Dated 20 July 2012

IN THE MATTER OF THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

ADDENDUM TO SUBMISSIONS ON BEHALF OF

NEWS INTERNATIONAL ON PRIVACY LAW

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INTRODUCTION

1 On 24 February 2012, NI sent the Inquiry its "Submissions of News International on privacy law" (the "Privacy Submissions").

2 The purpose of this document is fourfold: (1) to update the Inquiry as to developments in the law of privacy since the Privacy Submissions were submitted; (2) to provide, for the assistance of the Inquiry, further commentary in relation to certain of the internet intermediary cases already referred to and subsequent cases in that area; (3) to comment on the proposal by Philip Coppel QC for amendment of section 32 of the Data Protection Act 1998; and (4) to comment on the DPP's "Interim Guidelines for Prosecutors on Assessing the Public Interest in Cases Affecting the Media".

3 This update is structured by reference to the Privacy Submissions and accordingly the headings and sub-headings below mirror those used in that document.

SECTION B. HARASSMENT

(2) Protection from Harassment Act 1997

(c) Application to news-gathering activities and to publication

4 *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) was the first claim alleging harassment by publication against a media defendant to come to trial in this jurisdiction. The Claimant was a bisexual woman living in a civil partnership who had a secret affair with a married male politician. In the general election campaign of 2010 the politician presented himself to voters as a happily married man committed to family values. By the time of the articles complained of he was a cabinet minister. The Claimant was his press officer during the election campaign and knew of and took part in the deception of the electorate. The Claimant complained, inter alia, of harassment in respect of a series of 65 articles published in the Daily Mail, The Mail on Sunday and on the internet via Mail Online. The Claimant did not complain of coverage of her affair with the politician, but only of small parts of the coverage containing repeated references to (a) her appearance and (b) her bisexuality. The former focused on statements to the effect that the Claimant was ugly and of masculine appearance and the latter – consisting almost entirely of references to her as "bisexual" - were described by her as "*relentless and irrelevant homophobic comments over many months*". In relation to online publication complaint was made of reader comments as well as of the articles themselves.

5 The issues before the Court following trial were identified at [111] of the judgment as follows:

(1) Was the distress suffered by the Claimant the result of the course of conduct complained of, namely the publication of the specific words that she complained of?

(2) If so, ought the Defendant to have known that the course of conduct amounted to harassment?

(3) If so, had the Defendant shown that the pursuit of that course of conduct was "reasonable" (in the sense defined by Lord Phillips in *Thomas* at [50], viz, whether the course of conduct "*constitute[d] an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed*".

In relation to questions (1) and (2) Tugendhat J identified two subsidiary questions: was the Claimant a purely private figure or not? and, either way, was she in other respects a person with a personality known to the Defendant such that it neither knew nor ought to have known that the course of conduct amounted to harassment?

6 At [249] the Judge rejected the Claimant's case that she was a private individual for two reasons: first, in her professional capacity, she undertook to work for one of the leading politicians in the country as press officer in a role commonly referred to as a "spin doctor"; second, in her private capacity, she conducted a sexual relationship with that politician in circumstances which she knew were likely to give rise to a political scandal.

7 In relation to section 1(2) of the PHA (what a reasonable person in possession of the same information as the alleged harasser would know: see [42.1] of the Privacy Submissions) the Judge held at [251] that none of the Defendant's witnesses (who were authors of some but not all of the articles) ought to have known that what he or she was writing amounted to harassment of the Claimant. Further, a reasonable person in the possession of the same information about the Claimant, namely about her job and her past career as a political journalist, could reasonably consider that she was a woman of strong character not likely to be upset by comments or offensive language [252].

8 On the question of causation of distress the Judge stated at [253] that he was not persuaded that the distress suffered by the Claimant was caused, or that the Defendant ought to have known that it would be caused, by the course of conduct to which the Claimant limited her claim (ie the publication of the specific words complained of) as opposed to the wider course of conduct not complained of which included extensive coverage of her affair with the politician and its impact on his marriage, much of which was highly defamatory of her. Accordingly it was not the case that the Defendant ought to have known that its conduct in publishing the specific words complained of would be sufficiently distressing of themselves to be oppressive or amount to harassment [254].

9 The argument that repetition of references to the Claimant's sexuality amounted to taunting also failed. The Claimant was not the "main target" of the articles and was named

in less than half of them [270]. Whilst it was not impossible for a secondary character to a story to succeed in a claim for harassment for speech directed to the primary character, each case would have to be considered on its own facts: "*The initial plausibility of [the Claimant's] claim based on repetition or taunting arises from the repetition about her being considered in isolation from the repetition and fresh reporting of stories about [the cabinet minister]*" [271]. Further, because each occasion on which the words complained of were repeated related to a newsworthy event in relation to the cabinet minister and the aftershocks of the break-up of his marriage as a result of the affair, the fact of the repetition, even 65 times, did not have the effect of rendering speech which is otherwise 'reasonable' (within the meaning of section 1(3)(c)) harassment.

10 The Claimant has applied for permission to appeal.

SECTION C. DATA PROTECTION ACT 1998

11 On 17 July 2012 Philip Coppel QC gave evidence to the Inquiry in respect of the Data Protection Act 1998 ("DPA") and the protection this Act provides for personal privacy. The most significant aspect of this evidence was a proposal for amendment of section 32 of the DPA, which provides an important exemption from many of the Act's requirements where the processing of data is carried out for the purposes of journalism, literature and art. The Chairman indicated that a proposed EC Regulation might require reconsideration of the area by Parliament, and that should take place with the benefit of "*any consideration of the exemptions within the context of the terms of reference of the Inquiry*" [170712AM/38/12-17].

12 This part of the update to the Privacy Submissions focuses upon Mr Coppel's proposals for the reform of section 32 of the DPA [Coppel WS [73]].

(1) The fundamental objection

13 There is a fundamental objection to Mr Coppel's proposed amendment to section 32 of the DPA.

14 His proposed amendment is designed to ***narrow*** the scope of the exemption applicable to the processing of data for the purposes of journalism, ie to reset in favour of privacy the balance struck by the exemption between the competing claims of privacy on the one hand and freedom of expression on the other.

15 However, any narrowing of the exemption would be inconsistent with the decision of the Court of Appeal in *Naomi Campbell v MGN Ltd* [2003] QB 633. In *Campbell* the CA held that section 32 had to be given a ***wide*** construction in order to prevent the requirements of the DPA interfering to an unacceptable extent with journalism and the freedom of the press. This emerges clearly from [121] – [123] of the judgment of the court delivered by Lord Phillips LCJ.

16 At [121] it is stated that many of the Act's requirements "*are not appropriate for the data processing which will normally be an incident of journalism*". At [122] the court stated that "*The speed with which these operations* [the operations involved in publishing a newspaper] *have to be carried out if a newspaper is to publish news renders it impractical to comply with many of the data processing principles and the conditions in Schedules 2 and 3, including the requirement that the data subject has given his consent to the processing*". At [123] the court concluded that unless section 32 is given a wide interpretation so that it applies to all the data processing operations involved in the publication of a newspaper (including the actual publication of the paper copies of the newspaper) "*the requirements of the Act, in the absence of section 32, would impose restrictions on the media which would radically restrict the freedom of the press*".

17 In the light of this authoritative recognition of the need for a wide journalistic exemption to cover all of the data processing operations involved in the publication of a newspaper, any amendment which is designed to narrow or limit the scope or application of section 32 would be objectionable. The CA ruling in *Campbell*, which was not affected by the further appeal to the HL in that case, effectively means that the existing provisions of section 32, provided they are given a wide interpretation, strike an appropriate balance between Articles 8 and 10. The balance cannot, consistent with that ruling, be re-set in favour of Article 8.

18 We now turn to the detail of Mr Coppel's proposed amendments.

(2) The proposed "necessity" test in s32(1)(a)

19 Mr Coppel's proposed amendment to s32(1)(a) replaces the current test of processing "*undertaken with a view to*" publication with a test of processing "*necessary for the*" publication. This proposed narrowing of the exemption is inconsistent with the highest authority in this jurisdiction and with decisions of the Strasbourg court. As set out at [5.3(8)] of the Privacy Submissions, the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22 recognised that the balance to be struck by the application of the principle of proportionality must afford the journalist or editor in a media case a "*margin*" or "*degree of latitude*" in deciding what to include in a particular article [28], [62], [112], [143], [167]. Further reference to judicial recognition of this principle in this jurisdiction and in Strasbourg is made at [20.6-20.7], [20.9] and [25.3] of the Privacy Submissions. It would be inconsistent with this principle for the court to assess whether the processing of particular data was necessary or unnecessary for the publication.

20 Further, a test of "necessary for publication" would be unworkable in practice. In journalism, not all processing leads to publication. It is self-evident that in order to be workable the exemption must cover, as it does at present, the processing of information which the journalist or editor ultimately decides to leave out of a published article.

(3) The proposed removal of the requirement at s32(1)(b) to have regard in particular to the special importance of the public interest in the freedom of expression

21 The proposed removal of the requirement in s32(1)(b) to have particular regard to the special importance of the public interest in freedom of expression itself is inconsistent both with authority and with the express provision of s12(4) of the Human Rights Act 1998. The public interest in the freedom of expression itself and in a free press is dealt with in detail at [19.1] to [22.4] of the Privacy Submissions. Attention is drawn in particular to *A v B plc* [2003] QB 195 CA; [2002] EWCA Civ 337 at [11(iv)], (cited at [19.5] of the Submissions), where the Court stated: "*Any interference with the Press has to be justified because it inevitably has some effect on the ability of the Press to perform its role in society.* ***This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free Press is in itself desirable and so any interference with it has to be justified***." (emphasis added). The Court described this as a well established common law principle underlined by s.12(4) of the Human Rights Act 1998. It should also not be forgotten that the section 32 exemption applies to the processing of data for the purposes of literature and art as well as journalism – in the case of literature and art there will often be no public interest over and above the public interest in freedom of expression itself.

(4) The proposed amendment to s32(1)(c) to introduce a balancing test

22 The proposed amendment to section 32(1)(c) to introduce a balancing test fails to recognise that the balance between Articles 8 and 10 is already struck in the existing provision by the availability and scope of the exemption. That is the effect of the ruling of the CA in *Campbell* referred to above. To introduce a further balancing exercise within the exemption would upset the balance which has been struck.

(5) The proposed amendment to s32(2), which renders the media subject to the "subject access provisions" under s7

23 This is perhaps the most worrying of Mr Coppel's proposals. Mr Coppel's proposed amendment to s32(2) will have the effect of excluding from the s32 exemption the requirement to comply with the s7 "subject access provisions". In other words, the media will become subject to those provisions for the first time in relation to journalistic activity. The effect of this would be that a newspaper would be obliged, upon application, to inform an individual about whether they are processing his or her personal data, why they are processing that data and to communicate that to him or her in intelligible form.

24 Such a requirement would be fundamentally inconsistent with the investigative journalism the Inquiry is committed to protecting. Robert Maxwell would have had a field day! Sources need to know that they will be protected. And a newspaper carrying out an investigation needs to be able to operate covertly and over a period of time.

25 It would have a number of undesirable consequences. By way of example:

(a) Very significant resources would be required to respond to s7 requests. Any legal adviser of an individual in the public eye will recommend that subject access requests are made at regular intervals to all newspapers by way of a "watching brief" on potential stories.

(b) It would spell the end of the exclusive. An individual on notice as a result of a subject access request could provide the story on their own terms to another newspaper first.

(c) It would seriously undermine the protection of sources, since it would in many cases be possible to identify the source from the data held.

These consequences would not just inhibit proper journalistic activities. They would have serious implications for the economic viability of the press.

26 The Directive to which the DPA gives effect expressly recognises that exemptions are necessary in order to give effect to Article 10 rights. Recital (37) provides:

> *Whereas the processing of personal data for purposes of journalism or for purposes of literary of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities*.

27 Further, Article 9 of the Directive provides:

> *Processing of personal data and freedom of expression*
> *Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.*

28 In *Campbell* at [110] the CA observed that Article 9 imposes a positive obligation on member states to provide exemptions in respect of data processing carried out for the purposes of journalism. Of course the boundaries of the exemption must be drawn by balancing Articles 8 and 10, but once this is done it must extend to exemption from the subject access right.

29 During the Standing Committee debate on 21 May 1996 the then Parliamentary Under-Secretary of State for the Home Department at Standing Committee stage, Mr George Howarth, said:

> *We think it right that there should be no possibility of challenge to processing for the special purposes, prior to publication. We wish to avoid what has been called the chilling effect of pre-publication restrictions. That is, in our view, wholly inconsistent with freedom of expression. A central thrust of the arrangements made in clause 31 and the associated provisions is to achieve that principle.*

30 For all these reasons Mr Coppel's proposed amendment to section 32 should not be espoused by the Inquiry.

SECTION D. LIABILITY FOR INTERNET PUBLICATION

(1) Introduction

31 Section D of the Privacy Submissions largely addressed the liability of internet intermediaries for publication rather than authors and operators of websites (who are exposed to the same range of liabilities as the printed press). It was noted at [54.2] that relief is often sought against intermediaries, for example because the identity of the person with primary responsibility cannot be ascertained or is outside the jurisdiction. The decision of the ECJ in *G v de Visser* (Case C-292/10) (2012) The Times, 22/6/12 may assist persons wishing to claim against on-line authors or operators of websites who cannot be traced, since it upholds the lawfulness under EU law of service of proceedings on such persons by public notice, and judgments in default obtained in proceedings served in this way. However, there may still be insuperable problems of enforcement in many cases.

(5) Meaning of "actual knowledge of unlawful activity or information"

32 In the *Twentieth Century Fox v BT* case referred to at [60.14] of the Privacy Submissions, there had been previous proceedings against the web-site operators which had established that they were guilty of copyright infringement on an enormous scale. However, in the *Dramatico* case (also referred to at [60.14]), the Court held that separate proceedings against the web-site operators were not required before proceedings for injunctive relief against the ISPs could be taken, and further that it was unnecessary to join the web-site operators (whose whereabouts was unknown) in order to make findings of copyright infringement against them. On the facts the Pirate Bay web-site had been used

for copyright infringement on a massive scale by subscribers of the ISPs, and injunctions against the ISPs were appropriate and proportionate.

33 Further consideration was given to the meaning of the phrase "actual knowledge of unlawful activity or information" in the recent case *Tamiz v (1) Google Inc (2) Google UK Ltd [2012] EWHC 449* (QB). Like *Davison v Habeeb & others* (considered at [60.10ff] of the Privacy Submissions), *Tamiz* concerned material posted on a blog hosted by Google at blogger.com. In *Tamiz*, the material took the form of comments posted in response to material published on a blog. The Claimant had complained about the comments to Google and, after what was described as a "considerable delay", Google drew the blogger's attention to the offending material. The material was then voluntarily removed by the blogger. The Claimant's claim was brought in respect of publication after receipt of the complaint only. Eady J set aside an order permitting service of a libel claim on Google Inc out of the jurisdiction on the basis that it could not be regarded as a publisher of the comments in question (in this respect Eady J went further than HHJ Parkes in *Davison v Habeeb* where it was held to be arguable that Google Inc was a publisher of the words complained of). Having done so, the Judge went on to consider other lines of argument put forward by Google including, at [52]-[61] of the judgment, that the defendant did not have "*actual knowledge of unlawful activity or information*" within the meaning of Reg 19.

34 The Judge held that Google did not have actual knowledge within the meaning of Reg 19. In doing so he accepted at [59] the submission[1] that:

> [A] *provider who simply receives notification that particular words are alleged to be defamatory will not have received notification of illegality in terms that are adequately substantiated. Such a provider would not have actual knowledge of illegality; nor an awareness of facts or circumstances from which it would have been apparent that the information was unlawful. In order to achieve that state of mind, it would be necessary to examine and consider, on an informed basis, the validity or strength of any available defences (including, for example, those of justification, fair comment and qualified privilege in one or other of its recognised forms).*

35 The Court of Appeal granted permission to appeal to the Claimant on 23 April 2012. The appeal is listed for hearing on 3 or 4 December 2012.

(6) Monitoring and Filtering

36 The decision of Kenneth Parker J at first instance in *R(British Telecommunications Plc and anor) v Secretary of State for Business and anor* is considered at [61.4] and [61.5] of the

[1] Based upon the argument that the decision of the Grand Chamber in Luxembourg in *L'Oréal SA and ors v eBay International AG and ors*, 12 July 2011 (C 324/09) at [120]-[122] and in particular the phrase "insufficiently precise or inadequately substantiated" reflected and was consistent with the approach taken in this jurisdiction.

Privacy Submissions. An appeal by the Claimant in that case has been dismissed by the Court of Appeal save in relation to the provisions of the Digital Economy Act 2010 that required the ISPs to contribute to the costs of the new scheme for dealing with online infringement of copyright: [2012] EWCA Civ 232; [2012] 2 CMLR 23. In respect of those provisions the CA upheld and extended the Judge's ruling that the provisions of the Authorisation Directive prohibited the imposition of such costs on ISPs. Importantly for the Inquiry, it is submitted that this ruling would prevent any attempt to impose part of the costs of a new regime regulating online journalism on ISPs.

(7) Conclusion

37 With reference to the concluding paragraph of the section of the Privacy Submissions which considered the issue of liability for internet publication ([61.10]), it should additionally be noted that any attempt to impose part of the costs of a new regime dealing with online journalism on ISPs is likely to be incompatible with the Authorisation Directive and fall foul of the ruling of the CA referred to at paragraph 36 above.

SECTION E: THE NEED FOR A UNIVERSAL PUBLIC INTEREST DEFENCE IN THE CRIMINAL LAW

(4) The immediate future – an interim CPS Code for journalists

38 At the time that the Privacy Submissions were submitted the DPP had stated that he was about to promulgate an interim policy setting out the facts taken into account when considering whether or not to prosecute journalists acting in the course of their work as journalists ([66.1]-[66.2]). That policy has now been set out in "Interim guidelines for prosecutors on assessing the public interest in cases affecting the media" issued on 18 April 2012 ("the Guidelines"). These were subject to a 12-week consultation period which ended on 12 July 2012.

39 Annex A to the Guidelines contains a list described as "*criminal offences most likely to be committed in cases affecting the media*". The list includes all the offences listed at [63.2] of the Privacy Submissions with the following exceptions:

- Offences under the Mobile Telephones (Re-programming) Act 2002;
- All offences listed under the sub-headings "In relation to blagging"[2] and "Miscellaneous other offences"; and
- Common law bribery.

The list also includes a small number of offences not referred to in [63.2], namely sections 2, 3 and 3A of the Computer Misuse Act 1990.

[2] With the exception of s55 of the DPA.

40 The extent to which "public interest" is factored in to the first part of the two-stage test, namely whether there is sufficient evidence to provide a realistic prospect of conviction, is addressed at [19]-[25] of the Guidelines as follows:

Express defences

19. Where an express defence is provided - for example, that the conduct in question was in the public interest - prosecutors must consider what any public interest defence may be, and how it is likely to affect the prospects of conviction. In particular, when considering the sufficiency of evidence, prosecutors must be satisfied that there is enough reliable and admissible evidence to rebut any suggestion that the conduct in question was justified as being in the public interest. If not, there is unlikely to be a realistic prospect of conviction and the evidential stage of the Code test will not be met. When considering an express defence, the matters set out in paragraphs 31-35 below are likely to be relevant.

20. An example of an express public interest defence is to be found in section 55 of the Data Protection Act 1998, which creates the offence of obtaining, disclosing or procuring personal data. Section 55(d) provides a defence, namely: "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.

Cases where there is no express public interest defence

21. Among the offences which are most likely to be under consideration (see Annex A), a number have no express public interest defence. Where that is the case, prosecutors must ascertain whether the courts have already given clear guidance on the proper interpretation of any criminal offences which they may be considering. Where such guidance has been given, prosecutors must follow it.

22. Although the provisions of the Official Secrets Act 1989 are primarily aimed at individuals who are subject to the Act or Crown servants, they may be relevant when prosecutors are considering cases involving journalists or those who interact with them, because sections 44 to 46 of the Serious Crime Act 2007 create offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed.

23. The courts have given clear guidance that the public interest has little or no application in relation to sections 1(1)(a) and 4(1) and (3)(a) of the Official Secrets Act 1989 (R v Shayler [2002] UKHL 11).Therefore prosecutors should proceed on

the basis that there is no public interest defence available to a suspect who is charged under these sections.

24 Clear guidance has also been given by the courts about the proper approach to the common law offence of misconduct in public office. In AG's Reference No.3 of 2003 [2004] EWCA Crim 868, the Court of Appeal made it clear that not every act of misconduct by a public official is capable of amounting to a criminal offence. To attract criminal sanctions, the misconduct in question would normally have to amount to an affront to the standing of the public office held and to fall so far below the standards accepted as to amount to an abuse of the public's trust in the office holder. Prosecutors will have to consider carefully whether conduct which is in the public interest is capable of reaching that high threshold. Again although the offence of misconduct in public office is not primarily aimed at journalists, sections 44 to 46 of the Serious Crime Act 2007 may apply.

41 The key paragraph for present purposes is [25], which provides:

Where no express public interest defence is provided in legislation and clear guidance has not yet been given by the courts on the proper interpretation of the criminal offences under consideration, the best course for prosecutors may be to put the relevant facts and matters before the court for consideration (assuming that the evidential stage of the Code test is otherwise met). However, before doing so, prosecutors should go on to consider the separate question of whether a prosecution is required in the public interest, i.e. the second stage of the Code test.

42 In the light of the above, and in particular [25], it appears that save where (a) an express public interest defence is provided; or (b) the courts have clearly stated the position regarding the availability (or not) of an implied public interest defence, prosecutors are instructed in effect to ignore the potential existence of an implied public interest defence in considering evidential sufficiency and proceed to stage 2. As a result, it remains the case that the lack of clarity around the availability of implied public interest defences contravenes the principle of legal certainty and Articles 7 and 10 of the Convention as outlined at [67.6] et seq of the Privacy Submissions. Moreover, the fact that the public interest factors likely to affect the second part of the two-stage test are set out in the Guidelines does nothing to address the issue.

43 Finally, NI notes that on a number of recent occasions the Chairman has raised concerns with witnesses about the viability of a universal public interest defence. It appears that these concerns arise not as a result of any objection of principle but because, in practice, a journalist, editor or publisher raising it may rely on confidential sources which cannot, as a result of the fact that they are confidential, be subjected to the usual investigation by the prosecuting authorities.

44 It is submitted that the Chairman's concerns in this regard are not ones which ought to stand in the way of the introduction of a general public interest defence. In this regard, the Inquiry's attention is drawn to the fact that, in libel litigation, the Courts are regularly required to consider evidence from and about confidential sources in the context of assessing whether the public interest "responsible journalism" or "*Reynolds* qualified privilege" defence applies to a particular article.[3] Factors which a court is required to consider include the reliability of the source of the information and the steps taken to verify the information provided. For illustrative examples as to how the courts have approached the issue the Court is directed to the judgment of the House of Lords in *Jameel v Wall Street Journal* [2006] UKHL 44; [2007] 1 AC 359 at [8], [59], [63], [110-112], 139], 143], 149], and the judgment of the Supreme Court in *Flood v Times Newspapers Ltd* [2012] UKSC 11 at [81]-[99], and, at first instance [2009] EWHC 2375 at [153ff]. As Eady J. explained in the recent case of *Hunt v Times Newspapers Limited* [2012] EWHC 110 (QB) at [31] and [32], although *"it is necessary to take full account of source protection …. It cannot be assumed that it will be sufficient for the defendant merely to say that the information was based on Source A or Source B..."*.

45 In the final analysis, the concern that defendants may abuse the fact that a defence exists either by praying in aid "sources" which did not in fact exist or exaggerating the credentials of those that were relied on is not, it is submitted, an appropriate reason for denying its introduction. The exposure of falsehood through cross-examination is one of the fundamental objectives of the adversarial system. Many of the defences put forward by individuals suspected of having committed criminal offences are difficult to verify – but that does not mean that they are simply accepted at face value by the prosecuting authorities.

[3] See [25.1] to [25.3] of the Privacy Submissions.