

THE LEVESON INQUIRY

OPENING SUBMISSIONS ON BEHALF OF THE DAILY EXPRESS, SUNDAY EXPRESS, THE DAILY STAR AND THE DAILY STAR SUNDAY

1. These brief opening submissions are lodged on behalf of the Daily Express, Sunday Express, The Daily Star and the Daily Star Sunday newspapers. These newspapers are published by Northern & Shell plc, (“Northern & Shell”). In July 2010 Northern & Shell acquired Channel 5.

2. These submissions are intended to address a number of different matters which it is hoped will assist the Inquiry. These are:
 - 2.1 Some introductory comments on the importance of a free press;
 - 2.2 The desirability of identifying the extent to which possible changes to the civil law governing relationships between the press and the public will be the subject of examination;
 - 2.3 the desirability of considering other international experiences of press regulation.

SOME COMMENTS ON THE IMPORTANCE OF A FREE PRESS

3. The Terms of Reference emphasise the need for recommendations by the inquiry to support “*the integrity and freedom of the press*”. The inquiry has made it plain during preliminary hearings that it is well aware of the fundamental importance of the freedom of the press. For these reasons references set out below have been

kept to a minimum and are references which it is hoped will assist in identifying *why* a free press is important.

4. In McCartan Turkington Breen v The Times Newspaper Ltd [2001] 2 AC 277 Lord Bingham said (pages 290G-291B) that: *“In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction”*.

5. In Jersild v Denmark (1994) 19 EHRR 25 the European Court of Human Rights said that: *“31. ... The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not*

overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

6. In Guardian Media Ltd and others [2010] UKSC 1, [2010] 2 AC 697 Lord Rodger reviewed a number of earlier authorities and emphasised the importance of allowing editors to present the news in a manner which engages a reader's interest: "63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corp'n* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will

interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

EXTENT OF ANY INVESTIGATION INTO POSSIBLE CHANGES TO THE
CIVIL LAW GOVERNING THE RELATIONSHIP BETWEEN THE PRESS
AND PUBLIC

7. In the ruling relating to the application by Ms Elaine Decoulos to become a core participant it was noted in paragraph 3 that *“the approach of the press to proceedings in Court to correcting libellous errors and to the right of reply may -- I repeat may -- arise”* at one end of the spectrum of issues to which this inquiry relates. That statement raises a practical consideration about the extent to which the inquiry will examine and make recommendations about the “civil law” governing the relationship between the press and the public.

8. It is respectfully submitted that the Terms of Reference for this inquiry are wide enough to cover not only identifying what is the civil law governing the relationship between the press and public, but also whether changes should be made to the civil law. However it is also clear that there is a limited time available to the inquiry in order to conduct Part 1 of the inquiry, and it is right to

note that the focus of the Terms of Reference appears to be directed towards making recommendations for a more effective policy and regulatory regime.

9. In Beer on “Public Inquiries” at paragraph 2.109 it was stated that “*a public inquiry ought to interpret and then publicly explain its own interpretation of its terms of reference*”. It has also been suggested that this should be done at an early stage, see paragraph 79 of the Royal Commission on Tribunals of Inquiry (Cmnd 3121, 1966). The requirement for an early public interpretation of Terms of Reference might be thought to be overstated, but it is respectfully submitted that it would be helpful to know whether and the extent to which changes to the “civil law” governing the relationship between the press and public will be the subject of examination.
10. Identifying the extent to which changes to the civil law relationship between the press and the public will be examined by the inquiry will enable core participants and others to attempt to assist the inquiry by identifying relevant evidence and adducing relevant submissions on whether the current “civil law” relationship is adequate.
11. It is respectfully submitted that there is a further principled reason to address the “civil law” relationship between the press and the public. This is because any need for “regulation” should be examined in the light of the criminal and civil law obligations and rights of the press. In circumstances where regulation and restrictions on press freedom should be proportionate and no more than is necessary to promote the legitimate object of the restriction (compare the

statements made by Lord Bingham set out in paragraph 4 above), it would be helpful to determine whether changes to the law, or indeed to the administration of the law (in particular the cost of proceedings for both the press and individuals) might be the subject of recommendations.

REGULATION OF THE PRESS IN OTHER JURISDICTIONS

12. It is respectfully submitted that as the Terms of Reference require the Inquiry to make recommendations “*for a new more effective policy and regulatory regime which supports the integrity and freedom of the press ...*” it might assist the inquiry to obtain evidence about comparative approaches to regulatory regimes in other countries, both in common law and civil law jurisdictions, and the perceived strengths or weaknesses of regulation in that jurisdiction.

13. In this respect it appears that in the United States a distinction is drawn between newspaper and internet content, which is not licensed or regulated by any central government-related agency, and broadcast media which is regulated by the Federal Communications Commission. It seems that one of the reasons justifying regulation of the broadcast media was the scarcity of “broadcasting width”, see Red Lion Broadcasting Co. v Federal Communications Commission 396 US 367. The advent of modern communications media, specifically the proliferation of television channels and increase in available band-width have caused some to question whether the distinction drawn between print and broadcast media can still be justified. The focus of the debate appears to be whether the broadcast

media should now enjoy the same freedom as the print media, rather than any suggestion that the print media should be regulated.

14. In Australia a distinction also seems to be drawn between print and broadcast media. The print media is subject to voluntary self-regulation by the Australian Press Council, which was established in 1976 and is funded by the newspaper and magazine industries. This seems to have no legal or legislative power to discipline the press.
15. In India both print and broadcast media seem to be regulated by the Indian Press Council. The Council seems to be funded by fees levied by it on newspapers and news agencies, which monies may be supplemented by Central Government Grant if deemed appropriate.
16. In Germany the industry appears to be self-regulated by the German Press Council (“Deutscher Presserat”), which seems to be a non-profit association established in 1956 under the Civil Code and which has the status of a legal person under German private law. The German Press Council’s website describes its work as ‘voluntary self-monitoring’. In France there is a distinction between the print media (which seems to include the internet) and broadcast media, the latter benefitting from central funding but being subject to significant government regulation by the Supreme Audiovisual Council (“Conseil Superior de L’Audiovisual”).

17. If there is to be any investigation of overseas regulatory regimes, or the absence of overseas regulatory regimes, it will obviously be important to have some information about the applicable relevant laws.
18. Even this brief review suggests that any regulatory regime will need to ensure that there is balance between any regulation of the printed media and the internet.

JAMES DINGEMANS QC

3 Hare Court, Temple

London EC4Y 7BJ

ANTHONY FIELD

Rosenblatt Solicitors,

London EC4A 3AF

10 November 2011