THE LEVESON INQUIRY

SUPPLEMENTARY WITNESS STATEMENT OF DAVID ALLEN GREEN

1. This supplementary witness statement is provided in accordance with the section 21 notice served on me under a letter from the Inquiry dated 29 June 2012. I have previously given written and oral evidence to the Inquiry.

2. I am the author of the Jack of Kent blog. I also am a journalist for the *New Statesman* and other publications, usually on the internet. I have done relatively little print journalism. In addition, I am a qualified solicitor with a commercial and media practice in the City.

3. My blogging and journalism has included the promotion of the Simon Singh libel case (which led to a Court of Appeal victory and a draft defamation bill) and the "TwitterJokeTrial" case (which is currently before the High Court, and where I am also solicitor), the unmasking of the journalist Johann Hari as "David Rose", the discrediting of the health and safety arguments used by St Paul's Cathedral against the "Occupy" campers, publishing the Wikileaks "non-disclosure agreement", and the exposure of the "NightJack" email hacking by the *Times* newspaper. I have also given evidence to the joint parliamentary committee on privacy and super-injunctions.

4. I provide this statement only in my capacity as the author of the Jack of Kent blog though it pulls on my wider experience and knowledge of the practice and law of media regulation.

"Freedom of the press"

5. The Inquiry will have seen or heard the phrase "freedom of the press" a number of times in the evidence which has been provided to it. If the Inquiry has not done so already, it may be useful for the Inquiry to consider the historical background of the phrase and how its meaning may have changed.

6. The Oxford English Dictionary dates the phrase "freedom of the press" to around 1661 to a pamphlet by Roger L'Estrange, who participated in the newspaper licensing debates that we now associate mainly with John Milton and his *Areopagitica* of 1644. (Milton himself appears not to have used the phrase.) The phrase is also, of course, included in the First Amendment of 1791 to the American Constitution, which of course states:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

7. The "Press" as we know understand it developed mainly in the mid to late nineteenth century, and popular mass daily and Sunday journalism primarily emerged in its familiar form in the early twentieth century. Because of the familiarity of this (capital-P) Press, the phrase "freedom of the press" has come to mean the general rights of those who happen to be employed by or in control of newspapers, or "Fleet Street"). However, that could not have been what the phrase meant in 1661 or 1791 as the Press did not exist as such.

8. What was meant by "freedom of the press" was not the Press of Fleet Street but the right of any person to (literally) have access to a press, that is to a means of publication to the world (to publish here meaning to make *public*).

9. In other words, any person should not only have the right to express themselves freely to those around them but also to publish

information to the public at large. It was thereby a right for pamphleteers to mass produce tracts for wide distribution.

10. Being able to publish (rather than just to communicate and express oneself to those currently around you) is a powerful right, especially against those in government or otherwise dominent. Before broadcasting or mass journalism, it was the only means by which the individual could often tell truth to power.

11. If "freedom of the press" is formulated as freedom to *publish to the world* then its application to the modern phenomenon of blogging, tweeting, and other forms of internet-based activity is obvious.

12. The Inquiry should not take the rhetorical and intellectual force of the phrase "freedom of the press" to mean just the rights and liberties (and privileges) of the Press of Fleet Street.

What does "regulation" mean?

13. I have not been involved in the preparation of Lord Black's submission on self-regulation. I would not expect to be involved in the process even if it was in place or would I even expect to be invited. No one

14. However, as someone who has followed the Leveson Inquiry closely and as a previous witness, there are some general points I would like to offer on the topic of regulation.

15. First, it is important to be precise as to what is actually meant by "regulation" before considering "self-regulation".

16. For there to be meaningful regulation in any given situation there must be a state of affairs different from there being no regulation at all.

17. Here it is my view that regulation does not mean that certain unwanted acts and omissions are somehow extinguished as if by magic. It instead means that in the event that there are specified situations then there are particular and predictable consequences. The benefit of any regulatory system is that any entities to which

the regime applies can (literally) regulate their conduct accordingly.

18. Accordingly, to be regulated means that one would be able freely to do certain (but unwanted) things but for the application of a regulation. If an entity is still able to act freely despite an apparent "regulation" then it is not in any meaningful way being regulated. It is regulation in name only. It is "non-regulation".

19. By not being able to act freely, I mean that if a regulated entity does not comply with an applicable standard then there would be a consequence. If there are no consequences then there is again nothing which can meaningfully be called "regulation".

"Self-regulation"

20. Therefore, for "self-regulation" to be meaningful it must describe a situation different from there not being any regulation at all. Self-regulation cannot be the same as "non-regulation". There must be certain things which have particular and predictable consequences.

21. It then follows that a self-regulated entity cannot act freely as if there are no regulations at all, and a self-regulated entity should receive a sanction for non-compliance with a standard.

22. Some of those calling for "self-regulation" of the press appear to be proposing what in reality would be a regime of "non-regulation". There would be nothing to stop newspapers doing whatever they want under the general law of the land and no consequences for them for doing so. There is nothing inherently wrong with such a proposal; but it is not "self-regulation" or any form of regulation at all.

23. However, regulation does not mean there has to be a formal regulator or even published codes of conduct. As long as the entity knows that certain things have certain unwanted effects then there is regulation in practice if not in form.

"Dog eating dog"

24. It would appear that for a long time British newspapers did not subject each other to the same scrutiny they subjected politics or sport. There was a general culture of "dog does not eat dog".

25. In general, unethical and unlawful behaviour was tacitly tolerated in the newspaper sector when comparable activity in another industry sector would be exposed.

26. There are exceptions to the general statement in the preceding paragraph. The "Street of Shame" section of *Private Eye* has long had the function of bringing to light alleged misconduct by newspaper proprietors and journalists. The Inquiry will also be fully aware of the excellent work of the *Guardian* in uncovering the hacking scandal at News International.

27. It may well be that there would not have been any need for the Inquiry in the first place had newspapers investigated each other for wrongdoing. In my opinion, that would have been a better display of "self-regulation" in action than the Press Complaints Commission.

28. One test for any proposal of either "self-regulation" or formal newspaper regulation should therefore be the impact it would have, if any, on the likelihood of newspapers investigating the wrongdoing of other newspapers.

"Statutory" is not necessarily a dirty word

29. A number of journalist and pundits have warned of the dangers of "statutory" regulation.

30. The Inquiry will be aware that any effective regulator needs to have a legal basis for investigations and other interventions. If the power is not based in statute then it must presumably be based on contract or other form of recognised consent.

31. In the example of "Nightjack" it was the statutory power to compel individuals at News International to produce witness

statements in response to questions that provided the material which led to the true circumstances of the email hack to come out.

32. Unless any proposed regulator has a statutory power to compel evidence then it is extremely difficult to see what it can achieve in any investigation. It is a salient point that all the evidence uncovered by the exercise of the Inquiry's statutory powers did not get uncovered by the Press Complaints Commission. Indeed, it is impossible to see how it could have emerged other than by statutory powers.

33. Accordingly, if there is to be a regulator of any kind, it would seem crucial that it has the (perhaps residual) statutory power to obtain evidence, even if its powers to make sanctions are based on consent or contract.

Bloggers and the news media

34. Effective regulation also comes in other forms. There are a number of blogs which routinely expose the bad journalism of certain tabloids or other media outlets. These blogs can be media blogs such as "TabloidWatch". Or they can be science blogs such as those of Dr Ben Goldacre and Professor David Colquhoun FRS. And there are legal blogs such as my own Jack of Kent and the blogs written by Adam Wagner, Carl Gardner, and Francis FitzGibbon QC.

35. Insofar as these blogs identify and correct misleading mainstream media stories then they can be said to be (in effect) performing a regulatory function. They provide a valuable resource and their work should be better known.

36. The wiser news journalists work alongside bloggers in their particular fields; however, newspaper editors seem to be generally hostile and so the work of bloggers often does not reach the readership of newspapers and other news media.

37. Accordingly, a further test for any proposal of either "self-regulation" or formal newspaper regulation is the extent to which editors will engage with those who point out errors or sub-standard

journalism either on independent blogs or by direct communication.

38. Blogging provides one crucial problem for any proposal of either "self-regulation" or formal newspaper regulation. If I submit a post to a regulated entity such as *New Statesman* and it is rejected, then I can publish it anyway on the unregulated Jack of Kent blog. This would also be the situation with many other journalists who have their own independent blogs. In that situation, regulation would have achieved nothing substantial.

39. There may be some blogs which would agree to be part of a form of "self-regulation" or formal newspaper regulation. However, the sheer ease with which a blog can be set up means that any proposal to "regulate" blogs will be at best problematic. In the words of Observer columnist Nick Cohen, we are all journalists now.

40. Because of the phenomenon of blogging, there must be a question mark over any attempt to formally regulate the news media sector.

41. The effect of formal regulation would be that newspaper would not be able to publish things which a blogger would be able to do so. The old model of regulation was very much based on "Fleet Street" – to publish something took resources and effort. The key abuses of the tabloid sector were in the years preceding or just at the beginning of the rise of the internet. The Inquiry must be careful not to impose a pre-1999 solution to the media of 2012.

Are Bloggers the same as editors?

42. Finally, there is an observation to be made about the letter of 29 June 2012 asking for a blogger's views as "an editor".

43. As I am not an editor of anything in any formal way, though I do have my own blog, I sought clarification as to why I had been asked to give such further evidence. I was told that my evidence was wanted in my "capacity of Editor of [my] blog".

44. With the genuine respect, and with courtesy, I have to say that to describe any blogger as an "editor" is not to fully appreciate or comprehend the role of bloggers.

45. Having a blog is not really analogous with being an editor. A blogger is usually both the author and publisher of his or her own blog. Insofar as editing is understood as a distinct exercise then it would be fair to say that almost all blogging is unedited (just as it is also unlawyered). This is sometimes painfully obvious from the blogs themselves.

46. This is because a blogger is more akin to the pamphleteer than a newspaper editor. It would perhaps sound absurd to talk of the "regulation of pamphleteering" or a "pamphleteers' code of practice". If so, it would be just as misconceived. Pamphleteers published under the general law of the land, and were as liable for (say) libel as any other publisher.

47. Although some bloggers can do journalism with their blogs (nothing stops them), blogging is not a subset of journalism. It is more a form of advanced citizenship whenever it is used for political or media purposes.

Conclusions

48. In summary:

a. "freedom of the press" does not mean the rights of Fleet Street but the rights of any person to publish information to the world;

b. "regulation" does not necessitate a regulator but it does mean conduct has to be modified than what would happen with no regulation;

c. there is reason to be sceptical of any supposed "self-regulation" as it may mean "non-regulation";

d. any regulator should have access to a statutory power of obtaining evidence;

e. newspapers should not be discouraged from investigating other newspapers by the existence of a regulatory scheme;

f. engagement by editors with bloggers should be encouraged; and

g. any formal attempt to regulate bloggers will undoubtedly be futile given the ease with which any blog can be published.

Statement of Truth

I believe the content of this supplementary witness statement to be true

David Allen Green

11th July 2012