

## Response to questions asked by the Leveson Inquiry

I have reproduced the Leveson Inquiry's questions in **bold**. The normal text gives my responses.

### 1. Who you are and a brief summary of your career history.

Rowan Cruft, Senior Lecturer in Philosophy at the University of Stirling. I have taught philosophy at Stirling since gaining my PhD from Cambridge in 2002. My published research focuses on the nature and justification of rights and duties, paying particular attention to the varying ways that different types of rights (e.g. human rights, property rights, contractual rights) are justified. I work closely with colleagues at Stirling whose work encompasses related areas: Prof. Antony Duff, Dr Simon Hope, Prof. Sandra Marshall and Dr Ben Saunders. I have recently convened research projects (funded by the Arts and Humanities Research Council) on the philosophical foundations of human rights and on the nature of duties to others.

### 2. How would you describe the public interest in a free press?

One way of understanding 'the public interest' is as the interest we hold collectively as members of the public sphere: an interest in public communication and discussion (as opposed to private chats and arguments), in information about public matters (including politics, law, culture), in the maintenance and smooth running of the public sphere. The press plays an important role in the public sphere as one vehicle of public communication.

An alternative and much wider way of understanding 'the public interest' is as the shared, aggregated or group interests of all members of the public. This will include interests that are taken by the first understanding to be private.

A free press is one aspect of a more general freedom of thought and expression. There is a strong public interest (in both senses outlined above) in the existence of a *liberal* public sphere, one governed by the liberal position that people should be free to think and say what they wish unless a good case can be made against this (as in, e.g., incitements to violence). This is not simply for its instrumental benefits (for which, see the paragraphs below). Freedom of thought and expression are also in the public interest because they constitute the public as a society of equals who respect one another: a society in which each member can participate and bring their own views to the public sphere. This is a good independent of the instrumental benefits it brings.

In addition, a free press serves the public interest instrumentally in two key respects:

- *Constraining power.* A free press is an important check on political and other forms of social power (corporate, individual). To achieve this end, the press requires not just freedom from interference with the form and content of what it says, but also the capacity to investigate and acquire information.

- *Enabling democratic deliberation and decision-making; educating and enabling understanding.* A free press – especially a diverse press in which many views are represented – is an important

forum for public deliberation and education, a means for enabling the public to engage in informed democratic decision-making. If suitably diverse, it can provide a voice for the views of those who are not sufficiently articulate or powerful to communicate in the public realm. In addition, as J. S. Mill argues in Ch. 2 of *On Liberty*, a free press and more generally an open society in which free communication of beliefs is allowed are of great instrumental importance to our well-being as truth-seekers. Mill's arguments include the thesis that even if one's own views are true, the critical faculties which enable one to grasp truth and attain understanding will only flourish in an open environment in which claims can be challenged.

In light of these points, a free press is also *symbolically* important as a visible aspect of a society's respect for the public interest.

**3. How would you describe the public interest in freedom of expression? To what extent does that public interest coincide with, or diverge from, the public interest in a free press?**

The arguments listed above (under 2) for a free press also underpin a strong public interest in freedom of expression in general.

Rights to freedom of expression are morally justified both for individual people and for many corporate entities (such as newspapers). But only the former are grounded directly in the individual right-holder's important interests in being able to express themselves and in being an equal participant in the public sphere. The moral justification for a media organisation's rights of expression and communication is less direct, though not necessarily less morally powerful: it turns on the role of media organisations' rights in constituting a public sphere that gives appropriate status and respect to *individual people*, and on the related instrumental grounds listed above.

One source of tension between the public interest in a free press and the public interest in free expression is imbalance of power between communicators. When some elements of the press are much more powerful communicators than others (and than most individual people) – in the sense that they have more resources to gather information and more resources to ensure that their message is heard and noticed by more – the press's capacity to perform the public interest functions outlined under 2 is impaired. A powerful newspaper or TV programme can drown out rival voices, diminishing the value of individuals' and other papers' freedom of expression. Note that a powerful state or powerful businesses and individuals can be equally problematic in these respects.

Another source of tension concerns an insufficiently diverse press. The functions outlined under 2 are undermined – even if the press is protected by extensive freedoms – if all newspapers speak with one voice. Such a powerful consensus can silence others, for example by portraying a minority in a way that makes them too scared to speak or prevents their being listened to.

**4. In order to maximise the overall public interest, with what other aspects of the public interest would freedom of expression, or freedom of the press, have to be balanced or limited?**

The inquiry is particularly interested in the following, but there may be others:

**4a) the interests of the public as a whole in good political governance, for example in areas such as:**

- i) national security, public order and economic wellbeing;**
- ii) the rule of law, the proper independence and accountability of law enforcement agencies, and access to justice;**
- iii) the democratic accountability of government for the formation and implementation of policy**

**4b) the public interest in individual self-determination and the protection and enforcement of private interests, for example:**

- i) privacy, including (but not necessarily limited to) the rights to privacy specified in general in Article 8 of the European Convention on Human Rights and in European and national legislation on the protection of personal data;**
- ii) confidentiality, the protection of reputation, and intellectual and other property rights; and**
- iii) individual freedom of expression and rights to receive and impart information where those interests and rights are not identical to the interests and rights of the press.**

The question's focus on 'maximising the overall public interest' by balancing or limiting is misleading. Many theorists follow Ronald Dworkin in taking rights, and some other important values such as equality, to be 'trumps' that cannot be justifiably sacrificed for a small net gain in satisfaction of the public interest (in either of the two senses given under 2 above).<sup>1</sup> It would be better to focus on how the public interest could be 'best served' by balancing or limiting, than to aim to 'maximise' it.

This is not to deny that each aspect of the public interest listed above can justify restricting a free press in certain (narrowly circumscribed) circumstances. There are no simple rules for deciding these cases, but regarding 4a)ii) restrictions on, for instance, reporting of ongoing legal cases or reporting the names of police suspects seem appropriate for ultimately the same reasons that support a free press: the importance of a fairly constituted public sphere in which individuals are treated respectfully as equals. Even so, there are difficult conflicts in this area, for example between ensuring police are accountable to the public and protecting police investigations and people about whom the police have information.

Regarding 4a)iii), the public interest is not just in a free but a diverse press, and also – given the press's power and its central role within the public sphere of democratic policy-making – an accountable press too (and of course this applies to the wider media in general). See 5 and 6 below for some suggestions on press and media accountability.

Concerning 4b), it is worth noting that individual privacy, confidentiality and individual rights of expression and communication are not entirely private interests. There is a public interest – in the first sense given under 2 above – in individual privacy: as members of the public sphere we collectively have an interest in drawing the limits of that sphere appropriately. To get this right requires a developed philosophical and jurisprudential understanding of when something becomes a properly public matter – an

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<sup>1</sup> R. Dworkin, 'Rights as Trumps', in J. Waldron (ed.), *Theories of Rights* (OUP 1984).

understanding we do not yet possess, I believe. A related issue here concerns fair access to properly 'public' redress for individuals whose privacy has been unjustifiably invaded, or who have been libelled.

**5. What are your views on the extent to which the overall public interest is currently well-served, both in principle and in practice, by the current balance between the public interest in the freedom of the press and free expression on the one hand, and competing aspects of the public interests on the other? In your opinion, what changes if any would be desirable in this respect, in order to maximise the overall public interest? If relevant, please state whether those changes should be voluntary or obligatory.**

**6. What would be the distinguishing features of the conduct and practices of a media industry, or any organisation which was a part of that industry, which would make it an 'ethical' one?**

Note my concern (at the start of 4 above) about the notion of 'maximising the overall public interest'.

I take questions 5 and 6 together because the public interest in drawing the appropriate balance between freedom of expression and other values is best served by an ethical media industry, broadly understood. By this I do not mean a media industry driven by ethical goals in the way that a charity like Oxfam is. I mean, rather, a media industry whose members and whose regulatory framework, while driven by a range of diverse goals that are not necessarily 'ethical' in a narrow sense, are nonetheless deeply sensitive to the industry's pivotal role in the liberal public sphere, as given by the arguments under 2 above.

A free press within an ethical media industry in this sense would have the following features, among others:

- a sense of journalism as a profession with its own aims and values, including respect for the truth, respect for those about whom the press writes, respect for readers.
- poor practices (unethical, illegal, or contrary to the reasons supporting press freedom) are regarded as shameful and their practitioners are ashamed of them;
- whistle-blowers are supported;
- journalists, editors and proprietors grasp the complexity of the moral role of the press (as, perhaps, politicians since the expenses scandal grasp the moral complexity of their own role);
- the wider public is willing to pay the comparatively high costs (e.g. of ethical investigative methods) to support a press that upholds a liberal public sphere.

One important change is to make the press accountable to an independent *public* body, rather than to an internal regulator. This would reflect the press's role as one of the powerful bodies that constitutes the liberal public sphere: as such, the press is 'our business' in roughly the same way that law-making is our business in a democracy. Making the press accountable to *the public* is not the same as making it accountable to *the government* or *the state*. A public body to which the press is accountable should be independent of government and should not hold powers to censor content: its role should be to uphold a liberal public sphere as outlined under 2 above.

Note that greater regulation of an area can sometimes reduce ethical behaviour, by making individuals think that *what the regulations or laws say* exhausts what they need to be concerned about ethically. We would not want the public body to which the press is accountable to be thought of by journalists, editors and proprietors as a regrettable evil whose impact is to be minimised, but rather as consonant with values that should be animating these professions in any case.

Further possible changes in the regulation of the press include, as Onora O'Neill outlines, requiring media to accompany stories with details of payments made to or received from members of the public in return for publishing the story (but, I would suggest, not details of to whom or from whom such payments were made; anonymity of sources is important in a liberal society), and requiring editors' and proprietors' political and financial interests to be registered publicly.<sup>2</sup> Similarly, Freedom of Information legislation could be extended to media corporations and other entities that powerfully shape the public sphere.

These changes are not all suggested as new *legal* measures, as opposed to new standards for an independent regulator to uphold. But much of what is most deplorable about recent press practices (such as phone hacking) is already not simply contrary to, say, the regulations of the PCC, but is, rather, illegal or can readily be interpreted as such. It is not clear that many new layers of regulation or of law are needed, as opposed to more rigorous enforcement of existing law. One possible change to support greater respect for current law would be to increase the legal responsibilities of proprietors, editors and directors for the actions of their employees, so that illegal conduct by journalists and investigators had a genuinely shaming effect on, and sometimes carried serious legal consequences for, proprietors, editors or directors who did not themselves know this conduct was taking place.

Another change that would help redress power imbalances in the media would be general redistribution of individual wealth so that no individuals were rich enough to own a powerful media organisation, or to pay to have their stories included or excluded where others could not. Related changes would be to limit campaign spending or to introduce a voucher scheme that allows all some access. These moves would not, however, replace the separate need for a public body to which the press is accountable.

**7. In particular, to whom might the press be considered to owe ethical duties, and why? What might be the content of such duties? To what extent might such duties come into conflict, and how should any such conflicts be resolved? The inquiry is particularly interested in the following as potentially owed ethical duties, but there may be others:**

- a) readers and consumers of the media;**
- b) persons who are the subject matter of stories and other media products**
- c) the wider public**
- d) employees, journalists and other producers of the media**
- e) shareholders, investors, advertisers and others with an economic interest in the media**

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<sup>2</sup> O. O'Neill, 'The Rights of Journalism and the Needs of Audiences', lecture delivered at the Reuters Institute for the Study of Journalism, 22 November 2011.

We should distinguish the ethical duties we bear in our different roles: the duties we bear as one person or group among others (including familiar basic duties not to attack or deceive, and to assist), and the duties we bear specifically as a journalist, editor, proprietor, or as a newspaper.

The latter ethical duties include duties of respect for the truth, of respect for ethical investigative methods, and (as listed in the question) duties of respect for subjects of media stories and of respect for readers. Given the role of the press in constituting the public sphere, the press is also subject to (again as listed in the question) ethical duties of respect for the wider public, and of respect for the public interest, where this includes duties to respect the considerations outlined under 2 above. The complexity of the range of duties here can make it difficult to know what the precise ethical duties are that bear on a particular case. Consider privacy: I do not think we can say as a matter of ethical principle that certain topics (e.g. a person's sexuality or their children's health) are always private matters with no place in the public sphere, although they will normally be. Understanding of the appropriate ethical limits of the public sphere in this sort of case is hard to come by, and should be governed by the arguments given under 2 and 3 above.

Although this complexity means our ethical duties are hard to grasp, it does not mean that they will conflict frequently. An editor's duty to respect the truth is not a duty to *publish* the truth no matter what. Similarly, ethical duties to respect the wider public and ethical duties to respect the subjects of stories will conflict less frequently than one might expect. For example, it is a mistake to conceive the publication of MPs' expenses as something which, while serving the wider public interest, was disrespectful to MPs as subjects of the story. In general terms (if not in the details of how it was done) it was *not disrespectful* to the MPs in question, given their role as public servants. Similarly again, ethical duties of respect for readers will rarely conflict with duties to respect subjects of stories, for respecting readers involves treating them as reasonable ethical agents whose interests are not (or very rarely) served by disrespect for others.

A related point is that behaving ethically or respectfully towards someone is connected to but not equivalent to refraining from harming them. A news story can be harmful or costly to its subjects without disrespecting them (as in the MPs' expenses case); it can also be disrespectful to its readers (perhaps because it deceives them) without harming them in any direct sense. As the press's ethical duties are primarily duties of *respect*, their relationship to harm is not simple and direct. This is, of course, not to deny that many harmful news stories are disrespectful to readers, subjects and the wider public.

Newspapers' ethical duties to employees, shareholders and investors (as mentioned by the question) are grounded in newspapers' role as businesses, rather than springing from their distinctive function as the press. This dual aspect of the press as private businesses that are also 'everyone's business' due to their powerful role in shaping the public realm, can create ethical tensions. But again I doubt that the ethical (as opposed to legal) duties of businesses qua businesses create frequent tensions with other areas of ethics, at least if capitalism is ethically justified. For example, the ethical duty businesses owe to their shareholders is not to maximise shareholder value at the expense of ethics, but at most to enhance shareholder value within the constraints of ethics and the law.

Even if ethical duties of respect borne by media organisations and their members conflict only rarely, there will still be difficult tensions in designing *institutions to uphold* such duties

– for example, as mentioned earlier between ensuring police accountability and respecting police investigations.

**8. What role might reasonably be expected to be played by a code of conduct in encouraging, inculcating or enforcing ethical behaviour by the press? What would be the distinguishing principles and features of any code of ethical conduct with universal application to the media industry?**

Central principles for such a code are given by the arguments under questions 2 and 3 above: principles expressing the media's role in constituting an open liberal public sphere in which the public is a society of equals whose members respect one another, and its role in constraining power and in enabling democratic decision-making, educating and enabling understanding. The importance of media freedom – both of content and of investigative practices – and of media diversity should ground such a code.

If media organisations are to be answerable to an independent public body, then they should be answerable for living up to or violating the standards set by a code of this type, so long as these standards are understood suitably minimally: for example, an organisation should not be censured simply for failing to *promote* democratic decision-making, but rather for *distorting* or *perverting* such decision-making by deceiving its readers. And, partly because of the instrumental risks of limiting press freedom, and partly because of the symbolic importance of maintaining a visibly free press, it is doubtful that failures of this type should merit legal censure, as opposed to independent public regulation.

**9. Please comment on the current edition of the media industry's Code of Practice <http://www.pcc.org.uk/cop/practice.html> from the perspective of its status as an ethical code. Your answer should in particular address the following:**

**a) comprehensiveness – are there significant areas of conduct or practice which are not covered which it would be reasonable to expect to be addressed? Does the Code sufficiently address itself to the range of ethical duties which the press might reasonably be expected to owe?**

**b) the public interest – to what extent does the Code seek to maximise the public interest? Where might it go further in that respect? Are there respects in which it has a potential to operate contrary to the public interest?**

**c) normativity – does the Code appropriately identify, and distinguish between, conduct which is to be regarded as:**

- i) obligatory or forbidden (whether or not as a matter of law)**
  - ii) important, and necessarily the subject of best efforts**
  - iii) generally desirable, or good day to day practice**
  - iv) aspirational only – a standard of excellence, or best in class?**
- and does it appropriately identify exceptions to these rules?**

**d) interpretation – is the 'spirit' of the Code clear and appropriate?**

**e) effect – is it clear what consequences will flow from non-compliance with the Code, whether in general or in particular? Are those consequences appropriate?**

Note that given its purpose, this Code is not able to create a diverse press with a plurality of voices represented; other measures are needed to ensure this.

On question 9a): The Code could do more to require proprietors, editors and journalists to declare their *financial* and also their *political* interests, and to declare these to *readers* as well as editors (see the suggestions under questions 5 and 6 above). This would involve strengthening section 13ii to require journalists to declare financial interests to readers as well as editors. Taking seriously O’Neill’s suggestion mentioned under 5 and 6 above would involve major strengthening of sections 14 and 15 to require journalists to declare to readers payments made to or received from members of the public for publishing stories (these should be declarations of the amounts paid or received, rather than to or from whom). It would also require new declarations of political interests.

Although several aspects of the Code (e.g. section 1) cover duties owed to readers, the idea that ethical behaviour by the press involves treating *readers* respectfully could be made more explicit.

The precise requirements for an ‘opportunity to reply’ (section 2) could be spelled out in more detail, including a requirement of fair access (independently of one’s standing or wealth) to this opportunity.

On 9b): First, note again my concern about aiming to ‘maximise’ the public interest.

Secondly, section 2 of the Code’s explanation of ‘The Public Interest’ says ‘There is a public interest in freedom of expression itself’. This is correct, but should not be taken to imply that any instance of expression is in the public interest because free expression is in the public interest. Furthermore, as noted under questions 2 and 3 above, the grounds for the public interest in freedom of expression are the importance of a public sphere in which individual people are in some sense equal participants, and the importance to the individual of being able to express themselves; free expression of corporate entities like newspapers is justified derivatively from this.

On 9c) and 9d): In the Code’s text (though perhaps there is more in the details of the handling of particular cases) the distinction in degrees of normativity is between rules to which exceptions can be made on public interest grounds (the starred clauses in the Code) and rules to which no exception can be made. There is merit in avoiding the complexity that a large number of different degrees of normativity would bring (as in (c)i-iv above). But the current distinction between exceptionless rules and rules to which exceptions can be made is not enough. A characterisation of the *values* that should underpin journalism as a profession would also be helpful.

On 9e): The PCC’s website states that ‘the PCC’s greatest sanction is issuing a critical adjudication against a newspaper or magazine’ requiring publication of this critical text in a prominent place in the offending newspaper or magazine. I doubt that this sanction – especially taking the prominence requirement seriously – is applied as frequently as it should be, but I also doubt that sanctions beyond this (e.g. giving the Code the status of criminal or civil law) are appropriate, given the powerful public interest arguments for a free press outlined under 2 above.



**10. What approach would you recommend to the consideration of improvement to the nature, status, content and enforceability of the current Code? Are there changes to either content or enforceability of the current Code that you would wish to see? Please explain your thinking.**

**11. What other changes would you consider desirable in order to encourage or constrain the press to improved standards of ethical conduct and practice? Your answer should explain the standards you consider appropriate and why, whether conformity should be encouraged or constrained, and how.**

I take these two questions together. I have outlined under 2 and 3 the principles that should inform changes. We can infer the following from these principles:

- A Code of Practice for the press should make the press answerable to *the public*, for its role in constituting the public sphere. The current system of self-regulation makes the press answerable only to its own members. Accountability to the public is not the same as accountability to the government or the state.

- Such a Code should obviously apply to all parts of the press insofar as they are part of the public sphere (so perhaps not to fanzines for a circle of friends); it should therefore not be restricted to titles whose publishers contribute to PressBof.

- The set of people who write the Code should be constituted so as to represent the public sphere of which we are all members. It should include journalists and editors, but it should also include others – perhaps both lay members selected for their expertise and members of the public chosen as for jury service.