17, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[317] p284, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf
[318] p285, *ibid*
[319] pp286-287, *ibid*

I am aware of your letter on Friday to John Whittingdale MP in relation to any proposed fit and proper persons test and would be grateful if you could keep me informed of progress. In particular I would be grateful if you could clarify whether in your view, your current consideration or any potential future decision in relation to the fit and proper persons test might have an impact on the merger and my decision on media plurality or on the proposed undertakings in lieu.

Given the well-publicised matters involving the News of the World in the past week that led to its closure, I would be grateful if you could let me know whether you consider that any new information that has come to light causes you to reconsider any part of your previous advice to me including your confidence in the credibility, sustainability or practicalities of the undertakings offered by News Corporation."

5.70 Mr Hunt impressed upon the Inquiry the gravity of the watershed moment which had led him to write to Ofcom and OFT, describing it in these terms:[320]

"Then we had the horrific Milly Dowler revelations on 4 July, which I don't think anyone could not have been touched by, and then a couple of days later News Corporation announced that they were closing the News of the World.

That, for me, was a very, very significant moment because then I began to wonder whether there could be a management issue that spread beyond News International to News Corp, and even if it wasn't an issue of trust, even if I accepted that the people that we were negotiating the UILs with, … were doing so in good faith, I asked myself, if they found it necessary to close down a whole newspaper – this is a big, big deal for a company like News Corporation – is there a corporate governance issue here? Is this a company that actually doesn't have control of what's going on in its own company, even if the management don't know about what's happening?

So it was really that and, of course, the fact that there was a plurality issue with a big newspaper being closed down and the fact that Ofcom had been asked to investigate whether BSkyB was a fit and proper licence holder for a broadcasting licence, those came together. So a week after the Milly Dowler revelations I wrote to both Ofcom and the OFT to ask them whether they still stood by the advice they'd given me at the end of June that plurality considerations had been addressed by the UILs as they did then."

5.71 Faced with a crisis, James Murdoch decided to withdraw the UIL with the inevitable result that Mr Hunt decided to refer the proposed transaction to the Competition Commission. Mr Murdoch explained his decision in a letter to Mr Hunt later on 11 July 2011:[321]

"...we have listened and considered public sensitivity, political concern and the requests for an independent Competition Commission review. In these circumstances I have taken a decision to withdraw the undertakings. This will allow the matter to be considered by the Competition Commission on an objective and fair basis taking into account factors and evidence which are relevant to the only applicable legal test of sufficiency of media plurality.

[320] pp85-86, lines 1-12, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[321] p283, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH3-MOD300004949-MOD300005263-docs-105-163.pdf

News Corporation continues to believe that properly taking into account those factors its proposed acquisition will not lead to there being insufficient plurality in news provision in the UK."

5.72 Mr Hunt announced his decision to refer the proposed merger to the Competition Commission in Parliament on the afternoon of 11 July 2011. The terms in which he expressed himself reflected the dramatic change in atmosphere which the previous week's events had wrought:[322]

"...As a result of News Corporation's announcement this afternoon I am going to refer this to the Competition Commission with immediate effect and will be writing to them this afternoon.

Today's announcement will be an outcome that I am sure the whole house will welcome.

It will mean that the Competition Commission will be able to give further full and exhaustive consideration of this merger taking into account all relevant recent developments.

Mr Speaker, protecting our tradition of a strong, free and independent media is the most sacred responsibility I have as Culture Secretary. Irresponsible, illegal and callous behaviour damages that freedom by weakening public support for the self-regulation upon which it has thrived. By dealing decisively with the abuses of power we have seen, hopefully on a cross-party basis, this government intends to strengthen and not diminish press freedom, making this country once again proud and not ashamed of the journalism that so shapes our democracy."

5.73 Avaaz sought to seize the moment to press the case for the Secretary of State to issue a new EIN widened in scope to include not only plurality but also commitment to broadcasting standards. The group did so on 12 July 2011 by sending DCMS a Note, produced by counsel expert in merger and competition law, which challenged the view that s67(5) of the Enterprise Act 2002 prevented the Secretary of State from widening the scope of the intervention. Counsel concluded:[323]

"Although I cannot claim that the position is certain, I can say that in my view, given the factual context set out above, any attempt by News Corporation to challenge a decision by the Secretary of State to issue a further Notice allowing him and the CC to consider fitness would be more likely than not to fail, notwithstanding section 67(5) of the EA02.

...

I should make it clear that I am not saying that the Secretary of State is bound now to issue a replacement Notice allowing fitness to be examined as a public interest consideration. His discretion is a wide one. However, in the present circumstances, the view that he definitely cannot lawfully do so seems to me to be far too cautious."

5.74 In the result, that legal argument did not need to be resolved because although the transaction was formally referred to the Competition Commission on 13 July, News Corp subsequently withdrew its bid and, on 25 July 2011, the reference was cancelled by the Competition Commission.[324]

[322] p282, *ibid*
[323] pp292-298, *ibid*
[324] pp304-311, *ibid*. The reference was cancelled in accordance with the provisions of article 7(1) of the 2003 Order

5.75 The speed at which a proposed transaction such as News Corp's bid for BSkyB is considered may itself be commercially sensitive (in this case there can be no doubt that, for News Corp, it was the sooner the better). From the point of view of the public interest there will also generally be a need to deal with this sort of decision promptly because it would not be in the public interest for regulatory delay to thwart a deal deserving of approval. However, that need for promptness in the public interest will always be qualified by the public interest in ensuring that the proposed transaction is considered sufficiently to ensure that the right decision is made. In this case the speed at which the bid was actually considered was consistent with the public interest. Mr Hunt described himself as wanting to do things "*briskly but properly*".[325] He certainly sought to avoid unnecessary delay but when time was needed fully to consider, take advice about, and to consult upon the UIL, it was afforded.

Lobbying behind the scenes

5.76 In addition to the considerable volume of responses which were the product of the Secretary of State's specific invitations to interested parties to make submissions, there was a remarkable amount of additional unsolicited communication. Some of this came from the Alliance, whose solicitors and public relations advisers actively sought to influence the Secretary of State through correspondence. These contacts though paled in comparison to the voluminous behind the scenes contact between Mr Michel and people at the DCMS. In particular, Mr Michel had a great deal of email, text and telephone contact with Adam Smith. It is now well known that the publication of Rupert Murdoch's exhibit KRM18, which evidenced some of this contact, led very quickly to Mr Smith's resignation. It is therefore now necessary to consider the nature and extent of unsolicited and behind the scenes lobbying whilst the bid was Mr Hunt's responsibility.

The Alliance

5.77 Like News Corp, the Alliance had begun to lobby DCMS before the transfer of the bid. Emails in the period 8 to 10 December 2010 show that there was a meal attended by representatives of DCMS and Weber Shandwick, after which the latter offered and the former accepted a briefing on "*the plurality issue*".[326] The DCMS official made clear (as was the case at that stage) that DCMS had no formal role but Weber Shandwick was still keen to get its client's message across: "*...I know you have no formal role but good for you to hear our case and why we think there is a change*".[327]

5.78 On 26 December 2010, the bid then having been transferred to Mr Hunt, Weber Shandwick copied Slaughter and May's submission to Ofcom to DCMS.[328] The next day the firm sent the results of a poll conducted by the Alliance to a DCMS official.[329] DCMS wisely cancelled the planned briefing but Weber Shandwick thereafter remained in email contact with DCMS. Of the briefing an in-house legal adviser wrote: "*...I don't think the presentation was, in any*

[325] p104, line 21, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[326] pp1-2, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH8.pdf
[327] pp1-2, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH7-MOD300007701-MOD300007725-docs-379-391.pdf
[328] p89, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[329] pp119-122, *ibid*

event, to Jeremy, but given recent events, I think that we ought to distance from any remote suggestion of influence by any interested party".[330]

5.79 When reports emerged that News Corp was discussing remedies with the Secretary of State, Weber Shandwick was quick to ask for a meeting which was declined.[331] The firm also sought early sight of Ofcom's report which it was not granted on the ground that the Secretary of State would publish the report, in redacted form, in due course.[332] Weber Shandwick later forwarded copies of letters from Slaughter and May dated 12 and 20 January 2011 (discussed further below) but did not add substantively to them.[333]

5.80 Slaughter and May also wrote directly to the Secretary of State on a number of occasions, typically following reports in the media about the progress of the bid. On 12 January 2011, the firm wrote after reports in the (FT) that discussions about UIL had commenced. UIL had in fact only been mentioned at the meeting between Mr Hunt and James Murdoch on 6 January 2011 as something which News Corp wanted to discuss if their primary submission that Mr Hunt should not refer the bid failed. The first draft UIL had not yet been submitted to the Secretary of State. Slaughter and May pointed to the low threshold for a reference to the Competition Commission, arguing that remedies should not be considered before a referral, and seeking further information. TSol replied on behalf of the Secretary of State with a letter which, amongst other things, gently made clear that, if and when the time came for the Alliance to make submissions, then they would be sought.[334]

5.81 At that stage, Mr Hunt was, in any event, minded to refer the bid and had not yet formed even a provisional view about the UIL. He was not then obliged to hear submissions from the Alliance. Indeed, on the question of referral they would have been otiose and on UIL premature. When later, after taking advice from Ofcom and the OFT, the Secretary of State became minded instead to accept the UIL, he launched a consultation (to which the Alliance was able to and did respond).

5.82 Slaughter and May was not content to wait. On 20 January 2011 the firm made further unsolicited submissions, this time following publication by the (FT) of news that News Corp had offered to divest Sky News. It argued that it would be difficult to achieve an effective remedy without wholesale divestment of BSkyB and pressed again for a reference to the Competition Commission.[335]

5.83 When the Secretary of State announced that he was asking the OFT and Ofcom to advise him on News Corp's proposed UIL, and would go out to public consultation if he provisionally decided to accept the same, Slaughter and May wrote to him seeking to be involved at an earlier stage. On 27 January 2011 they wrote, inter alia:[336]

> *"You only propose to go out to public consultation however, after you have provisionally decided (in the light of the advice from OFT and Ofcom) to accept such undertakings.*

[330] p3, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH8.pdf
[331] pp6-7, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH7-MOD300007701-MOD300007725-docs-379-391.pdf
[332] p8, *ibid*
[333] pp10-16, *ibid*
[334] p350, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf
[335] pp15-16, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH7-MOD300007701-MOD300007725-docs-379-391.pdf
[336] p441, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH1-MOD300004241-MOD300004682-docs-1-52.pdf

In order to ensure that the overall process is both fair and thorough, it will therefore be critical for Ofcom / OFT and the Secretary of State to consult with key industry players (including the Concerned Parties) ahead of the provisional decision."

5.84 The Alliance did not get the early involvement that it was seeking and so Slaughter and May wrote again, on 9 February 2011, making a veiled threat to judicially review the Secretary of State. It persisted with the argument for early involvement:[337]

"We understand that the process you envisage would require Ofcom (working with OFT) to assess undertakings in lieu of reference to the Competition Commission ("the CC") without the involvement of interested third parties. Third parties would instead only be consulted after Ofcom / OFT have reported to you and after you have concluded that you are minded to accept such undertakings.

It is our view that this process would be unfair and would fail to meet the normal procedural standards of merger control and public law more generally.

...

If your decision is to meet public law requirements of fairness, it is essential that interested third parties are properly consulted before Ofcom / OFT report to you and before you propose to accept undertakings.

...

In the absence of the above safeguards, the review will be procedurally unsound."

5.85 TSol replied on behalf of the Secretary of State on 11 February 2011 refuting the allegations of unfairness and repeating the point, more bluntly this time, that the Alliance would have an opportunity to make submissions at an appropriate time if the need arose. The letter concluded:[338]

"Proper and, as you put it, meaningful consultation does not require multiple iterations of comment throughout a decision making process such as this one. The important point is that you and your clients are given an opportunity properly to comment on any proposal to accept undertakings in lieu of a reference. You will have that opportunity.

Finally, I cannot but emphasise that if, and I stress if, the Secretary of State does reach a view that he proposes to accept undertakings in lieu of a reference, he will carefully consider any observations you and your clients may have about those proposed undertakings."

5.86 Slaughter and May nevertheless continued with its effort to get the Alliance more deeply involved at an earlier stage, writing again on 1 March 2011, this time following another article in the (FT) which had been published on 24 February 2011 on the subject of the proposed UIL. It sought an outline of the key features of any remedy proposals made by News Corp; the opportunity for the Alliance to discuss the proposals with OFT and Ofcom prior to them advising the Secretary of State; and the opportunity to discuss the remedy proposals with the Secretary of State prior to any provisional decision or substantive announcement which he may make on the issue.[339] The firm's repeated representations about process were then overtaken by events when the Secretary of State reached the provisional view that he was

[337] pp3-6, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH2-MOD300004683-MOD300004948-docs-53-104-and-MOD3000013794-MOD3000013796-doc-598.pdf
[338] pp71-72, *ibid*
[339] pp118-119, *ibid*

minded to accept UIL from News Corp and consequently initiated a statutory consultation. As has already been recited above, Slaughter and May submitted lengthy and detailed submissions as part of that process and subsequently attended the Secretary of State's meeting with Alliance members on 24 March 2011.

5.87 In March 2011 Weber Shandwick was involved in arrangements for the Secretary of State's meeting with the Alliance.[340] The firm itself was at the last minute asked not to attend that meeting with the result that News Corp had an internal public affairs officer in attendance when James Murdoch met the Secretary of State, but the Alliance was prevented from having an equivalent, albeit external, adviser present.

5.88 Finally, there was a brief email exchange between Weber Shandwick and DCMS in which the former sought information and asked whether their further input was needed. The firm received a brief and entirely proper response.[341]

5.89 A number of observations flow from a consideration of the Alliance's unsolicited communications. First, there was a qualitative difference between its lobbying efforts and those of News Corp in that it was, essentially, conducted through emails to officials and formal correspondence. The approach to lobbying by News Corp extended well beyond that and, at least in part, took the form of Mr Michel's indefatigable use of text messaging, email and the telephone.

5.90 Second, the financial stakes associated with the proposed transaction, and the passions which it aroused, caused the Alliance, through its solicitors, to push as hard as it could to be heard throughout the process. It is almost inevitable that exactly the same will happen when the next major qualifying media transaction falls to be considered under the Enterprise Act 2002.

5.91 Third, the veiled threat of judicial review from the Alliance, when combined with the equally threatening correspondence from News Corp's lawyers, amply demonstrates the need for a process which is both robustly and manifestly fair to all parties if it is neither to be impugned in court nor impossibly slow.

5.92 These three observations all point to the desirability of detailed procedural guidance being available for a Secretary of State responsible for administering quasi-judicial decisions under the Enterprise Act 2002 and for a fair yet workable procedure to be established and followed throughout. That need is made all the more clear after a consideration of the lobbying undertaken by Mr Michel.

Frédéric Michel's contact with Jeremy Hunt

5.93 On Christmas Eve, some three days after responsibility for the bid had been transferred to Mr Hunt, Mr Michel sought to lay the ground to make use of the channel of communication which he had previously established with the Secretary of State. With characteristically friendly (even intimate) and informal tone, he texted:[342]

> *"Hi. James has asked me to be the point of contact with you and Adam throughout the process on his behalf. Glad Jon Zeff is in charge of dossier. Have a great Christmas with baby! Speak soon. Fred"*

[340] pp17-22, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH7-MOD300007701-MOD300007725-docs-379-391.pdf
[341] p25, *ibid*
[342] p54, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM81.pdf

5.94 Mr Hunt immediately appreciated that, as the decision maker, he was now in a very different position and properly informed Mr Michel that all contact from then onwards needed to be through official channels until the decision had been made:[343]

> *"Thanks Fred. All contact with me now needs to be through official channels until decision made. Hope Daddy has a lovely Xmas. Jeremy"*

5.95 Mr Michel held back, but only for a short while. He cautiously resumed communication by text on 20 January 2011 following the second of the two formal meetings about the bid to which he had accompanied James Murdoch. He was careful not to mention the bid, but sent:[344]

> *"Great to see you today. We should get [names redacted] together in the future to socialise! Nearly born the same place! Warm regards. Fred"*

5.96 Mr Hunt's brief reply implicitly made clear that any socialising with Mr Michel would have to await resolution of the bid but in terms which made slight reference to the bid:[345]

> *"Good to see u too. Hope u understand why we have to have the long process. Let's meet up when things are resolved J"*

5.97 Mr Michel picked up on that slight reference in a response which he augmented with flattery:[346]

> *"We do and will do out very best to be constructive and helpful throughout. You were very impressive yesterday. And yes let's meet up when it's all done. Warmest regards fred"*

5.98 Mr Michel did not text Mr Hunt again until 3 March 2011, the day on which Mr Hunt announced to Parliament that he was minded to accept News Corp's UIL, when he again resorted to flattery:[347]

> *"You were great at the Commons today. Hope all well. Warm regards, Fred"*

5.99 That text led to two more within a few minutes of the first. Mr Hunt replied briefly: "*Merci large drink tonight!"* Mr Michel concluded the exchange on a similarly friendly note: "*Me too! Taking wife out for dinner!"*[348]

5.100 There were two more exchanges during the currency of the bid. First, on 13 March 2011, Mr Michel praised Mr Hunt's performance in an interview: "*Very good on Marr. As always! Fred*". Mr Hunt's reply amounted to a polite reminder of the bid and consequent need for some distance: "*Merci hopefully when consultation over we can have a coffee like the old days!"*[349]

5.101 Second, on 3 July, Mr Michel sent a text to propose a social engagement: *"Come on Nadal!! We should get together to celebrate the one year baby birthdays! Hope all well. Warm regards, Fred"*. Mr Hunt replied in friendly terms but once again he put off Mr Michel whilst the bid

[343] p54, *ibid*. There was a further inconsequential text from Mr Michel to Mr Hunt later that evening: "*You too mon ami! Fred*", p56, *ibid*
[344] p57, *ibid*
[345] p58, *ibid*
[346] p59, *ibid*
[347] p60, *ibid*
[348] pp61-61, *ibid*
[349] pp63-64, *ibid*

was in progress: "*Agree he MUST win! Let's do that when all over*".[350] During his oral evidence Mr Hunt candidly reflected on Mr Michel's 3 July 2011 text, stating:[351]

> *"I think it's incredible ingenuity. I mean he was just looking for any opportunity he could try and establish contact of some sort or another. You know, it was pushy. You know, I responded briefly, courteously, and in a friendly way as well.*
>
> *What I didn't deduce from this, and I think you alluded to in earlier comments, was the effect of this kind of contact multiplied many, many times over to Adam Smith. And that was the crucial thing right at the beginning of the process that we didn't foresee, the fact that there was going to be such a volume of correspondence, ..."*
> (emphasis added)

5.102 It is conspicuous that all of the exchanges during this period were initiated by Mr Michel. All were brief. The bid was barely touched upon and there was no substantive communication either about the substance of the bid or the process. It was all about making the connection at the personal level. Mr Hunt was careful to put off any social arrangements until after the bid. His responses were consistent with the general approach which he took to those in the media industry with whom he came into contact during the bid. In evidence, he explained:[352]

> *"...what I'm really saying in paragraph 37 is that because of my other duties as Secretary of State, I was going to be bumping into people who had views on the bid.*
>
> *I think during that period I spoke at the Oxford Media Convention where the whole media world would be gathered and I gave a speech and answered questions and there would have been coffee afterwards, and so there would have been – but they were brief interactions, and I interpreted that to mean there might be a casual comment about the bid, but they weren't part of my consultation process."*

and later he said:[353]

> *"All the interactions which related to the decision that I was going to take would be through official channels, but as I explained there, if I bumped into someone in a lift or gave a courteous reply to a text message, I didn't think that was off limits."*

5.103 It would have been prudent for Mr Hunt politely to have insisted that Mr Michel should not seek to communicate (whether by text or otherwise) until after the bid had been resolved, thus enforcing the wish which he expressed at the outset on 24 December 2010. Doing so would have prevented any suggestion of the appearance of bias arising from the contact which in fact occurred. The direct contact between Mr Hunt and Mr Michel which did occur was not entirely satisfactory but, having said that, I should make it clear that I do not consider that, on its own, it would have been sufficient to impugn the process had it been the subject of judicial review.

[350] pp66-67, *ibid*
[351] pp22-23, lines 16-11, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-31-May-2012.pdf
[352] p51, lines 10-21, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[353] p56, *ibid*

James Murdoch and Jeremy Hunt

5.104 Mr Hunt also exchanged text messages with James Murdoch during the period in which he was responsible for the plurality decision. On the evening of 3 March 2011, the day on which Mr Hunt announced that he was minded to accept the UIL and launched the first statutory consultation about them, James Murdoch sent a text in appreciation: "*Big few days. Well played. JRM"*. Mr Hunt replied: *"Thanks think we got right solution!"* He followed that the next day with a text which had nothing to do with the bid but was connected to the sporting element of his portfolio: "*Just been with the Team GB cycling team in Manchester who are most impressed with the personal interest you show in their performance!"*[354]

5.105 There was then an exchange of messages on 31 March, initiated by Mr Hunt who wished to congratulate Mr Murdoch upon his promotion. The Secretary of State's message joked about Mr Murdoch's relationship with Ofcom: "*Many congratulations on the promotion although I am sure u will really miss Ofcom in NY! Jeremy*". The reply recognised that there were constraints on contact whilst the fate of the bid remained unresolved: "*Thanks Jeremy – sadly I fear they won't see the back of me that easily! Hopefully we can move our other business forward soon so we can catch up properly. Best*".[355]

5.106 Mr Hunt was clear that his reference to Ofcom was tongue in cheek and that it had no impact on the process. However, if faced with the same situation again, he said that he would just avoid all text messages:[356]

> *"Q. Were you at all uncomfortable communicating with Mr James Murdoch in this way?*
>
> *A. Well, I think, you know, as we look at the whole way quasi-judicial processes are run and as we look at the lessons that we learned from what happened between Adam Smith and Mr Michel, I think there are probably things we would learn, and my interpretation of my quasi-judicial role was that a courteous reply to a text message was fine. I think probably now I wouldn't take the same view, and I would just avoid all text messages, but that was my assessment, that it had absolutely no impact on the process. It was not material to the decision I took, and it was just me being courteous."* (emphasis added)

Jeremy Hunt and Andy Coulson

5.107 On the advice of Sue Beeby, his SpAd who dealt predominantly with media relations, Mr Hunt drew the line at meeting Andy Coulson whilst a decision about the bid was pending. He had been intending to have a drink with Mr Coulson and Ms Beeby advised by email. Referring to News Corp, she wrote: "*He's so closely linked to them that if you were seen it wouldn't look great."* Mr Hunt thought that advice was "*absolutely right"* and that it was "*wiser to wait*".[357] This approach was in keeping with his decisions not to meet Mr Michel or Mr Murdoch socially whilst he was responsible for the decision about the bid.

[354] p9, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JH16-MOD300008147-MOD300008166-docs581-596.pdf
[355] p9, *ibid*
[356] pp35-46, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-31-May-2012.pdf
[357] pp31-32, *ibid*

Frédéric Michel and Adam Smith

5.108 In his dealings with Adam Smith, Mr Michel found a more communicative target for his lobbying endeavours. The type and volume of their communications during the currency of the bid is, of itself, striking and well illustrates just how deftly Mr Michel managed to inveigle his way to a source so close to the Secretary of State. There were numerous emails, many telephone calls and, most of all, a prolific number of text messages. No fewer than 690 text messages passing between Mr Michel and Mr Smith were found on the image of Mr Michel's iPhone covering the period 27 August 2010 to 11 July 2011, the majority sent by Mr Michel.[358] All but three of these messages post dated the transfer of the bid to Mr Hunt, the manifestation of a step change in the attention which Mr Michel paid to Mr Smith once regulation of the bid rested in Mr Hunt's hands.[359] The evidence from Mr Michel's iPhone was but one piece in the jigsaw of evidence which, when put together and analysed led to the following overall statistics being put to Mr Michel in evidence and with which he did not take issue:[360]

> *"Can I move on now to your communications with Mr Adam Smith. Would you agree that there was a pattern of very frequent text messages, telephone calls and emails with Mr Smith, which certainly increased from December 2010?*
>
> *A. Yes.*
>
> *Q. Overall, over the period June 2010 to July 2011, we have counted the following: 191 telephone calls, 158 emails, 799 texts, of which over 90 per cent were exchanged with Mr Smith. Does that feel about right?*
>
> *A. I didn't know the quantum, but I trust your counting.*
>
> *Q. Over the period 28 November 2010 to 11 July 2011, we have counted 257 text messages sent by Mr Smith to you, and given that you were more prolific in your texts to him than he was to you, there would be more than that which you sent. Would you agree?*
>
> *A. I would."*

5.109 The content of these communications was further evidenced by Mr Michel's numerous emails to his colleagues within News Corp, often including James Murdoch, reporting on his activities and exhibited by Rupert Murdoch as KRM18. Publication by the Inquiry of KRM18 began to bring the full extent of the contact between Mr Michel and Mr Smith into the public domain. On the basis of that evidence, Mr Hunt's Permanent Secretary, Jonathan Stephens, described how he quickly assessed the communications to have been unacceptable:[361]

> *"...The first suggestion that the contacts went beyond what was proper was 24th April 2012 with the release of emails from Frederic Michel (and this was the first occasion I recall mention of Michel by name). The following morning I told the Secretary of State*

[358] pp4-690, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[359] Mr Smith's records (from his telephone bill http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AS4.pdf) showed 19 messages to Mr Michel in the period 28 November 2010 – 27 December 2010 which are not found on the image of Mr Michel's iPhone indicating that some messages might have been deleted from that phone. Too much weight should not therefore be attached to the precise statistic but the overall pattern evident in the records does show a step change in contact after 21 December 2010
[360] pp44-45, lines 12-3, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-24-May-2012.pdf
[361] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf

I thought the number, extent, depth and tone of contacts suggested by those e-mails went beyond what was acceptable".

5.110 After time for reflection and after both Mr Michel and Mr Smith had given their oral evidence to the Inquiry, Mr Stephens remained of the same view, saying:[362]

"The first thing I thing I would say is that I have to be clear that I think, as I've said, the extent, the number, the nature of these contacts was, in my judgment, clearly inappropriate and not just in one or two disputed cases. I think that's a judgment I just have to place on record."

5.111 I agree with that assessment. In doing so I have taken into account that there was a often a degree of hyperbole and inaccuracy in Mr Michel's email reports of his exchanges with Mr Smith with which Mr Smith rightly and unsurprisingly took issue. I recognise that the majority of the contact was initiated by Mr Michel, not Mr Smith, and that some of the individual communications were innocuous, concerning either anodyne matters of process or being mere repetition of what News Corp had already been told formally. I also recognise that Mr Smith had held himself out as being a point of contact for News Corp. But none of that escapes the fact that Mr Michel and Mr Smith engaged in a very considerable volume of private communication about the bid, much of which was clearly inappropriate for reasons which are examined further below.

5.112 Before turning to the detail of the exchanges in the period after the bid was transferred to Mr Hunt, it is instructive first to examine the status of SpAds, the rules which applied to Mr Smith, his working relationship with Mr Hunt, and how he was managed, supervised, instructed and guided.

5.113 SpAds are temporary civil servants appointed under Article 3 of the Civil Service Order in Council 1995. They are unique amongst civil servants because they are exempt from the general requirement that civil servants should be appointed on merit and behave with impartiality and objectivity so that may retain the confidence of future Governments of a different political complexion. Indeed, they are political appointees, appointed by Ministers with the approval of the Prime Minister. The amalgamation of civil servant and political partisan into the same post makes for a hybrid position.[363] A SpAd's appointment ends at the end of the administration which appointed him (or her) or when the appointing Minister leaves the Government or moves to another appointment.[364] The Code of Conduct for Special Advisers ("the Code") explains the nature of the role of a Special Adviser, in the following terms:[365]

"Special advisers are employed to help Ministers on matters where the work of Government and the work of the Government Party overlap and where it would be inappropriate for the permanent civil servants to become involved. They are an additional resource for the Minister providing assistance from a standpoint that is more politically committed and politically aware than would be available to a Minister from the permanent Civil Service."

[362] pp58-59, lines 23-3, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf
[363] p62, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[364] Para 4, Code of Conduct for Special Advisers, pp12-18, at p13, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AS2.pdf
[365] p12, *ibid*

5.114 Paragraph 3 of the Code lists and describes types of work which a Special Adviser can be expected to undertake. There is no mention of assisting a Minister acting in a quasi judicial capacity.[366]

5.115 The Code makes clear that management and conduct of SpAds, including discipline, rests with the appointing Minister, subject to the overriding power of the Prime Minister to terminate the employment of a SpAd by withdrawing his consent to their appointment. The material part of paragraph 4 of the Code reads:[367]

> *"...The responsibility for the management and conduct of special advisers, including discipline, rests with the Minister who made the appointment. It is, of course, also open to the Prime Minister to terminate employment by withdrawing his consent to an individual appointment".*

5.116 The appointing Minister's responsibility for the management and conduct of a SpAd is repeated at paragraph 3.3 of the Ministerial Code which also describes the accountability of Ministers for their actions and decisions in respect of their SpAds:[368]

> *"The responsibility for the management and conduct of special advisers, including discipline, rests with the Minister who made the appointment. Individual Ministers will be accountable to the Prime Minister, Parliament and the public for their actions and decisions in respect of their special advisers".*

5.117 The Code imposes a duty of confidence upon SpAds in these terms:[369]

> *"...Special advisers should not, without authority, disclose official information which has been communicated in confidence in Government or received in confidence from others..."*

5.118 Mr Stephens had, amongst his many duties, an advisory role as: *"...the principal adviser to the Secretary of State across the range of his functions, including on all decisions, matters of policy or questions of conduct."*[370] He was accountable to the Secretary of State: *"...for the effective discharge by the Department of all its functions in support of the Government and its objectives."*[371] As he put himself put it: "*I am accountable for all the advice and ultimately what goes on within the department, as I set out in my statement"*.[372] He thus had, in that respect, overall responsibility for the handling of the bid and he oversaw the process. His advisory role to his Minister in relation to all decisions and questions of conduct was wide enough in principle to encompass advice to Mr Hunt as to the use to which Mr Smith was put in relation to the bid and how he discharged that role. It was advisory only, of course; the decisions about the deployment and management of the SpAd were for Mr Hunt.

5.119 Pursuant to his advisory role, it had been Mr Stephens who drew to the attention of Mr Hunt and Mr Smith not only the Code of Conduct for Special Advisers but also the Ministerial Code

[366] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf
[367] p13, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AS2.pdf
[368] p11, Adam Smith, *ibid*
[369] para 5 of the Code, p13, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/AS2.pdf
[370] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf
[371] p1, *ibid*
[372] p8, lines 1-3, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf

and the Civil Service Code when Mr Hunt took office and Mr Smith was appointed. Mr Stephens saw it as his role to provide advice in relation to these codes in case of uncertainty, stating:[373]

> *"These Codes are drawn to the attention of Ministers on appointment by the Cabinet Secretary. I write to Special Advisers on their appointment to draw their attention to the Code of Conduct of Special Advisers – I wrote to Adam Smith on 14 May 2010 (this letter is attached). I also brief both Ministers and Special Advisers on the importance of abiding by these Codes and my availability to provide advice in any uncertainty. It is also my practice to explain to Special Advisers that, in all external dealings, they will be seen as representing their Department and Minister."*

5.120 Mr Smith was one of two SpAds who worked for Mr Hunt. He concentrated on policy development whilst the other SpAd, Sue Beeby (after October 2011, Lisa Hunter) dealt primarily with media relations.[374] Mr Smith knew Mr Hunt very well and vice versa. He had worked for him since 2006 as his Parliamentary Researcher and then Chief of Staff, before becoming a SpAd when Mr Hunt was appointed as Secretary of State after the May 2010 General Election. In Mr Smith's words:[375]

> *"...we developed a very close working relationship. He came to know my approach to matters and my style, which is generally relaxed, courteous and seemingly accommodating".*

5.121 Mr Hunt's evidence was unequivocally to the same effect. He was sure that Mr Smith would have known what he thought on different issues:[376]

> *"...I doubt there's a minister who worked more closely with a special adviser than I worked with Adam Smith, I really did work very closely with him for best part of six years, I think it was a given that he would know what I thought on different issues. I don't think that's quite the same as speaking for me, which is a different thing, but I think people would have expected him to know my views".*

5.122 Geographically, at DCMS, the SpAds' office was on the same floor as the Ministers.[377] Mr Smith described a high level of professional contact with Mr Hunt but a lesser degree of contact with him about News Corp's bid for the remaining shares in BSkyB:[378]

> *"Mr Hunt and I saw each other almost every working day and we spoke frequently on the telephone. Over the years, I considered that I developed a close professional relationship with Mr Hunt. He was familiar with my approach and style. The regular meetings, to which I refer above, and our more informal, regular, contact provided him with opportunities to obtain updates from me in relation to the projects with which he had asked me to become involved and I would provide updates, as I mention above, either at our meetings, by telephone or more informally at the office. We did not socialise together that often – we only went for drinks on a handful of occasions,*

[373] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf
[374] p4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf
[375] p3, *ibid*
[376] pp55-56, lines 24-7, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[377] p65, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[378] pp11-12, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf

in the time that we worked together, although I did attend his wedding along with a couple of other staff at the time".

and in relation specifically to the bid:[379]

"Not as frequent as it – as you might have thought, I suppose. I mean there was [sic] the meetings which I've listed there, but I would – I wouldn't go and speak to him about it on anything like a sort of daily basis or even – it would only be if he was preparing for a major statement or if there were the odd occasions where an issue that I judged to be of significant interest to him, that I would go and speak to him about it, but he – the whole point of having the department, the officials and myself, I suppose, was so that we could kind of carry on which the work and not need to go running to him every day."

5.123 Mr Smith understood his role in practice to require three things of him: "*...to be [Mr Hunt's] "eyes and ears" inside and outside of the Department; to act as an early warning system on issues of importance; and to be a "buffer" between him, other Ministers, officials and outside organisations so that he could focus on his work*".[380] The third of these capacities is important in understanding the role which Mr Smith believed himself to be playing in his interactions with Mr Michel. In relation to the bid he described his role as: *"To be one of the points of contact for News Corporation. To act as a buffer and as a channel of communications."*[381]

5.124 Although undoubtedly answerable to Mr Hunt, Mr Smith did not have a line manager of the type in place for ordinary civil servants. He explained:[382]

"I didn't really have a line manager, if you like, I reported in to Mr Hunt and would sort of meet with and talk with the senior officials, including the Permanent Secretary, but there was no sort of manager in that sort of strictest sense of the word, no."

5.125 Mr Smith's performance was required to be the subject of formal appraisal on an annual basis by a number of individuals, one of whom had to be his Secretary of State, Mr Hunt, and another, the Permanent Secretary, Mr Stephens. Both would have required some familiarity with Mr Smith's job description, objectives and day to day performance in order to discharge that responsibility.

5.126 Mr Smith's most recent appraisal, in December 2011, vividly corroborates the very positive evidence which both Mr Hunt and Mr Stephens gave orally about his general performance. He was extremely highly regarded. Mr Hunt wrote:[383]

"Adam is an effective operator; bright, articulate, insightful, extremely well briefed and an effective communicator. He sees his main task as "getting things done". To date he has been very effective at achieving it.

He is able to me my eyes and ears at meetings I cannot attend and knows exactly what I would want to happen. He is brilliant at handling difficult situations in a civilised way without compromising on core objectives.

[379] p66, lines 10-21, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[380] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf
[381] p87, lines 13-14, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[382] p61, lines 6-10, Adam Smith, *ibid*
[383] p8, and see also p9, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf

An ideal bridge between the department and Ministers, consistently adds value, and has been particularly adept at handling issues between Ministers."

5.127 Although, as the above appraisal makes perfectly clear, Mr Smith was a talented and able SpAd, he had had no previous experience of quasi-judicial decision making prior to his involvement in the bid. Moreover, he had been a SpAd for only a matter of months and consequently had limited experience of working in Government as opposed to working in politics more generally. In those circumstances, it was particularly important that his role in the handling of the bid should be clearly defined and that he had clear, appropriate guidance and instruction.

5.128 There was, at that time, no specific written guidance either for SpAds or more generally for departments relating specifically to quasi-judicial decisions and none was specifically issued in relation to News Corp's bid to acquire BSkyB. On 25 April 2012, the day after publication of KRM18, the Cabinet Office produced and provided to departments new guidance on the handling of quasi-judicial process: *"Principles governing the handling of quasi-judicial decision by Ministers."*[384] It is intended to complement the range of good practice guidance already available to departments on the Cabinet Office website.[385] Specifically in relation to SpAds, the new guidance states:[386]

> *"Special advisers. Decisions of this sort should not be made by reference to political or presentational considerations. This applies regardless of the source of the advice, and that of special advisers is treated in the same way as advice from an official giving internal advice to Ministers. If a special adviser is approached by an interested party, he/she should refer the matter to the appropriate official. A special adviser so approached must not give the impression that any particular advice will be determinative when decisions are taken.*
>
> *Departments should bear in mind that details of any potentially relevant contacts are liable to be disclosed in the event of a challenge to the decision. All Departments should have formal written guidance for those involved in decision-making processes. Such guidance may be of general application. But departments should also consider issuing specific guidance for certain individual decisions, particularly where such decisions arise infrequently, raise issues of unusual sensitivity or are of such complexity or novelty that general guidance is likely to be insufficient to assist in the proper discharge of the decision-making function in accordance with these general principles. All such guidance should be agreed by the relevant Permanent Secretary and Legal Adviser."* (emphasis added)

5.129 It is commendable that guidance has now been produced and that it was done so quickly after the problems identified by the Inquiry's examination of the bid exposed a gap in existing guidance. However, it is regrettable that no written guidance was available when DCMS had to deal with News Corp's 2010 bid for BSkyB.

5.130 Mr Smith does not appear to have been given any express individual instructions as to how he should, or should not, conduct himself with interested parties on matters relating to the quasi-judicial decision. On this point, Mr Hunt, who was himself new to quasi-judicial process,

[384] pp1-2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-supplementary-statement-of-Jonathan-Stephens_Principles-governing-the-handling-of-quasi-judicial-decsion-by-ministers.pdf
[385] p1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Supplementary-statement-of-Jonathan-Stephens-04.06.12.pdf
[386] p2, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-supplementary-statement-of-Jonathan-Stephens_Principles-governing-the-handling-of-quasi-judicial-decsion-by-ministers.pdf

said that they both relied on meetings with lawyers and officials for an understanding of what was required of them and that he did not give Mr Smith any express instructions:[387]

> *"Q. Any communication between Mr Michel and Mr Smith would be no different, would it, to communication between Mr Michel and you, because Mr Smith was your agent. Do you agree with that?*
>
> *A. Not in this process. I think sometimes special advisers have a role which is about speaking for their boss, but in this situation Mr Smith's role was a different one. He was a point of contact in a very complex process, and there to advise News Corp about the questions they had about the process and I think also to reassure them that the process was fair.*
>
> *Q. What express instructions, if any, was Mr Smith given as to what his special role was?*
>
> *A. Well, he was present at all the meetings where we had advice from lawyers and officials in the department, so he heard that advice, and it was understood that he would be a point of contact for News Corp in the process.*
>
> *Q. But what express instructions was he given as to the role he would undertake?*
>
> *A. I don't think he was given any express instructions other than how I've described it.*
>
> *Q. So in terms of the discharge of the function which had been allocated to him, your evidence is he would work that out from what he heard at meetings; is that correct?*
>
> *A. Yes.*
>
> *Q. Did you give him any instructions as to what not to do?*
>
> *A. No. As I say, he heard in the way that I heard all the things that we needed to be careful about."*

5.131 Mr Stephens (who knew that Mr Smith was in contact with News Corp but did not know of the volume or detail of that contact) accepted with the benefit of hindsight that Mr Smith should have been warned about the risks arising from dealing with a professional lobbyist:[388]

> *"Q. The third point out of my four: the power of advocacy and sophistication of the lobbyist. Although you didn't know [Frederic Michel] personally, or know his exact title, you knew the sort of role he was occupying and that it was his job, really, to push as hard as he can to extract as much as he possibly could. Nothing necessarily inappropriate in that, but there was a particular risk, therefore, that the special adviser needed to be alive to and perhaps warned about. Do you accept that issue?*
>
> *A. Certainly with the benefit of hindsight I wish we had warned him, and indeed I think one would necessarily want to warn anyone in contact with him."*

5.132 It is certainly unfortunate that neither Mr Stephens nor Mr Hunt specifically addressed with Mr Smith the risk that if he was to be a point of contact for News Corp, he could well come under pressure (at least similar to that of which Mr Hunt had had some experience) which could be difficult to deal with and so required particular attention. Such attention could not

[387] p54-55, lines 2-6, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf; see also on the same issue p60, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-31-May-2012.pdf

[388] pp47-48, lines 21-7, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf

only have covered providing a greater awareness of the consequences of going beyond those limits, but also a degree of managerial and pastoral support to ensure that he could deal with the issues likely to arise. Both have said, in effect, that they simply trusted him to get on with it by himself.

5.133 Both Mr Hunt and Mr Smith did have the benefit of the departmental advice given in November 2010 when Mr Hunt had been advised not to contact Dr Cable about the bid. That advice, which contained the specific phrase "quasi-judicial" should have been enough to signal that this was not a normal policy or political decision, but it was not detailed advice about how the Secretary of State and those acting in his name should conduct themselves once responsibility for the bid had transferred to Mr Hunt. The note which both the Secretary of State and Mr Smith were sent explained that the decision was quasi-judicial and that such decisions might be judicially reviewed. In particular it warned: *"...such decisions are case specific and must be taken on the individual merits of the case. They are not decisions about broader matters of Government policy as might be decided by Cabinet collectively and must be taken by the BIS Secretary of State acting alone."*[389] The November advice did not address the question of either actual or apparent bias.

5.134 Specific advice about the process was given after the transfer. The first such advice was given at the handover meeting on 22 December 2010 at which both the Secretary of State and Mr Smith were present. There is a documentary record of the meeting in the form of an internal email but it captures little about what was said generally about quasi-judicial decision making. It records that: "*BIS officials outlined the SoS's role in the process and the various legal considerations."*[390]

5.135 Both men were also present at an internal meeting on 5 January 2011, which was preceded by written advice from DCMS officials. The advice is addressed to Mr Hunt but Mr Smith is not included in the copy addressees. In any event, it deals with next steps rather than the requirements of a fair quasi-judicial procedure more generally.[391]

5.136 Mr Stephens in his evidence was confident that the requirements of a fair process had been clearly communicated. He stated:[392]

> *"Taken together, the written advice offered on 12 November and on 4 January 2011, and the oral advice offered in the meetings on 22 December and 5 January, including by legal advisers, established in my view clear requirements for how the process needed to be conducted, namely that this was a quasi-judicial process, in which decisions were now for the Secretary of State alone to take, on the basis of objective assessment of the evidence available to him, taking account of all the relevant considerations and ignoring any which were irrelevant. He needed to take an even-handed approach, giving all sides an appropriate opportunity to make representations, ensuring that the process was without bias or the appearance of bias."*

5.137 When asked about what had been said at the 22 December 2010 meeting he thought avoiding bias and the appearance of bias had been specifically mentioned:[393]

[389] the minute was addressed to the Secretary of State and copied inter alia to SpAds, pp4-5, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JS11.pdf
[390] p14, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-JS11.pdf
[391] p15, Jonathan Stephens, *ibid*
[392] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf
[393] pp24-25, lines 16-8, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf

"Q. BIS officials outlined the Secretary of State role in the process and the various legal considerations. Do you think that the term quasi-judicial was mentioned on that occasion, Mr Stephens?

A. I think it's very, very likely.

Q. Was that concept explained?

A. Yes. As I recall it, in this meeting and the subsequent meeting, officials took the Secretary of State and others quite carefully through the statutory functions, the stage that had been reached, the next steps, and in particular, rehearsed the need to approach the decision with an open mind on a basis that took account of the relevant considerations, ignored the irrelevant, that it was even-handed and avoided bias or the appearance of bias.

Q. It's the avoidance of bias or the appearance thereof which you feel was mentioned on that occasion, do you?

A. Yes."

5.138 In some contrast to Mr Stephens' recollection, Mr Smith's recollection of what had been covered in these meetings was much less definite and, in particular, his understanding of what a quasi-judicial process required of him was conspicuously vague. As to what had been said at the meeting on 22 December 2010, Mr Smith stated: "*They [that's the BIS officials] may also have mentioned that Mr Hunt was to act in a quasi-judicial capacity.*" (emphasis added)[394] Once he had refreshed his memory from the documents he clarified:[395]

"I think my paragraph 44, the minutes that I've seen, it says the process and the various legal considerations were discussed. So that sort of jogged my memory to suggest that quasi official may well have been discussed. I can't remember whether it definitively was, but we certainly did discuss quasi-judicial on other occasions if not that one."

5.139 Mr Smith was questioned closely on his understanding of quasi-judicial. The exchange, although lengthy, bears quoting in full because it suggested that Mr Smith did not in fact fully and truly understand the procedural requirements of a quasi judicial process, and (consistently with Mr Hunt's evidence) had not received specific instructions as to what he could and could not do, not least with reference to avoiding an appearance of bias. He said:[396]

"A. My understanding was that it meant that the decision had to be made only after considering certain issues, in this case namely media plurality; the sort of wider political or other policy issues couldn't be taken into account. And then sort of uniquely within government that this was a personal decision for whoever the Secretary of State was rather than a collective government decision. So a normal policy decision, if you like, even though it may well have been Mr Hunt making it. Collective government would have meant that they were all essentially making that same decision.

Q. What about any process requirements built into the concept? Were you aware of those?

A. Of the quasi-judicial concepts?

Q. Yes.

[394] p14, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf
[395] p84, lines 19-21, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[396] pp85-86, lines 6-25, Adam Smith, *ibid*

A. Not – well, the process that we were following was in the Enterprise Act, but I didn't necessarily link quasi-judicial to –

LORD JUSTICE LEVESON: Let's just think about the word judicial a bit, because there are lots of things I don't know much about but I know a bit about that. I'm sure you would agree with me that if a judge is trying a case, then he can't speak to the parties outside the case and go and chat to them in the evening as the case is going on, one side as opposed to the other. You don't have to be a lawyer to appreciate that wouldn't be right. I mean, would you agree with that?

A. I would. I think in this particular instance the quasi-judicial process and the fact that you're dealing with two interested parties, you obviously do need to discuss lots of different things with those interested parties. In fact, you need to, to get certain things to happen.

LORD JUSTICE LEVESON: But in a way that's open and transparent to everybody. Don't you think? Or not?

A. Um ...

LORD JUSTICE LEVESON: It might be that I shouldn't be questioning you about what you viscerally understand about the phrase, but what you were told about the phrase. What you were told it meant you could do or what you were told it meant you couldn't do.

A. I wasn't told I couldn't do anything in particular. It was more about – because it was Mr Hunt's decision, the discussion was mainly about what he could or couldn't do. I don't remember being told about myself."

5.140 It became clear that Mr Smith had approached the bid procedurally as he would have done a decision in any other policy area:[397]

"Q. So whatever quasi-judicial might have meant in practice, it didn't really – maybe I'm putting it slightly too high, but it didn't really bear on what you did or didn't do because you just proceeded as you would ordinarily have proceeded in any straightforward policy area, is that fair?

A. Yes, because, as I explained, my understanding of quasi-judicial was that Mr Hunt had to decide on media plurality issues and that Mr Hunt himself had to decide on the bid. Beyond that, there was no difference to the way I approached it." (emphasis added)

5.141 In the absence of specific instructions, he assumed the role of "point of contact", "buffer" and "channel of communications" because he had behaved in a like capacity previously:[398]

"Well, I had previously carried out that role for other work that the department had done and, as we sort of discussed earlier, for Mr Hunt in opposition. It was never, to my memory, sort of directly said to me, but it was just sort of inferred by me and I think as we go through, we'll see the department sort of assumed that that would be the case. But there was no sort of direct instruction, if you like, no."

5.142 Mr Hunt agreed that Mr Smith's role was to be a point of contact. Indeed, in the light of the bid's very unhappy procedural history up to that point he positively wanted Mr Smith to be

[397] pp94-95, lines 16-1, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[398] p88, lines 3-10, *ibid*

a helpful point of contact for News Corp. But he had not, he said, seen Mr Smith's role to be a channel of communication through which to exchange his thoughts with those of News Corp:[399]

> *"Well, I think it's important to be clear about what we mean by "channel". I didn't see Mr Smith in this process as being someone who would be telling me what News Corp thought or telling News Corp what I thought. I saw him as a point of contact, an official point contact in the process, so that News Corp had someone that they could call if they had concerns about the process, and someone who was there to – you know, I mean the situation in which we inherited responsibility for a bid was one in which News Corp felt they had not been fairly treated, and so I wanted to make sure that there was someone there who could answer questions about how the process was going in a helpful way."*(emphasis added)

5.143 Mr Hunt plainly understood that the decision was for him alone and had to be taken on the basis only of relevant considerations, excluding the irrelevant. He no doubt also understood that he must not act in a biased fashion. But it is not clear that he fully understood just how scrupulous he needed to be to avoid the appearance of bias. It was his first quasi-judicial decision and he very fairly accepted that he had learned lessons from the experience:[400]

> *"No, I think what I interpreted – my interpretation of quasi-judicial, I think, you know, obviously having completed this process, one learns lessons, and I'm not saying I would necessarily make exactly the same interpretation now, but my interpretation at the time was that what was important was that the decision was impartial, unbiased, and that I decided it on the basis of the evidence in front of me, and so that was where the transparency was important, but if there was something that was, you know, a trivial – not trivial, that's the wrong word, but it wouldn't necessarily apply to every single matter of process."*

5.144 The understanding described above fits with Mr Hunt's actions. He was at pains to demonstrate how he went about making his decision, taking advice at every step and publishing relevant material as far as commercial confidences would permit. But when it came to contact with Mr Michel, although he was careful, he did not shut it down altogether. He was also content for his SpAd to act as a point of contact for one party to the bid, quietly helping it at least as far as matters of process were concerned.

5.145 Neither Mr Stephens, nor Mr Hunt, had any reservations at the time about Mr Smith being used as a point of contact for News Corp. Mr Stephens accepted that it was not necessary to use a SpAd but his view, based on his experience, was that he expected it to be useful:[401]

> *"My experience in these roles is that often there is a mix between roles and that it can often be sometimes useful for similar messages to be passed on both channels. Certainly in this case, most of the contact was through legal advisers, as I would expect. There were some exchanges with policy officials and I thought there were some exchanges of the equivalent nature with Adam Smith.*
>
> *My experience in a number of government departments is that there is not a rigid distinction between special advisers and officials, necessarily."*

[399] pp53-54, lines 13-1, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[400] p52, lines 7-18, *ibid*
[401] pp31-32, lines 14-24, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf

5.146 When asked why he had involved a SpAd at all in the quasi-judicial process, Mr Hunt explained that he saw a very positive role for Mr Smith in what was an important issue because he was so close to him:[402]

> *"Well, he was an absolutely key and trusted aide. He is highly intelligent, highly able, and I believed that he would have a very positive role to contribute in terms of making sure that the process was run robustly and in the right way generally. He's a very talented person and he's amongst the officials who are closest to me, so it would have been quite a natural thing; indeed, I think as Mr Stephens said, entirely proper and appropriate for special advisers to be involved in decisions that their ministers – or issues that are very important to their ministers."*

5.147 There is nothing inherently wrong or inappropriate in the involvement of a SpAd in a quasi-judicial process and no harm necessarily results. It does, however, carry clear risks which can be avoided by using officials for this role, especially if they have experience in this type of decision making. SpAds usually work in the sphere of the political and the presentational both of which must be put aside for the purposes of making a quasi-judicial decision. Without specific instruction and adequate supervision there is a risk that they will act as they do, entirely legitimately, when dealing with ordinary policy decisions but in a way which is not commensurate with fair process or compliant with the requirements of public law. The risk is compounded if, as may well be the case, they are working with parties with whom they have had contact in contexts not connected with a quasi-judicial decision. For this reason the new Cabinet Office guidance to SpAds, discussed above, which advises SpAds to refer approaches from interested parties to an appropriate official is helpful and prudent.[403]

5.148 When Mr Michel sought, after 21 December 2010, to pursue and exploit the previous contact and rapport which he had had with Mr Smith, he was dealing with a SpAd who had not fully appreciated the sensitivities of such contact in a quasi-judicial context, but who had understood that his principal wanted him to be helpful to a company which had legitimate grounds for complaint about the bid's handling by Dr Cable. This was a dangerous combination.

5.149 For his part, Mr Michel was a professional lobbyist who, whilst charming and experienced, said that he himself was unaware of the dangers to the process of the contact which he was actively encouraging Mr Smith to engage in. It was the first time that Mr Michel had dealt with such a transaction and the concept of a quasi-judicial decision was not explained to him by a lawyer at any stage.[404] He understood something of the position of the Secretary of State recognising that any direct discussions should be formal and minuted but he did not appreciate the need for distance and transparency when dealing with Mr Hunt's officials and SpAds:[405]

> *"Yes. I think we had discussions on the fact that it was very important that the decision rested with the Secretary of State, that it was not appropriate to have direct discussions with the Secretary of State unless they were formal and minuted, but beyond that we were in unchartered territory in terms of – and I'm speaking in*

[402] p59, lines 6-16, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[403] Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Exhibit-to-supplementary-statement-of-Jonathan-Stephens_Principles-governing-the-handling-of-quasi-judicial-decsion-by-ministers.pdf
[404] p36, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-24-May-2012.pdf
[405] pp36-37, lines 21-4, Frederic Michel, *ibid*

hindsight as well – in terms of the level of representations that could be made below the Secretary of State."

and:[406]

"No. I was never of the view that it was inappropriate to at least try to put the arguments or make representations to these officers [civil servants and special advisers]."

5.150 In the result Mr Michel interacted with Mr Smith without modifying his ordinary approach to lobbying so as to reflect the rather special circumstances of this quasi-judicial process.

5.151 James Murdoch did not regard the channel of communication between Mr Michel and Mr Smith as a secret means of informal indirect communication with Mr Hunt. He did accept the obvious point that the propriety of their communications was dependant upon what the contact was about:[407]

"Q. Mr Hunt must have taken the view on advice that formal meetings – and we've seen the minutes of those meetings, 6 January and 20 January 2011 – were okay, would not impugn the fairness of the process, but if there is informal contact of the sort we're seeing here, that would be inappropriate and the way to avoid the appearance of that is let the informal contact take place secretly between Mr Michel and the special adviser. Do you see that point?

A. Mr Jay, respectfully, I disagree with that point. I think he was saying that informal contact between me and Mr Hunt or others would raise eyebrows, because they would say, "What was discussed?", et cetera, but general contact at the political level, if you will, at the staff level, around process, around document submissions, around – just to give colour around these things from us, that that was something that was acceptable and that was part of the process he was setting up.

Q. It may depend on what the contact is about. Would you agree?

A. I suppose so, and I assume we're going to keep going through this."

5.152 It is regrettable that Mr Murdoch, to whom many of Mr Michel's email reports were addressed, did not at any stage call a halt to, limit or in any sense express concern about the risks that might be run as a consequence of the nature and extent of the communications between Mr Michel and Mr Smith or the fact that they went beyond what was appropriate in a quasi-judicial environment.[408] Mr Murdoch need only have asked himself what the Alliance would have made of sight of the texts and emails which were passing.

5.153 Turning now to the actual substance of the contact between Mr Michel and Mr Smith, it not necessary to rehearse in full the course of their communications. From a consideration of the relevant evidence as a whole one can discern its defining characteristics. It is conducted very much on a personal and informal basis. Mr Michel almost invariably adopts a friendly approach, preferring a confrontational stance only very rarely and on key issues. He frequently flatters both Mr Smith and his principal, Mr Hunt. There is striking use of the language of common cause to communicate a sense of shared purpose. Allied to this is a tone which is

[406] p38, lines 3-5, Frederic Michel, *ibid*
[407] pp26-27, lines 13-10, James Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-24-April-2012.pdf
[408] See emails addressed to James Murdoch in Exhibit KRM18, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

occasionally conspiratorial and surreptitious. Mr Michel uses comments unfavourable of the Conservatives' political opponents presumably designed to communicate that News Corp was politically "on side". The majority of the communication is initiated by Mr Michel who is by far the more pro-active party. The volume of his contact is high, amounting to a 'barrage' at times, as Mr Smith rightly described it.[409] There was pressure and encouragement to change the course of the process as Mr Michel advocated the steps which would have favoured News Corp's interests.

5.154 For his part, Mr Smith was usually brief in his replies, invariably courteous, and generally friendly. He was very often communicating mundane information about the process or repeating matters which Mr Hunt or DCMS officials had already stated in more formal circumstances. He stood his ground when pushed in a direction other than that which Mr Hunt intended to take. He very often did not pass on the fact, still less the content, of his communications with Mr Michel, thereby fulfilling the role of buffer. On occasions, where he judged it necessary, he did pass on information to Mr Hunt, acting as a conduit.[410] He was aware at the time that Mr Michel was trying to extract information from him: *"I'm sure that's what he was trying to do, yes".*[411]

5.155 But there were times when Mr Smith succumbed to Mr Michel's tactics and appeared momentarily at least to have been drawn in by the narrative of common cause. On one occasion he found himself joking with Mr Michel about an opponent of the bid. On another, he joined in criticism of Ofcom. He passed on information about the progress of the bid that would have been more properly communicated in a much more formal manner. He did not make formal notes of the communications. There is an issue (analysed below) about Mr Michel's source of confidential information about the Government's thinking as to the form which inquiries arising out of the phone hacking scandal would take: whatever the truth of the matter, Mr Smith should never have been running any risk of being the source of any but the most inconsequential information.

5.156 The above impressions can be illustrated by reference to a few salient examples. On 10 January 2011, the telephone records showed three calls between Mr Michel and Mr Smith totalling 27 minutes, 55 seconds.[412] There is also an email from Mr Michel to James Murdoch and others. It is clear from the email that Mr Smith had told Mr Michel about the reaction of Ed Richards (of Ofcom) to the points on which Mr Hunt had sought clarification from him.[413] Ultimately, Mr Smith did not dispute that he had done so and correctly pointed out that it had always been Mr Hunt's intention that News Corp should be informed of the clarifications that Mr Richards had provided. This is, however, an example of substantive information about the bid being communicated by Mr Smith in a very informal manner and without keeping a formal record. The e mail recorded in material part that:[414]

> *"[Jeremy Hunt/Adam Smith] saw Ed Richards today:*

[409] p20, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Adam-Smith.pdf
[410] pp13-15, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[411] p9, line 15, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[412] p2, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM18-Telephone-Records1.pdf
[413] p48, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf; See under Procedural Arrangements and Meetings with James Murdoch above
[414] p48, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

he challenged Ed on the "may be" rationale. Ed was adamant that the threshold was very low and referral was the only option

-he also challenged him on "sufficiency of plurality

-ed repeated the same concerns which are in the report

-he didn't raise remedies with Ed."

and Mr Smith's evidence about this was:[415]

"Q. That may be right, but at least you're providing confirmation of what Mr Hunt told Mr Richards, and you're also providing fresh information as to what Mr Richards' position was because you see the sentence:

Ed was adamant that the threshold was very low ...

That, in fact, is correct, as a matter of law.

... and referral was the only option.

That would be a matter of opinion. But unless you told Mr Michel that, he wouldn't know that, would he?

A. Well, I would have been confirming what Mr Hunt had said, but in the meeting that Mr Hunt had with Ofcom, the minutes of that meeting show that he wanted to share Mr Richards' answers to those questions with News Corporation.

Q. Mm.

A. So, in this sense, that's what I was doing."

5.157 The same email contains a typical example of the sort of report which Mr Smith frequently disputed. Mr Michel had gone on to write "*He made again a plea to try to find as many legal errors as we can in the Ofcom report and propose some strong and "impactful" remedies.*" It is not necessary to resolve these disputes on a case by case basis, although I am satisfied that Mr Michel did on many occasions use hyperbole when reporting his conversations with Mr Smith and was prone, on occasion to inaccuracy.

5.158 Mr Michel's email report of a telephone conversation with Mr Smith on 23 January 2011 contains numerous examples of Mr Michel's use of the language of common cause and conspiracy, albeit in this case Mr Smith did not believe that he said what Mr Michel attributes to him. Whatever Mr Smith actually said, the terms in which it was reported demonstrate Mr Michel's propensity to record matters in these terms. The report concerned the UIL and News Corp's concerns about publication of Ofcom's report. It contains the phrases:[416]

"His view is that once he announces publicly he has a strong UIL, it's almost game over for the opposition.

He understands fully our concerns/fears regarding the publication of the report and the consultation of Ofcom in the process; but he wants us to take the heat, with him, in the next 2 weeks.

[415] pp26-27, lines 22-12, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

[416] p53, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf; pp28-37, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

He very specifically said that he was keen to get to the same outcome and wanted JRM to understand he needs to build some political cover on the process." (emphasis added)

5.159 The startling opening to Mr Michel's email report of a conversation with Mr Smith to James Murdoch dated 24 January 2011 and timed at 15:21hrs reads: *"Managed to get some infos on the plans for tomorrow [although absolutely illegal..>!]"*[417] The substance of the report concerned an early indication in outline of what was to happen the following day when Mr Hunt announced that he was minded to refer the bid but was going to take advice on News Corp's UIL. In fact communicating this information was not, in itself, illegal but the report does, put at its lowest, convey a sense that information was surreptitiously being provided.

5.160 The next morning saw a text message from Mr Smith which, on any interpretation, was unsatisfactory. Mr Michel had started the day's exchange of text messages at 07:56hrs, shortly after Mr Hunt's press statement about the bid had been released. He complained, albeit in friendly terms, that Mr Hunt had not said much about the strength (as News Corp saw it) of the proposed remedy (the UIL): "*Good statement. not much on strength of remedy though:) Any news on meeting slots? Tomorrow 10.30 or Thursday afternoon?"*[418] Mr Smith replied at 08:03hrs: "*There's plenty – potential to mitigate problems! We can't say they are too brilliant otherwise people will call for them to be published. Will check on meetings."*[419] On its face it is conspiratorial and appears to betray Mr Hunt's thinking as being that the UIL were very strong but he did not want to be seen to be saying as much. That is an interpretation which would be consistent with the terms of Mr Michel's email of 23 January 2011, discussed above. Mr Smith gave a different explanation for his use of this language, claiming that he was being disingenuous to mollify Mr Michel:[420]

> *"I think by this stage, Mr Michel had got quite cross that Mr Hunt's statement didn't, as he had been asking for and pushing for previously – you will call the UILs strong or brilliant or, you know, some sort of description like that, and the first part of my text was a bit of a – the potential to mitigate problems bit was paraphrasing what Mr Hunt's statement had said that had gone out slightly earlier that morning, was an attempt by me to say there is support for the UIL. I mean, if you read what Mr Hunt said, I mean it didn't support the UIL, so my attempt there was quite sort of shaky ground, if you like.*
>
> *Then, the other part was too flippant and jokey, I admit that.*
>
> *Q. The position is that Ofcom was recommending a referral to the CC. The UILs had been published or – at least published internally on 20 January and this was the remedy which would prevent the referral to the CC if they were strong enough, but the departmental view, apparently, was that the UILs were solid, were good – indeed it was your term, "brilliant", but you couldn't say they were brilliant, otherwise that would undermine the process and, what's more, as you rightly pointed out, people would ask for them to be published. Don't you accept that that's the only reasonable interpretation?*
>
> *A. That was an attempt by me to pacify and mollify by being slightly disingenuous. If you read what Mr Hunt had said, he didn't say they were brilliant."*

[417] pp56-57, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[418] p49, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[419] p50, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[420] pp41-42, lines 16-19, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

5.161 Mr Smith's explanation shows some vulnerability to Mr Michel's modus operandi, preferring to enter into the conspiratorial dialogue rather than provide an alternative and more appropriate reply. Mr Michel's response was to keep pushing. After the Parliamentary statement at 09:30hrs that morning he texted: "*Still. All the language is statutory. I understand the constraints but there is nothing in the statement which gives us comfort or send [sic] signals that remedy is strong one.*"[421] Mr Smith replied: "*Other than what Jeremy and I have told you! We have no legal wriggle room in a statement to parliament.*"[422] That reply prompts the question: what had the Secretary of State and Mr Smith told Mr Michel? Mr Smith said that he was referring only to what Mr Hunt had told them on 20 January and what he had reiterated of that.[423] He described his text as another example of him trying to get Mr Michel off his back.

5.162 By this stage Mr Smith was already far too close to Mr Michel and their communications were unacceptable in the context of his principal making a quasi-judicial decision. Despite his evident discomfort, Mr Smith explained why he did not call a halt to the exchanges. He felt that it was his job to remain as the point of contact:[424]

> *"Q. One strategy you might have used by this point is simply to turn off your mobile phone, frankly. Weren't you reaching the point that this was getting much too close now, to this man?*
>
> *A. I don't think that I would have been doing the job that I had assumed in terms of being a point of contact with News Corporation if I'd stopped being the point of contact with them. I mean, in hindsight I would have maybe liked to have at some stages to have had a break from it, yes."*

5.163 It is regrettable that Mr Smith did not take what should have appeared as an obvious step, namely to seek the advice of the Permanent Secretary or Mr Hunt either at this stage or, indeed, at any stage of the process about Mr Michel's communications and how he should deal with them. In not doing so, he made an error of judgment. Even allowing for his lack of experience, the lack of specific instruction, and the perceived need to provide procedural reassurance to News Corp, he ought still to have realised that the volume, tone and content of Mr Michel's emails was an issue to be raised with others. Continuing the dialogue and seeking to appease Mr Michel was a mistake.

5.164 There were further text exchanges on 25 January 2011 culminating, at 22:26hrs in an example of Mr Michel's use of the language of common cause: "*I think we re [sic] in a good place tonight no?*"[425] To which Mr Smith replied: "*I agree. Coverage looks ok. Let's look again in the morning though!*"[426]

5.165 On 4 February 2011, Mr Smith sent a text message which he admitted looked surreptitious. Mr Michel had asked for sight of the documents submitted by Enders and by Slaughter & May. Mr Smith replied: *"I haven't actually got them at the moment. Officials just told me about them. Don't mention them to anyone like oft etc. If we need them I'll show you."* When

[421] p52, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[422] p53, *ibid*
[423] p45, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[424] pp45-46, lines 21-5, Adam Smith, *ibid*
[425] p65, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[426] p66, *ibid*

questioned about his choice of words, he accepted that it looked surreptitious, whilst denying that anything surreptitious actually happened:[427]

> *"Q. One possible inference is that you were going to do something a little bit surreptitious. Would you accept that?*
>
> *A. I do accept that it looks like that way, yes, but I don't believe anything like that happened."*(emphasis added)

5.166 Five days later, on 9 February 2011, Mr Smith joked with Mr Michel in partisan terms. Mr Michel informed Mr Smith that he was to see Lord Black, an opponent of the bid: "*Am seeing Guy Black Monday evening. Interesting. James in London until Friday if needed. He is then off to New York next week. Fred*."[428] Mr Smith replied: "*Take your stab proof vest with you! Am hoping for an update later on process so will let you know if anything new"* (emphasis added)[429] Mr Smith did not seek to defend the comment: "*...I wouldn't have used that language again, if I had the opportunity"*.[430] Not only does this joke contribute to an appearance of bias given by the course of communications as a whole, it also exemplifies the inherent dangers of using a medium of communication as informal as text messaging in the course of the formal process of which, although not the decision maker, he was a part.

5.167 Relevant to the question of the appearance of bias, Mr Smith accepted that the accumulation of text messages gave rise at least to the perception that he was on side with Mr Michel. It was put this way:[431]

> *"Q. It's just the accumulation of text messages, which arguably give rise to am impression. One can't identify one particular message and say, "Aha, this means X rather than Y", it's just the series of them. Do you accept that they are giving rise at least to the perception that you were on side with Mr Michel?*
>
> *A. I can see how that perception would be created, yes".*

5.168 Despite the cumulative effect of very many emails which prompted Mr Smith's realistic admission, the course of the dialogue was by no means one way. In particular, there are a number of issues on which Mr Michel pushed really quite hard for an outcome which he did not get. For example, these included efforts to persuade Mr Smith to persuade Mr Hunt to dismiss Ofcom's views. On 9 February 2011, Mr Michel related a conversation with Mr Smith in these terms:[432]

> *"I told him he had to stand for something ultimately and this was his chance to dismiss Ofcom's views and show he had some backbone, he said he couldn't ignore Ofcom, he had brought them into this OFT process to get some cover and in public debate, he would get absolutely killed if he did such a thing."*

5.169 Mr Smith said of this:[433]

[427] p51, lines 15-19, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[428] p128, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[429] p129, *ibid*
[430] p53-54, lines 18-10, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[431] p56, lines 12-18, *ibid*
[432] p78, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[433] p60, lines 3-5, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

> *"Well, I don't actually remember him saying those sorts of specific words, but I do know that they were constantly pushing for the Department to essentially ignore Ofcom."*

5.170 News Corp's constant pushing, through Mr Michel and through more formal channels, got it nowhere. Mr Hunt resolutely maintained his reliance upon the regulator's advice. Similarly, when News Corp described Ofcom's advice that the hived off Sky News should have an independent chairman, Mr Michel told Mr Smith that it was a "*deal stopper*".[434] That act of brinksmanship did not prevent Mr Hunt from writing to News Corp on 15 February 2011 and giving the company just 24 hours to agree in principle to that and other recommendations that had been made by Ofcom.[435]

5.171 It is worthy of mention that Mr Michel's exchanges with Mr Smith about Ofcom's advice at this stage of the process involved premature disclosure by Mr Michel to Mr Smith of a letter written by Ofcom to News Corp, a fact that was reflected in typically conspiratorial terms by Mr Michel to James Murdoch:[436]

> *"–he can't instruct his officials to get back to Ofcom as he is not supposed to be aware that we have received the letter and its content ...so we have to be very careful on this."*

5.172 On 11 February 2011, Mr Michel, who was waiting for Ofcom's report, sent a text to Mr Smith at 21:26hrs. It was one of a number that day. He wrote: "*Thanks Adam. Hope you get home soon. It might arrive very late tonight. Last time Ofcom sent it at 23h!*" Mr Smith replied sarcastically, in terms which would have struck a chord with News Corp's jaded view of the regulator: "*Helpful! Just one of their many strengths*".

5.173 On 17 February 2010, only two days after Mr Hunt's firm letter to News Corp, Mr Smith found himself lapsing into the language of common cause so frequently used by Mr Michel. The latter emailed a summary of the previous day's Media Show broadcast by BBC Radio 4. Mr Smith emailed a reply which read: "*Interesting. More evidence that <u>we need to be strong and confident when we go to public consultation</u>*" (emphasis added).[437] Mr Smith's explanation to Counsel to the Inquiry that by "we" he meant the DCMS did not escape the fact that this was language that might equally have come from News Corp. The exchange went as follows:[438]

> *"A. The point of the email below is that there were – I think it was on the radio, wasn't it? Yes. An individual from Enders' analysis had been saying that there were possible remedies that could deal with the Ofcom concerns and, of course, by this point News Corporation had written to Mr Hunt to concede on the points that Ofcom and the OFT had asked to be in the UILs, so the point there was that, if people that had previously been opposed to the undertakings in lieu were now saying that there may be undertakings in lieu, that could work and that News Corporation had conceded on the issues that Ofcom and the OFT had wanted in there, then there was every reason for the department and Mr Hunt to be confident about those undertakings in lieu.*

[434] p57, line 18, Adam Smith, *ibid*
[435] see under Consideration of the Proposed UIL: Advice and Consultation above
[436] p78, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[437] p88, *ibid*
[438] pp70-71, lines 16-11, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

> *Q. You're almost communicating there a public relations message, and coming close to putting yourself in the same boat as News Corp by using the pronoun "we". Do you accept that?*
>
> *A. "We" would have been "we" the collective department I wouldn't have put "I" because I obviously wouldn't have been saying anything publicly."*

5.174 Comparison of Mr Smith's text messages to Mr Michel on 24 February 2011 with Mr Michel's internal email reporting back to James Murdoch, contain a clear exaggeration by Mr Michel. The communications concerned Ofcom's then ongoing work considering the proposed UIL.[439] At 08:25hrs Mr Smith texted: "*They said this was a promising basis from which to work in their advice to JH. Not quite complete acceptance so I guess that's why they are looking for confirmation on some things*".[440]

5.175 At 10:43hrs he stated: "*We can't interfere with the process really. We can give more time but not deal with substance whilst they are working with you*."[441]

5.176 At 10:50hrs, Mr Michel emailed James Murdoch in terms which communicated what Mr Smith had texted but then added a further sentence:[442]

> *"JH just texted that he can't interfere with the process but can give us more time to sort things out. He can't engage substance whilst Ofcom is working with us. He can only use his officials to put pressure at this stage."* (emphasis added)

5.177 Typical of Mr Michel's familiarity and use of flattery was a text exchange on 3 March, at the culmination of an intense period of activity leading up to the Secretary of State's oral statement to Parliament announcing the first public consultation about which Mr Michel texted: "*Jeremy is superb*". Mr Smith replied: "*I'm now at the airport so missed it but glad it went well. The late night and early prep was worth it!*" Mr Michel followed up, adding a comment with a political dimension: "*Seriously. Really good defence and slapped Ivan Lewis who was humiliated. Enjoy Italy*".[443]

5.178 The flattery was later augmented by an offer to socialise. On 5 April 2011, Mr Michel texted: "*Would you both like to join me and [my wife] for Take That on 4th July at Wembley? Fred*".[444]

5.179 The text which Mr Smith most regretted sending was dated 2 June 2011. On its face it appears to show that he and Mr Michel had become so close that they were almost working together. Mr Smith said that in fact it was another attempt to mollify Mr Michel and was not substantively true. The text read:[445]

> *"Over the last few days I have been causing a lot of chaos and moaning from people here on your behalf. I should have an update later today"*(emphasis added)

[439] see under Consideration of the Proposed UIL: Advice and Consultation above
[440] p220, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[441] p227, *ibid*
[442] p96, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf; see also pp74-75, lines 23-2, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[443] pp318-320, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[444] p415, *ibid*
[445] p485, *ibid*

5.180 Mr Smith's explanation was in these terms:[446]

> *"A. This is the one that I do regret the most. By this stage I was probably coming toward the end of my tether, as it were, and I sent him a text to get him off my back, but I certainly don't think anybody in the department would have said that that's what I'd been doing, and I certainly wasn't doing anything on their behalf, but in hindsight I shouldn't have sent it, but it was an attempt to mollify him.*
>
> *Q. Either to mollify or to indicate assent to the proposition, I suppose, there's a degree of collusion here between you, that you've become so close that you were almost working together. Do you feel that that's a reasonable inference or not?*
>
> *A. I can see how people would think that, but I sent it to mollify him and get him off my back, not to do as you've just suggested."*

5.181 On 27 June 2011, Mr Michel sent Mrs Brooks an email purporting to communicate Mr Hunt's views about how the Government should respond to the unfolding phone hacking issue. It read:[447]

> *"Hunt will be making references to phone-hacking in his statement on Rubicon this week.*
>
> *He will be repeating the same narrative as the one he gave in Parliament few weeks ago [sic].*
>
> *This is based on his belief that the police is pursuing things thoroughly and phone-hacking has nothing to do with the media plurality issue.*
>
> *[It's] extremely helpful.*
>
> *On the issue of the Privacy Committee, he supports a widening of its remit to the future of the press and evidence from all newspaper groups on the regulatory regime.*
>
> *He wants to prevent a public enquiry [sic]. For this, the Committee will need to come up with a strong report in the Autumn and put enough pressure on the PCC to strengthen itself and take recommendations forward.*
>
> *JH is now starting to look into phone-hacking / practices more thoroughly and has asked me to advise him privately in the coming weeks and guide his and [No10's] positioning..."*

5.182 When asked about this email Mr Smith accepted that he might have asked Mr Michel to be kept informed about News Corp's reaction to the phone hacking scandal but denied that he asked to be guided. He said:[448]

> *"A. Yes, certainly. If this was a conversation with me, it's quite possible that I asked him to let me know what steps News International was taking in response to the phone hacking situation, mainly because the department is obviously responsible for the media sector, so that would be interesting, but I would never have asked to be guided, and I think this use of the word "privately" again is one that I don't really sort of recognise because if I'd asked him to send me statements they were making about phone hacking, then he would have sent them to me. I don't think that's privately."*

[446] pp92-93, lines 17-7, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[447] pp2-3, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-21.pdf
[448] p109, lines 9-19, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

5.183 For her part, Mrs Brooks' reaction was simply to ask for confirmation as to when Mr Hunt would be making his statement.[449]

5.184 On 30 June 2011, the day on which Mr Hunt announced that he was minded to accept the revised UIL, subject to a second short consultation, Mr Michel combined flattery, and the narrative of common cause in little more than a line. His text read: "*Just showed to Rupert. Great statement by the way. We need to knock Avaaz down. They are all about US Democrats*".[450]

5.185 By 7 July 2011, publicity about the phone hacking scandal was reaching a crescendo. Mr Smith called Mr Michel at 17:35hrs and had a conversation lasting 11 minutes and 8 seconds.[451] At 18:01hrs, Mr Michel emailed James Murdoch and others at News Corp with a report relating to the bid.[452] The subject line read: "*JH – CONFIDENTIAL – please read*". The first bullet point contains information about the Government's then current thinking about inquiries into phone hacking. This was material that was not in the public domain. Under the subheading "Latest on Rubicon" (News Corp's code name for the bid) it read:[453]

> *"-Was not discussed at the No10 meeting that Hunt had with the PM – was discussing the two enquiries ["police" one led by a judge; and "media practices" one not with a judge and led by DCMS]"*

5.186 Mr Smith accepted that it was possible that he was the source of this information but did not accept that it was probable that he did so. The exchange with Counsel to the Inquiry on the point was as follows:[454]

> *"Q. There is reference to two possible public inquiries, which, at that stage, we believe does represent government thinking on 7 July. The suggestion is that the only source for this information could have been you, and it ties in with what we know to be a fact, namely the telephone call half an hour earlier. Would you agree that or not?*
>
> *A. I'm not sure that I would necessarily be the only source of that information. I can't remember, at that stage, whether I knew that that was the case. I may well have done.*
>
> *Q. You may well have done?*
>
> *A. Yes, I may well have done but I can't remember whether I did, but I think most of the discussions were – most of those conversations were being dealt with by Number 10 but I don't know –*
>
> *Q. This wasn't in the public domain as yet, Mr Smith. I think the simple point I'm making, and it may be more a matter for inference, if you knew the facts set out in the first bullet point, if you accept that there was a conversation within half an hour of this email, one possible inference, it may be a reasonable inference, is that you're the source of the information we see in the email. Would you agree with that?*
>
> *A. I would agree that that is a possible inference, yes.*

[449] p2, Rebekah Brooks, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-RMB-21.pdf
[450] p584, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM91.pdf
[451] p8, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM18-Telephone-Records1.pdf
[452] p160, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[453] *ibid*
[454] pp106-108, lines 1-5, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf

Q. Probable inference?

A. Possible.

Q. Unless there was someone else providing this information ahead of the game, you're the only person we can possibly look at for these purposes, I think. Would you accept that?

A. I don't know who else – I mean lots of other people would presumably have known only far more than I would have done by this stage because – but I don't know who –

Q. Pretty confidential, I would have thought at this point, what government thinking was. It would have been known about, obviously within Number 10, the Cabinet Office, people high up in DCMS and something that you knew about because Mr Hunt might have shared it with you. Is that fair?

A. I don't know that I did know about it, but he may well have shared it, yes, but I don't remember at this stage.

Q. Had he shared this information with you, do you accept that it's information which, I'm not saying that you did impart it to Mr Michel, but you shouldn't have imparted it to Mr Michel?

A. Yes, I would say so, yes.

Q. Which may explain why you're hesitant to agree with me that you did impart it to Mr Michel –

A. Well –

Q. – that would be natural, wouldn't it?

A. – I don't remember imparting it, mainly because I don't quite know that I knew it, which would make it quite strange for me to be able to impart it."

5.187 The very close temporal link between the telephone conversation and Mr Michel's email, the fact that Mr Michel was obviously reporting in his email about the telephone conversation with Mr Smith, the reference to Mr Hunt and the complete absence of evidence that Mr Michel was communicating with anyone else about these matters, all lead me to infer that it is not merely possible but probable that it was Mr Smith who had provided confidential information about Government thinking as to the appropriate form of inquiries arising from the phone hacking scandal. The rapid leak of confidential Government thinking to the parent company of the entity at the heart of the scandal is undeniably a matter of concern.

5.188 Both Mr Hunt and Mr Stephens knew that Mr Smith was in contact with News Corp. Mr Stephens was aware that Mr Smith was attending formal meetings and *"on occasion following up points of process and procedure with News Corporation"*.[455] He did not know Mr Michel's name or job title but he did assume that Mr Smith was in contact with someone with access to News Corp's Chief Executive. He thought that the purpose of Mr Smith's contact was:[456]

"To follow up on matters of process and procedure, to reinforce, on occasions, messages that the Secretary of State had delivered personally or in correspondence to News Corporation."

[455] p29, lines 15-17, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-25-May-2012.pdf
[456] p30, lines 14-17, Jonathan Stephens, *ibid*

5.189 Mr Stephens did not become aware of the full nature or extent of the contact, or, indeed, that it had in any way been inappropriate until 24 April 2012.[457]

5.190 Mr Hunt described Mr Smith's role as:[458]

> *"a point of contact, an official point of contact in the process, so that News Corp has someone that they could call if they had concerns about the process, and someone who was there to – you know, I mean the situation in which we inherited responsibility for a bid was one in which News Corp felt they had not been fairly treated, and so I wanted to make sure that there was someone there who could answer questions about how the process was going in a helpful way".*

5.191 As well as being aware of Mr Smith's role, there were occasions during the process on which Mr Smith reported back to Mr Hunt about particular aspects of the contact which thought were worthy of his attention. When asked whether he had specifically used Mr Michel's name in discussions with Mr Hunt, Mr Smith said:[459]

> *"I can't remember whether I specifically did but I would have thought, on the odd occasion that I did mention to Mr Hunt, on one of the issues that I thought was worthy of his attention, I would, I think, almost certainly have said, "Fred's told me X,Y or Z."*

5.192 Nevertheless, Mr Hunt expressed his shock at discovering the true extent of the contact in his evidence:[460]

> *"Q. I suppose it might be said that the greater the volume of contact, arguably the more extraordinary the contact, the more likely it is that he'd communicated the fact that there had been such an amount of contact with you. Are you sure that he didn't, Mr Hunt?*
>
> *A. He didn't, and I was totally shocked when I discovered the level of that contact. I think it does explain why sometimes he slipped into inappropriate language."*

5.193 I must admit to finding it surprising that Mr Smith, who had worked for Mr Hunt so closely and for so long should have kept him unsighted on the way in which he was performing what he saw to be his duty; that, as I understood it, was the role of a SpAd – to be the 'eyes and ears' of his principal. Both men, however, make it clear that Mr Hunt was unaware of the nature, and extent of his contact with Mr Michel. Mr Smith explains the position on the basis that his role as a buffer was specifically to protect his principal from the barrage to which he had been subjected. In the circumstances, I accept what I have been told.

5.194 There were officials and lawyers within DCMS who knew that Mr Smith was in contact with Mr Michel. The evidence about that contact did not suggest that they were aware of the full nature and extent of the contact that was actually taking place. However, it did confirm that

I

[457] p8, Jonathan Stephens, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-statement-of-Jonathan-Stephens3.pdf
[458] pp53-54, lines 17-1, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-31-May-2012.pdf
[459] p6, lines 8-12, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[460] p45, lines 16-23, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-31-May-2012.pdf

no one suggested to Mr Smith that he ought not to be communicating with Mr Michel. Mr Smith said:[461]

> *"I suppose what I would say is that they generally knew I was in touch. On some certain issues they certainly knew, but I don't think they knew the volume or extent."*

and:[462]

> *"...I think as the process went on with discussions I had with members of the department or emails I sent them, they would have very clearly been aware and knew that I was having those discussions with Mr Michel, and nobody ever said, you know, where did you hear this or you shouldn't be doing that or – it was – I assumed that was the role I was going to be taking, and then as it developed, I don't think anybody was surprised that that was the role."*

5.195 There were naturally a number of lawyers and officials who were in communication with News Corp about the bid. Jon Zeff, who was the lead official for the DCMS on the bid, exchanged text messages with Mr Michel. This text contact is deserving of mention because of the contrast between it and that which passed between Mr Michel and Mr Smith. There were far fewer in number, only 23 in the period 20 January 2011 to 13 July 2011. They are typically very short, to the point, and limited to matters concerning the actual execution of the process.[463]

Conclusions

5.196 In some respects, there was much to commend in Mr Hunt's handling of the bid. It is undeniable that he had views about News Corp and its place in UK media operations: these were views that he was entitled to hold given his portfolio responsibilities. He appreciated, however, the need to restore confidence after Dr Cable's damaging utterances and showed a determination to put aside these views and to follow a fair and rigorous procedural route to a final decision. At the formal level there was a high level of transparency. Mr Hunt's extensive reliance on external advice, above and beyond the minimum required, was a very wise and effective means of helping him to keep to the statutory test and to engender the confidence of those opposed to the transaction that an objective decision would be taken. There is a danger if the decision maker accepts and follows advice too slavishly. If that is done then discretion is fettered. Mr Hunt avoided that risk, as was evidenced by the way in which he probed Ofcom's advice.

5.197 All the effort and good work which was done on the bid was put in jeopardy by a serious hidden problem. Had Mr Hunt accepted News Corp's UIL, and had there been a challenge to that decision by way of an application for judicial review, seeking to impugn the procedural fairness of the decision (a course which had in fact been the subject of thinly veiled threat by Slaughter and May at an early stage) then there would have been an obligation on the Secretary of State to disclose all relevant documents evidencing contact between News Corp and him and his officials, including that of his SpAds, relating to the bid. The effect of those documents, particularly the communications between Mr Michel and Mr Smith, would undoubtedly have been to give rise to a powerful argument that there was at least

[461] p7, lines 22-24, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-25-May-2012.pdf
[462] pp93-94, lines 22-5, Adam Smith, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-24-May-2012.pdf
[463] pp1-23, Frederic Michel, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Exhibit-FM102.pdf

the appearance of bias in the process and therefore the risk of a successful claim for judicial review.

5.198 In reaching this view, I should make clear that I am doing so on the merits of the matter. I fully recognise that the practical risk of a judicial review in relation to this 'serious hidden problem' was, almost by definition, low. Those who might have brought such a challenge would have been unaware of the basis they had for doing so. Even had the risk eventuated the chance of a punctilious search within the Department for all potentially relevant material yielding these particular documents were not high either. The majority of the relevant material disclosed to the Inquiry was provided from the records of News Corp. But none of this is to the point; the substantive legal and ethical issues remain, the hidden problem was there, and it might not have remained for ever concealed. The disclosure of these documents as KRM18 during the Inquiry process shows that events can take an unpredictable course.

5.199 There is one further observation I make about this. To the extent that the practical risk of an application for judicial review might have been assessed as low precisely because the appearance of bias would not have been apparent in departmental records, there are additional reasons to express concern about the hidden problem of voluminous 'private' (unrecorded) communications by text and email. In quasi-judicial procedures, there is no place for any argument that relevant conduct, as all of these communications certainly were, is somehow rendered any less relevant because it is informal, unrecorded, and contains some mixture of the personal, the political or the presentational.

5.200 I well understand the distinctions that have to be made from the point of view of Government accountabilities between the conduct of SpAds (and, indeed, Ministers) on Government business and on party-political or personal business. But these are distinctions which have to correspond to the substance of a communication or other course of conduct, not its manner and form. Government business does not cease to have that character simply because it is transacted out of hours on a personal phone and includes private pleasantries. And where quasi-judicial decision making is concerned, all relevant actions and communications by a decision maker or those acting with his or her actual or apparent authority are, in reality, Government business.

5.201 Among all the excesses of Mr Michel's correspondence, perhaps the message with some of the most concerning wider implications was his advice to his principal not to meet with the decision maker on the grounds of counter-productivity, but advising in terms that he "*could have a chat with him on his mobile which is completely fine and I will liaise with his team privately as well*".[464] This example in microcosm of a practice where the informal, 'off-record' and 'personal' is seen as an obvious and effective means of conducting lobbying on matters of media policy is symptomatic of a problem evidenced more widely to the Inquiry; the fact that such practices have a side-effect (I say no more than that) of placing the conduct of public policy issues outside the mechanisms of transparency, accountability and public record cannot but give rise to perceptions and questions which are corrosive to public trust and confidence. I underline this point because it is in this respect that I consider the conduct of the BSkyB bid to have important characteristics, as part of a much wider issue about the relationship between the politicians and the press, which I consider in some detail in the conclusions I draw at the end of this Part of the Report.

5.202 It is right to recognise that the bid came to Mr Hunt and DCMS in a crisis not of their making. That it did so made Mr Hunt's task all the more difficult. Even so, examination of the course

[464] p23, lines 1-4, *ibid;* p28, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

of the bid shows that the seeds of the problem which was to emerge were sown at an early stage. The process that was put into place did not prove to be robust enough. Best practice of the kind subsequently encapsulated in the Cabinet Office guidance was not followed. There was no written guidance for Mr Smith and others as to the conduct expected of them in a quasi-judicial environment. Mr Stephens, no doubt, genuinely believed that the requirements and the principle had been made crystal clear in the various meetings that he described, and to him as a very experienced and senior civil servant, they may indeed have been.

5.203 Evidently, however, at the level of practical detail, these requirements and the underlying reasons for them were not made clear enough for Mr Smith, or even, albeit to a much lesser extent, for Mr Hunt. For reasons already discussed above, the use of a SpAd as a point of contact for News Corp gave rise to risks which could easily have been avoided by entrusting the task to an official: the decision to allocate the role to a SpAd was, in my judgment, unwise. That is not because of any question about his integrity or calibre, but because he had a pre-existing and amicable relationship with Mr Michel, which Mr Michel was able to exploit to engineer contact that was inappropriate in volume and in some cases in tone. Mr Michel was also able to trade on the fact that Mr Smith would want that relationship to continue after the bid was concluded. When faced with the intimacy, charm, volume and persistence of Mr Michel's approaches, Mr Smith was put in an extremely difficult position.

5.204 That was a risk which was, or should have been, obvious from the outset. The consequential risks were then compounded by the cumulative effects of the lack of explicit clarity in Mr Smith's role, the lack of sufficient express instruction that it was clear he fully understood, and a lack of supervision. They are all matters for which Mr Hunt was responsible, although they might have been prevented had Mr Hunt fully appreciated the extent to which meticulous attention had to be paid to every aspect of the conduct of quasi-judicial procedure. Given that this was the problem that had faced Dr Cable, Mr Hunt was very aware of his own position.

5.205 Irrespective of the extent to which News Corp might have been entitled to feel aggrieved by the comments of Dr Cable, the bid was now in different hands and its consideration started afresh. Both from the perspectives of Mr Hunt as decision-taker and Mr Stephens' responsibilities for advising him and for the overall conduct of the bid process, it was essential that the precise limits of what was acceptable (and, just as important, what was not acceptable) were fully understood by all who might have contact with News Corp or its executives: that most certainly included anyone in the position of Mr Michel. Unfortunately, both Mr Hunt and Mr Stephens appear to have overestimated Mr Smith's detailed comprehension of the requirements and limits of his role, and his capacity to put them into practice unsupported; their overconfidence in him appears, ironically, to have its roots in the excellence which Mr Smith had demonstrated in his more usual duties. For Mr Hunt, this was an issue of the tasking and management of his SpAd; for Mr Stephens, it was an issue that could create risks for conduct of the bid.

5.206 There is much to say by way of mitigation for Mr Smith. He was inexperienced, had been involved in Government for a matter of months and had never before been involved in (even if he had ever heard about) a quasi-judicial process. He did not receive what was to be, for him, sufficiently clear or detailed guidance because, although he heard what Mr Hunt and Mr Stephens heard and, I have no doubt, wanted to further the proper discharge of his principal's duties, he did not appreciate the limitations; neither was he appropriately supervised. On the one hand, he behaved as if his role was to act as 'eyes and ears' which meant keeping Mr Hunt informed of what was happening; on the other hand, he was a 'buffer', there to provide a measure of protection. Trying to reconcile these roles, he effectively behaved as he would on any other matter while operating in the political environment with which he was familiar.

5.207 Mr Smith was diligent, literally to a fault on this occasion, and undoubtedly had discharged his duties in an exemplary manner before having to deal with the bid. Despite all that can be said on his behalf, he ought nevertheless to have realised that Mr Michel was pushing his way too far into the process, by over-familiar means, and that action was required to address that. It is regrettable that he did not seek advice from either Mr Hunt or Mr Stephens, or alternatively take action himself to put the communications onto a proper footing. Instead, he succumbed to Mr Michel's intimate, surreptitious and conspiratorial language and got 'way too close' to him, ultimately, as I have concluded, probably passing on confidential information about Government thinking which should never have been imparted to News Corp.

5.208 The perception of bias emerges from the exchanges between Mr Smith and Mr Michel. What was not evident from the close consideration of events which the Inquiry undertook was any credible evidence of actual bias on the part of Mr Hunt. Whatever he had said, both publicly and in private, about News Corp or the Murdochs, as soon as he was given the responsibility for dealing with the bid the evidence demonstrates a real desire on his part to get it right. His actions as a decision maker were frequently adverse to News Corp's interests. He showed a willingness to follow Ofcom's advice and to take action, to the extent recommended by the regulators, in response to the consultation. Even had the deal been approved, it is abundantly clear, that it would only have been permitted to proceed subject to very significant and closely scrutinised UIL.

6. News Corp and the Rt Hon Alex Salmond MSP

6.1 The lobbying of Adam Smith was not the only way in which Mr Michel hoped to influence Mr Hunt. One of the conduits which Mr Michel sought to exploit calls for examination. Its roots lay in the period before Mr Hunt took over responsibility for the bid.

6.2 During the autumn of 2010, Mr Michel had been in touch with the First Minister for Scotland, the Rt Hon Alex Salmond MSP. By this stage, Mr Salmond was forging a close relationship with Rupert Murdoch and News Corp which is discussed more fully elsewhere in this Report.[465] In particular, he was hoping to secure the support of The Scottish Sun in the then forthcoming 2011 Scottish Parliament election. Mr Salmond saw advantage for Scotland in the bid's success because News Corp is a big employer in Scotland. He was more than ready to try and encourage a successful outcome for the bid. An email from Mr Michel to James Murdoch dated 1 November 2010 records Mr Salmond's position and that of another unnamed politician[466] with a political interest in the bid's success:[467]

> *"Mission accomplished.*
>
> *–Libdem MP, former Sky employee, with major Sky customer centres in his constituency and around, will contact Vince Cable to ask him to bear in mind the economic / investment point of view rather than getting influenced by political games, especially in times of austerity and very difficult economic environment for those areas. He will also emphasise the opportunity for Cable to show the maturity of the Libdems as coalition partners, working for the long-term, and will draw from the Coalition*

[465] See Part I, Chapter 7, Section 4

[466] Mr Salmond thought it was a Scottish MSP, p66, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf

[467] p20, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf; see also pp66-67, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf

government experience lib-dems have had in Scotland. He agrees with the need for this to be looked at by Brussels rather than scrutinised again on plurality ground in the UK [sic]

–Alex Salmond is very keen to also put these issues across to Cable and have a call with you tomorrow or Wednesday. His team will also brief the Scottish press on the economic importance of News Corp for Scotland."(emphasis added)

6.3 Mr Salmond did not quarrel with the thrust of that email and confirmed that he had not only spoken to James Murdoch about the bid but also gone on to meet him in London in January 2011 to discuss the bid and other matters. Mr Salmond explained the importance of the bid to Scotland in these terms:[468]

"It should be understood, I mean, BSkyB is a huge employer in Scotland. We're talking about more than 6,000 full-time jobs in addition to the 2,000 outsourcing jobs and temporary jobs. It's vital in Dumfirmline, Livingston, Uddingston. Some 36 per cent of BSkyB's total global employment is in Scotland. They are in the top 10 of Scottish private sector employers. So it's a matter of great importance and the argument being forward by Mr Murdoch was that an expansion of the digital platform on a European-wide basis would result in additional investment and that Scotland would be well placed in that context to benefit, given the strength of the Scottish offer in terms of competitiveness, to benefit from that additional investment."

6.4 Mr Salmond confirmed that when he had spoken to James Murdoch by telephone the bid had been mentioned and that he wanted to discuss the bid with Mr Murdoch when he met him:[469]

"Q. You refer, though, to the impact of consolidation of BSkyB ownership, so plainly you had in contemplation at that stage the BSkyB bid; is that right?

A. That's correct. Prior to this, it had been indicated I think in a phone call – I'm sure in a phone call, actually, because I wanted to meet Mr Murdoch to discuss this in particular. This was one of the key things I wanted to discuss, to understand better the argument that the consolidation of ownership would result in additional investment and that Scotland was well placed. To be fair – well, I'm going to be more than fair, they can speak with a great deal of authority, if a company has 36 per cent of its global workforce in Scotland, then they speak from a position of some credibility."(emphasis added)

6.5 He regarded it as his duty to pursue jobs and investment for Scotland and denied any responsibility for plurality in the press. He had been prepared to put forward those arguments to the relevant Secretary of State but, as things turned out, the opportunity to do so never arose:[470]

"Q. I think it's fairly clear from what you've just said, Mr Salmond, that certainly from the date of this meeting with Mr James Murdoch you were in favour of the bid. Is that right?

A. Yes. I was in favour of what benefited the Scottish economy. Remember, I have no responsibility for broadcasting policy, I have no responsibility for plurality in the press,

[468] pp53-54, lines 14-3, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf
[469] p54, lines 4-17, Alex Salmond, *ibid*
[470] pp54-55, lines 18-20, Alex Salmond, *ibid*

but I do have a responsibility for jobs and investment in Scotland. That is my statutory responsibility. Indeed, it's reflected not just in the fact it's my responsibility, it's actually reflected in our Ministerial Code in Scotland that it is one of the responsibilities that you must pursue. So I would tend to put an emphasis on the jobs and investment aspects of this. It was for others to consider other matters. And specifically what I was prepared to do and said I was prepared to do would have been to speak to the relevant Secretary of State to say jobs and investment are going to be a consideration along with other things that they had to consider when these matters were brought to decision at the appropriate time.

As circumstances turned out, that appropriate time never arose, but I was certainly prepared to argue for that and I would certainly say that's entirely a legitimate preoccupation and argument that the First Minister of Scotland or any Scottish minister should put forward." (emphasis added)

6.6 He said that a purpose of his meeting with James Murdoch in January 2011 had been better to understand the potential consequences of James Murdoch's plans for a European digital platform for Scotland:[471]

"MR JAY: Mr Salmond, before January 2011, were you a supporter of the BSkyB bid or not?

A. What I'd said was that I'd be prepared to argue to the Secretary of State, initially Vince Cable, or advance to the Secretary of State the argument that jobs and investment should be taken into account along with other factors, which were their responsibility. I never got the opportunity with Mr Cable, because he disappeared from the scene for reasons you know about, and as it happens, I didn't get the opportunity with Mr Hunt either, but I was certainly of a mind that I wanted to put forward the position that jobs and investment was an important criteria which should be taken into account, and the meeting with Mr Murdoch in January which followed on a phone call in November, I don't have a date for it, was because I wanted to hear in more detail the connection between the European digital platform investment argument and what the consequences might be for Scotland in that respect.

So I was prepared to make that argument and if the circumstances had arisen, then I would have made it."

6.7 To return to the question of Mr Salmond's understanding of his role and duty, he made clear that he accepted that he knew that Dr Cable and then Mr Hunt were fulfilling a quasi-judicial role and had to make their decision insulated from the considerations which Mr Salmond had intended to raise. Even this knowledge would not have stopped him from trying to advance considerations which would have led the decision maker into error had they been heeded:[472]

"Q. Were you advised that Dr Cable was occupying a quasi-judicial role and that he had to make the decision insulated from the sort of considerations you might have wished to bend his ear about?

A. Yes. He was; I wasn't. Interestingly, as I said earlier, I don't have responsibility for competition, I don't have responsibility for plurality in the media. I do have responsibility for jobs and investment in Scotland, and the ministerial code, which

[471] p56, lines 3-23, Alex Salmond, *ibid*

[472] pp68-70, lines 2-4, Alex Salmond, *ibid*; see also pp82-84 on the question of Mr Salmond's understanding of the Enterprise Act and quasi judicial decision making

we may discuss later in terms of politicians and their inter reaction with businesses in Scotland.

9.29 of the Ministerial Code of Scotland actually makes the point exactly:

However, nothing in this code should be taken as preventing ministers from fulfilling their proper function of encouraging investment and economic activity for the benefit and prosperity of the people of Scotland."

Because within the terms of our remit and responsibilities, what is my responsibility, the government's responsibility obviously takes pre-eminence. And across a whole range of issues, whether it be banking reform or oil taxation would be another issue where we don't currently at least have competence, we nonetheless make an argument from the Scottish interest, and while Mr Cable or Mr Hunt, however they understood it, and I'm sure they did, were in a quasi-judicial capacity, I wasn't. My capacity was quite clear and my ability to represent was also quite clear.

Q. I hadn't considered that provision in the Scottish Ministerial Code before but I question, Mr Salmond, whether a very general provision of that nature would entitle you, if I may say so, to interfere with a quasi-judicial function which fell to the duty of the Secretary of State in London to discharge.

A. Well, in that case, can I give you a different example entirely where – a very controversial well-known example, where my colleague Mr MacAskill, the Justice Secretary of Scotland, was taking a quasi-judicial decision on the compassionate release of Mr al-Megrahi, and indeed on the application for prisoner transfer, where although he was in a quasi-judicial role he invited opinion and evidence, including opinion and evidence from the United Kingdom government.

In the event, they for their own reasons decided not to submit it, but our understanding certainly in Scotland, and I'm actually pretty certain it's the same here, is that people are able within their responsibilities to make representation. It is for the Secretary of State or the politician concerned who is operating in that capacity to make sure that they stay within the bounds of their responsibilities."

6.8 Paragraph 9.29 of the Scottish Ministerial Code, 2011 edition, is a part of a section on "Travel by Ministers" and falls under the subheading "Contact with Commercial Companies". It concerns the promotion of products and services by association and attempts to influence public sector procurement and falls to be read in that context. It states:[473]

"Ministers should also avoid promoting an individual company's products or services by association. They should also bear in mind public sector procurement procedures and resist any attempt to influence them in favour of particular products or services. If such attempts are experienced, Ministers should report these to the Director of Procurement. However, nothing in this Code should be taken as preventing Ministers from fulfilling their proper function of encouraging investment in economic activity to the benefit and prosperity of the people of Scotland."

6.9 The Scottish Ministerial Code starts with the following two paragraphs concerning General Principle and Ministerial Conduct:[474]

[473] p39, http://www.scotland.gov.uk/Resource/Doc/364058/0123666.pdf
[474] pp8-9, paragraphs 1.1 and 1.2, Scottish Ministerial Code, 2011 edition, http://www.scotland.gov.uk/Resource/Doc/364058/0123666.pdf

"Scottish Ministers are expected to behave in a way that upholds the highest standards of propriety.

The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law, including international law and treaty obligation, and to uphold the administration of justice and to protect the integrity of public life."

6.10 On 11 February 2011 Mr Michel met with Mr Salmond's adviser. The resulting report from Mr Michel to James Murdoch is consistent with Mr Salmond's evidence that he was standing ready to speak to Mr Hunt. It also indicates that newspaper coverage and the potential for a televised First Ministerial debate were discussed on the same occasion. The email read:[475]

"I met with Alex Salmond's adviser today

He will call Hunt whenever we need him to

1 – He noticed a major change in the Sun's coverage recently. The Daily Record is running a very personal campaign against him

2 – He believes the time has come to organise a First Ministerial debate between him and Ian Gray [Labour leader], who are the two only possible FM candidates.

He would be very keen for Sky News to organise it with Adam. There is a timing issue as it would have to be organised before dissolution on 22nd March." (emphasis added)

6.11 Asked about the reference to the Sun's coverage in the above email, Mr Salmond pointed out that The Sun did not commit to support the SNP until March 2011, although he seemed to accept that there had been something of a change in The Sun's coverage. His evidence was:[476]

"Q. Does that reflect an underlying reality that the Sun was more favourably disposed to you and your party at about this time?

A. I don't know. Certainly they weren't – I think the new editor had probably come in by this time. The Sun had not declared for the SNP at that time..."

and:

"Q. I think the gist of your evidence is you wouldn't disassociate yourself from the perception at least Mr Aberdain [Mr Salmond's adviser] had about the Sun's coverage; is that right?"

A. I think we did feel that the new editor was treating things a bit differently, but certainly at that stage there was no commitment from the editor to support the SNP in the election, because that I'm sure came later. In fact, it came in March."

6.12 The third and final of three emails from Mr Michel to Mr Murdoch to refer to Mr Salmond in the context of the bid is dated 2 March 2011, the day before Mr Hunt announced that he was minded to accept the UIL in their then form and consequently began the first statutory consultation. It records Mr Salmond expressly seeking help to ensure that The Sun did support the SNP at the then forthcoming election. It also confirms Mr Salmond's continuing willingness to support the bid. Insofar as is relevant, it read:[477]

[475] p80, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf
[476] pp71-72, lines 6-8, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf
[477] p102, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-KRM-18.pdf

> *"Alex Salmond called. He had a very good dinner with the Editor of the Sun in Scotland yesterday.*
>
> *The Sun is now keen to back the SNP at the election. The Editor will make his pitch to the Editorial team tomorrow.*
>
> *Alex wanted to see whether we could help smooth the way for the process.*
>
> *...*
>
> *He also asked whether we could go for dinner at Bute House before the election campaign kicks off on the 22nd March.*
>
> *On the Sky bid, he will make himself available to support the debate if consultation is launched."*(emphasis added)

6.13 Mr Salmond confirmed that he had called Mr Michel. The meal to which he referred was one of two meetings which he had had with the editor of The Sun. He had gone to see the editor following his meeting with James Murdoch in January (at which he had met Mr Michel for the first time). When seeking support on that occasion he had been told to "*go and see the editor*". He said that what is recorded in the email as a request to smooth things over was in fact a plea to prevent London vetoing the Scottish editor's wish to support the SNP: *"All I wanted was a lack of influence. I wanted – the editorial team were well up for the cup"*. He denied that discussion of both the bid and political support for the SNP in the same conversation amounted to a subtle and reciprocal exchange of favours.[478]

6.14 The history of Mr Salmond's readiness to intervene in the bid, on News Corp's behalf, is of real interest. He stood ready to lobby first Dr Cable and later Mr Hunt, prepared to argue that it would be good for Scotland and Scottish jobs. Had he done so he would have been seeking to persuade a quasi-judicial decision maker to take into account a factor which was irrelevant to the statutory plurality test. Plurality was the only consideration which could legitimately have been taken into account by the Secretary of State. Acceding to Mr Salmond's argument would have rendered the decision unlawful.

6.15 Mr Salmond adamantly believed that he was entitled to make his case and that responsibility for ensuring that the decision was properly taken rested entirely with the Secretary of State. Mr Salmond is right that legal responsibility for taking the decision lawfully rested with the Secretary of State. But it does not follow that he was entirely at liberty to seek to persuade the Secretary of State into error (particularly, if successful, it could potentially have had the effect of giving rise to grounds for challenge). Neither do I understand how a section of the Scottish Ministerial Code dealing with public sector procurement assists. Mr Salmond's duty to promote the Scottish economy and Scottish jobs cannot sensibly be understood as requiring irrelevant submissions to be made to a quasi-judicial decision maker.

6.16 The evidence does not go so far as to show either an express or an implied deal between Mr Salmond and James Murdoch trading newspaper support for assistance with the bid. What it did reveal was the way in which Mr Salmond was expressly seeking the support of The Sun in the same conversation as he was repeating an offer to assist with the bid. That occurred in the context of a relationship between Mr Salmond and News Corp which had been warming since 2007 and was continuing to do so. Mr Salmond's readiness, when the subject was first raised in November 2010 and thereafter, to stand ready to assist News Corp is striking.

[478] pp73-82, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf

6.17 I have absolutely no doubt that Mr Salmond was motivated by an anxiety to help Scottish employment and to benefit Scotland generally: that is entirely laudable and exactly what is the expectation and proper function of the First Minister. How far that should be taken, however, is another matter. He appreciated that employment whether in Scotland or elsewhere was not a relevant consideration for the Minister and, in fact, he never contacted either Dr Cable or Mr Hunt to argue the contrary. Judged by what he did, as opposed to what he said he was prepared to do, therefore, he cannot be criticised.

Conclusion

6.18 The handling of News Corp's 2010 bid for BSkyB proved to be an illuminating case study, highlighting the difficulties which politicians face when dealing with acutely sensitive media issues, in this instance a plurality decision. The picture which emerged, at a macro level, is of a swing from the clear perception of bias against News Corp on the part of Dr Cable in the comments he made to his 'constituents' to a highly unsatisfactory course of communications between Mr Michel and Mr Smith on Mr Hunt's watch which itself risked a finding of apparent bias in favour of News Corp. It involved political lobbying by News Corp, wholly without regard to the restricted ambit of the plurality test, and at least one politician expressing himself to be 'standing ready' to lobby on grounds that he was aware were legally irrelevant but served his (entirely legitimate) political interests. Had the bid not failed for other reasons, Mr Michel's activities, of which James Murdoch was aware, would have put at risk a favourable decision, had one materialised. In that respect not only was their activity misguided, it was also ultimately contrary to the interests of News Corp.

6.19 It is also highly material to issues concerning the relationship between the development of policy (where we depend on the democratically elected politicians and Government) and those who are in a position to use their powerful megaphones to advance causes which they support, namely the press (not, of course, constrained by the requirements of impartiality imposed on broadcasters). As I have made clear, dialogue between politicians and the press is greatly to the benefit of our democracy and entirely in the public interest. Where the public interest and private media interests can collide, however, care must be taken to ensure that the former prevails and the latter is recognised for what it is.

6.20 The difficulties which the politicians concerned had with this bid gives pause for thought as to whether and, if so, in what capacity politicians ought to be involved in media plurality decisions. It is a question on which the Inquiry heard the views of both Dr Cable and Mr Hunt. Dr Cable thought it right that politicians ought to be involved.[479] Mr Hunt believed that it was possible to set aside political and personal views but believed that, by taking and publishing advice, he had applied a valuable lock to the process with which to help safeguard it. He could, in practice, only depart from the advice if he could convincingly and publicly explain why.[480]

6.21 A detailed consideration of the issues relevant to plurality is described elsewhere in the Report[481] and the issue is not, therefore, taken further in the concluding part of the analysis of the bid by News Corp for the remaining shares in BSkyB. What this analysis does reveal, however, is that a new approach is essential. Repetition of the problems which arose on this bid is undeniably not in the public interest.

[479] pp72-84, Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[480] pp95-103, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-31-May-2012.pdf
[481] Part I, Chapter 9

CHAPTER 7
FURTHER POLITICAL PERSPECTIVES ON RELATIONSHIPS WITH THE PRESS

1. Introduction

1.1 Having briefly reflected on relationships between politicians and the press from the perspectives of our last five Prime Ministers and brought the narrative up to the present, I turn in this Chapter to the viewpoint of a number of politicians currently occupying senior positions in UK national life, whose perspectives were of particular interest to the work of the Inquiry. The evidence of the Rt Hon Theresa May MP, the Home Secretary, is covered in Part G of the Report.

1.2 Having concluded the last chapter with the perspective of the current Prime Minister, I turn next to the views of the Deputy Prime Minister, the Leader of the Liberal Democrat party, before moving on to consider the views of the Leader of the Opposition and of the First Minister of Scotland. The section concludes with the evidence of a number of contemporary Cabinet Members about their relationships with senior figures in the press.

1.3 The Inquiry benefited greatly from all of these unique perspectives. As set out below, the personal experiences and approaches of some of these witnesses to handling relationships with the press were of particular interest in themselves.

1.4 It is inevitable that I have been highly selective (although, I hope, fair) in highlighting a very few aspects of the evidence which appear to me to be of particular interest for the purposes of the Inquiry. I have also largely confined myself to the words of the witnesses, rather than upon any commentary or debate about their perspectives either as received by the Inquiry or which have emerged elsewhere. Again, there is no need for me to do so, and there are other places (not least Parliament and the press) in which the contest of perspectives about these matters can be seen and understood more fully by the public than in the pages of this Report.

2. The Deputy Prime Minister, the Rt Hon Nick Clegg MP

2.1 Mr Clegg's evidence was of value not only from the perspective of his current senior position in the coalition Government, but also as leader of the UK's 'third party'. Over the period considered in the previous Chapters of this Report, the Liberal Democrats and their predecessor political organisations, being neither in Government nor in the position of Official Opposition party, could be expected to have had a very different experience of personal relationships at senior levels between the political leadership and senior figures in the press. Mr Clegg reminded the Inquiry that the Liberal Democrats had never been politically supported by any of the News International titles, and had enjoyed express endorsement, only in recent years and to a degree, from The Independent, the Guardian and the Observer. He also reminded the Inquiry of his highly personal experience of press coverage in the run-up to the 2010 general election.

2.2 Mr Clegg underlined that, in these historical circumstances, he regarded himself and his party as removed from the sort of relationship others might have had, with News International in particular.[1] He said this about relationships between politicians and the press more generally:[2]

> *"But it's really at the end of the day for politicians to stand up for themselves and say: look, we have a democratic mandate, we've gone out to get elected, we listen to our constituents in our surgeries every Thursday, Friday, Saturday. The editors, the proprietors don't do that. We get out and about in the country much more, by the way, than many of the journalists who constantly pronounce on the state of the country. I just think a bit of – an assertion of the legitimacy of politicians to make decisions in their own right, unfettered, unintimidated, unpressured, would probably go further than almost anything else in making sure the balance is correctly set."*

2.3 Mr Clegg emphasised the sheer importance of interaction between press and politicians:[3]

> *"I can't stress enough… the idea that politicians and the press should operate in hermetically sealed silos separate from each other is completely unrealistic and it's totally right they should seek each other out. It's just the manner in which they do so and the spirit in which they approach each other."*

2.4 He also underlined the value of the press acting as 'a very important corrective in the political system',[4] putting that in context in this way:[5]

> *"I think the balance to strike, however, is to make sure that politicians are not too – how can I put it? Not too weak-kneed in face of pressure which they don't agree with or is unwarranted or is unjustified in a mature democracy. The pressure is one thing. Intimidation is another. And I think it's very important to point the finger not just at the press but the political class. The more the political class allow themselves over time to be intimidated or cajoled or pressured, of course the more it becomes a self-fulfilling prophecy."*

2.5 Mr Clegg's advice to the Inquiry was to recommend a series of 'quite precise proposals' which would not be the subject of 'endless political argy-bargy' and would stand a good chance of cross-party support.[6] He underlined, in addition, that the future for press standards "*has to be independent regulation, independent of government, Parliament, politicians and the media, with teeth*";[7] he saw independence from both press and politicians as important, in other words, for a proper and effective system of press standards which would command public confidence.

I

[1] He illustrated this memorably by reference to the seating plan at a dinner in December 2009: p27, lines 16-17, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[2] pp94-95, lines 13-1, *ibid*
[3] p9, lines 20-25, *ibid*
[4] p2, line 22, *ibid*
[5] p3, lines 2-12, *ibid*
[6] pp87-88, lines 6-2, *ibid*
[7] pp80-83, lines 16-3, *ibid*

3. The Leader of the Opposition, the Rt Hon Ed Miliband MP

3.1 In his interviews and public statements following the phone-hacking revelations in July 2011, Mr Miliband acknowledged that politicians had become 'too close' to News International. He was asked in oral evidence to explain precisely what he meant by that, and he said this:[8]

> *"I've obviously read a lot of the evidence you've had and thought a lot about this. I think the way I very specifically view this – I believe the thing I'm looking for is the interview I gave to Andrew Marr, actually, just after the phone hacking Milly Dowler scandal broke, because I believe I said in that interview that we were too close, in the sense that it meant that when there were abuses by the press, we didn't speak out. That is my version of "too close", my view of the consequence of "too close". Now, different people – the reason I say I refer to your other evidence is different people have used different phrases for that word. Mandelson said "cowed", Tony Blair said "unhealthy". There's a whole range of other adjectives that have been used. I suspect they may be more accurate as ways of thinking about this issue, that it was a sense of fear, I suppose, in some sense, or unwillingness or worry, anxiety about speaking out on those issues, issues that were affecting ordinary members of the public, issues where I think that if it had been any other organisation in another walk of life that had been perpetrating some of what happened, action would have been taken earlier."*

3.2 I made a connection between this analysis and some of the evidence I had heard from previous Prime Ministers, including Sir John Major and Mr Blair. The latter, for example, explained that for him 'too close' should not necessarily be taken to suggest something which was amicable and collaborative; the power of the press was also experienced as something creating a degree of circumspection in dealing with matters affecting the press's own reputation and commercial interests. I understood Mr Miliband's comments in that context; that this experience of the power of the press led to a correlative reticence in politicians, an unwillingness to speak out about problems in the culture, practices and ethics of the press, including those exposed in evidence to the Inquiry. Mr Miliband was including himself in that analysis.[9]

3.3 He said that when senior politicians did decide to speak out, this was perceived as '*crossing a Rubicon because this would be seen by News International as pretty much an act of war'.*[10] His assessment was that issues of power and influence could not be divorced from issues about the concentration of market share in a limited number of hands and the associated megaphone effect, and that issues of press misconduct equally could not be divorced from the fact of economic power, since it created:[11]

> *"...[a] sense of power without responsibility, which is what I believe it was, came from the fact that they controlled 37 per cent of the newspaper market before the closure of the News of the World, and I don't think we can divorce these questions of ownership, quasi-monopoly et cetera, from – or at least concentration of power, better put than "quasi-monopoly" – concentration of power – I don't think we can divorce those questions from the behaviour of some parts of the press. And add in, by the way, the Sky platform, which then became – and Sky. All that became an issue*

[8] p28, lines 2-24, Ed Miliband, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
[9] p3, lines 2-4, *ibid*
[10] p44, lines 8-10, *ibid*
[11] pp17-18, lines 11-1, *ibid*

around BSkyB, but I think that is a big concentration of media power, and I think part of the arrogance – and I use the word advisedly; in a way, it's a mild form of the word I might use – came from that."

3.4 He set out his commitment to do everything in his power to seek to work on a cross-party basis to ensure that the Inquiry's recommendations provided a basis for the future of press regulation. As he put it:[12]

"I think we have a huge responsibility and I want to say, really, echoing something you said at the beginning of this week and something that Tony Blair said in his testimony, that for any Prime Minister this is going to be very difficult and I want to say that I will do everything I can to seek to work on a cross-party basis so ensure that your recommendations provide a framework for us for the future."

3.5 On the question of his personal approach, Mr Miliband was asked about his dealings with Mr Murdoch and in particular his attendance at the News International summer party on 16 June 2011. He said this:[13]

"I say I recall a relatively short conversation with Rupert Murdoch for a few minutes at the summer party. I believe it was about US politics and international affairs, and I believe I should have raised the issue of phone hacking with him. I didn't, which is something I think I said last summer."

3.6 In his written evidence, Mr Miliband was asked to explain the circumstances in which he hired Tom Baldwin as Director of Communications of the Labour Party on December 2010. Mr Baldwin had previously worked at The Times for about 11 years. Mr Miliband's explanation was as follows:[14]

"A number of candidates were considered. In respect of the role which Tom was appointed to fill we were looking for someone with significant experience as a journalist, with an outstanding understanding of the world of politics, and, crucially as far as I was concerned, with a genuine commitment to the values of the Labour Party.

My then Acting Chief of Staff, Lucy Powell, and I spoke to a number of colleagues, associates and others in whose judgement we had confidence – including fellow politicians and media experts – in connection to Tom, and other candidates', suitability for the role(s) prior to appointing him. At no point did anyone raise concerns about Tom's journalistic integrity. Indeed the opposite was the case ...

Tom Baldwin's connection to News International was as an employee of Times Newspapers Limited in which News international has a controlling interest. He was not someone who had close or privileged relationships with the senior executives at News International. His connections with News International played no role in, and had no significance for, his recruitment. He was employed for his skills and his commitment to the Labour party. Neither I nor my Chief of Staff had any conversations about Tom's recruitment with executives of News International.

Before offering Tom Baldwin the job he and I discussed whether there were any reasons why his appointment could be the cause of any embarrassment to either me

[12] pp3-4, lines 24-2, *ibid*
[13] p34, lines 16-22, *ibid*
[14] pps 9-10, para 13, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Ed-Miliband.pdf

or the Labour Party. This discussion included the references to Tom Baldwin in Lord Ashcroft's book "Dirty Times, Dirty Politics" which was first published in 2005. I should underline that the book contains no allegations "linking Mr Baldwin to the unlawful and unethical acquisition of information". Lord Ashcroft refers in his book to Tom Baldwin being given information about some of Lord Ashcroft's financial affairs some time after its acquisition by Times Newspapers in defence of a legal action against the paper by Lord Ashcroft.

The more serious allegation that Tom Baldwin had himself commissioned the blagging of this information was made only subsequently by Lord Ashcroft in a blog in summer last year when Tom Baldwin had already been working for me for six months. When this was raised with Tom Baldwin (including by me) he made it absolutely clear that it was entirely false. My Acting Chief of Staff followed up with the Editor of the Times at the time of the events Lord Ashcroft describes – Sir Peter Stothard. He made it clear that in his view Lord Ashcroft's allegation was false. He went out of his way to praise Tom Baldwin's professional integrity and journalistic acumen."

4. The First Minister of Scotland, the Rt Hon Alex Salmond MSP

4.1 As I have explained,[15] although the remit of this Inquiry extends to all parts of the UK, I have not sought to make any recommendations of exclusive application to Scotland (or indeed Wales or Northern Ireland). As for Scotland, the pattern of devolved and reserved competence in media matters in Scotland is not straightforward. For example, broadcasting regulation and competition rules in Scotland fall to be dealt with on a 'reserved' basis (that is on a UK-wide basis, with decision-making resting with the UK Government and Parliament). Press standards, and the commercial interests of the press more generally, fall to be considered on a 'devolved' basis: the Scottish Government and Parliament can choose either to make their own policy and law for national application or to support a UK-wide approach. What follows must be considered with that in mind.

4.2 Mr Salmond was asked about his expectations from the Inquiry in terms of the application of its recommendations to Scotland. He said this:[16]

"Well, I think that rather depends on what the Inquiry comes up with, Mr Jay. If the Inquiry comes up with a proposition which accords with public support, which is eminently sensible and points the way to a better future, then I think the Scottish Parliament would be very foolish not to pay close attention to it. If on the other hand, which I don't believe for a minute will happen, it came up with a solution which was either over-prescriptive, restricted press liberty, then I think the Scottish Parliament might wish not to apply that. So I think that rather depends on the proposition that emerges from this Inquiry. I wish you well in the deliberations and I assure you we're looking with enormous interest."

4.3 Mr Salmond said this, by way of his general views on his personal approach to relationships within the press:[17]

[15] See Part A Chapter 4
[16] p9, lines 8-21, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf
[17] pp26-27, lines 13-3, *ibid*

> *"Q. ... [s]o are we to understand by that that you will seek to persuade newspapers to modify their editorial or reporting stance to reflect the interests of either yourself or your party?*
>
> *A. Oh yes. I mean, I don't know of any politician I've ever come across who – well, if anybody doesn't answer yes to that question, they certainly shouldn't be under oath at an Inquiry. All politicians try quite legitimately and properly to influence newspapers to treat them or their party, or in the case of myself, their cause of Scottish independence, more favourably. That's not the only reason for meeting editors. Often there are meetings about specific issues, specific campaigns, things that are important to that newspaper or important to the government, and a range of these meetings would be covered by that category."*

4.4 Mr Salmond spoke about his relationship with Rupert Murdoch: they had evidently made significant personal connections. They shared Scottish roots and heritage. Mr Murdoch's grandfather was a Church of Scotland Minister within Mr Salmond's old constituency. Mr Murdoch told the Inquiry that he was 'intrigued' by the notion of Scottish independence, and it is also clear that, over time, he came to be impressed by Mr Salmond's ideas and political acumen.

4.5 The personal element of the relationship evidently dated from relatively recent years. Mr Salmond told the Inquiry that he recalled one telephone conversation with Mr Murdoch in November 2000, shortly after the US Presidential election, but that there was then no personal contact between them for nearly seven years.

4.6 The Scottish Sun, a News International title, was anti-SNP at the 2007 election (as indeed was the Daily Record). Mr Salmond's relationship with Mr Murdoch changed after the 2007 election.

4.7 Bearing in mind the public interest in the transparency of relationship between senior politicians (particularly in government) and senior figures in the press, on 4 August 2011 Mr Salmond had volunteered to publish a list of his meetings with newspaper proprietors, editors and media executives over the preceding years.[18] This list, together with more recent evidence to the Inquiry, shows that Mr Salmond and Mr Murdoch met on five occasions over a five year period. The tone of these meetings was said to be warm and friendly.[19] Mr Salmond also had two meetings with James Murdoch.[20]

4.8 It is apparent from the evidence that these meetings and conversations covered topics such as common heritage, the issue of Scottish independence, and (although the evidence was less clear about this) corporation tax rates in Scotland. Doubtless Mr Salmond had the opportunity on these occasions to explain to Mr Murdoch the advantages, as he saw them, of Scottish independence to the latter's commercial interests. He also invited Mr Murdoch to sporting events and the theatre. Significantly, on Mr Murdoch's side there was an invitation for Mr Salmond to be the guest of honour at the formal opening of New International's Eurocentral printing plant on 30 October 2007.

[18] p23, lines 20-24, *ibid*

[19] p47, lines 3-8, *ibid*. See also p19, line 17, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf

[20] p52, lines 16-22, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf

4.9 BSkyB is a significant employer in Scotland, directly responsible for 6,000 full time jobs and 2,000 outsourced and temporary jobs. Some 36% of BSkyB's total global employment is in Scotland.[21] Mr Salmond's support for Mr Murdoch's bid to increase his holdings in BSkyB is discussed elsewhere:[22] it is clear that he was prepared to lobby UK Ministers in furtherance of News Corp's case. He said that that was with the motive of furthering Scottish economic interests, including investment and employment opportunities.[23] Mr Salmond was also hopeful that The Scottish Sun would support him in the May 2011 election, and his evidence was that the issue was raised with the Murdochs, for him to be told by them that it was a matter for the editors:[24]

> *"Q. Did you ever discuss with Rupert Murdoch or James Murdoch support by their newspapers in Scotland for your party?*
>
> *A. I find certainly with Rupert Murdoch and with James Murdoch as well that if you do that, what they'd say was, "Go to the editors", and that's what they say, so you just assume that's what's going to be said, and they're perfectly right to say that and therefore that's what I've done.*
>
> *Q. Can we be clear on how many occasions then you have raised the issue with Rupert Murdoch and James Murdoch? Are you able to assist us?*
>
> *A. I wouldn't explicitly raise it at meetings necessarily, because they'd always say, "Go to the editors". That certainly was Rupert Murdoch's practice, and I can't even remember, it may have cropped up in a James Murdoch meeting, but if so, he would say, "Go to the editors", and go to the editors I did, as I say, sometimes successfully and sometimes not.*
>
> *Q. But that answer presupposes that you made a direct request statement to James Murdoch or Rupert Murdoch, "Would your papers support me?" and their answer is always, "Go and speak to the editors"; is that right?*
>
> *A. No, I don't think I've ever done it explicitly like that. It would be something like, "I take it I have to go and speak to the editors to get support for my point of view". Much more like that. It's chicken and egg. That's been the position certainly throughout – not just in the meetings I've had with Rupert Murdoch more recently in the last five years, but even if we go back to 2000, 2001. I mean, I can't speak for other people's experience, but that's been consistently what he says, so you just accept that's what he's going to say and therefore you anticipate that, so you don't actually – I don't think I've ever explicitly asked him for support for the party because the answer would be, "Go to the editors and argue the position."*
>
> *Q. In your witness statement, the way you formulate it at 13987, eight lines from the top of the page, you say quite generally: "In relation to questions about support from particular titles, any such discussion with Rupert or James Murdoch was always met with a request to talk directly to the relevant editorial team." So you're making it clear there that if – or rather when you raised such a request with Rupert or James Murdoch, they told you to go and speak to the editors?*
>
> *A. I refer back to what I said a couple of minutes ago. I think probably the way I put it was "I take it I should go and see the sub-editor or go and see the Times editor or go and see the Sunday Times editor."*

[21] p53, lines 14-19, *ibid*
[22] Part I, Chapter 5
[23] p56, lines 13-16, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf
[24] pp58-60, lines 12-14, *ibid*

4.10 It was also put to Mr Salmond that the editorial direction for The Scottish Sun came from Rupert Murdoch. His answer was:[25]

> *"Not according to Mr Murdoch. Mr Murdoch would say he was maybe part of discussions, but it was up to the editors. He would always say that."*

4.11 In early March 2011 Mr Salmond made his 'pitch' to the editorial team of The Scottish Sun,[26] and support from that paper was forthcoming later that month. Although Mr Salmond's understanding was that Mr Murdoch's editors rather than Mr Murdoch personally would decide which party to support, Mr Murdoch's evidence to the Inquiry was that, although he could not recall the matter specifically, The Scottish Sun's decision was one to which he contributed, and he was also able to explain the basis for it.[27] Immediately after the general election the editor, Mr Dinsmore, wrote a personal letter of congratulation.[28]

4.12 The relationship between Mr Salmond and Mr Murdoch after the 2007 Election came to be one of mutual respect and admiration, notwithstanding the fact that it was not built on frequent interactions between the two (very busy) men. Mr Murdoch could no doubt appreciate that he was dealing with a politician of considerable skill, resource and intelligence, and he may also have felt, and perhaps continues to believe, that the aims of the SNP are consistent with the long-term objectives of both News International and News Corp in Scotland. Mr Salmond clearly saw the advantages of securing political support from News International and The Scottish Sun, notwithstanding that the 2007 election had led to his becoming First Minister of a Coalition Government without support from The Scottish Sun or the Daily Record; and he would no doubt wish to do all that was properly within his power to achieve that.

4.13 Mr Salmond had been particularly keen to ensure that the Terms of Reference for this Inquiry should make explicit reference to the missed opportunity afforded by Operation Motorman to address problems in the culture, practices and ethics of the press. He said this:[29]

> *"Well, I am concerned with it because I think there's a connecting thread which is that what seemed to me to be substantive evidence of illegality or illegal practices which was contained in the Information Commissioner – the English and Welsh Information Commissioner's report, Richard Thomas, I think, of December 2006 had been not left unlooked at because there had been a limited number of prosecutions, but even, for example, his proposal that breaches of data protection should be an indictable offence, as we call it in Scotland, and it's the same in England, you know, had been left, and most recently the revelations on hacking, I mean the connection is obviously that there was a substantial body of evidence that there had been a sequence of perhaps systematic illegal practices going on, and the response of the law and those who have responsibility for pursuing these things, whether the police or the prosecution services, had not been adequate, and therefore I suggested to the Secretary of State that an explicit reference in the terms of reference to Operation Motorman would be helpful in making it clear that this was one key aspect, I hoped, of the Inquiry's consideration, and now as it happens, as you know, it was argued to me that it didn't have to be explicit because it was already implicit within the terms*

[25] p61, lines 10-12, *ibid*
[26] pp63-64, lines 22-2, *ibid*
[27] p22, lines 7-17, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-25-April-2012.pdf
[28] p23, lines 7-20, *ibid*
[29] pp94-96, lines 1-7, Alex Salmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-13-June-2012.pdf

of reference and fair enough … . I was really thinking of illegal practices. I think it's possible to consider – clearly this Inquiry is considering practices which are improper but not necessarily illegal. I mean, there are ways to access people's data which are not illegal and it might be argued that's a perfectly proper way to do things. You might – but I wouldn't put my senses on that. I was really driving at the illegality as opposed to the propriety."

4.14 Mr Salmond had this to say about the future:[30]

"First, and I would give primacy to this, is to uphold the law. I think it's – my view is it's extraordinary of the various aspects of this that I've spoken about that an assumed illegality can have been taking place on a huge scale and nothing substantial done about it. I made the point earlier about the lack of information that had been given to the Scottish authorities, which I feel very angry about. I can give you the assurance that's been given to me by the Lord Advocate that the criminal law will be upheld in Scotland without fear and favour, and I'm sure, given the circumstances in which this Inquiry has come into being, that will now be the case everywhere, but it has to be the case because, unless that's the case, nothing else that's suggested – I go back to the point – a voluntary or even a statutory code is not going to be enforced or enforceable if the criminal law is not being enforced and enforceable so I think it's absolutely invites that that's first in my hierarchy.

Secondly – and maybe this is maybe why you think I'm a minimalist in this matter – I think the freedom of the press is important not just as a matter of practice but as a matter of principle. And while I salute and applaud those newspapers like, for example, the ones I mentioned in DC Thomson and there are others, who make an absolute virtue of saying, look, comments are in our editorial or in our columnists, fact is in our news columns. That's great, but it may be desirable but not only is the impossible to implement, in my opinion, this division between fact and comment, I actually do think there is a freedom for people within the law, the laws of not inciting hatred, to conduct themselves in a biased manner. It was Lord Northcliffe, wasn't it, who the phrase the "daily hate" was attributed to, but whether it's hate or bias, whatever you want to call it, I think that's a price we have to pay for the essential freedom of the press and you cannot have a free press which does what you want it to do, which always behaves itself. It has to behave itself within the law and within certain norms, which I'm going to come onto in a few seconds.

Thirdly, in terms of redress from – well, the redress for illegal behaviour is clear enough, that should be a matter for criminal law to enforce that, but from other behaviour which might not be illegal but be wrong, then certainly on that, the redress must be open to all. There has to be the ability of individuals or groups, in my opinion, to seek redress in an effective manner they can have confidence in. Rich people and powerful people will always have the civil courts and actions that they can pursue, but to be proper, the redress must be open to all. Fourthly, politicians. I think the move towards transparency is a good thing for both government and opposition politicians. I think the abidance by the Ministerial Code is – the Ministerial Codes are there for a reason and the reason I cited you to Scottish Ministerial Code is because we pay it close attention and so politicians and relationships should be guided by transparency in terms of what is now being done by everyone –

LORD JUSTICE LEVESON: Is the Scottish Code in your exhibits?

[30] pp98-101, lines 9-14, *ibid*

A. I cited it earlier on, sir. If we haven't made it an exhibit, then I shall make sure it is done.

LORD JUSTICE LEVESON: I'd be grateful if you could send me a copy.

A. And obviously the differences would tend to be it stresses areas where the Scottish ministers have particular competence, like the one on jobs and investment that I read out to you. But following the Ministerial Code is my fourth point. –"

5. The Rt Hon Kenneth Clarke QC MP

5.1 Kenneth Clarke QC MP provided a number of different perspectives. In particular, as Lord Chancellor and Justice Secretary at the time, his Cabinet portfolio included a number of matters of central concern to the Inquiry, including substantive and procedural law on both the civil and criminal sides, access to justice more generally, and data protection law and policy.

5.2 He said this about the political response to Operation Motorman:[31]

"That was the startling thing, but I don't think you can put that down to the Information Commissioner. The Motorman reports were pretty startling, and rather going back to what I said before, what is known in the bubble and what's known outside, I think every knew that private and confidential information was fairly readily available in the outside world as long as you were prepared to pay for it, and the Commissioner produced these two reports and not much was done about it, but it goes beyond, I think, just the penalties and the powers of the Information Commissioner.

Q. You say not much was done about it. What other reasons do you think exist for why not much was done about it?

A. Well, it's no good mentioning my pet theories because I don't know for sure, but what this Inquiry is looking into, how far was it a desire, for one reason or another, not to upset the people who were happily indulging in all this? I won't go further. It's not totally new, all this. When I was first appointed Chancellor of the Exchequer, I had to move my bank account because my bank complained to me that journalists were trying to bribe the staff of the village branch where I had my bank account. It would have been regarded as perfectly customary in those days, I think particularly as the Chancellor of the Exchequer who had been appointed had views which weren't shared by some the editors of the more vigorous newspapers. So that and various other things happened. And in business everybody was perfectly well aware that if you wanted to engage in these sort of practices, it was terrible easy to get details of the private information of your competitors or rivals, and journalists joined in the same thing. The scale of it appears to become startling. Motorman sort of made people aware this had now grown to a very profitable and large industry, and even following through the newspapers the evidence given to this Inquiry, the scale has certainly shocked me, when I would have thought I was fairly worldly wise on the subject in previous years, but I had no idea it was going on on this monumental scale."

5.3 Mr Clarke spoke in these general terms about relationships at senior levels between the politicians and the press:[32]

[31] pp26-28, lines 13-4, Kenneth Clarke, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf
[32] pp50-51, line 3-15, *ibid*

> *"Well, what falls in force with your remit is as it were the proprietors of it, isn't it? I mean, how far is undue influence being exercised for commercial, well, political, other reasons? The politics are quite difficult because in the end it is for the politicians to decide how far they're going to allow a particular powerful group to influence policy. If I'm sounding – every democratically elected politician in every part of the world I've ever known easily falls to criticising the press, so if I sound as if I'm criticising the press, my criticisms are actually aimed equally at the ministers.*
>
> *LORD JUSTICE LEVESON: I understand that.*
>
> *A. When taken to excess, this terror of the tabloids and this subservience to the media doesn't give any success to the politician who does it. You may win some temporary praise, but you make stupid decisions in government and they turn on you eventually when it starts to fall apart. You still come to the same ruin in the end unless you actually make a decent fist of the good governance of the country.*
>
> *...*
>
> *Well, in my opinion the power of the media has grown, is excessive, and ought to be diminished, although I think the remedy is as much in the hands of the politicians as others. On the other hand, I still want to have a free media, an aggressive media, an irreverent media, and one that continually questions the government's own estimate of itself, so you have to get the balance right between those two."*

5.4 Of particular interest was the example that Mr Clarke was able to provide relating to criminal justice policy over recent years which, in his view, 'has been a response to tabloid newspaper complaints'.[33] Overall:[34]

> *"If the tone of the newspapers had been different for the last 15 years, we'd probably have 20,000 fewer prisoners in prison. I hasten to add that's not a scientific estimate, it's just a way of illustrating my opinion."*

5.5 He also challenged the theory that the endorsement of political parties from time to time by The Sun really made much difference to the political fortunes, since Rupert Murdoch and his newspaper tended to align themselves with perceived winners and to change sides *'when it was obvious that the horse they're riding is about to collapse'.*[35]

5.6 On the way forward on press regulation, Mr Clarke observed:[36]

> *"I think we're all agreed, I don't know, you've had many witnesses now, that whoever the regulator is must be totally independent of both government and press in their activities, that they should have some authority, and the ability to require the relevant media organisations to subject themselves to the authority, and that they should have the power to impose penalties so there is some practical effect. Financial penalties, I imagine, the most part. It's when they break the criminal law, it should go off to other courts and other jurisdictions to deal with that. If that needs statutory underpinning because you won't get everybody to produce something like that and join something like that, submit to something like that and comply with something like that, then you're going to need statutory underpinning..."*

[33] p55, lines 20-22, *ibid*
[34] p58, lines 8-12, *ibid*
[35] p54, lines 8-12, *ibid*
[36] p64, lines 4-19, *ibid*

5.7 Mr Clarke subsequently reverted to the Inquiry in writing on 26 July 2012.[37] Of particular value was his comment about the care needed when considering remedies for press misconduct in the wider civil law context, and his view that a measure of statutory underpinning for a new regime "*would not be the freedom of expression Armageddon some commentators would have you believe*".[38]

6. The Rt Hon Michael Gove MP

6.1 Mr Gove's perspective is interesting in two principal respects. First, he is both a senior politician and a former journalist (including having been news editor for The Times). Second, in his capacity as Secretary of State for Education, he had also had some experience interacting with senior News International interests on public policy issues within the remit of his Department.

6.2 From the perspective of his experience in journalism, Mr Gove offered some insights into the relationship between politicians and the press. He said this:[39]

> *"I can quite understand why Lord Mandelson thought that the relationship between politicians and journalists was a purely transactional one. I prefer to think of the relationship between politicians and journalists as being nuanced and multi-layered. Sometimes it will be the case that some politicians will regard their interactions with journalists in a transactional fashion, but it can also be the case that friendships can arise and it can certainly be the case that politicians can understand the pressures that journalists face in trying to make sure that the public are informed and it can also be the case that journalists can appreciate the pressures that politicians face in trying to make sure that their policy is presented fairly.*
>
> *Q. Thank you. In your view, have we reached the point where the current state of relationships between journalists and politicians is poisonous or close to it?*
>
> *A. No, I don't believe it's poisonous.*
>
> *Q. Have we reached anywhere near that point?*
>
> *A. No, I don't believe we have. Of course there's acrimony between some journalists and some politicians as a result of wrongs or perceived wrongs, but I think that the idea that the relationship is poisonous is an overstatement.*
>
> *Q. Are there any aspects of the relationship, if one doesn't like the word "poisonous", one might characterise as unhealthy?*
>
> *A. I think it's certainly the case that there are sometimes elements of the relationship between politicians and journalists that can be a little rough-edged. I think that's certainly true. And it is also the case that there are some politicians and some journalists who develop, over time, a close relationship, which may not altogether be in the public interest. But in my experience, most politicians and most journalists have a proper sense of the boundaries between each.*
>
> *Q. So a close relationship which may not altogether be in the public interest, why not altogether in the public interest?*

[37] pp1-4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Kenneth-Clarke-MP.pdf
[38] p1, *ibid*
[39] pp2-4, lines 17-11, Michael Gove, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-29-May-2012.pdf

A. It may be the case sometimes that a relationship between certain journalists and certain politicians will involve a journalist or a politician relying one upon the other for confidences which are not always shared with the public at an appropriate time."

6.3 Mr Gove provided his personal view of Rupert Murdoch, with whom he clearly has a close affinity. Initially expressing himself in fairly succinct terms (*"I think that he is one of the most impressive and significant figures of the last fifty years"*), he broadened his insights as follows:[40]

"I think that the changes that he made to newspaper publishing as a result of his decision to relocate his titles to Wapping lowered the barriers to entry for newspapers and meant that like the Independent, which would never otherwise have existed, existed, and as a result more individuals have been employed in journalism. It's also the case that his investment in satellite television has also created jobs as well, and I think that it's undoubtedly the case that there are few entrepreneurs who have taken risks in the way that he has and therefore generated employment, but also controversy in the way which he has.

Q. And the generation of controversy, how does that arise or how has that arisen?

A. It's often the case that successful people invite criticism. He has been successful in a particular industry, where there are others who are only too happy to criticise, and they have exercised their liberty to do so.

Q. You described him, consistently with the evidence you've just given, as a force of nature, a phenomenon and, I think, a great man. That's right, isn't it?

A. Yes, it is. I enjoyed meeting him when I was a journalist, I subsequently enjoyed meeting him when way a politician and I would also say that as well as having been a successful businessman, I think that the position that he took on, for example, the European single currency, has been vindicated by events.

Q. Have you ever expressed a view on the merits of the BSkyB bid, Mr Gove?

A. Never to any of my political colleagues, no.

Q. So insofar as you held a view about it, by definition it would have been a private view?

A. Correct."

6.4 Mr Gove was taken at some length[41] through documentary evidence which related to Mr Murdoch's interest in investing in free schools and academies, and his own involvement in that project. Some commentators have seen this evidence as a legitimate cause for concern about what may have appeared to be an 'overly close' relationship between Government and proprietors in which matters of Government policy are transacted in the context of friendly personal relationships. Although the evidence was explored in detail with a view to testing that proposition, no substantive grounds for public concern were established. Although Mr Murdoch's commercial interests were clearly engaged at one level, Mr Gove expressed a clear view that Mr Murdoch's interests, such as they were, in the free school movement were essentially philanthropic.[42] In any event, nothing came of Mr Murdoch's interest; the project foundered for want of local authority funding support.[43]

[40] pp16-18, lines 23-9, *ibid*
[41] pp38-50, *ibid*
[42] p46, lines 10-12; pp49-50, lines 25-9, *ibid*
[43] p42, lines 17-22, *ibid*

7. The Rt Hon George Osborne MP

7.1 Mr Osborne's contemporary involvement in the appointment of Andy Coulson and in the BSkyB bid have been addressed elsewhere.[44]

7.2 Mr Osborne explained that he had a number of good friends who were journalists and with whom he enjoyed political discussion.[45] In his written evidence he provided details of his meetings and social interactions with media proprietors and senior editorial and executive staff, between 2005 and 2010.[46] Approximately one-third of these were with representatives of News International. Asked, by way of example, about a dinner hosted by Rebekah Brooks on 19 December 2009 and attended by Rupert and James Murdoch, Mr Osborne said this:[47]

> *'I'm sure political matters were discussed. I mean, they normally were. I don't remember any improper conversation or any conversation about the commercial interests of News Corp or News International. I think it was a general discussion about the political situation in Britain as we were heading into a General Election year and indeed the economic situation with the rest of the world. I mean, normally when Rupert Murdoch was at one of these events, the conversation was about the global economy and at the time, of course, we were right in the middle of the financial crisis.'*

[44] Part I Chapters 6 and 5 respectively
[45] pp69-70, lines 11-23, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf
[46] pp1-27, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Annex-A-to-First-Witness-Statement-of-George-Osborne-MP.pdf
[47] p16, lines 2-13, George Osborne, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-11-June-2012.pdf

CHAPTER 8
CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

1.1 The subject-matter of Module Three was the contacts and relationships between national newspapers and politicians, and the conduct of each, considered in the overall context of the culture, practices and ethics of the press. Pausing to take stock, it is first worth restating what context led to the inclusion of this Module in the Inquiry's terms of reference.

1.2 The questions the Inquiry looked at in Module Three were these: was there something amiss in the relationship between the press and the politicians? And if so, was it connected to the current state of press standards? Most importantly, was there a genuine issue of public trust and confidence here which ought to be addressed? Were politicians to any degree a 'part of the problem' of press standards and of public concern about them?

1.3 The relationship between the politicians and the press is, as I said at the outset, part of the vital lifeblood of democracy. It is also an unbalanced relationship in one important respect: the politicians are directly answerable to the public for it. So in asking the Inquiry to reflect on this matter, it was effectively being directed to the question of whether there has been some shortcoming in the democratic processes of accountability for the relationship.

1.4 It is important to make that point clear because, in one sense, the politicians made the issue straightforward. The cross-party consensus at the time the Inquiry was set up was, in itself, at least a partial answer to the question of whether there was a legitimate issue of public confidence. The commissioning of a judge-led Inquiry, and particularly an Inquiry running in parallel with extensive criminal investigations, cannot be regarded simply as a matter of placing a complex and sensitive set of policy issues into a forensic context for the purposes of gathering and analysing evidence for future decision making (although it was certainly all of that). At some level, it must also be understood to be an acknowledgment that there would be value in considering the matter, from an independent and objective perspective, removed from the context of Government and Parliament where such matters are more usually considered.

1.5 In conducting Module Three, I have been very mindful of the responsibility to maintain political objectivity and of questions of public perception. The subject matter is both of real public interest and is also interesting to the public: the evidence ranged over important issues of accountability, and it is clear that the public took a close interest in what witnesses (including some of the leading politicians of our time) had to say about them. In the circumstances, I have sought to ensure a very high level of transparency in all that has been undertaken. This means that everyone can make their own minds up directly, while at the same time reflecting on the political commentary and the mediation of the press. I have also repeatedly emphasised the non-partisan context of the work of the Inquiry.

1.6 In contrast, the contemporaneous commentary on the evidence was vigorously partisan, as it was fully entitled to be. Among the large number of thought-provoking questions about the relationship between the politicians and the press which were raised in the process, I have had to be highly selective, and so not lose sight of the remit set out in the Terms of Reference.

1.7 My focus in these concluding pages is not on individual politicians or political parties. I have concentrated entirely on long-term patterns of behaviour as they might be perceived by the public, observing from the outside the relationship between the politicians and the press. The evidence contained many examples from which these patterns clearly emerge. No doubt there is unlimited scope for debate and value-judgment about the relative contribution to the pattern of one example rather than another. For my part, however, I do not intend to take any part in that debate.

1.8 I have also been conscious that politicians (and not only those in Government to whom I formally report) hold the future of this Report in their hands; it is they who must now be finally and fully responsible and accountable to the public for dealing with it. To that extent, I am bringing the story full circle. I have concluded that, in some ways, the conduct of the relationship between politicians and the press has been a part of the problem. Now, however, that relationship has to hold the key to the solution.

1.9 The problem revolves around one principal public concern; put simply it is that the relationship has become 'too close'. Politicians have used that term themselves and the Inquiry has explored what is meant by it. The definitions and explanations provided have not always been the same, nor, indeed, has been the public perception of this problem.

1.10 A number of features have been mentioned. First, there is the power of proprietors and the risk that it has, in itself, stifled political comment about the power of the press, contrary to the public interest. Second, there is the question about how politicians have conducted themselves in relation to that power in all its manifestations. Third, the sheer quantity of meetings between senior editors, proprietors and politicians has raised concern about the perception that, on occasion, understandings could have been reached or deals struck well out of public sight.

1.11 There have been further public concerns. They include first, the issue of failure by politicians to speak out in the face of the growing evidence of criminal wrong-doing and, secondly, that personal relationships and friendships have been allowed to develop, with the risk that appropriate boundaries have become blurred and, potentially, led to errors of judgment.

1.12 However the term 'too close' is exactly defined, the question has boiled down to this issue: have there been unaccountable exchanges in influence and favours, trading political support and advancement (or the avoidance of political damage) for policies which favour the commercial interests of the press, however defined, or the abstention from policies which would disfavour those interests? Less starkly, but no less important, are there aspects of the close relationship between politicians and the press which should just very simply be less close, or which the public should be able to know more about so that they can make their own minds up about it?

1.13 Generally speaking, I have considered the issue on a chronological basis, taking the last five Prime Ministers over three periods of time, corresponding with the periods of power of their respective parties, and examining their relationship with the press; and then by scrutinising the issue through the lens of a series of policy and legislative developments, culminating in a close examination of the BSkyB bid. This last episode has been analysed in detail for a number of reasons. First, because of its currency and the quantity of evidence, both documentary and oral, which was brought to bear on it. Second, the story allows a clear focus on a number of aspects of the relationship between the press and the politicians. Third, the evidence available, and the fact that the case involved a decision with a legal (and quasi-judicial) dimension, makes it possible to analyse it forensically.

1.14 Module Three has also addressed a number of issues in which the press themselves have expressed a particular interest. These include 'spin', so-called anonymous briefings and the practice of 'feeding' favoured journalists with stories in return for an expectation of a certain type of treatment in the telling of those stories by the newspapers involved. These issues are not central to the work of the Inquiry for a number of reasons. On examination, some of the matters of which complaint is made turn out to fall within the spectrum of what might fairly be described as the rough and tumble of politics and political journalism. Some are inevitably too impressionistic and partial to bear much analysis. And it is also problematic to conceive of any practical recommendations which might be crafted to address these issues. I do recognise, however, that there is a genuine issue of public perception and confidence here, to which the Report can do some service if only by holding up a mirror.

1.15 The principal focus of Module Three has been the relationship between politicians and News International. This has been inevitable. The Prime Minister, echoed by others, summed up the problem: *'we all got too close to News International'*. Mr Murdoch's titles still have the largest market share in the UK despite the demise of News of the World, and Mr Murdoch himself has exercised enormous fascination in the public imagination over some 40 years. He has been demonised in some quarters and lauded in others, to the extent that one might be entitled to observe that a moderate view about the man would be unorthodox. Moderate or otherwise, a balanced assessment is required for these purposes in the context of the specific issues which arise under the Terms of Reference.

1.16 The purpose, therefore, of this concluding Chapter of this Part of the Report is to draw the various strands together and so found an evidential basis and justification for the recommendations that I feel it right to make. I first examine the relationships between the press and politicians specifically from the perspective of the proprietors who gave evidence before the Inquiry: this will be achieved in fairly general terms, because Part I Chapters 2-4 has already addressed these topics in detail, albeit specifically from the perspective of the politicians. I will then set out some general conclusions as to the ways in which the relationship between politicians and the press seems to have fallen out of line with the public interest. Finally, I will draw some wider conclusions which will lead onto my recommendations.

2. The proprietors

Rupert Murdoch

2.1 Those who are expecting a series of revelatory insights into the career and personality of Rupert Murdoch will be disappointed by what follows. I say this for at least two reasons. First, as those who have written biographies about him would no doubt explain, the time at the Inquiry's disposal to investigate Mr Murdoch's lengthy career was limited in comparison with the breadth and depth of exploration necessary for such a subject. There was considerable ground for Counsel to cover and, in addition to pursuing the wider interests of the Inquiry, it was important that Mr Murdoch was able to say what he wanted about the various issues that have cost his company so dear.

2.2 Second, the Inquiry remains constrained by the ongoing criminal investigations, at least as regards those aspects of Mr Murdoch's evidence which bore on Module One and the saga of phone hacking. Sir John Major made the point in evidence that what he considered to be the less than acceptable state of the culture, practices and ethics of the press is attributable

to the acts and omissions of proprietors and editors.[1] However, as I have already explained, this is the sort of issue that criminal proceedings rightly preclude the Inquiry from exploring, save in very general terms, not least because the only conduit from the conduct of journalists to Mr Murdoch is the layers of editorial and other management that separated him from the news room floor none of whom could be asked about the matter. This means that there are clear limits on the basis of the evidence I have heard to what I can say about Mr Murdoch's leadership and his responsibility, if any, for this aspect of the culture, practices and ethics of the press.

2.3 There are no similar inhibitions operating on me in relation to those aspects of Mr Murdoch's evidence which covered Module Three issues, although I naturally bear in mind that an enormous amount of evidential ground had to be covered in a relatively compressed timescale. Furthermore, the events in question covered a 31 year period (the acquisition of The Times and its associated titles was in January 1981) and Rupert Murdoch was 81 years of age when he testified. Notwithstanding that he is plainly extremely astute, some allowances need to be made for the fact that, over a two day period, he was being asked to give wide-ranging evidence and being taken, in the course of that evidence, to documents which were numerous, complex and diverse. It is not necessarily unreasonable that he may not always have given direct answers to the questions posed, and was not always able to recall events. It is also necessary to reiterate that Mr Murdoch is the Chairman and CEO of a world-wide media empire, and however dear to his heart newspapers may be as a whole, or The Sun newspaper in particular, his time has to be rationed and certain responsibilities delegated.

2.4 Mr Murdoch's relationships with various British Prime Ministers have been considered in depth above, and in this Chapter, I come to the heart of the matter. He denied on several occasions that he made any express deals with politicians, and the available evidence does not prove that he ever did. This, however, is not the end of the story.

2.5 This Report is not the place to comment on Mr Murdoch's undeniable business acumen. On any basis, I have absolutely no doubt that he is a newspaper man through and through, and that he has developed a serious and abiding interest in politics and current affairs. An iconoclast in a number of respects, and certainly not an establishment figure, Mr Murdoch's position (which may be as the most powerful newspaper magnate in the English-speaking world, or at least one of them), has brought him into contact with all the leading politicians inhabiting that environment, from Australia to the USA. It is inevitable that he should get on better with some than others, but it is also clear from the evidence that he is a man who enjoys political argument and debate with those who are at the centre of this universe.

2.6 If Mr Murdoch made no express deals with politicians within government, the question which arises is whether he made any implied deals or reached tacit understandings with those who engaged with him. In this regard it is necessary to define terms carefully because there is a clear danger of permitting a lack of precision in the question to suggest or indicate what the answer to it might be. Instead, it may be better simply to set out what inferences, if any, may reasonably be drawn from Mr Murdoch's conduct over the years.

2.7 All the politicians who gave evidence before the Inquiry said that Mr Murdoch exercised immense power and that this was almost palpable in their relations with him. Mr Blair spoke in terms of his acute awareness of the power that was associated with him.[2] This is not to

[1] p93-95, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf;
[2] p3, line 17, Tony Blair, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf

say that Mr Murdoch set out to wield power or that his personal manner was other than amicable and respectful in his dealings with politicians. But it is to say that he must have been aware of how he was being perceived by his interlocutors; to suggest otherwise would be to suggest that Mr Murdoch knows little about human nature and lacks basic insight, which could not, of course, be further from the truth.

2.8 Rupert Murdoch accepted that The Sun broadly reflected his worldview.[3] His editors would not need to ask him for his opinion on any particular topic; they would know his thinking on the issues of the day in general terms, and could work out what it would be likely to be in any specific instance. Some have likened this process to the workings or metaphorical radiations of the Sun King, but, in fact, it is no more than basic common sense. Editors at The Sun, and probably also the News of the World, could form a pretty good idea of what their proprietor wanted without having to ask. It follows from this that, for example, the position The Sun took in relation to Lord Kinnock's personality and policies through the 1980s and right up to the general election of 1992 was consistent with Mr Murdoch's assessment of the man, even if the proprietor did not necessarily encourage all his paper's methods and rhetoric.

2.9 It is the 'without having to ask' which is especially important here. Sometimes the very greatest power is exercised without having to ask, because to ask would be to state the blindingly obvious and thereby diminish the very power which is being displayed. Just as Mr Murdoch's editors knew the basic ground-rules, so did politicians. The language of trades and deals is far too crude in this context. In their discussions with him, whether directly or by proxy, politicians knew that the prize was personal and political support in his mass circulation newspapers. The value or effect of such support may have been exaggerated, but it has been treated as having real political value nonetheless.

2.10 Turning the tables round, as it were, Mr Murdoch was also well aware that political support was what his interlocutors were seeking.[4] Equally, politicians were well aware that 'taking on' Mr Murdoch would be likely to lead to a rupture in support, a metaphorical declaration of war on his titles with the inevitable backlash that would follow. What might count as taking him on would have to be seen from Mr Murdoch's point of view, and in the context of a continuing and complex relationship. Mr Murdoch knew this too.

2.11 These factors, taken together, would be likely to lead to an appreciation of the consequences both of disturbing the status quo as regards the regulation of the press and, more broadly speaking, of adopting policies which would damage Mr Murdoch's commercial interests. Politicians' interests, in other words, would find themselves highly aligned with Mr Murdoch's.

2.12 Put in these terms, the influence exercised by Mr Murdoch is more about what did not happen than what did. To reiterate: a case by case examination of the policies which were introduced over this long period fails to demonstrate that politicians compromised themselves or their policies to favour Mr Murdoch's business interests directly. Where a decision pleased Mr Murdoch, there would always be other public-policy reasons for it. At least one administration introduced many policies to which, by any stretch of the imagination, Mr Murdoch would not have been well disposed. But no government addressed the issue of press regulation, nor of concentration of ownership.

2.13 Another important factor is that Mr Murdoch fully understood the value of personal interactions, the value of the face-to-face meeting. His (self-invited) lunch with Baroness

[3] p36, lines 15-16, Rupert Murdoch, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf
[4] p58, lines 18-24, Rupert Murdoch, *ibid*

Thatcher on 4 January 1981 exemplifies this point in microcosm. Mr Murdoch was not necessarily expecting any favours from Baroness Thatcher but he was investing in her nonetheless, seeking to impress on her his personal qualities as a risk-seeking entrepreneur who shared political affiliations with the Prime Minister and, although he never made the argument explicitly, why he should be regarded as the favoured bidder for The Times. There is no evidence that Baroness Thatcher sought in turn to persuade her Secretary of State of Mr Murdoch's qualities, but had there been a conversation between the two of them Mr Murdoch had the comfort of knowing that he had taken the opportunity of advancing his own case. In any event, if the lunch had been known about at the time, that itself would have been significant. Suffice to say, Mr Murdoch well understands the value of 'less is more'.

Viscount Rothermere

2.14 I am grateful for the evidence Viscount Rothermere provided to the Inquiry, but for these purposes it is possible to address it quite briefly. He recognised the power wielded by the press, including by his own titles, but an assessment of his evidence overall does not suggest that this was a power which he was particularly keen to wield; he left it to others to do so.

2.15 Viscount Rothermere was concerned to explain the distinction he said he made in his own mind between overt campaigning activity on a matter of general public interest, or on issues of commercial concern to his newspaper, which in his view should take place with Ministers and officials on the record,[5] and social interactions with politicians where, as he put it, it might be seen as not very good manners to raise particular problems.[6] This distinction was encapsulated in this way:[7]

> *"Well, I don't – I think that if I see a politician and they want to talk about general politics and they want to talk about – they want to explain their views and I want a general understanding of what's going on, then that's appropriate in one scenario. If I have specific issues that I wish them to understand over something like the EU privacy directive or local television, I think that's best done in a business environment, where everything is on the record. Frankly, I think it's the – it protects them and it protects me from insinuations of undue access. That's how I operate, anyway. Or try to operate."*

2.16 This was straightforward evidence, both in its ethical compass and its recognition of the problems of public perception which attach to both parties to these interchanges: the '*insinuations of undue access*' was Viscount Rothermere's pungent turn of phrase and identified the very core of the problem.

2.17 Viscount Rothermere also explained that, on occasion, he was at the receiving end of representations of a different sort from politicians discontented with their coverage in the Daily Mail in particular. He explained that he saw it as his role, when appropriate, to draw these complaints to the attention of his editor:[8]

> *"Certainly, when I've had meetings with politicians, they have expressed – of all parties – expressed unhappiness with some of the coverage in the newspaper. Largely, I refer them back to Paul Dacre, but if there is an instance which I feel justifies merit,*

[5] p52, lines 6-13, Viscount Rothermere, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-10-May-2012.pdf
[6] p52, lines 14-21, *ibid*
[7] p53, lines 3-14, *ibid*
[8] pp9-10, lines 1-4, *ibid*

then I may well bring that up with Paul and say that – and recommend that he look into it and talk to that politician to seek out the truth. So if they say that we've run something which is blatantly untrue, and that is probably – I won't get involved on a level of opinion, but if someone comes to me and says, "Your newspaper has printed an untruth, it is categorically a mistake", then I will say to Paul, "This person has written to me", and it is normally a letter, "complaining about this which they say is untrue, would you please look into it" and he and the legal team look into it and either talk to the politician and sort it out directly or write back to me and say that there is no truth in it – sometimes people have a different opinion as to truth.

LORD JUSTICE LEVESON: So it's just a system that's built up. It's not something that you've made known?

A. No, I – well, yes, it's not something I've made known, and to be honest, I don't really invite it, because I don't think that is – I don't wish to get into a position of having to constantly deal with this issue because obviously the newspaper is writing controversial things all the time, so it is –"

Aidan Barclay

2.18 Mr Barclay gave evidence to the Inquiry in his capacity as Chairman of Telegraph Media Group Ltd, a position which he has occupied since July 2004.[9] The Barclay family own a range of other business enterprises including other print titles, and the media as a whole is perhaps a less important part of their undertakings than some of the other proprietors from whom the Inquiry has heard.

2.19 Aidan Barclay explained that it is his practice to accord complete editorial freedom to his titles.[10] The Telegraph titles support the Conservative Party at general elections but regularly criticise Conservative Governments and politicians.[11] Mr Barclay made it clear that he does not ask politicians for favours, and none are returned; his discussions with politicians are largely of a general political and economic nature.[12] His SMS text message communications with David Cameron, particularly in May 2010, are addressed elsewhere but bear out his evidence in this respect. No doubt Mr Barclay's principal concern is the macro-economic environment in which his wide-ranging business interests will inhabit.

2.20 Mr Barclay's evidence as to his various dealings with the last three Prime Ministers is as follows:[13]

'I have known each of the last three Prime Ministers. My relationships with each of them have been cordial and sporadic: I would not describe them as particularly close. I saw Tony Blair on a number of occasions, and if my memory serves on almost every occasion (other than dinner) Jonathan Powell was in attendance. As is widely recorded, Mr Blair's approach to such meetings was relaxed and social. He was interested in the press but I do not recall him ever raising specific editorial matters with me, or suggesting that the Telegraph titles might adopt a different political stance.…

I had a number of meetings with Gordon Brown when he was Prime Minister. He was, as is well known, interested in the granular detail of economic policy and we spoke often about economic theories and the state of British business. I saw him more than

[9] p1, para 7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Aidan-Barclay.pdf
[10] p9, para 31, *ibid*
[11] pp9-10, para 32, *ibid*
[12] p12, para 40, *ibid*
[13] pp12-14, paras 41-44, *ibid*

other Prime Ministers because of the extraordinary times we were living through following the collapse of Northern Rock and then of Lehman Bros. Mr Brown was keen to get my views on the impact on business, and I would sometimes send him articles and books I thought he should see. He was also Prime Minister when the scandal of MPs' expenses broke, and he must have raised this with me in general terms; but as with Mr Blair I do not recall him ever asking me to intervene in editorial matters as he was aware of my own views on editorial independence.

I first met Mr Cameron where he was a candidate to become leader of the Conservative party, and I have had meetings with him on a handful of occasions since. The Prime Minister has a background in the media and I have always found him to be knowledgeable about, and interested in, the way the newspaper industry works and is developing. Like his predecessors, he has also always been interested in general economic and business discussion. Again I do not recall that he has ever asked me to interfere in matters of editorial policy.

Each of the three Prime Ministers I have had dealings with have obviously understood from the outset the broad political approach of the newspaper. None has asked me to change that approach.'

Richard Desmond

2.21 Mr Desmond has already been discussed in some detail in the Report. In this short section I shall focus on his dealings with politicians.

2.22 Mr Desmond presented himself as quintessentially a business man rather than a 'newspaper man': newspapers are a strictly business, rather than an emotional, undertaking. In his written evidence to the Inquiry he explained his approach to editorial freedom and the direction of political support of his newspapers:[14]

'... all editorial decisions are left to the Editors. The best example I can recall is when Peter Hill was the editor of the Daily Express, he wanted the newspaper to stop supporting the Labour Party and back the Conservative Party. I got on well with Tony Blair and I felt bad for letting him down. However, at the end of the day, it was the Editor's decision and the paper trusted his political allegiance [sic]'

2.23 Mr Desmond was asked to amplify on this in his oral evidence. As he explained:[15]

'I'm not a – you know, I remember meeting Mr Blair for the first time when we bought the papers. He was very nice, we talked about – fortunately, we talked about music and drums, which is my passion, and as we walked out of the door, he said to me, "Well, who do you support then?" I said, "Pardon?" He said, "Who are you, left, right, you know, one of us?" I said "Honestly, mate, I'm not really interested in politics". And he said to me, "You will be", and interestingly on my way back to the office I got hijacked by Porter who said, "What are you? Are you a Tory or a socialist?" I said he seems a nice fellow, Blair, so I was a socialist.

Q. We've heard from Mr Hill that the paper changed direction, perhaps re-entered its natural habitat before 2005.

A. Yes.

[14] p4, para 15, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Richard-Desmond.pdf

[15] pp64-66, lines 25-6, Richard Desmond, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-12-January-2012.pdf

Q. Did you have any interest in or influence over that decision?

A. Yeah, I felt that I betrayed Tony, as a mate. I felt he was a good bloke, I thought he was doing a good job, I liked him. You know, he came to my house, I went to his house or flat or whatever you want to call it. I thought he was a good guy. So I felt on a personal level bad, but at the end of the day Peter Hill runs the editorial of the paper and that was the decision that he made.

Q. And it's a decision, therefore, which from my understanding of what you just told us that you didn't oppose. Because you could have overruled it, it could be said?

A. We don't really work that way.'

Evgeny Lebedev

2.24 Mr Lebedev brought another perspective to the Inquiry through his evidence as joint owner with his father of the three Independent titles and the London Evening Standard, although his background is obviously different from that of Mr Murdoch on the one hand and Viscount Rothermere on the other. He told the Inquiry that he did not set the editorial direction of his papers, but left his editors to do so unimpeded. Although he enjoys personal friendships with senior politicians such as Boris Johnson,[16] and spoke of the symbiotic relationship between journalists and politicians, Mr Lebedev was clear that he had never been asked for political support from a politician.[17] He said that politicians discussed matters of policy with him not in order to encourage or secure political support for them but solely so that he as a newspaper proprietor had the benefit of a personal explanation.[18] However, in answer to a follow-up question Mr Lebedev did impliedly accept that the distinction between the benefit of a personal explanation on the one hand and assessing whether a particular policy should be supported on the other may be quite a fine one:[19]

"LORD JUSTICE LEVESON: So part of the value is that you get a personal explanation of why –

A. Yes, exactly, absolutely.

LORD JUSTICE LEVESON: – a particular idea is good and, although unstated, should be supported?

A. Yes, although, as I mentioned before, it will still be left up to the editor of whether the policy is supported or not."

2.25 Mr Lebedev sought to distance himself from the type of newspaper proprietor who he believed might seek to influence policy.[20] It is interesting to observe that, from his viewpoint as a newspaper proprietor, it was an opinion which he firmly held, no doubt alive to the risks which he felt were capable of arising from the complex and shifting dynamic which exists between proprietors and politicians: as he put it, *'because we occupy the same sphere of influence'*.[21]

[16] p14, line 11, Evgeny Lebedev, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Afternoon-Hearing-23-April-2012.pdf
[17] p16, lines 21-25, *ibid*
[18] p24, lines 16-22, *ibid*
[19] pp24-25, lines 20-2, *ibid*
[20] pp22-23, lines 10-3, *ibid*
[21] p22, lines 22-23, *ibid*

2.26 Finally, Mr Lebedev offered an interesting insight, bearing in mind the perspective of his Russian background, into the constitutional importance of a free press:[22]

> *"Well, I just think that – okay. Going back to the question of politicians meeting proprietors, I think we are in danger of building a society where every institution, every element of democracy becomes too feeble. So politicians become too feeble, police becomes too feeble, the country itself becomes too feeble. If the press also becomes feeble, then what we get is what I would call a tyranny of consensus, and everyone is afraid or thinks twice or has to check twice before a step they make, a comment they make, and I think one of the extraordinary things about this country is a very robust and diverse press, and I think that has to be protected. Without, of course – those who have created – who have committed crimes, sorry, should be punished and punished according to the law. But I think the robustness of the press in this country should be protected because otherwise, as I mentioned earlier, I've been recently going on trips to countries where there is no freedom of the press. I've just come back from Ethiopia and there are journalists there that have been charged with terrorism, with genocide. Some might be put to death. Countries like that, when you visit them and you see what the lack of the freedom of the press has on the effects on the government and the state, and also, as far as I'm concerned, I come from – I was born in the Soviet Union, I come from Russia, and I can see the effects of not having a free press is having on Russia."*

Reflections on the proprietors

2.27 It may be appropriate at this point to make brief and general observations about the participation of the proprietors in the work of the Inquiry and indeed in the conclusions and recommendations of this Report. It is of the essence of press freedom as discussed in Part B of this Report that (consistently with safeguarding the public interest in a plural and diverse press) anyone with the means and motivations to do so may own and run a printing press. The fact that the proprietors of our national titles can view themselves on a continuum of one sort, in the digital age, with the humblest blogger or tweeter does not alter the fact they occupy, by virtue of their role, a fundamentally important place in UK public life, and perform a vital public service in the contribution they make to a vigorous and thriving democracy.

2.28 As discussed below, although I have reached the conclusion that, in some respects, the relationship between individual newspaper proprietors and senior politicians has not been wholly beneficial from the point of view of the public, I do not consider that the principal responsibility for remedying that situation lies with the proprietors. The response that I invite from newspaper proprietors to this Report lies in a different direction.

2.29 The culture, practices and ethics of individual press organisations, and the contribution that each one makes to the culture, practices and ethics of the press viewed as a whole, are matters on which individual proprietors are uniquely placed to exercise personal influence in the public interest. This does not, in any way, suggest interference with editorial independence or with the opinions or content that their titles are free to publish. I am referring instead to the way that any important business contributor to national life and culture will want his or her business to make that contribution, and to operate in ways that command public respect and admiration, enhance the reputation of the business and, in this case, the press generally and their titles in particular. The more that the public trust the press, the greater the chance that they will partake more freely and to a greater extent in the variety that different titles offer.

[22] pp27-28, lines 16-18, *ibid*

2.30 I have noted the support which national newspaper proprietors have expressed for a new system of press standards which restores public trust and confidence in, and the reputation of, the industry by offering an unequivocal demonstration to the public that the press is committed to the standards of the best, to eradicating the causes of past failures and to real ambition about the way things will be seen to be done in future.[23]

2.31 I hope, therefore, that in response to this Report and however lively the debate and analysis freely playing out in the pages of their titles, newspaper proprietors will continue to play an open and public-spirited role in embracing the need for a system of press accountability that inspires public confidence. I have no doubt that they are able to set the tone within and beyond their organisations and I hope that they will feel able to do so. From the point of view of the readership and the wider public, there has perhaps never been such a clear need for leadership within the industry both in relation to regulation and issues of internal governance.

3. 'Too close' a relationship

Generic conclusions

3.1 Having tested and examined the proposition that the relationship between politicians and the press has become too close, including through the historical and current perspectives of our last five Prime Ministers, the thoughts of contemporary politicians, and the series of 'case studies' which have been chosen (or, more precisely, simply presented themselves) to exemplify the nature and character of this relationship, it is now appropriate to draw the strands together and express some conclusions of a general nature.

3.2 In this part of the Report it is the generic nature of these conclusions which is important, not the specifics of the relationship between any individual Prime Minister and any individual newspaper proprietor. I have already set out my conclusions in particular cases, and the evidence which in my view supports each conclusion, citing chapter and verse in relation to witness statements and the transcripts. Almost invariably, I have not relied simply on what commentators and other observers have said or opined (although some of these contributions have been full of insight); instead, my conclusions have been based on what the proprietors and the politicians themselves have told me.

3.3 For the purposes of these high-level conclusions I believe that it is unnecessary to set out other than one or two isolated examples of the supporting evidence which is to be found in the main body of the Report: indeed, it would be invidious to do so, given that the scale of the available evidence would force me to be selective, and it might then be wondered why I have cited evidence in relation to one politician but not another. However, my findings do have to be reasoned and supported by evidence, and I have decided to place links to all of the relevant evidence in Appendix 5 to the Report.

3.4 I should also explain that, pursuant to my obligation to act fairly under the Inquiry Rules 2006, in particular Rules 13-15, I have given the leaders of the three main parties in the UK[24] advance notice of these generic conclusions, which were then at a provisional stage of

[23] Part K, Chapter 7

[24] I did not write to the leaders of the national parties of government and opposition in the UK devolved administrations in this way because, as I make clear in this Report, in my opinion the conduct of politicians of devolved government cannot reasonably be considered as part of the historical UK national pattern with which my generic conclusions are concerned

formulation, as well as notice of the supporting evidence. No-one has sought to take issue with what I then called my 'generic criticisms' which now follow.

3.5 In my view, the evidence clearly demonstrates that the political parties of UK national government and of UK official opposition[25] have had or developed too close a relationship with the press. This assessment relates to the period of the last thirty to thirty-five years but is likely, as has been suggested, to have been much longer than that. Although this relationship has fluctuated over time, the evidence suggests there has been a perceptible increase in the proximity of the relationship over this period. I do not believe this has been in the public interest. I do not seek to attribute or apportion blame any more specifically than that.

3.6 The relationship between the press and the politicians has been too close in the following principal respects. First, in my view (and as many have said) politicians have spent a surprisingly large amount of time, attention and resource on this relationship in comparison to, and at the expense of, other legitimate claims in relation to their conduct of public affairs. Second, in conducting their relationship with the press, politicians have not always maintained, with adequate rigour, appropriate boundaries between the conduct of public affairs and their private or personal interests. Third, politicians have failed to conduct their relationship with the press with sufficient transparency and accountability from the point of view of the public. Again, it would be invidious, and unnecessary, for me to be any more specific than this in evidencing these conclusions.

3.7 I therefore conclude that politicians have conducted themselves in a way that I do consider has not served the public interest, so as:

(a) to place themselves in a position in which they risked becoming vulnerable to unaccountable influences in a manner which was, at least, potentially in conflict with their responsibilities in relation to the conduct of public affairs;

(b) to miss a number of clear opportunities decisively to address (and persistently fail to respond more generally to) public concern about, the culture practices and ethics of the press; and

(c) to seek to control (if not manipulate) the supply of news and information to the public in return for expected or hoped-for favourable treatment by sections of the press, beyond that which is appropriate or an inevitable by product of politics in a 24-7 media age, but to a degree and by means other than the fair and reasonable partisan conduct of public debate.

3.8 In making the first and second of these points I should not be interpreted as concluding that politicians have made express or implied 'deals' with press proprietors in a manner contrary to the public interest. Rather, I have concluded that a combination of these factors has contributed to a lessening of public confidence in the conduct of public affairs, by giving rise to legitimate perceptions and concerns that politicians and the press have traded power and influence in ways which are contrary to the public interest and out of public sight. These perceptions and concerns are inevitably particularly acute in relation to the conduct by politicians of public policy issues in relation to the press itself.

[25] I am, of course, conscious of the limited extent to which the Liberal Democrat party (and its predecessors) have, in practice, fitted within that description

3.9 As I have already pointed out, the evidence upon which I rely is available in Appendix 5 to the Report. I content myself by citing just one piece of evidence from an experienced politician. The Rt Hon Lord Patten of Barnes CH put it this way:[26]

> *"I think major political parties, and particularly their leaders over the last 20 or 25 years, have often demeaned themselves by the extent to which they've paid court on proprietors and editors. Of course I'm in favour of talking to editors and journalists but I'm not in favour of grovelling, and I think that politicians have very often laboured under – again, I'm reminded of something I said by the documents you asked me to look at. I think that politicians have allowed themselves to be kidded by editors and proprietors that editors and proprietors determine the fate of politicians."*

3.10 In concluding that the relationship has become too close, I bear in mind that this has been acknowledged by many of our leading contemporary politicians themselves, but in different ways and to different degrees. I also bear in mind and fully recognise that the overwhelming majority of close interactions between politicians and the press are not only entirely healthy, but an essential part of democratic life. It is important therefore to set out some of the wider context to my generic conclusions before turning to thoughts for the future, both to explain what I mean by those conclusions, and, just as important, to be clear about the aspects of the relationship which I consider to be entirely outside the scope of my criticisms.

3.11 In doing so, I turn first to two distinct aspects of the problem I have identified, before stepping back to consider some wider context.

Image and 'spin'

3.12 The acknowledgement that relationships have become too close is not just one about public perceptions (whatever the reality) that covert deals have or might have been done. To some extent the closeness has simply been a matter of politicians spending too much time and attention on the press, perhaps worrying too much about the fleeting minutiae of image and presentation in a way which is not proportionate to the substance of national politics. To that extent, this Report need do little more than amplify the message that this is, in itself, conduct which demonstrably undermines public trust and confidence.

3.13 In doing so, when viewing the matter from their perspective, it is impossible not to have considerable sympathy with the politicians. In a context of declining public engagement with and confidence in the national political process, the most natural thing in the world is to try to improve the situation with attractive and engaging communications strategies, trying to harness the power of the media to tell better and brighter narratives, trying to contain the power of the media to corrode public opinion or, in other words, simply getting the message across more successfully. But it is a strategy which carries within it the very obvious risk of being counter-productive.

3.14 The presentation of politics is vital to a healthy democracy, but the politics of presentation can themselves foster cynicism, disengagement and public mistrust. The ubiquity and slickness of modern communications is daily life for all of us, and the public is highly sophisticated in filtering and interpreting it. Where political content is concerned, people are especially wary and sceptical. I make allowance for the degree to which the media themselves may have been over-zealous in promoting public distrust of politicians: from one perspective, 'spin' is just the out-manoeuvring of unfair and corrosive press criticism. Nevertheless, the perception of the

[26] pp8-9, lines 15-13, Lord Patten, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Afternoon-Hearing-23-January-2012.pdf

politician as salesman, to be treated with circumspection by the wise, is an abiding obstacle to public trust and confidence.

3.15 This is a lesson which many politicians may already be learning. A number of important steps have already been taken in the right direction. These include progress on the approach to government communications since the Phillis Report,[27] in which Sir Robert Phillis analysed the state of public confidence in the relationship between the politicians and the press as it stood in 2003. Credit must be given for the measures put in place to secure more straightforward communications strategies which the public can better understand.

3.16 It is striking too, however, how much of Sir Robert's advice bears repetition. Of his seven key principles for modern government communications, three in particular remain highly relevant today, and relevant to the conduct of all political relationships with the press and not merely those of governments. These are, first, the importance of politicians engaging in more unmediated communications with the public; secondly, staying on the right side of the dividing line between the positive presentation of policies and achievements on the one hand and misleading spin on the other; and thirdly, the use of all relevant channels of communication rather than excessively emphasising national press and broadcasters.

3.17 Further progress in the direction of a more straightforward relationship between politicians and press is likely, in itself, to reap benefits in improved public confidence. That conclusion speaks for itself.

3.18 In a small number of specific respects, however, I have concluded that simply setting out the criticisms in writing (as I have done) will not, on its own, be sufficient to secure further improvement. I return to this in the recommendations at the end of this Chapter.

The press as lobbyists

3.19 This Part of the Report has drawn attention to a number of ways in which the press has exercised political influence, in other words engaged in lobbying. There have been those in positions of leadership of the press who have shown themselves to be exceptionally dedicated, powerful and effective political lobbyists in the cause of their own (predominantly commercial, but also wider) interests. The fact that lobbying is pursued through the medium of personal relationships, and at an intuitive level, is part of its effectiveness. The lobbying may be powerful exactly because it need not be crudely articulated.

3.20 Here, it is critical to differentiate lobbying from campaigning. The press undertakes many campaigning activities, editorially and otherwise, to excellent effect. These include investigative campaigns and campaigns on matters which have captured the public imagination, such as 'Help for Heroes'. They include all sorts of campaigns on political issues, including party political campaigns and electioneering. All of this is the very stuff of journalism and part of the important contribution the press makes to our public life.

3.21 The press also campaigns on particular subjects on the basis that it represents to governments the views of its readers and argues for them. The readership of national titles, however, is sometimes more sceptical and diverse in its views than the editorial stance of the title might suggest; the sophistication of readers and consumers of media has never been greater. Nor can the antennae of editors, however finely tuned and however much apparently validated

[27] http://www.ppa.co.uk/legal-and-public-affairs/ppa-responses-and-evidence/~/media/Documents/Legal/Consultations/Lords%20Communications%20Committee/final_report.ashx

through the public inboxes of their titles, substitute for democratic process or what politicians learn from their constituents.

3.22 It may be, as witnesses such as the Rt Hon Kenneth Clarke MP have observed, that press campaigning activities in areas such as criminal justice and immigration have, over the years, seemed to carry more weight in political circles than they may have strictly merited as a matter of the evidence of public opinion or, more importantly still, as a matter of empirical evidence and of proportion. But, rightly or wrongly, such campaigning will always be the stuff of politics.

3.23 Lobbying, in this context, is very different. Here I refer to activities designed to promote the self-interest of the press not only to increase readership and sales but more basically also as a matter of commercial self-interest. This is not just about their individual titles and organisations but also about the media or the press in general, including matters of regulation and accountability.

3.24 Of course, as advocates for their own commercial interests, the press are in some respects in no different a position from other major commercial organisations or sectors, capable of exerting power and influence over public policy and I am well aware that very much broader questions about political lobbying do, from time to time, rise up the political agenda. These issues cannot be part of this Report.[28]

3.25 Nor do I consider any of the 'self-interested' lobbying activities of the press to be an appropriate matter for press regulation. Media companies should not be criticised for, or restrained from, lawfully advocating their private interests with all the considerable skill and resource at their command, and at the highest levels to which they can (and do) secure access. The dedication and resourcefulness of press organisations as lobbyists has been vividly illustrated for the Inquiry in the person of Mr Michel.[29] There is no doubting the sheer hard work and professionalism of press lobbyists and I have no reason to believe that Mr Michel is an isolated phenomenon in this respect.

3.26 There is an important exception to the principle of unrestrained advocacy, and it relates to the openness and formality required in the context of quasi-judicial decision-making. This exception applies just as much to any other commercial or campaigning organisation as it does to the press.

3.27 Having said that, I am clear that it is, more generally, entirely the responsibility of the politicians who are the object of lobbying to judge how far and in what way they consider it to be in the public interest for them to respond. As I have said, the relationship is not a symmetrical one. The politicians have responsibilities to the public who elected them. Lobbyists do not.

3.28 One of the chief responsibilities of politicians is to bear in mind that while a free and healthy press is certainly in the public interest, that does not mean that everything which is in the (commercial or wider) interests of any individual press organisation, or even of the industry as a whole, will itself necessarily be in the public interest. The matter must be looked at in the round, taking all relevant considerations into account. I make that clear because, in listening to the evidence, I have noted the way in which the rhetoric of public interest tends to become elided with the self-interest of the press. No doubt other sectors also routinely appeal to

[28] I appreciate that other lobbyists might have other potential tools of persuasion in their possession; the megaphone (which is the tool available to the press), however, is undeniably extremely powerful and, therefore, justifies consideration in its own right

[29] Part I Chapter 6 above

a sense of the public interest in the health of their enterprises and the contribution they make to general quality of life, prosperity and well being. Perhaps the press do so especially insistently. It is politicians' job to test such claims on a case by case basis.

3.29 Furthermore, there are particular temptations and vulnerabilities for politicians in connection with lobbying from the press. First, the press hold the powerful weapons of a public megaphone and extensive, behind the scenes access. Second, there is the direct influence that the press exercises over public communications about the relationship itself. This has a personal dimension which can be and has been very striking.

The personal dimension

3.30 Free communication at a personal level between press and politicians is vital for healthy democracy. It is how the public is kept informed, both of the detail of current affairs and of the large scale issues of politics, policy and citizenship. It fosters public engagement in the debated issues of the day, civic responsibility, responsive government and allows power to be held to account in the public interest. Face to face communication can be among the most powerful and effective, and is therefore of very real importance.

3.31 At the same time, as politicians and journalists are constantly thrown together or seek each other out, often in informal or social contexts, personal relationships can develop into friendship; that is, of course, often the case when people share time, professional interests and backgrounds.

3.32 In this context, the relationship between national politicians and the national print press has some distinctive qualities of its own. Whereas the broadcast media are subject to constraints of political neutrality, balance and impartiality, the free partisanship of newspapers is, by contrast, of their essence. They foster a form of political debate which is noisy, polemical and critical, and which is rightly highly valued as part of the UK's heritage. They offer a choice of different world views and different values, among which readers can make their choice, and the variety of which promotes richness of perspective and public debate. What the national press uniquely offers the politician, therefore, is attractively packaged, and actively mediated, political partisanship.

3.33 That in turn means that political/press relationships tend to have a focused bilateral quality, in which each party has something the other wants. This motivates politicians to get a quantifiable outcome from their investment in relationships with journalists. It may be in terms of new information, political and policy support, or the enhancement of personal reputation and profile. It also motivates the press, perhaps to try for exclusive access, or for something else tangible.

3.34 This distinctive relationship is full of vigour, and a life-force which gives it the capacity to evolve in response to changing times. It is visibly still evolving and changing today, largely as a result of the proliferation of new media. That gives politicians new opportunities to communicate with the public in alternative, and highly personal ways; some politicians have emerged as gifted bloggers with attentive and enthusiastic readerships, others have made the use of Twitter very much their own. These constitute new, lively fora of political debate in their own right, very accessible to the public, directly participative in real time, and more raucous, opinionated and diverse than ever. All of this is full of potential to benefit our national life in the digital age.

3.35 However, these changes have also brought new pressures into political/press relationships. The online 24 hour presence of newspapers and other news sources has the consequence that both press and politicians now have substantially less control over information, and face more competition for attention.

3.36 These changes inevitably affect the dynamic of the relationship between the politicians and the press. The print press is no longer the unique medium through which public reputation and political partisanship is contested and is no longer the all-surrounding sea in which political fish must swim or sink. But paradoxically, this may enhance the relative power of what remains unique about the press: a powerful, mediated partisanship which may indeed contain unspoken expectations of a tangible return.

3.37 There are other kinds of pressure. The Inquiry received evidence about the extent to which politicians may legitimately be regarded as having relatively limited expectations of personal privacy, by virtue of their publicly accountable role, or because they have taken particular public positions (for example on moral issues). This is not straightforward. In law, a politician has like any other citizen a right to respect for his or her privacy, autonomy and family life. But that is a right which can be 'waived' to a greater or lesser degree, or, perhaps more accurately if less technically, 'traded'. The press could be described as a 'trading floor' in the extent to which personal information is publicised, so the issue of express or implied waiver of privacy is always potentially in issue in interactions with the press.[30]

3.38 Politicians may choose to concede a measure of privacy to journalists for a range of reasons; these might be to put themselves in a good light, to offer an exclusive, or simply to maintain a good or important working relationship. The terms of this trade are, however, hard to articulate, vary from person to person, and are constantly under negotiation. They are largely untestable too, since not bringing the issue to the test (particularly not via the law) is integral to the maintenance of the interaction. For politicians, managing their relationships with the press is, in day to day reality, a matter of endless variation on the themes of personality, power and vulnerability. The civil law (of privacy and defamation) remains in position as a long stop in cases of relationship breakdown. But there are few other rules.

3.39 I was also struck by what Mr Coulson said in his evidence[31] about the inexorable growth of the importance of individual personality at the highest level (indeed at all levels) in politics. Mr Coulson spoke of the significant investment needed to ensure that the public has an "authentic view" of senior politicians. That can involve a work of portraiture in which colour and background are provided by well-chosen and sympathetic insights into aspects of character, and private and family life. It is easy to see that the potential dividend of bringing the human side to the fore is an attractive one; but as some of the Inquiry's 'celebrity' witnesses observed, it brings with it a large and obvious risk. If an image is explicitly presented as 'authentic', does that not to some degree invite a challenge to the claim of authenticity, and legitimise intrusion into other aspects of character, privacy and family life?

3.40 I mention these issues because of the light they shed on how, when the press operate as lobbyists within those personal relationships, issues of particular concern can arise.

[30] Exactly the same has been vigorously argued by the press in relation to certain celebrities

[31] pp82-83, lines 24-9, Andy Coulson, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-10-May-2012.pdf

Public interest issues

3.41 The relationships within which lobbying can take place are not the everyday relationships of journalism and politics. They are the relationships of policy makers (actual or potential) and those who stand to benefit directly from those policies. That is a limited category, comprising (on the one hand) a small number of relevant Government decision-makers and those who credibly aspire to those positions in the future, and (on the other) the proprietors and executive decision-makers of the press. Nevertheless this limited category of personal relationships partakes fully of the personal qualities of all press/political relationships as described above; those qualities may also include real friendship.

3.42 In press/political relationships within this limited category, the boundaries between government, party and private business in relation to a politician's dealings with the press are particularly fluid and blurred, and inevitably so, for all the reasons set out above. Any individual interaction is likely to contain elements of all three. Government profile and party political profile are virtually inseparable at the level of individual interactions, and the personal dimension pervades the whole.

3.43 Movement across these boundaries, although inevitable, can cause problems because existing formal mechanisms of public accountability applying to these relationships depend on them. Where press/political relationships are concerned, there appear to be few 'bright lines' in practice between the conduct of government business with its formalities and accountabilities on the one hand, and informal 'political' or 'personal' interactions on the other; the personal reputation and public profile of the politician will always be a concern at some level in all these interactions. The theoretically separate domains are in fact inseparable and it is this which gives rise to the problems of public perception when press lobbying takes place. The impression is given of decisions being taken about matters of media policy in the context of close, personal relationships (and friendships); there is then a legitimate concern that the public will be in the dark on matters of legitimate interest to them and accountability will be lost. The narrative of the BSkyB bid is relevant in this respect.

3.44 That risk also includes the possibility that the public will not be completely in the dark, but may come to learn something of what appear to be close relationships and reasonably suspect them of being in some degree relevant to the conduct of public affairs. Save for speculation or intrusion, however, there is no available means of understanding how far that may be so. That leaves the matter unsatisfactory from the public point of view; further, the speculation exposes the politicians involved to a degree of innuendo along with the difficulty of proving a negative both of which could very well be unfair.

3.45 The result is uncomfortable and creates a problem for all concerned: the public is entitled to know about a personal relationship if, but only if, it is relevant to the conduct of public responsibilities for which a politician should fairly be accountable. By their nature, the very senior relationships I am considering do contain the clear potential to have that sort of relevance. In the circumstances, it seems to me that it is necessary to find a way between the bare assertion of irrelevance to the conduct of public affairs on the one hand, and intolerable eavesdropping on private lives, on the other. I reflect on this further below.

3.46 In the rough and tumble of political life, pressures within the personal relationships between the decision-makers in the press and in politics have always been there. But there is an argument for saying that they appear to be intensifying in ways which are associated with a ripple of public unease. This can be described in a number of ways, but the common theme is the perception of the impoverishment of public debate and of risk to the public interest.

3.47 The focus of the press and the politicians on managing the individual relationship between themselves at all levels has, it is said, begun to show an increased tendency to focus on what each stands to gain in a narrow, self-interested way, to the exclusion, and at the expense, of the wider public, and the public interest both in journalism and in politics. As I have already observed, some evidence of this is apparent in the low and declining levels of public trust in both press and politicians, in public disengagement from the processes of politics, in the criticism of 'spin' and PR techniques, and of the infusion of celebrity values into political behaviour and journalism.

3.48 In these relationships, there is what I have described as an inevitable 'trading' element. The politicians have exclusive news and exclusive relationships, private advocacies and personal titbits to offer; and, in return, the press has partisanship, personal favours, the protection of sources and not holding to account. Potential promises and threats hang in the air. It all means, in short, that politicians have a particular susceptibility to being lobbied when they get close to the opinion-makers of the press.

3.49 The public, in turn, stand to be the losers. They have a reason to worry that public debate may be being manipulated behind their backs, public policy decided unaccountably, and the ethics of both press and politicians compromised in the process. It was the concern of this Module of the Inquiry to reflect on the nature and proportions of that risk, and my conclusions are set out above.

3.50 The conclusions that I have reached are troubling but this should not be surprising. In July 2011, the Prime Minister stated that, in his view, the relationship between politicians and the press needed to be re-set, and I entirely agree. Some progress has been made since then, and I welcome the fact that the leaders of the three main national parties in this country have not sought to challenge the proposition that my overall conclusions are justifiable on the evidence or to persuade me of an alternative view. But this acknowledgement is only the first step on the road, not the last.

3.51 The Report has concluded that over not just the last thirty to thirty-five years, but really over two generations, there have been failures to act politically on previous warnings about media misconduct. These failures can be associated with indications that, over recent decades, the press and the politicians have formed too close a relationship, and that that has in turn damaged public confidence in the political process. The Terms of Reference require me explicitly to address this issue, and expressed in these terms, it needs to be recognised that politicians have over the years been 'part of the problem' of press standards.

3.52 It is clear, however, that politicians hold the complete solution. The relationship between the press and the politicians needs, this time, to make a distinctive break with that history, and change in such a way that is visible to the public.

4. Existing regulatory framework

4.1 As noted above, there are very few constraints beyond the legal basics governing the relationship between the press and politicians and no case can be made for the ordinary run of interactions between journalists and politicians to be anything other than freely negotiated and managed by the parties involved, without interference. The existing 'regulatory framework' is, therefore, limited to and rightly focused on only the very specific circumstances where there are pressing reasons of public interest to be safeguarded.

4.2 All members of Parliament are required, for example, to comply with the Houses' rules on the registrable declaration of interests, the purpose of which is:[32]

> *"to provide information on any financial or non-financial benefit received by a MP or Member of the Lords which might reasonably be thought by others to influence their actions, speeches or votes in Parliament or influence their actions taken in their capacity as a Member."*

4.3 This important discipline, which is obviously not confined to interests in relation to the press, is imposed in the interests of transparency, not to inhibit the holding of interests as such but to ensure that the public is aware of them and able to take them into account in forming a view on politicians' conduct of Parliamentary business. Similar rules apply to the specific articulation of interests in the course of contributing to Parliamentary debates.

4.4 The liberty of Parliamentarians to speak and act freely in Parliament is a cornerstone of our constitutional democracy, protected for hundreds of years by the Bill of Rights and regularly reaffirmed by both Parliament itself and the courts when the matter is challenged. The transparency of Members' interests is in no sense incompatible with that freedom. On the contrary, it is designed to promote it, by ensuring that the conduct of Parliamentarians ought not to be casually impugned by reference to allegations of hidden interests, and by allowing Members to be mindful of any appearance of conflict between private interests and the public interest, and to deal with any such appearance openly and explicitly as and when it may be relevant to the conduct of public affairs.

4.5 It is a discipline whose focus is on tangible, material benefits to the politician, whether pecuniary or in kind, rather than on the subtleties of the exchanges of advantage (including reputational advantage) which characterise press/political relationships. Although it can, and does, for example tell the public when a politician is being paid to write articles for a newspaper, or when he or she holds a position on the board of a media organisation, it is not intended to go very much further than that in telling the public about the relationship.

4.6 The principal context in which there is a regulatory dimension of any sort to the relationship between the press and the politicians, therefore, is of restricted application to politicians who are members of Government. It is obvious why that should be so. Government politicians are in a unique relationship of power and accountability in the conduct of public business, to the electorate. They are decision-takers. That is underpinned both in law and in practice.

4.7 As a matter of law, there are a number of disciplines which are capable of imposing constraints, almost entirely of transparency, on the relationship between Government Ministers and the press. The Freedom of Information Act, for example, will oblige the disclosure of information about that relationship to the public on demand, subject only to exemptions imposed to protect countervailing aspects of the public interests. Its application is, however, limited to recorded information, and to information held by or on behalf of government (rather than information held by Ministers in a party or personal capacity).

4.8 Government accounting rules apply disciplines and transparency measures to government spending on issues relating to the press, as they do to all government spending. And the ordinary requirements of public law in relation to decision-making in government, including on matters such as public consultation, the giving of reasons for decisions, and the availability of judicial review, will also where appropriate apply to matters and interactions relating to the press.

[32] http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/

4.9 Other, less legally-based, disciplines will also apply but very specifically only to the conduct of *government* business relating to the press, principal among which is the Ministerial Code.[33] As former Cabinet Secretary Lord O'Donnell explained to the Inquiry:[34]

> *"The Code sets out, in a public document, the standards of conduct expected of Ministers and the lines of accountability. There are high standards of conduct expected of Ministers and rightly so because they are decision takers and it is therefore important that their decisions and actions are beyond reproach. Recent improvements by this Government enabling greater transparency around meetings and hospitality are also to be welcomed. I believe this transparency about standards of conduct increases and helps ensure accountability.*
>
> *The aspects which I believe to be relevant to the conduct of relationships between the media and Ministers are accountability, collective responsibility, openness and the need to avoid any conflict of interests, including ensuring that decisions are taken on the merits of the case and that no improper influence is brought to bear. These provisions operate on a daily basis through the relationship between Ministers and their Permanent Secretaries. I believe the Code is stringent and provides for a high bar. A recent addition in July 2011 which provides for the publication of information about Ministers' meetings with senior media executives shows how the Code is an evolving document able to react to developments as they arise."*

4.10 In his oral evidence to the Inquiry, Lord O'Donnell also explained that the Ministerial Code is principles-based[35] and intended to address not just conflicts of interest but also the perception of conflict.[36] The amendment of July 2011, made with the support of the Prime Minister at the same time as the Inquiry was set up, provides that:[37]

> *"The Government will be open about its links with the media. All meetings with newspaper and other media proprietors, editors and senior executives will be published quarterly regardless of the purpose of the meeting."*

4.11 Lord O'Donnell explained that this insertion was made to avoid any possible doubt that the requirements of paragraph 8.14 of the Ministerial Code applied to meetings with senior press figures:

> *"Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. Departments will publish, at least quarterly, details of Ministers' external meetings."*

Self-evidently now, this covers a whole range of lobbying activity and is apt to cover meetings with the press.[38]

4.12 On the face of it, these words are extremely wide and, to repeat the words, appear to cover every meeting "regardless of purpose". However, it is also important to understand the limitations of the Ministerial Code. First, it obviously has no application to Opposition politicians who are not, by definition, present decision-takers, although they may very

[33] http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf
[34] p5, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Lord-ODonnell.pdf
[35] p34, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.txt
[36] pp 35-36, *ibid*
[37] http://www.cabinetoffice.gov.uk/content/ministerial-conduct-and-guidance
[38] p36, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.txt

well be engaging in interactions, particularly as general elections draw near, with a view to establishing relationships and preparing for decision-taking should they be offered the opportunity of power by the electorate. Second, it does not apply to politicians of governing parties who do not hold government positions; again, they are not by definition decision-takers, although they may hope for preferment, not least by establishing useful relationships or otherwise acting on behalf of, or with a view to attracting the approval of, government ministers. Third and of critical significance, it addresses only Ministerial activities that are classified as government business, excluding therefore activities classifiable as either party or private business.

The gaps in the existing framework

4.13 In a nutshell, it is because of the potential overlap between the way business can be classified as government, party or private that the relationships between the press and politicians can create problems in the context of the lobbying activities of the press. The general public interest considerations underlying the transparency requirements of the Code are being only partially served by what is presently required.

4.14 As I have said, those general public interest considerations do not necessarily lie in the suppression or discouragement of lobbying relationships. They lie in the transparency of those relationships and the enhanced accountability which follows from that transparency. Just as in the case of Parliamentary disclosure of interests, good democratic governance requires that the interests and influences to which Ministers are subject should not necessarily be subject to restriction as such, but should be known about and understood, so that judgments can be made about their decisions and the decisions will be taken in the knowledge that those judgments will be made.

4.15 Put at its crudest, the problem of the incomplete fit between the public interest considerations underlying the Ministerial Code and the realities of political/press relationships, raises a form of what might be described as anti-avoidance issues. If it is too easy for a Minister to classify an encounter with the press as 'political' or 'personal' business rather than 'government' business, the formal checks and balances on propriety and accountability in decision-taking become too marginal to do proper service. Furthermore, that threefold classification into government, party and personal relationships may be more theoretical than real where relationships with the press are concerned; such relationships are characteristically more complex and fluid than that. Again, from the same perspective, if a Minister and a press proprietor or executive arrange to conduct aspects of their relationship via intermediaries, then a transparency provision biting only on the Minister's own behaviour will have little real force.

4.16 Put slightly differently, and allowing for the observation of the spirit as well as the letter of the Ministerial Code, the problem is one of partial transparency which potentially distorts the public perspective on the relationship. In turn, that potentially does damage to the public accountability which the Code is intended to serve. If the public is told that a politician has a single meeting with a press interest on 'government' business, but knows nothing about the weekly or daily interactions on 'political' or 'personal' business, to a potentially significant degree, the public is being misinformed in a matter in which it has a legitimate interest. As I have said, the three are not so easily separable in practice.

4.17 And, just as important, in this situation, there is a very powerful incentive and momentum precisely for the lobbyists of the press to guide their political relationships into the private sphere of friendships, and to cultivate the private dimensions of the political friendships they already have. That need not be a cynical process, but may simply be intuitive. I have no reason to doubt that the appetite for and gift of political friendships of people like Rebekah Brooks and Rupert Murdoch was (and was almost certainly experienced as) wholly authentic. But such friendships not only intensify the influence of the lobbyist, they pull the relationship (including its lobbying dimension) out of the sphere of accountability. The closer, the more intense, the relationship, the lesser the public accountability.

4.18 The evidence the Inquiry received about this hinterland of press/political interaction at the level of personal friendships was one of the particularly cogent features of this Module of the Inquiry in the public mind. I readily recognise that this interest had its trivial and, indeed, intrusive dimension: this, in itself, is a problem. I have repeatedly emphasised that there are and must remain limits on the legitimate public interest in knowing the details about politicians' private lives and genuine friendships. But the public interest in knowing something of the fact and degree of such friendships, where they overlap with extremely powerful lobbying interests, is another matter. In that, it is my view that the Inquiry performed a legitimate public service, and it is in this area that I consider that a way forward needs to be found.

4.19 It is important, however, to be very clear indeed about the limited nature of the problem I see here. I hope that I have already put beyond doubt that I emphatically do not see any case at all for interference in the day to day business of the interaction between journalist and politician. Political journalism as a genre has a more powerful claim than many others to be at the heart of those essential functions the press performs in a democracy, keeping the public informed, holding power to account, and providing a vibrant forum for vigorous debate on matters of public life. This is turn requires free-flowing interaction between politicians and the press.

4.20 The issue is not one about political journalism, nor indeed about journalism of any sort. It is about the relationship between the press and politicians, complex and multi-faceted as it is, as the arena within which decisions about public policy relating to the media are lobbied about and, ultimately, taken.

4.21 The essence of the problem disclosed by the evidence to the Inquiry is not just that politicians may have simply spent too much time and effort on the press, to the detriment of other claims on their attention to the conduct of public affairs. It is that, although it has not been their intention, politicians have risked actual or potential conflict of interest (via both fear and favour) and have done so in dealing with sources of influence which are, in themselves, powerful and unaccountable.

4.22 The perception that politicians have done this out of public sight has diminished public scrutiny and accountability and run the risk of eroding public trust as the full facts emerge. In this way, a view gains ground that power and influence have been traded in ways which are contrary to the public interest, most especially in relation to media policy issues. The principal example of that relates to the long history of missed opportunities to address public concerns about press standards.

5. Recommendations for future relations between politicians and the press

The starting point

5.1 I should perhaps begin this section by being as clear as possible, again, about the matters I have no intention of affecting by means of my recommendations in this Part of the Report. First, nothing I suggest is intended to intrude into or impact on the private lives and private relationships of either of politicians or press figures. Second, I have no intention of affecting political journalism as I have already defined it.

5.2 This is a problem about public policy making, about the political approach to media policy and press standards in particular and concerns the relationship between politicians and the policy-makers and decision-takers of the media, that is to say with proprietors, senior executives and editors. This is the only area which, to my mind, can cause real concern, not least because of the power of their ability to lobby and use that ability (along with an extremely effective megaphone) to serve their own interests.

5.3 In taking a different approach to these relationships I entirely endorse the analysis of Lord O'Donnell in these terms:[39]

> *""[T]here will be conversations and meetings with individual journalists which are the basic lifeblood of politicians and the media interacting. If you see in the House of Commons, there are many media representatives there and Ministers, they interact, they talk, they phone each other. So … I'm putting the bar at the editors and news proprietors above."*
>
> *….*
>
> *"I've taken the view that we should define the line at fairly senior proprietors and senior editors. I think they are different because of the ability of newspapers to very strongly support particular political parties. So I think there is something to be said for those things being noted in a transparent way, but they shouldn't be stopped."*

5.4 The core of the problem is the accountability of politicians, not the conduct of the press. This is not simply a matter of significance in its own right. It plays into the wider concern about the role and responsibilities of politicians in (or aspiring to) decision-making positions in Government and the problems of public perception which these have generated.

Transparency

5.5 To the extent that the Inquiry has gone any way towards affecting the approach to the relationship between senior politicians and the press, it has done so by shining an intense but temporary light on the issue. Transparency, in this sense, provides both an opportunity for the public to understand and assess along with a discipline which is likely to touch on the conduct of those involved. However, longer term, there is not enough in the current transparency provisions although these are themselves designed to underpin public confidence. There needs to be a workable and proportionate middle way for the future.

[39] p37, lines 14-24 and pp 39-40, lines 20-1, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

5.6 In the circumstances, I have concluded that it is appropriate to offer some detailed thoughts on possible improvements. The fact is that the relationship between politicians and the press has incentives on both sides which could serve to encourage a lack of openness so that a simple and generalised appeal to transparency is unlikely either to be self-fulfilling or, more widely, to command public confidence.

5.7 That is particularly so in the area of media policy which is the principal subject-matter of this Report, namely press standards themselves. This is an area in which press lobbying can be particularly powerful by virtue of being concerted. It is illuminating to note the limited extent to which the press hold power to account when that power resides in the influence wielded by the organisations of the press themselves, even in the case of competitors (to which generalisation, there are obvious, honourable, exceptions). It is an area in which I have no doubt that the press have acted and will continue to act as powerful lobbyists and yet one in which (by admission) the politicians have repeatedly failed to respond to public concerns as one series of problems follows another: this is notwithstanding the bewildering number of inquiries that have been conducted. It should not be surprising, therefore, that I have concluded that further steps do need to be taken to address public concerns together with the realities of, and perceptions surrounding, the relationships which have given rise to them.

5.8 Before discussing how it might be possible to increase the visibility of the way in which politicians and the press interact at the highest levels of policy formulation, it is necessary to recognise that transparency, on its own, has its limits. There are three which I bear particularly in mind in making the recommendations I do.

(a) There are very proper limits on the extent to which public intrusion into matters genuinely private is tolerable or appropriate. The detail of truly private friendships and relationships between politicians (however much they may have invited or permitted intrusion into their privacy) and individuals within the press merits respect.

(b) There is a danger of the perverse incentive, well recognised in the context of regimes such as that established by the Freedom of Information Act. This danger is that measures to increase transparency simply drive activity into a different place. The result is that incentives are to be found for avoidance measures (such as ignoring the need to keep some record or finding alternative ways to communicate) which serve only to put accountability ever more distantly out of reach.

(c) There is also a risk of a different effect. Excessively burdensome rules about transparency are impractical; mistakes and omissions then become virtually inevitable and, in themselves, produce unwarranted critique and suspicion. Ultimately, this is all counter-productive and erodes trust.

Towards more transparent relationships

5.9 I believe that further steps in the direction of transparency are necessary in order to reassure the public and restore confidence in the way the politicians handle those relationships with the media in which lobbying is a real possibility. Without seeking to be prescriptive as to what should be said, therefore:

I recommend as a first step that political leaders reflect constructively on the merits of publishing on behalf of their party a statement setting out, for the public, an explanation of the approach they propose to take as a matter of party policy in conducting relationships with the press.

5.10 The first value of such a public exposition is that it would be a recognition of the potential pitfalls of the relationship, a statement of intention to promote a more transparent approach, and an explanation of how the public could expect to benefit as a result. That itself would help to address issues of public confidence. Clearly setting out the rules they proposed to apply to themselves, and by which they expected to be judged, would be both open and demonstrably accountable: no doubt political journalism could be expected to play its part in assessing the approach and, thus, holding political power to account.

5.11 In recommending to political leaders how they might best go about that task, I cannot improve on the evident animating spirit and exhortation of renewal contained in the Foreword of the Prime Minister to the most recent edition of the Ministerial Code,[40] published when the current Coalition Government took office following the 2010 General Election:

> *"Our new government has a particular and historic responsibility: to rebuild confidence in our political system. After the scandals of recent years, people have lost faith in politics and politicians. It is our duty to restore their trust. It is not enough simply to make a difference. We must be different.*
>
> *"We have promised the people a coalition government united behind the key principles of freedom, fairness and responsibility. Every day of this government we must make good on that promise, acting in a way that reflects these principles.*
>
> *"In everything we do – the policies we develop and how we implement them, the speeches we give, the meetings we hold – we must remember that we are not masters but servants. Though the British people have been disappointed in their politicians, they still expect the highest standards of conduct. We must not let them down.*
>
> *"We must be different in how we think and how we behave. We must be different from what has gone before us. Careful with public money. Transparent about what we do and how we do it. Determined to act in the national interest, above improper influence. Mindful of our duty. Above all, grateful for our chance to change our country."*

5.12 Remaining with the spirit of the Ministerial Code as a starting point, it is worth considering the possibility that there should be greater Ministerial transparency beyond its current scope. The Code itself prescribes the approach that should be adopted by Ministers to many if not all aspects of their ministerial duties relying on the clarity of the boundary between what may be described as political or private activities on the one hand and the conduct of government business on the other. However, there is a real risk that the two become blurred in the context of influential media relationships and that the latter will be transacted within the space left for the former; that risk should not be overlooked.

5.13 The amendment last year to the Ministerial Code recognised the nature of the problem but it remains. The Inquiry has revealed that the way in which some of these relationships have just been too complex for the Ministerial Code to render what is happening fairly transparent to the public in even the most basic way: whether or not lobbying of Ministers on matters of public policy takes place in what is 'party' or 'private' time, there is likely to be a public perception that it is.

5.14 This is not satisfactory especially where the public interest in a free and responsible press is concerned and I have little doubt that what has been revealed in the course of the Inquiry has changed public perceptions and expectations in this respect: the challenge is now to

[40] http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf

meet those expectations in a way that both respects where the boundaries should lie and is workable.

5.15 In the light of the limitations to the Ministerial Code, I conclude that senior politicians should now give very serious consideration to accepting the case for public transparency at least to some degree beyond interactions which may be narrowly categorised as entirely on 'government' business in order to give a more rounded picture. That does require the contemplation of transparency measures in relation to conduct in what might be capable of being described as the political or private activities of politicians, but which, for reasons I have described above, I consider to be in practice inseparable from their conduct of public business.

5.16 As I explain below, I have only very limited steps in mind. I am also aware that the concerns that I have expressed about, for example, the use of 'private' means of communication (personal phones, texts and so on) for transacting government business may require a broader look at the issues than is open to me and, furthermore, that there could be wider implications to that which I suggest. I venture into this area because I believe that the concerns about the relationship between politicians and the press which have been ventilated in the Inquiry do justify a proportionate and appropriate response. In the circumstances, in encouraging politicians of all parties to consider the problem, I set out steps that could be taken in this direction simply as a starting point to their deliberations. Having said that, I remain of the view that there are problems in this area which are of special relevance to the relations between politicians and the press. I believe that these aspects can fairly be dealt with without being made to wait for any broader review.

5.17 First, I have come to the very clear conclusion that transparency must be improved not just in relation to interactions taking place directly between senior politicians and proprietors, newspaper editors and senior executives, but also where they take place between their respective agents, such as junior political colleagues, SpAds and civil servants on the political side, and representatives and professional lobbyists on the press side. As I have said, while the focus must be firmly on the policy-makers and decision-takers, and while it is important to leave plenty of unrestricted space for the ordinary transactions of political journalism, the public would be entitled to be sceptical if measures designed to increase transparency were circumvented by the use of third-party agents or 'back channels'. Needless to say, these measures should apply to such third party agents only where they are acting in that capacity, that is to say on behalf of their principals in matters of policy.

5.18 Second, I also conclude that it would be in the public interest for obligations of greater transparency to be undertaken not only by Ministers in Government but also by the Leader and Front Bench of the Official Opposition (and, as in the recent past, the Leader and Front Bench of a major third party). In this I am conscious of stepping into an area of public life, outside the propriety and transparency constraints of the conduct of elections and of Parliamentary and Government business, in which public accountability is an underdeveloped concept, but it seems right to do so.

5.19 I say that in the first place because in answer to a general question on the comparison between Government and Opposition, the current Leader of the Opposition has accepted that, broadly speaking, similar standards should apply.[41] Not the least reason for this entirely appropriate stance is that the lobbying activities of the press in relation to politicians should not, in my view, be undertaken on anything other than a level playing field in terms of party politics.

[41] p11, lines 1-4, Ed Miliband, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf

5.20 In any event, there is another, substantive reason. This relates to the public interest in understanding not only the press influences on the exercise of executive power, but also the influences on the aspirants to executive power. The lobbying relationship between the press and the politicians is not short term with the impact of general elections being only one part of the continuum. The Report has noted the issues that arise for the conduct of the political/press relationship in the transition from Opposition to Government status, particularly after lengthy periods of Opposition and, as Alastair Campbell recognised, there is a risk that habits formed in Opposition will remain entrenched in Government in a way that is not, ultimately, conducive to the public interest.[42]

5.21 In these circumstances I have further concluded that public interest considerations of transparency apply also in respect of opposition parties who may aspire to, or find themselves in a position of, holding a balance of executive power if not exercising it outright. This conclusion only serves to underline the critical requirement of a cross party approach to these issues while they are at the forefront of public attention. Lord O'Donnell put it this way:[43]

> *"I think there's an opportunity, a window of opportunity to get the opposition parties together and say to them: can there be a set of guidelines, code of conduct, something, which would cover these relationships which all could sign up to?"*

My recommendation is that this opportunity be taken. My starting point, as I have explained, would be parity of application for both Government and Opposition, but if there are genuine points of distinction no doubt they could be explored and explained to the public.

5.22 That is not to say that I do not understand the significance of suggesting measures to be followed both by Government Ministers and members of the Opposition Front Benches. Their positions bear comparison from the point of view of the public interest in transparency, but not of course in terms of the regulatory context. The Ministerial Code has no application outside government. However, I do not recommend any change that will (or should) have the force of law and the Government itself will have to reflect on whether acceptance of my recommendations would have implications for the Ministerial Code or would be better dealt with otherwise. I fully recognise that in both cases, although I give an indication of where I consider improvements could be made, implementing any such steps would have to constitute something of a self denying ordinance.

5.23 Having said that, I have no doubt that the public needs and expects increased transparency from all political leaders. Without a limited (but significant) improvement in the visibility of contact at the highest levels between proprietors, newspaper editors and senior executives on the one hand and those who develop media policy on the other, the public is entitled to be sceptical that it is being left out of account in exchanges of influence. I am concerned that lack of trust and confidence will inevitably ensue.

What might be done?

5.24 The amended Ministerial Code now requires of Ministers a quarterly publication of all meetings between Ministers and senior media figures, regardless of the purpose of the meeting. I suggest therefore that consideration be given to the adoption of the same principle of transparency, in the first place for:

[42] p20, http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf
[43] pp28-30, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.txt

(a) Opposition Front Bench spokesmen;

(b) meetings involving not just the politicians and media principals themselves but also the agents of each as described above; and

(c) so far as practicable (about which I say a little more below) meetings between these principals or agents in whatever capacity in which the meeting could be said to take place.

5.25 I recommend that consideration be given also to the publication not merely of the fact of such meetings in themselves, but also the fact of any discussion taking place at such meetings of media policy issues, by which phrase I mean the formulation and implementation of general public policy in relation to the media, including in relation to media standards, as well as any significant policy issues or decisions relating to individual media organisations.

5.26 What information might be published about the content of any such discussion should of course be guided by the particular public interest in the transparency of such discussion in itself. It must, of course, in doing so have regard to other public interest issues such as commercial confidentiality and reasonable personal privacy but, overall, could depend on the balance of the public interest on a case by case basis. Even an explanation of the reasons for withholding information would aid public understanding. Enhancing public confidence depends on the spirit of any such measures and a genuine willingness to address the issue of how matters look to the public, rather than a legalistic or bureaucratic focus on the specific formulation of any provision. I am not recommending that transparency measures should necessarily extend further into content beyond a very general identification of topics covered.

5.27 Furthermore, it is clear that the problem does not simply (or even mainly) arise within face to face meetings and, in my view, there is more than a legitimate case for contemplating some limited transparency obligation in relation to other communications (such as correspondence, phone, text and e-mail). Again, there should be no suggestion of exhaustive new requirements for record keeping or the collection of statistics; that would be both impractical and unnecessary, not to say counter-productive. However I do not consider that it need be either intrusive or burdensome for politicians to indicate on a quarterly basis, in relation to any individual senior principal within the press (or their agents), by way of general estimate, something about the frequency or density of such interactions, for example by reference to some common-sense and very general published parameters. I do not suggest there is any case for descending into detail or content.

5.28 My purpose in identifying these possibilities is simply to suggest that consideration be given to a moderate, achievable move in the direction of further transparency and improvement of public confidence. I re-emphasise that the class of persons within the media to whom it is intended to apply is very limited; the point is that it is a category which produces unique contexts for press lobbying and, in consequence, unique public interest concerns.

5.29 Common sense has an overarching part to play. There are, for instance, a number of cases in which meetings and other communications may take place extremely frequently, for example in the case of close lifelong friends or partners. In cases of genuine impracticability of this sort, it would undoubtedly be sufficient simply to note the fact of that relationship. Lord O'Donnell's approach to such cases was this:[44]

[44] p38, lines 11-24 and p39, lines 5-12, Lord O'Donnell, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-14-May-2012.pdf

"Where you have a lifelong friend who happens to work in industry X, what you should do is disclose that to your permanent secretary and you say you meet this person socially all the time. If it were to happen that a policy issue arose where industry X was absolutely crucial and it would have a big impact on that, then stronger degrees of transparency might be required and you might need to remind the minister that actually this person that they socialise with all the time, they have to be particularly careful or they might want to amend their behaviour in some way during a particular period when that was a big issue."

….

"All politicians come into politics having developed a social circle already. They have friends. It's a rather good thing, in my view, that politicians have got quite normal relationships and they have friends from different backgrounds, different - maybe in industry, they may be trade unionists, they may be teachers, nurses. That's a good thing."

5.30 As I said at the time that Lord O'Donnell gave this evidence, I entirely agree and absolutely nothing in this Report should be taken as suggesting that this should change. It is difficult enough to encourage able people to enter public life and not only must a measure of trust be extended to all who do but, additionally, steps must be taken to ensure that they, also, are provided with a sufficient amount of private space. I have not, however, found myself able to conclude that internal disclosure mechanisms (such as Lord O'Donnell mentions when he refers to private disclosure to a senior official) will be sufficient as a means of restoring public trust and confidence. The problem is not a narrow one of conflict or propriety; it is a problem of public perception and legitimate concern about the extent to which existing accountability mechanisms do not provide a sufficient answer. The relationship between the press and the politicians, in this albeit limited respect has become something which the public needs to be able to see and understand.

5.31 In conclusion, I have no doubt, that the risks which I am recommending that senior politicians address are clear for all to see. If their interactions with senior press and media executives are approached fairly and squarely with those risks consciously understood, and with commensurate respect for public perceptions and the public interest in transparency, this is as much as can be achieved.

In the circumstances, I recommend that Leaders, Ministers and Front Bench Opposition spokesmen consider publishing:

(a) the simple fact of long term relationships with media proprietors, newspaper editors or senior executives which might be thought to be relevant to their responsibilities; and

(b) on a quarterly basis:

(i) details of all meetings with media proprietors, newspaper editors or senior executives, whether in person or through agents on either side, and the fact and general nature of any discussion of media policy issues at those meetings; and

(ii) a fair and reasonably complete picture by way of general estimate only, of the frequency or density of other interaction (including correspondence, phone, text and email) but not necessarily including content.

Implementation

5.32 There is already room for enormous value to be obtained from acceptance in principle of the need for greater transparency. This Inquiry was commissioned with cross-party political consensus specifically to respond to public concern; it follows the concession both from the Prime Minister and the Leader of the Opposition that the relationship between the press and politicians had become too close. I have set out in this Part of the Report the ways in which it seems to me that that closeness has been contrary to the public interest, and insufficiently transparent. At the same time, the Inquiry has been conducted against the agreed background that, in common with earlier mechanisms for self regulation of the press, the PCC has failed to meet the legitimate requirements of the public and must be replaced. Something needs to be done.

5.33 How that is to be achieved in practice? Inquiries come and go, but the constant traffic between politics and the media is as old as democracy itself. Although the Inquiry has sought to provide a very open forum in which both the press and the politicians could explain their positions to me, and thereby to the public, this has inevitably taken place against a background of a continuing conversation between press and politicians to which the Inquiry and the public has not fully been party. Some of that conversation has played out in the editorial and opinion pages of the press, and more rarely in the public observations of politicians; much more of it, no doubt, more privately.

5.34 With some limited exceptions but as the press are fully entitled to do, even before I concluded this Report, they started using their considerable megaphones for their own purposes. It would be surprising if they had not done the same with their senior access to those responsible for making decisions in this area, that is to say, the Government and other leading politicians. This has not, however, happened under the sort of conditions of transparency which I have concluded to be an essential component for the restoration of public trust and confidence.

5.35 The Inquiry takes its place historically at the end of decades in which the lobbying activities of the press on the matter of press standards have not been conducted under the sorts of considerations of transparency which I am now recommending for consideration. The conclusions of this Report are to the effect that successive governments have failed to meet reasonable public expectations in their approach to this issue, evidently to at least some degree under the influence of fear of favour of the press.

5.36 I am hopeful that genuine, informed, and vigorous public debate about the future of press standards will follow the publication of this Report. That can include an evaluation of the evidence which I have set out in detail, the merits of the various policy options and the different perspectives which can be brought to the issue from the many who are affected by it, as indeed we all are. It is critical, however, that the public must have full confidence in the political process engaged in that response; if it does not, the solution will hardly attract the public confidence that is essential for it to succeed,

5.37 In my view, the public has an entirely legitimate interest in understanding how the decisions made about the Report will be taken in the public interest. Obviously, the views of the press will be very important but if lobbying is to play a part (particularly if conveyed in private), there is a public interest in transparency about that fact and how extensive it has been.

In the circumstances, I recommend that the suggestions that I have made in the direction of greater transparency about meetings and contacts should be considered not just as a future project but as an immediate need, not least in relation to interactions relevant to any consideration of this Report. I encourage politicians to reflect on the legitimate public interest in understanding at least something about the interactions they have had with the press (whether direct or indirect) on the subject matter of the Inquiry. It is clear from all that has been put into the public domain that the press and the politicians have been closely engaged on this and doubtless with continue to be. The opportunity for transparency is obvious.

5.38 The onus on leading politicians of the country to seek to reach a consensus conclusion, taking account of all the interests affected, will have a significant impact on public confidence for another reason. As the Rt Hon Sir John Major graphically put it:[45]

> *"I have no idea what this Inquiry will recommend, but if it makes recommendations that require action, then I think it is infinitely more likely that that action will be carried into legislation if it has the support of the major parties. If it does not, if one party breaks off and decides it's going to seek future favour with powerful proprietors and press barons by opposing it, then it will be very difficult for it to be carried into law, and I think that is something that is very important. So I think there is an especial responsibility on the leaders of the three major parties. 20-odd years ago – 23 years ago, I think – a senior minister said the press were drinking in the last-chance saloon. I think on this occasion it's the politicians who are in the last-chance saloon. If, at the end of this Inquiry, with the recommendations that may be made – and I don't seek to forecast what they may be, but if the recommendations that are made are not enacted and nothing is done, it is difficult to see how this matter could be returned to in any reasonable period of time, and those parts of the press which have behaved badly will continue to behave badly and put at a disadvantage those parts of the press that do not behave badly.*
>
> *I reiterate: I think the underlying purpose is to eliminate the bad behaviour and bring the bad up to the level of the good, and the bad is just a cancer in the journalistic body. It isn't the journalistic body as a whole. And I think in the interests of the best form of journalism, it is important that whatever is recommended is taken seriously by Parliament, and it is infinitely more likely to be enacted if neither of the major parties decides to play partisan short-term party politics with it by seeking to court the favour of an important media baron who may not like what is proposed."*

5.39 The perception of the public may well consider that the phrase "courting favour" accurately represents what happens if private lobbying and influence leaves insufficient space for open, measured and balanced debate that is based on facts and reasoned argument.

5.40 The conclusion of this Report is that successive Governments have failed to meet reasonable public expectations in their approach to the issue of press standards. These must ensure, on the one hand, that the press is free to hold power to account, to conduct investigative journalism in the public interest, to provide commentary however partisan or irreverent, to fulfil the needs of the public. On the other hand, the press has to be accountable to the public in whose interests it claims to be acting and must show respect for the rights of others to such extent as legitimate public interest does not justify otherwise. It should not be acceptable

[45] pp61-62, lines 22-21, Sir John Major, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-12-June-2012.pdf

that it uses its voice, power and authority to undermine the ability of society to require that regulation is not a free for all, to be ignored with impunity. The answer to the question who guards the guardians should not be 'no-one'.

CHAPTER 9
PLURALITY AND MEDIA OWNERSHIP: CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

1.1 The Terms of Reference require me to make recommendations:

(a) 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; and

(b) for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police.

Specifically, in the context of plurality, I must therefore ensure that my recommendations would support media plurality and that I identify how concerns about cross media ownership should be dealt with, including by Parliament and Government. This does not amount to a requirement for a detailed prescription on what constitutes sufficient plurality or the technical means of achieving it. It is important to note that, within the broad constraints of the work that the Inquiry has had to undertake, there has been insufficient time to devote to a full scale review or to look in detail at these issues. My analysis and recommendations are therefore at the level of desirable outcomes and broad policy framework, rather than the technical means of achieving those outcomes.

1.2 Part C Chapter 4 sets out the importance of plurality, what it means and the legislative framework in place currently to ensure sufficient plurality in the media. In this Chapter I look at the extent to which any change is required and if so, what that change should be.

1.3 Although set out in Part C, Chapter 4, it is worth repeating the goal by reference to the Ofcom definition of the desired outcome of a plural market:

(a) "ensuring there is a diversity of viewpoints available and consumed across and within media enterprises;

(b) preventing any one media owner or voice having too much influence over public opinion and the political agenda."[1]

This approach to both the diversity of views available and the influence wielded seems to be generally accepted.

What are the questions that need to be answered?

1.4 That is more or less where the consensus ends. The Inquiry is required to recommend a regulatory and policy framework that supports plurality and to make recommendations for how future concerns in relation to cross-media ownership should be handled. These are

[1] p8 ,para 3.8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf

rather partial questions in respect of plurality and do not invite or require the Inquiry to come up with a comprehensive or detailed plurality or media ownership framework.

1.5 The questions that have emerged from the evidence are:

(a) What should be considered to be the scope of any plurality policy? Does this apply just to news and current affairs or should it go wider?

(b) How should plurality be measured?

(c) What form should any requirements to support plurality take, and what sort of remedies should be available to deliver them?

(d) Should such controls be triggered only by mergers and acquisitions or is there an argument for looking to closures and organic growth in the market?

(e) Who should be responsible for measurement of plurality, decisions on whether remedies are required and decisions on what remedies to apply?

The rest of this chapter seeks to answer each of these questions in turn.

2. Scope

2.1 By 'scope', essentially, I mean the nature of the published content to which any plurality rules should relate. The media ownership rules apply at the moment to newspapers, analogue television and analogue radio. The governments of the day made it clear, in bringing forward the Broadcasting Act 1990 and the Communications Act 2003, that this was because of the scarcity of analogue spectrum and the limits that that placed on the number of channels that could be licensed. By contrast, they were clear that the same concerns would not apply in the multi-channel environment provided by digital broadcasting. In the analogue world, where there were only the Channel 3 commercial channels and Channel 5, it was obvious that the holder of any one licence would have a significant proportion of the broadcast voice. We are now in a wholly multi-channel world. Anyone with access to television in the UK now has access to over 40 channels providing a varied diet of news, entertainment, cultural output, drama and sport. Anyone with access to the internet in the UK has access to many providers of news and information, all the genres available on television and a whole host of other forms of digital content.

2.2 Ofcom notes that both it, and other regulatory authorities, have concentrated to date on news and current affairs, but that this is not required by the legislative framework.[2] There are arguments for broadening the scope. Stephen Barnett, Professor of Communications at the University of Westminster, stressed that, in his opinion, plurality as a concept extends beyond the narrowly political to the wider cultural environment.[3] He eloquently explained why:[4]

> *"corporate cultures will have a direct bearing on decisions such as whether to prioritise celebrity stories, or invest in foreign news bureaux, or hire polemical columnists, or run a specific campaign (e.g. on Europe, sentencing policy in the criminal courts, or benefit levels) and [that] these in turn will impact on the national conversation. The greater number of such powerful organisations, the greater the opportunities for diversity of all forms of expression."*

[2] p12, para 3.11, *ibid*
[3] pp1-2, para 4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Professor-Steven-Barnett-on-plurality.pdf
[4] p2, para 5 *ibid*

2.3 Similarly, Claire Enders, founder of Enders Analysis, pointed out that because media enterprises tend to produce a mix of news and entertainment, not only is it difficult to separate them economically, but that in practice a media organisation that achieves a very large share of the entertainment market will have similarly high levels of economic power both inside and outside of that market.[5] Thus large media organisations have the power to shape the wider cultural agenda of the nation, as well as wielding significant economic power.

2.4 It is worth looking at the issue of economic power in more detail. Many of the national newspaper groups are owned by companies or individuals with significant economic interests outside of the newspaper market. The business empires of the Barclay family, Lord Rothermere or the Lebedev family would never be capable of inclusion in any form of plurality measure. The position of NewsCorp is different because the vast majority of NewsCorp's interests are in the media market. However, it is not obvious that all aspects of the media market will have an impact on plurality. BSkyB achieved its high proportion of television subscribers through its ability to offer exclusive access to premium sport and film content. It is difficult to see how sport coverage can have an impact on plurality of news provision, and the fact that a person can access television through a Sky box may have no impact whatsoever on what news or cultural channels they watch. Similarly, Richard Desmond owns some adult TV channels, which might be loosely considered to be in the media market but are unlikely to have any impact on plurality in the way we understand it. In order to be consistent, therefore, it is important, to consider economic power in relation only to the content that is considered relevant to plurality, not economic power more generally.

2.5 A further point about economic power is the potential ability of a large media organisation to leverage its different distribution channels to cross promote products, or even to engage in predatory pricing in one part of the market to the disadvantage of a competitor in order to secure an advantage in another part of the market. These are real issues, though not ones for the Inquiry. I would urge both Ofcom and the Competition authorities to ensure that, when considering both plurality and competition issues in the media sector, the ways in which power is used across a media organisation's interests is taken into account.

2.6 The question to be addressed, then, is what content should be considered relevant to plurality. The media consultant Robin Foster agreed that there was a case for starting with a wide perspective and looking at wider cultural activity and output in the UK, as different aspects of culture and content can have an impact on the way in which we think about our society and our understanding of social and political issues. However, he concludes that in practical terms the most important focus is on news media and related current affairs, opinion and debate.[6] Similarly, Ofcom conclude that news and current affairs are the most relevant form of content for the delivery of public policy goals and they recommend that the scope of any plurality review should be limited to these.

2.7 In his capacity as Secretary of State for Culture, Media and Sport, Jeremy Hunt adopted a similar approach, saying that he shared the view implicit in the guidance issued by the then Government in relation to the operation of the plurality provision in the 2003 Act, namely, that "plurality" should principally be concerned with the provision of news and current affairs as those are the main areas where owners could seek to influence opinions and control the

[5] pp65-68, lines 7-2, Claire Enders, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-17-July-2012.pdf
[6] pp3-4, lines 19-3, Robin Foster, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-17-July-2012.pdf

political agenda. [7] As Secretary of State for Business, Innovation and Skills, Dr Vince Cable also agreed:[8]

> *"I apply the concept to news and current affairs primarily. There is an argument for a diversity of provision of sport, comedy, drama, religious affairs and other items and these issues are covered in significant measure by the public service obligation of terrestrial channels. But news and current affairs are different since they are of direct concern not just to the consuming public but to the functioning of democracy and the choice of governments."*

2.8 Whilst the complexity of the media market and public habits of consumption of news and entertainment make this a complex issue,

I recommend that the particular public policy goals of ensuring that citizens are informed and preventing too much influence in any one pair of hands over the political process, are most directly served by concentrating on plurality in news and current affairs. However, this focus should be kept under review.

2.9 The next question in relation to scope is what types of news and current affairs media are included in the measure. It is obvious that television, radio and newsprint should be included, as they are today. However, online consumption of news is already significant and is increasing, with 41% of adults in the UK regularly using the internet for news.[9] All the main UK broadcast and print news providers have an online presence, making the internet a very significant delivery channel and route to influence for them. In addition, there are new big players online, with Ofcom research showing that 19% of people who use the internet for news use Facebook and Google News.[10] In addition, of course, the internet provides access to a profusion of new, individual, smaller voices through, for example, blogs.

2.10 Robin Foster points to the growth of news provision online, including through content aggregators, search engines, social networking sites and digital app stores, as a key development. The nature of these delivery mechanisms is such that they could, if they wished to do so, act as gatekeepers to the news that their users receive. Thus, the internet has an important role to play in distributing news to consumers but there are potential plurality risks as those models develop. Mr Foster is clear that online provision should not be ignored when considering plurality.[11]

2.11 **Ofcom conclude that online should be included in any market assessment. I entirely agree with this view and recommend that online publication should be included in any market assessment for consideration of plurality.**

2.12 Ofcom was also asked to consider whether the BBC should be included in any measure of plurality. They concluded that, as by some way the biggest provider of news, it must be included in any measure of plurality in the market, but that the governance controls in place to ensure internal plurality within the BBC, and the effect of the impartiality requirements, meant that its size gave rise to no plurality concerns. This is an interesting point. The

[7] p3, para 12, Jeremy Hunt, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf
[8] p22, para 81, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf
[9] p25, para 5.40, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[10] p25, para 5.42 *ibid*
[11] p5-6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Robin-Foster.pdf

Governance provisions of the BBC require a high degree of editorial independence within the Corporation, which, when working effectively, ensure that a diversity of voices and viewpoints from the different channels and programmes. This, perhaps, provides a model that would help to ensure plurality in relation to other large players in the media market.

3. Measuring plurality

3.1 Measuring plurality is far from straightforward. There are two outcomes sought: diversity of views, and the prevention of excessive influence, and neither is simple to measure. In relation to diversity of views, it is necessary not just to look for a proliferation of different voices but also for consumption of different voices. The measure must therefore include both a simple count of the number of voices available and some measure of the extent to which these voices are heard or consumed. In relation to excessive influence, the search must be some measure not just of how many people are exposed to the voice but also the extent of the influence that it has; this may depend on the audience reached, the trust they repose in it and the number of other sources that they consult.

3.2 Ofcom was asked by the Secretary of State to set out options for measuring media plurality across platforms and to recommend the best approach.[12] They considered three different types of metrics: availability, consumption and impact. The first conclusion is that availability metrics – the number and range of titles and providers – have a role to play in measuring plurality but offer limited insight and on their own are not sufficient.[13]

3.3 Ofcom considered five different types of consumption metrics: the volume of consumption (how much time a consumer spends consuming the relevant content); cross-media consumption (the extent to which a single provider's sources are consumed across the different media); revenue (a basic market share measure); reach (a measure of those who are exposed to the content) and multi-sourcing (a measure of how many sources a consumer uses).[14]

3.4 Of these Ofcom concludes that revenue is not particularly helpful, as most measures of revenue do not distinguish news and current affairs from other programming, and there is, in any case, a less direct relationship between revenue and influence than between revenue and economic power.[15]

3.5 In the event, Ofcom propose a complex set of measures based around share of consumption, which they believe provides a good proxy for measuring influence in the news media market, and reach and multi-sourcing, which provide a good proxy for measuring the diversity of viewpoints consumed.[16] Claire Enders prefers a measure of share of consumption, arguing that the other measures have less value.[17] Mr Foster endorses Ofcom's proposals on measurement but suggests, in addition, that more work be done on how to compare consumption across different media on a more consistent basis. Mr Foster also urges that a better understanding be developed of how audiences use their different sources of news and how they use news sources to form their views on matters of public debate.[18]

[12] p21, para 5.1, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[13] p22, para 5.10 *ibid*
[14] p22, para 5.12 *ibid*
[15] p22, para 5.12 *ibid*
[16] p24, para 5.20 *ibid*
[17] pp1-3, paras 1-8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Claire-Enders-Enders-Analysis.pdf
[18] p8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Robin-Foster.pdf

3.6 Ofcom's consumption measure would be supplemented by a measure of impact. There is no single proxy for impact and Ofcom suggest that the importance that users attach to news sources, and their perceptions of the impartiality, reliability and quality of the news provided should be taken into account.[19] Ofcom also argue that contextual factors should also be taken into account. These include regulation and oversight; governance models; internal plurality; and the potential power or editorial control exerted by owners within commercial organisations.[20]

3.7 In relation to online news providers, Ofcom suggest that the share, and possibly reach, of the top news websites would be the best measure to use currently, and that, in any review of the measurement framework, the suitability of online measures should be looked at.[21]

3.8 It is clear that there is no single measure that will provide an adequate picture of plurality. The Ofcom model is complex and includes all the measures that have been put forward. In addition, Ofcom suggests that the measurement framework itself should be assessed regularly to ensure that it continues to capture the key elements of plurality.[22]

3.9 Ofcom have set out a comprehensive approach that is likely to provide as good a picture of the plurality in the media market as can be derived. However, its complexity is also a disadvantage, in that it will be difficult for most people to understand and could come under sustained attack from those media providers who feel that they may be the subject of plurality concerns. In that context it is significant that BSkyB objected to that methodology, used by Ofcom, in the public interest test on the NewsCorp/BSkyB bid.

I recommend that Ofcom and the Government should work, with the industry, on the measurement framework, in order to achieve as great a measure of consensus as is possible on the theory of how media plurality should be measured before the measuring system is deployed, with all the likely commercial tensions that will emerge.

4. Limits and remedies

4.1 If agreement can be reached on what is meant by plurality, plurality of what and how to measure that plurality, the next question is what constitutes sufficient or adequate plurality and what can or should be done to ensure maintenance of sufficient or adequate plurality.

Caps on market share

4.2 The starting point for some of the witnesses to the Inquiry has been that there should be a fixed limit on the percentage of revenue of the total cross-media market. Specifically, Ms Enders suggests that no single company should be able to acquire more than 15% of the media market by revenue.[23] In this context she defines the media market as including: national and regional newspapers; consumer magazines; video games; television advertising; television subscription fees; books (both physical and digital); cinema; video/DVD rental

[19] pp24-p25, para 5.22-5.26, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[20] p25, para 5.28, *ibid*
[21] pp29-30, para 5.52-5.55, *ibid*
[22] p26, para 5.33, *ibid*
[23] pp7-8, para 32, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Claire-Enders-Enders-Analysis.pdf

and purchase; internet subscriptions; internet advertising; and radio advertising.[24] In oral evidence Ms Enders explained that neither the 15% limit nor the market definition were specific proposals, but were rather designed as a starting point for discussion.[25]

4.3 Ms Enders said that the market definition was: [26]

"trying to draw a media market, not actually a market for plurality purposes."

It is interesting that, having said that a consumption measure was the best measure of plurality, her proposed solution depends entirely on a measure of revenue. She explained that her proposition was really about getting a debate started on how many big media players would be the right number for the UK. A limit of 15% would require at least 7 major players (or a very large number of small players). A limit of, 25% would allow consolidation to only 4 big media actors.[27] Ms Enders clarified that, to the extent that the idea of the cap was a proposal, the intention would be that it should operate in relation to mergers and acquisitions, not to organic growth.[28]

4.4 The Rt Hon Jeremy Hunt MP told the Inquiry that it was important that the approach to plurality should not stifle innovation or growth in the sector. One option would be to prescribe specific limits for media and cross-media ownership, but the regulator would need flexibility in operating them, whilst still providing sufficient certainty to business in order to encourage investment.[29]

4.5 The Rt Hon Harriet Harman MP suggested that there could be a cap on the percentage of revenue of the UK's total cross media market that any one company or individual would be allowed to own, and that there should be a restriction, for example 30%, on the proportion of newspaper circulation that could be in the hands of one organisation.[30] In addition to the idea of a fixed upper cap Ms Harman suggested that transactions leading to a holding of between 20% and 30% of newspaper circulation should be subject to Ofcom approval and possible conditions.[31]

4.6 The Rt Hon Nick Clegg MP said that he was open to a percentage cap, or a figure at which an investigation might be triggered, but that he imagined that such a measure would prove difficult to define.[32] Similarly, the Rt Hon Dr Vince Cable MP felt that the current plurality test was too imprecise. He suggested that it might be possible to specify a limit, such as 25% of combined media markets, beyond which a plurality test should be applied.[33]

[24] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Annex-1-to-Submission-by-Claire-Enders-Enders-Analysis.pdf
[25] pp76-78, lines 20-21, Claire Enders http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-17-July-2012.pdf
[26] pp76-77, lines 25-2, Claire Enders, *ibid*
[27] p80, lines 18-21, Claire Enders, *ibid*
[28] p82, lines 14-25, Claire Enders, *ibid*
[29] pp14-15, paras 71-72, Jeremy Hunt http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf
[30] p6, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[31] p7, *ibid*
[32] p77, lines 1-12, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[33] p21, para 77, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf

4.7 However, Ofcom take the view that absolute limits or prohibitions on market share, that would require automatic divestment if breached, leave no room for flexibility and give rise to the risk that it is not possible to address issues of commercial sustainability and innovation in an appropriate manner. They argue that such an interventionist approach should only be applied in a targeted manner to those issues of greatest concern.[34]

4.8 As well as a media-wide limit as suggested by Ms Enders, Ofcom consider the case for platform specific limits in relation to newspapers and television. In relation to newspapers, the Ofcom report notes that limitations on a declining market run counter to the need for newspaper groups to build market share in order to survive. In relation to television, the report suggests that the existing impartiality rules, and the existence of the BBC under public ownership, deliver sufficient regulation for impartiality and that a platform specific cap would have limited impact.[35]

Sufficiency

4.9 Ofcom propose that, instead of fixed caps, there should be a concept of sufficiency of plurality against which to conduct a market review. Unlike a cap, a concept of sufficiency would not be precise. Ofcom suggest that a first step could be to set it out in qualitative terms:[36]

(a) *"There is a diverse range of independent news media voices* across all platforms.

(b) *Overall reach and consumption is relatively high among all consumer demographics and across all of the UK's nations and English regions.*

(c) *Consumers actively multisource – such that the large majority of individuals consume a range of different news sources.*

(d) *Sufficiently low barriers to entry and competition between providers spurs quality and innovation in the gathering and dissemination of news.*

(e) *Overall investment and commercial returns are sufficiently high to ensure sustainability, and guarantee high quality coverage, extensive newsgathering and investigative journalism.*

(f) *No organisation or news source has a share of consumption that is so high as to create a risk that consumers are exposed to a narrow set of viewpoints."*

4.10 The report goes on to suggest that it may be possible to develop a set of the levels of each of the metrics to be used in measuring plurality that would provide an indication of a plurality concern. These would not be limits, but they would provide a degree of clarity to the market as to what levels of concentration would be likely to give rise to such concerns.[37]

4.11 Ms Enders also looks at what might be sufficient plurality. She quotes Professor Charlotte Brewer as concluding that 'plurality' unambiguously meaning 'a large number' and not a number more than one.[38] Ms Enders goes on to say that "*when we talk of 'plurality' we are talking of a profusion, a multiplicity and an abundance*," and that it is reasonable to assume that Parliament had this in mind when the legislation was passed.[39]

[34] p37, para 5.93, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[35] p38, para 5.100 *ibid*
[36] pp40-41, para 5.119, *ibid*
[37] p42, para 5.120, *ibid*
[38] see the short post by Professor Charlotte Brewer on the meaning of the word plurality at http://blogs.lse.ac.uk/mediapolicyproject/2011/03/02/guest-blog-what-does-the-word-plurality-mean/
[39] p3, para 8, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Claire-Enders-Enders-Analysis.pdf

4.12 Whether the approach involves a fixed limit or an indicative level, there needs to be some way of identifying the point at which concerns arise. Other than the 15% figure offered, but not defended, by Ms Enders, there have been no suggestions as to what level of plurality is sufficient. It will certainly be different in different markets: for example, in the many regions that have only one local newspaper, it is generally accepted that one is better than none and no remedies are applied to what is, by default, a monopoly position. The Inquiry has no basis on which to reach a conclusion on what constitutes sufficient plurality, though it seems reasonable to conclude that concerns about plurality would arise at lower levels of concentration than concerns about competition.

Structural remedies

4.13 Ofcom note that structural remedies offer clarity and certainty, can deliver long term benefits and do not require ongoing monitoring. They also note that such remedies may be ineffective if the divested interests are commercially unsustainable. Structural remedies can act as a disincentive to investment and innovation and represent a significant regulatory intervention and impose potentially significant transition and transaction costs on the parties concerned.[40]

Behavioural remedies

4.14 Mr Foster suggests that it would be better to move away from structural remedies, such as caps on market share, and towards behavioural remedies. These could include requirements to invest in content; requirements to make space available for the inclusion of alternative viewpoints; effective right of reply procedures; and independent editorial boards.[41]

4.15 Ofcom identify three different forms of behavioural remedies that could be used. First, there are behavioural rules that may help to increase levels of internal plurality, for example by ensuring editorial independence for specific titles, channels or programmes. This approach may be less intrusive and more proportionate than structural remedies but would require complex ongoing monitoring and it does not have a particularly good reputation for effectiveness.

4.16 Second, Ofcom point to behavioural remedies that improve standards. This might include requirements on fairness, or accuracy and completeness in what is reported. This approach would be objective and well understood, but would also require ongoing monitoring and there is a risk that such remedies, if applied too widely, would reduce diversity in content.

4.17 Finally, Ofcom consider behavioural remedies to improve access. Must-carry obligations could require a distribution platform to distribute the content of news providers meeting specific criteria, while must-offer obligations could be used to ensure that news providers distribute their content via any platform meeting specified criteria. This is a good remedy to address specific concerns about discrimination by gatekeepers. It is unlikely to require active monitoring as those entitled to access will complain if it is not complied with. However, this approach can be susceptible to gaming and can become outdated in the light of market developments.[42] Robin Foster also considered access remedies, though specifically in the context of digital intermediaries. He suggested that a mixture of a guarantee that content would not be blocked, must-carry provisions, and an audit mechanism of some sort, might be considered should any relevant plurality concerns be identified.[43]

[40] Ofcom report 'Measuring Media Plurality, Supplementary Advice' Figure 5
[41] pp9-10, para 4.3, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Robin-Foster.pdf
[42] Ofcom report 'Measuring Media Plurality, Supplementary Advice' para 6.7 and figure 5
[43] P10, para 4.4, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Robin-Foster.pdf

Positive interventions to encourage more news provision

4.18 In addition to remedies designed to control excessive influence, Ofcom note that there is an option of taking action to encourage more news provision. This could take the form of public funding of news provision or placing obligations in relation to news and current affairs on existing providers in return for some benefit. The most obvious examples of this approach are the BBC and the public service broadcasting content obligations on Channel 3 and 5 licence holders. Remedies of this sort are particularly appropriate where commercial provision of the content required is not sustainable. Ofcom note that this approach does not penalise success as any of the structural or behavioural remedies might and, furthermore, could be a good way of promoting plurality. However, it would require both public funding and very careful design to minimise the effect of subsidies on market-based provision.[44] Professor Curran also sets out proposals for a system of funding for areas of the media underserved by the market.[45]

4.19 The argument for mechanically applied fixed caps or limits does not seem to me to be made out. Given the importance of having both public consensus on what constitutes sufficient plurality and sufficient clarity in the market to encourage investment, it would be sensible for Ofcom to carry out a consultative process designed to identify indicative levels of the various metrics that they are proposing to use that would give rise to plurality concerns. I am neither qualified, nor required, to give my own view on what such levels should be, and I have no intention of doing so. I do, however, accept that the importance of plurality of news and current affairs provision is a qualitatively different issue to those arising from general competition concerns.

I therefore recommend that the levels of influence that would give rise to concerns in relation to plurality must be lower, and probably considerably lower, than the levels of concentration that would give rise to competition concerns.

4.20 **Ofcom has presented the Inquiry and the Government with a full menu of potential remedies, and I have not seen any arguments to suggest that any of them are inappropriate in principle. Each of them might be appropriate in a given set of circumstances and I recommend that the relevant regulatory authority should have all of them in its armoury.**

I can see that this might be difficult, because of the funding implications, in relation to measures actively to promote plurality. I am particularly drawn to behavioural remedies that would enforce standards, not least because it could add force to other aspects of standards covered in this Report. There are strong arguments for requiring a news provider with a substantial market share to ensure editorial independence both from the proprietor or owner and between titles or media outlets as a means of protecting plurality. There are also respectable arguments for requiring a news provider with a large share of consumption to adhere to accuracy standards and perhaps to have strong internal governance mechanisms to ensure that the organisation meets the highest standards of journalism, thus protecting the public, both as consumers of news and as potential subjects of reporting. It is, of course, possible that one way for an organisation to demonstrate that it was meeting any such requirement would be for it to be a member of a recognised self-regulatory body that required the same standards, and requiring such membership might form part of a package of remedies.

[44] Ofcom report 'Measuring Media Plurality, Supplementary Advice' para 6.7 and figure 5

[45] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf

5. What should trigger a review?

5.1 Under the Communications Act 2003 the public interest in plurality can only be invoked when a relevant merger or takeover occurs. Ofcom provided advice to the Secretary of State as part of its Public Interest Test in relation to the BSkyB/NewsCorp merger that the current regime might no longer be equipped to deliver Parliament's policy objective of ensuring sufficient plurality of media ownership because it was not capable of responding to certain types of market development such as market exits or organic growth.[46]

5.2 This concern about the need for the plurality regime to be able to take organic growth into account was echoed by other witnesses. Harriet Harman proposed both that Ofcom should carry out a regular plurality review,[47] and that it should have the power to ask the Competition Commission to instigate a review in between regular reviews should an issue of monopoly arise.[48]

5.3 Mr Clegg expressed a concern that the plurality considerations in the Communications Act 2003 are only triggered at the point of a merger or acquisition. He regards this as a significant gap in the protection of plurality as:[49]

> *"size isn't just determined at the point of a transaction. It can, if you like, creep up on you through the success of a particular media group just increasing its market share."*

5.4 He suggested that it might be better to have a mechanism to allow an independent regulator to trigger a market review by the Competition Commission, taking into account plurality concerns.[50]

5.5 The Secretary of State asked Ofcom to consider what could trigger a plurality review in the absence of a merger. Ofcom identified two different potential types of trigger: a metric-based trigger, which would require a review to be carried out if a particular metric was breached; and a time-based trigger, which would require a review to be carried out automatically on a periodic basis.[51] A metric-based trigger would require agreement on both the metrics to be used and the level at which the trigger would act. Ofcom concluded that the complexity involved in setting a metric-based trigger was such that a time-based trigger would be better, providing a high degree of simplicity, transparency and certainty to the market.[52] In order to ensure that reviews take place sufficiently often to pick up significant changes, and with a sufficient gap to avoid the risk of a perpetual review cycle, Ofcom propose that regular media plurality reviews should take place every four or five years.[53]

5.6 Ofcom also considered whether event-based triggers, such as the closure of a media outlet, should be used. On the one hand, the effects of a closure may take some time to become

[46] p28, para 5.56, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[47] p7, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Harriet-Harman-QC-MP-on-behalf-of-the-Labour-Party1.pdf
[48] p7, *ibid*
[49] p76, lines 15-18, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[50] p18, paras 79-81, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf
[51] p31, para 5.59, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Ofcom-Measuring-Media-Plurality1.pdf
[52] p32, paras 5.63-5.64, *ibid*
[53] p32, para 5.65, *ibid*

apparent in the market. On the other hand, if an exit occurred soon after a periodic review the effects might not come under scrutiny for some time. Ofcom conclude that there might be merit in introducing an exit trigger if an appropriate mechanism can be designed.[54]

5.7 Ofcom also considered whether the existing merger-based trigger should remain. This raises questions about the risk of merger-based and time-based reviews overlapping. Ofcom also point out that, under the current regime, Ministers have discretion over whether a merger-based plurality review should take place or not. Again, this would need further thought in a system otherwise based around an automatic time-trigger.[55]

5.8 Finally, Ofcom considered whether they, or Ministers, should have discretion to trigger a review. The advantage of allowing discretion is that it introduces some flexibility into the system and provides the potential to target a review on a particular concern. The disadvantage is that discretion has the potential to be subjective and can lead to excessive lobbying and market uncertainty. Ofcom recommended against allowing either Ministers or the regulator to have discretion to trigger a review as long as a provision is introduced for periodic reviews every four or five years.[56]

Alternative approach using the Competition Regime

5.9 There is also another possible approach to how and when to carry out a review. The Enterprise and Regulatory Reform Bill (ERR), currently before the House of Lords, makes changes to how public interest issues are to be dealt with in the context of markets (as opposed to mergers). This has the potential to be another way of addressing the issue of plurality concerns that could arise as a result of organic growth rather than a specific transaction.

5.10 Where there are competition concerns about a market, or across markets, the Competition Commission can instigate a market study, which will look at whether there are competition issues in the market that need to be addressed. Under the new regime, if the Secretary of State considers that there may also be a public interest issue in the market he will be able to issue a public interest intervention notice which would have the effect of requiring the Competition and Markets Authority (CMA) to include the public interest issues in their market study report to the Secretary of State.

5.11 When the Secretary of State receives the market study report, he or she is then in a position to decide if the public interest issue is relevant. If not the CMA proceeds as for an ordinary reference. If the public interest (PI) issue is relevant then the Secretary of State has three options. The first is that a 'restricted PI reference' can be made, meaning that the CMA would look at the competition issues only, leaving the Secretary of State to make his own assessment of the PI issues. Secondly, a full PI reference can be instituted, meaning that the CMA looks at both competition and PI issues and makes recommendations on remedies. Finally, a full PI reference can be made and a PI expert, or experts, can be appointed to look at the PI issues and feed into the CMA report. The CMA report would then cover both competition and PI issues, taking account of the expert advice, and recommend remedies. In all these cases the Secretary of State is required to accept the CMA's findings in respect of the competition issues but has the discretion to make a decision on whether to make a public interest finding and, if so, what remedies to implement. If the CMA concludes that there are no competition issues that require further examination, the matter goes no further.

[54] p33, para 5.73, *ibid*
[55] pp33-34, paras 5.74-5.79, *ibid*
[56] pp34-35, paras 5.80-5.84

5.12 As currently drafted in the ERR Bill this regime has no application to media plurality. The only public interest issue that can be raised by the Secretary of State in relation to a markets investigation is national security. However, it would be possible for the need for media plurality to be introduced as an additional public interest issue. This would allow the CMA to look at media markets from a plurality perspective at any point when competition issues arise, and would ensure that the full range of competition remedies were available to deal with any problems identified. Such remedies could, for example, include a requirement to be a member of a recognised regulatory body.

5.13 The potential disadvantage is that this process relies on the existence of a competition problem before the Secretary of State can take action to remedy a plurality concern. Given that I have accepted the argument that plurality is likely to become a matter for concern at lower levels of concentration than would necessarily give rise to competition concerns, it is also possible that relying on an approach of this sort could allow excessive loss of voice because a competition threshold was not breached. I also note that Ofcom argued that there would be market benefits from a regular plurality review, rather than a power to review when necessary, because of the risk of market uncertainty from ad-hoc reviews and the extremely political nature of the issue that would lead to constant lobbying for a review, recognising that the proposal for a regular plurality review is more closely focussed on plurality issues.

Conclusions on plurality reviews

5.14 These are largely technical regulatory issues on which I see no need to reach a definitive view. The need to have a mechanism to take account of organic growth and market exists seems unarguable, but the precise mechanism for doing so is essentially a technical issue on which the Inquiry is not best placed to reach a definitive conclusion. Ofcom's suggestions about the nature of triggers for a review and the need for a regular review of plurality seem sensible. The possibility of using the competition regime may equally have merit. It does seem to me unlikely that the two regimes could co-exist without causing considerable uncertainty and the risk of competing reviews, run by different bodies, coming up with different recommendations.

I therefore recommend that the Government should consider whether periodic plurality reviews or an extension to the public interest test within the markets regime in competition law is most likely to provide a timely warning of, and response to, plurality concerns that develop as the result of organic growth recognising that the proposal for a regular plurality review is more closely focussed on plurality issues.

6. Who should be responsible for decisions?

6.1 Potentially the most significant of the questions on plurality is who should be responsible for decisions on what happens and when. Many of the politicians who gave evidence to the Inquiry had a view on this, some, of course, speaking from recent experience of the difficulties that the involvement of politicians in such decisions can give rise to. The majority view was that the very fact that plurality is a public interest consideration makes it important that Ministers continue to have the decision taking role.

6.2 The Rt Hon Ed Miliband MP said: [57]

> *"My suggestion on this – I have a concrete suggestion on this – is that – I believe that there is a case for saying that if a politician wants to depart from the recommendations of the Competition Commission or Ofcom, whoever it is, that decision should be challengable by appeal. So in other words, if I'm the minister and I get recommendations from the Competition Commission that a bid should be blocked or should go ahead, and I take a different view, then there should be recourse to the Competition Appeals Tribunal to say not simply was it a reasonable decision but on the merits."*

6.3 Mr Clegg said: [58]

> *"So I think there is a big case to tighten up the remit given to a Secretary of State, but I nonetheless think at the end of the day it is a good thing in a Parliamentary democracy to have people who are accountable to Parliament who have to explain why that decision was taken and inasmuch as they have any discretion within what I hope will be tighter definitions, why they chose to exercise discretion one way or the other."*

6.4 Dr Cable also felt that politicians should have a role to play in these decisions:[59]

> *"I think it's right that politicians are involved – elected politicians are involved in the process. As we described the first stage of my interview, there is a series of checks and balances built in, there is a major role for the regulators, but elected politicians, ministers, have a role in the process, and I think that's absolutely right. I think it's right because when we're talking about matters of public interest, we're making qualitative judgments. We're not following a sort of quantitative metric, which is what one would normally do with, say, a competition case, and I think it's right that those decisions be made by people who are – have legitimacy through the democratic process, who are accountable to Parliament."*[60]
>
> *I think where we do have a genuine public interest choice to make, I think it is appropriate in a democracy that we involve the politicians rather than some kind of platonic guardians who are in some sense isolated from the political process."*

6.5 Mr Hunt, however, took a rather different view: [61]

> *"There is an argument that politicians should make decisions on media plurality because any such decision is, by its nature, more subjective than an economically based competition test. There is also a view that because of the importance of media plurality decisions should only be taken by elected politicians. I do not share this view. This is not because I believe it is impossible for politicians to act in an impartial manner – I believe I did. But even when they do it is almost impossible to persuade elements of the public that justice is being done and being seen to be done.*

I

[57] p60, lines 12-22, Ed Milliband, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Afternoon-Hearing-12-June-2012.pdf
[58] p67, lines 14-22, Nick Clegg, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Transcript-of-Morning-Hearing-13-June-2012.pdf
[59] p73, lines 13-17, Dr Vince Cable, *ibid*
[60] pp72-73, lines 19-8, Dr Vince Cable, http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-30-May-2012.pdf
[61] p14, paras 67-68, Jeremy Hunt http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/JH-Witness-statment-MOD300005597.pdf

I note that decisions on competition issues where there are no public interest considerations are now no longer taken by the politicians but by independent regulators, presumably to address the same issue. I believe serious consideration should be given to adopting the same approach with respect to decisions on media plurality."

6.6 Mr Hunt, as Secretary of State for Culture, Media and Sport, asked Ofcom to consider what alternatives exist in relation to who should take the final decisions in relation to, for example, the application of remedies.[62] Ofcom refrained from providing a view on this matter, considering, very properly, that it is a matter for Parliament to decide, not for a regulator to opine on. The current regime places the trigger for a plurality review in the hands of the Secretary of State, who then has to take a decision on whether or not to refer the merger to the Competition Commission for a second stage review. The Secretary of State is also responsible, having received advice from the Competition Commission, for making a finding on whether the merger would operate against the public interest and whether to impose remedies and what those remedies should be.

6.7 Ofcom take the view that, in relation to public interest merger reviews, it is important to retain a discretionary trigger in order to minimise the burden on industry. The report, however, sits firmly on the fence as to whether that trigger should be in Ministerial hands or elsewhere. On the one hand, it is argued, where a decision requires a high degree of judgement it may be more appropriate for a democratically-elected decision-maker to exercise the discretion rather than a regulatory body. This, says Ofcom, is a choice for Parliament to make.[63]

6.8 Along with other aspects of this Report, I agree that this is a choice for Parliament to make. However, bearing in mind the context within which this part of the Inquiry has been conducted, I consider that it is appropriate that I express a view for the Government and Parliament to consider. The public interest process relating to the NewsCorp/BSkyB merger has certainly demonstrated just how pressured the role of decision-maker is in this context. The volume of lobbying on both Secretaries of State involved, principally from NewsCorp but also from the coalition (known as the Alliance) ranged against the merger, was immense. The highly politicised nature of these decisions, precisely because they deal with media owners, means that they are always likely to be made in a fraught environment.

6.9 Arguments have been made that every politician will have what might be termed baggage (whether as a result of prior dealings with the press or otherwise) in relation to the media market that could make them unable to carry out a quasi judicial function in this regard. First, I do not accept the assumption behind this proposition. Certainly, politicians may well have strong views in relation to the media market (as on many other issues), but it is entirely conceivable that they can put all irrelevant matters aside and exercise a quasi-judicial role in relation to the public interest: in relation to a large number of issues, it would be very disturbing if they could not. Second, it is surely false to hope that if the decision were to be remitted to a regulator, that the regulator would not also have similarly strong views. It is in the nature of large media organisations that every one of us is exposed to their output on a regular basis and we all have views (and, in some cases, perhaps prejudices) that might affect such a decision if allowed to do so.

6.10 It seems to me that those who argue that a public interest decision is rightly for a democratically-elected decision-maker are right. It is that person who is accountable to Parliament and the electorate: that is the nature of our constitutional arrangements. However, having said that, it is equally clear that the current system is less than ideal. The experience of the NewsCorp/

[62] Ofcom report 'Measuring Media Plurality, Supplementary Advice' p15, question f
[63] Ofcom report 'Measuring Media Plurality, Supplementary Advice' para 4.15

BSkyB merger shows nothing if it does not reveal that fact. Under the current regime the Secretary of State makes his first referral decision without the benefit of any formal advice. Thereafter, advice is available from the independent regulators to provide a guide through the subsequent decisions.

I recommend that, before making a referral decision, the Secretary of State should consult relevant parties as to the arguments for and against a referral, and should be required to make public his reasons for reaching a decision one way or the other. This would provide a buffer against the criticism that a referral might be made for purely political reasons, and offer a welcome degree of transparency as to the concerns that have led to any referral.

6.11 **In relation to subsequent decisions, I recommend, likewise, that the Secretary of State should remain responsible for public interest decisions in relation to media mergers. However, as with the first stage, there would be an advantage in introducing a degree of further transparency to the process. At present the Secretary of State simply receives advice from Ofcom and the Competition Commission and then makes a decision. I recommend that the Secretary of State should be required either to accept the advice provided by the independent regulators, or to explain why that advice has been rejected. At the same time, whichever way the Secretary of State decides the matter, the nature and extent of any submissions or lobbying to which the Secretary of State and his officials and advisors had been subject should be published: the fact of having to record such contacts would itself act as a restraint both upon lobbyists and politicians and serve to remind each of the quasi-judicial nature of the decision being made.**

6.12 On the surface, this might not appear to make much change to the current provision, but I believe that it does. If the Secretary of State is required to articulate and publish the submissions received and also the reasons for rejecting the independent advice of the regulator, thereby giving the opportunity to those adversely affected by the decision, if so advised, to mount a challenge by way of judicial review, it will ensure both the highest standards of probity and that a very rigorous test is applied to the reasoning behind the eventual position. This would not prevent a Secretary of State from rejecting the advice of the independent regulators if he or she believes, and can demonstrate and articulate, that it is in the public interest to do so, but it would require a real and convincing public interest explanation to exist.

TSO
information & publishing solutions

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Houses of Parliament Shop
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders: 020 7219 3890/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: shop@parliament.uk
Internet: http://www.shop.parliament.uk

TSO@Blackwell and other Accredited Agents