Statement made on behalf of:

THE CROWN PROSECUTION SERVICE

Witness:

KEIR STARMER QC, DIRECTOR OF PUBLIC PROSECUTIONS

Statement No: 1

Date Statement Made: 07 February 2012

I believe the facts stated in this witness statement are true:

Keir Starmer QC

Background.

1. The Crown Prosecution Service (CPS) is the Government Department responsible for prosecuting criminal cases investigated by the police and other law enforcement agencies in England and Wales.

MOD100059957

2. The CPS was created by the *Prosecution of Offences Act* 1985 and is headed by the Director of Public Prosecutions. In January 2010 it merged with the Revenue and Customs Prosecutions Office. The prosecution functions of DEFRA have also been transferred to the CPS as of September 2011.

3. As the principal prosecuting authority in England and Wales, it is responsible for:

    - advising the police and other law enforcement agencies on cases for possible prosecution;
    - reviewing cases submitted by the police;
    - determining any charges in all but minor cases;
    - preparing cases for court;
    - presenting cases at court.

4. The Director is independent but operates under the superintendence of the Attorney General, who is accountable to Parliament for the prosecution service. The Director is supported by a Chief Executive, who is responsible for running the business on a day-to-day basis,

allowing the Director to concentrate on prosecution, legal issues and criminal justice policy.

5. I have been the Director of Public Prosecutions since 1^{s}November 2008. My term of office ends on 31st October 2013.

The General Approach.

6. All prosecutions brought by the Crown Prosecution Service[1] are governed by the Code for Crown Prosecutors. This is a public document which is laid before Parliament. The most recent version of the Code was issued in February 2010; a copy is attached as my exhibit KS/1.

7. Prosecutors may only start a prosecution when the case satisfies the full Code test[2]. The test is set out in Chapter 4 of the Code. It has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.

---

[1] Hereinafter 'CPS'

[2] There are a number of qualifications to this statement, but which are not relevant for present purposes.

8. As far as the evidential stage is concerned, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. This means that an objective, impartial and reasonable jury[3], properly directed and acting in accordance with the law, is more likely than not to convict. It is an objective test based upon the prosecutor's assessment of the evidence (including any information that he or she has about the defence). If the case does not pass the evidential stage, then consideration of the public interest does not arise.

9. Only once a case has passed the evidential stage may the prosecutor go on to consider whether a prosecution is required in the public interest. It has never been the rule that a prosecution will automatically take place once the evidential stage is satisfied. However, a prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those in favour.

[3] Or bench of magistrates or judge sitting alone

10. The Code sets out some common public interest factors tending for and against prosecution. However, assessing the public interest is not an arithmetical exercise involving the addition of the number of factors on each side and then making a decision according to which side has the greater number. Rather, each case must be considered on its own facts and its own merits. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Even where there may be a number of public interest factors which tend against prosecution in a particular case, the prosecutor should consider whether the case should go ahead but with those factors being drawn to the court's attention so that they can be reflected in the sentence passed.

The approach taken in cases involving journalists.

11. At present, the CPS has no explicit policy or guidance relating to the prosecution of journalists. No doubt this reflects the fact that it is very rare for the CPS to prosecute journalists who commit offences in the course of their work as journalists. Although no precise figures are available, I am only aware of a handful of such cases since I have been in office.

12. However, the CPS has published guidance on matters which may on occasion be directly relevant, such as that relating to prosecuting public servants who disclose confidential information to journalists. I attach a copy of this guidance as my exhibit KS/2.

13. The CPS starting point is that no journalist is above the law and the CPS cannot give, and would not wish to give, what is sometimes described as a prospective immunity from prosecution. On the face of it a journalist who breaks the criminal law is in the same position as anyone else who breaks the law. However, the CPS recognises that there are laws and principles which have special application to journalists and which are relevant to the approach that we would take in any case where we were considering prosecution.

14. Both the common law and the *Human Rights Act* 1998 recognise and protect freedom of expression and the right to receive and impart information. These are not absolute rights, but it has been long recognised that any interference with them, for example by the bringing of a prosecution, must be necessary and proportionate. In

cases involving journalists, these conditions are subject to very close scrutiny.

15. As a public authority under the *Human Rights Act*, the CPS is therefore required to show that any prosecution of a journalist which interferes with his or her right to freedom of expression or to his or her right to receive or impart information is necessary and proportionate on the facts of the particular case in question. When approaching that assessment, the CPS is mindful of the general principle that, generally speaking, the law affords a wide measure of protection to journalists where a publication is in the public interest. For that reason, the CPS approaches cases involving the prosecution of journalists with great care, and subjects the need for, and proportionality of, a prosecution to very close analysis.

16. An example of these principles being applied in practice is provided by my decision in April 2009 not to charge Mr Damian Green MP or Mr Christopher Galley, then a Home Office civil servant, for alleged offences involving the leaking of information from the Home Office. I attached a copy of my decision in that case as KS/3.

17. Special care is taken in cases which involve the disclosure of journalistic sources. In approaching such cases, CPS guidance reminds prosecutors that:

> *"Freedom of the press is regarded as fundamental to a free and democratic society. The ability of a journalist to protect a source of information is afforded significant protection by the law, even where the relevant information has been obtained in breach of confidence."*

Reference is then made to the leading cases of *Goodwin v UK* (1996) 22 EHRR 123, *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2003 and *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.

18. The CPS is, of course, also bound to act in accordance with other rights protected by the common law and the *Human Rights Act*, not least the right to respect for private and family life. It will be apparent that, on occasion, balancing these rights with the rights to freedom of expression and the right to receive and impart information may not be straightforward.

The CPS approach to the public interest in cases involving journalists.

19.The approach that the CPS takes to the public interest in cases involving journalists varies according to the statutory context.

20.Some offences have an express public interest defence. One example is section 55 of the *Data Protection Act* 1998, which creates the offence of obtaining, disclosing or procuring personal data. A defence is then set out in section 55(d) as follows: "*that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest*". Section 59 contains a similar provision in relation to the offence which it creates.

21.In cases such as those under sections 55 and 59 of the *Data Protection Act*, where an express defence exists, the public interest would fall to be considered by the CPS as part of its assessment of the evidential stage of the Code for Crown Prosecutors. That is because under para.4.5 of the current Code, prosecutors are required to "consider

what the defence case may be, and how it is likely to affect the prospects of conviction".

22. More generally, section 3 of the *Human Rights Acts* 1998 requires all statutory offences which engage Convention rights to be read and given effect in a way which is compatible with those rights. Thus Article 10 is relevant to the proper interpretation of any statutory offence which may be committed by journalists acting in the course of their work as journalists. In such cases, the assessment of the public interest may fall to be considered either at the evidential or the public interest stage of the Code test.

23. There is thus considerable scope for overlap between the evidential and public interest stage of the Code test when prosecutors are considering cases involving journalists acting in the course of their work as journalists. So far, in view of the very low number of prosecutions, the cases have tended to be resolved on a case by case basis.

24. Although no comprehensive list of the public interest factors tending for or against prosecution in cases involving journalists can be set out,

it may be helpful for me to set out the following factors which it seems to me are likely in practice to have some relevance to the assessment of whether a prosecution is required in the public interest:

- The relative gravity of any potential offence committed and/or harm caused compared to the public interest in the publication in question.
- Whether there was any element of corruption in the commission of the offence.
- Whether the conduct in question included the use of threats or intimidation.
- The impact, if any, of the conduct on any course of justice, e.g. whether the conduct may have put criminal proceedings in jeopardy.
- Whether the public interest in question could have been served by lawful means.
- The impact on the victim(s) of the conduct in question.

These factors are given as indicators of some of the factors likely to be of relevance, not as a comprehensive or exhaustive list.

MOD100059967

25. In assessing the first of the factors identified above – i.e. the relative gravity of any potential offence committed and/or harm caused compared to the public interest in the publication in question – the approach taken in the *Public Interest Disclosure Act* 1998 has been highlighted in some CPS guidance as a useful starting point. Hence when assessing the necessity and proportionality of a prosecution, considerable public interest weight is given to journalistic conduct which discloses or tends to disclose one or more of the following:

- That a criminal offence has been committed, is being committed, or is likely to be committed.
- That a person has failed, is failing, or is likely to fail to comply with any legal obligation to which s/he is subject.
- That a miscarriage of justice has occurred, is occurring or is likely to occur.
- That the health or safety of any individual has been or is likely to be endangered.
- That the environment has been, is being, or is likely to be damaged.
- That the information tending to show any matter falling within any one of the above is being, or is likely to be deliberately concealed.

26. As with all other public interest factors, assessing these factors is not an arithmetical exercise involving the addition of the number of factors on each side and then making a decision according to which side has the greater number. Each case is to be considered on its own facts and its own merits.

27. For a small number of cases, the courts have indicated that the public interest has little or no application. One example is the case of *R v Shayler* [2002] UKHL 11, concerning some of the provisions in the *Official Secrets Act* 1989, where Lord Bingham held:

> *"It is in my opinion plain, giving sections 1(1)(a) and 4(1) and (3)(a) their natural and ordinary meaning and reading them in the context of the OSA 1989 as a whole, that a defendant prosecuted under these sections is not entitled to be acquitted if he shows that it was or that he believed that it was in the public or national interest to make the disclosure in question or if the jury conclude that it may have been or that the defendant may have believed it to be in the public or national interest to make the disclosure in question. The sections impose no obligation on the prosecution to prove that the disclosure was not in the public interest and give the defendant no opportunity to show that the disclosure was in the public interest or that he thought it was. The sections leave no room for doubt, and if they did the 1988 white paper quoted above, which is a legitimate aid to construction, makes the intention of Parliament clear beyond argument."* (Para.20)

In these cases the approach of the CPS is necessarily much narrower than in other cases.

Should there be a specific policy.

28. It has been the practice of the CPS in recent years publicly to issue policy and guidance in relation to many areas of the law, particularly where the law is complicated, involves sensitive issues or has given rise to public concern. It is my belief that the CPS should give assistance to our lawyers so that they can apply the law in a coherent and consistent fashion. Just as importantly, the provision of policy and guidance provides transparency for the public, whose interests we guard, as to the grounds on which we make our decisions, and a mechanism by which we can be held to account. I regard all these factors as being proper attributes of a modern public prosecution service.

29. Against that background, I have considered whether it would be sensible to develop a policy setting out the approach that the CPS takes to the prosecution of journalists, who, in the course of their work as journalists breach the criminal law.

MOD100059970

30. Although the number of cases in which the CPS prosecutes journalists who commit offences in the course of their work as journalists is very low, recent events have made it clear that there is now considerable public concern about the allegedly criminal activities of some journalists. In principle I can see no difficulty in developing a bespoke policy which would give guidance to my staff as to how to approach these often difficult cases, and which would be available to the public in the interests of transparency and accountability.

31. I have therefore decided to draft an interim policy and to publish it for public consultation. In the first instance, I anticipate that the interim policy will bring together and reflect more clearly existing CPS policy and guidance. It can then be adjusted if necessary in light of the responses to the consultation.

32. We have conducted similar exercises in recent years in relation to our policies on assisted suicide, perverting the course of justice in rape and domestic violence cases, and the inflicting of sexually transmitted infections, and we found the responses we received both helpful and instructive. It is to my mind important too that all sections of the public have an opportunity to express views, not merely those from

established groups with an identifiable interest in the subject. Following consultation, and consideration of the responses received, a finalised policy will be published.

33. The principal offences which are likely to be considered in the context of a possible prosecution of a journalist are:

- Offences contrary to the *Official Secrets Act* 1989
- Misconduct in a public office
- Offences contrary to the *Regulation of Investigatory Powers Act* 2000
- Offences contrary to the *Computer Misuse Act* 1990
- Bribery
- Corruption
- Data Protection Act offences
- Perverting the course of justice.

Where publicly available policy and guidance already exists for these offences, copies are attached as exhibit KS/4.

For Distribution to CPs

34. Once drafted, the interim policy will have immediate effect. The consultation period is likely to be twelve weeks. A final policy will then be published taking into account the responses to the consultation.

MOD100059973