Day 35 - AM Leveson Inquiry 1 February 2012

1 (10.00 am)

MR JAY: The first witness today is Lord Black, please.

LORD GUY VAUGHAN BLACK (sworn)

Questions by MR JAY

1. MR JAY: Lord Black, make yourself comfortable. Your full name, please?

A. Guy Vaughan Black.

2. Q. In the bundle in front of you, you will find certainly your first witness statement dated 16 September of last year and you've also provided us with a second witness statement quite recently, 25 January of this year. This is your formal evidence to the Inquiry?

A. It is indeed, yes.

3. Q. You are and have been the chairman of PressBoF, which of course is the Press Board of Finance, since September 2009. Your previous life, your previous career, can I summarise it in these terms, a career in Conservative politics until 1996, then you were director of the PCC, appointed by Lord Wakeham, between 1996 and I think the end of 2003; is that correct?

A. Correct.

4. Q. Then you worked for Michael Howard, of course then leader of the Opposition, as his press secretary and director of communications for the Conservative party between January 2004 and September 2005; is that right?

A. Correct.

5. Q. And then you left after the General Election, joined the Telegraph Media Group as director of corporate affairs, and then were appointed chairman of PressBoF, as we've heard, in September 2009, and finally you were made a life peer in May of 2010; is that correct?

A. Correct.

6. Q. Lord Black, your witness statement helpfully deals with the objects and powers of PressBoF. May I briefly touch on those? Under tab 3, please, there's a memorandum and articles of association without the permission of PressBoF. That is obviously to avoid any substantive changes being made to the role of the PCC without prior consultation with the industry.

A. It would need to discuss those with the Press Complaints Commission first.

7. Q. Thank you. In terms of the objects, it's object clause 3 at our page 03052. This is the general object: "To collect levies [that's its primary object] for the financing of the PCC or some similar body, to appoint the chairman of the PCC and generally to support the maintenance and preservation of press standards, periodic review of the code of practice for the press or any similar body, the adjudication of complaints, the promotion of freedom of the British press, the provision of information ..." and then similar ancillary objects.

A. Yes, indeed. As I explain in my witness statement, one of those associations no longer exists, and two of them have merged, but those are the core members of the board.

8. Q. Right. So PressBoF is entirely comprised of -- sorry, comprises press members; is that correct?

A. Indeed.

9. Q. Thank you. May I ask you to explain tab 5, which deals with the question of levy. This is page 03110, Lord Black.

A. Yes. Indeed.

10. Q. Some of this is clear, some of this is less clear. The basic principle appears to be that the national newspapers pay 54 per cent, the regionals 39 per cent and the magazines 7 per cent?

A. Correct.

11. Q. It's paragraph 3 which is less clear, which deals with the question of levy. Is that right, Lord Black?

A. Right.

12. Q. It's clause or article 5(a); is that right, Lord Black, which explains how the different newspaper associations and societies have the right to put up a certain number of members?

A. Yes.

13. Q. Thank you. In paragraph 28 of your statement, you say that: "Changes to the PCC's role and remit must be ratified by PressBoF before they come into effect." Could you explain that to us, please?

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A. When members of the Commission are appointed to that role, they undertake two things. One is obviously to contribute £1 to the winding-up costs of the Press Complaints Commission, should that prove necessary, but secondly, not to agree to any changes to the articles of association without the permission of PressBoF. That is obviously to avoid any substantive changes being made to the role of the PCC without prior consultation with the industry.

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Q. But it doesn't work the other way around. PressBoF does not have power to direct the PCC to make changes to the memorandum or articles of association; is that correct?

A. It would need to discuss those with the Press Complaints Commission first.

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A. Correct.
levy and how the levy is, as it were, allocated between them. Could you assist us with that, please?

A. Yes. Each year PressBoF asks the national press through the Newspaper Publishers Association to pay a certain amount towards the entire levy. It's then for the NPA to divide that up among its member companies and that is done through a formula which relates to consumption of news print and also the number of publications that each particular publisher has.

The reason the NPA does that is that some of that information is commercially confidential. It then collects the money and passes it on to PressBoF as a lump sum twice a year.

Q. Does PressBoF know both what the formula is and how the percentages work out in a particular year?

A. I know the basis of the formula, but again, because I am obviously part of one particular newspaper company, it would not be right for me to know the details of the formula, but we do always collect the full amount from the NPA.

Q. Paragraph 15 of your statement --

A. Paragraph 15 of your statement.

20 LORD JUSTICE LEVESON: So it's not transparent who is paying what?

21 Q. The Editors' Code of Practice Committee, which we've reviewed --

22 LORD JUSTICE LEVESON: So it's not transparent who is paying what?

23 A. The membership of the Newspaper Publishers Association is transparent, sir, but within that body, it is not.

24 LORD JUSTICE LEVESON: And that would be obvious to everybody?

25 Q. So one can see what happened in this particular case.

26 LORD JUSTICE LEVESON: Although one can take a pretty good stab at who would be paying the most?

27 A. You can indeed, sir, because the news print consumption will weigh more heavily in favour of the mass market publications.

28 LORD JUSTICE LEVESON: And that would be obvious to everybody?

29 A. Yes.

30 MR JAY: Thank you. The current membership you set out in paragraph 15 of your statement.

31 A. Indeed.

32 Q. The Editors' Code of Practice Committee, which we've heard a lot about, constitutionally, as your statement explains, that is a subcommittee of PressBoF, it is not part of the PCC; is that right?

33 A. Correct.

34 Q. And it's also clear from the evidence we've heard that there's no lay representation on that committee?

35 A. The only lay representation comprises the chairman and the director of the PCC at any particular time who are entitled to attend that committee in an ex officio capacity, and as they are both lay people, there is that small amount of lay input.

36 Q. If we look at one of the minutes of the Editors' Code of Practice Committee, we can see that. It's under tab 8 at page 03167. This was before your time, Lord Black.

37 A. Yes, indeed.

38 Q. Those attending include the PCC chair, who I think had just been appointed, Baroness Buscombe, director of the PCC, and the secretary -- now, Mr Beales is the secretary to the committee; is that correct?

39 A. Yes, yes.

40 Q. They have a watching role, but they cannot, as it were, contribute to any decision-making; is that right?

41 A. Yes, they would attend in a simply ex officio capacity.

42 Q. It's clear from the discussions on the review of the code of practice, if you look at the next page, 03168, the public, as it were, has no voice, no ability to contribute to a discussion on whether any particular item of the code of practice should be amended; is that a fair observation?

43 A. There is obviously no direct public involvement in the Code Committee, except that it can come in a number of ways. The Code of Practice Committee undertakes an annual review of the code, and invites suggestions from members, from interested parties, and indeed is open to anybody -- as clearly happened in this case -- as open to anybody during the course of the year between the annual reviews to make suggestions for potential changes for the committee to consider. So there is a public input in terms of the issues that are raised, but the decision on the changes to the code remains with the editors, that is correct.

44 Q. So one can see what happened in this particular case.

45 The annual code review for 2009, 03168, a firm of solicitors made two suggestions for amendments to the code, do you see that? The first suggestion under "Accuracy" at the top of the page, the suggestion was -- this was put forward by Schillings:

"The code should state that where there was an intention to publish serious allegations, the relevant parties should be given an opportunity to reply, and the gist of their response published."

Now, it might be said that theme emerges from the case of Burrell, which we saw reference to a day or two ago, but let's see how it played out:

"The solicitors claim this reflected PCC policy."

The secretary said that in fact PCC policy was that parties should be given an opportunity to reply, and the gist of their response published.

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where there would need to be exceptions. The chairman said that these would be difficult to codify.

Neil Wallis said where it had always been policy for the News of the World to make a 4 o'clock phone call to the subject of an expose, that was now impossible because of the risk of being successfully injunction at the hands of Saturday duty judges. Mr Rusbridger said that while it could not be an obligation, approaching the subject of a story was usually desirable. The code book might usefully make that clear."

Then you can see the decision: "No change".

So it's clear that the press voice, as it were, is predominant here, isn't it?

A. It is an Editors' Code Committee, so the press voice is bound to be predominant.

I would say, though, in talking about the Code of Practice Committee, which I obviously attended as an observer for many years up until 2003, there is a very broad range of opinion within it. It has experience and it is across the different parts of the industry and the debate is often extremely lively. The public may not have direct representation on it, but that doesn't mean to say there are not a substantial range of views which are aired during the course of its discussions.

Q. Many would say that the principle which Schillings is suggesting should be incorporated into the code, namely as a general rule, not as an absolute rule, there should be pre-notification of serious allegations, although there might be exceptions to that rule, but that is a fundamental principle of justice and common sense, yet it's being rejected here without proper consideration being given to both sides of the argument. Is that fair or not?

A. I obviously wasn't at that meeting, and don't know how much argument there was on that point. This is an issue which is raised from time to time, the whole subject of pre-notification. I think in subsequent Code Committee minutes it's raised and it was obviously raised in the wake of the Max Mosley case. There are important arguments on both sides to be had. I have always thought, from a personal point of view, that the obligation of the code to take care to be accurate does actually point to what Alan Rusbridger says there, that although it's not an obligation, it's certainly usually desirable.

LORD JUSTICE LEVESON: It's a bit more than that, isn't it, Lord Black? What Mr Wallis is clearly saying is, "We don't trust the judges".

A. That has always been a particular line from the News of the World, sir.
extremely positive and supportive of the status quo, isn't it?

A. It's supportive of the changes that have taken place.

LORD JUSTICE LEVESON: Well, it's rather self-congratulatory, which in the light of events may be a little bit difficult to justify.

A. I think, sir, that in the areas that are referenced there, such as harassment, the treatment of children, the treatment of hospital patients, there have been marked improvements in standards over the years. There is no doubt that recent events have shown that self-regulation is not a perfect mechanism, and the industry fully recognises that, but I do think it is important to realise what changes the code has brought about.

When I first became director of the Press Complaints Commission in 1996, the code was still relatively new and it was still quite difficult, sometimes, to get editors to correct inaccuracies. I don't believe that is the case now. I think there is a hidden part of self-regulation where newspapers do like to try to sort issues out before they reach the PCC, and that is an important part of the ecology of our system.

MR JAY: Of course you weren't there in April 2009, but the whole tone of this is: okay, we might need to make minor changes, but the basic system, what the PCC does in terms of its constitution and its functions, is fundamentally okay. That's the message which one gathers from this, isn't it?

A. In that having an independent Commission, an Editors' Code Committee and consistent levels of industry funding had managed to produce over the years some marked changes in newspaper behaviour, then I think that that is a perfectly valid observation of where the industry sat at that point.

Q. Okay. Would it have been your view in April 2009 that the PCC was a regulator?

A. I would never have used that word. I had never believed that the PCC to be a regulator.

Q. Can we just look on the next column. It's the fourth paragraph down, beginning: "In such a complex and large industry, it is inevitable that there have been occasional disputes involving individual publishers, sometimes as a result of wider newspaper industry issues. It was in such circumstances that Northern & Shell, owners of Express Newspapers, withdrew from PressBoF in 2008. A solution, however, was found with the company resuming its full contribution with effect from early 2009 and making a public commitment to its continued support of the..."
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<th>Publisher who would even dream of taking Private Eye to the Press Complaints Commission, so it may not be an issue whichever needed to arise. But we're looking now at obviously many different aspects of the way that the system works and reform of it, and I'd like to talk to Mr Hislop about that at some point.</th>
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<td>MR JAY: The final point on this report, the next paragraph, deep concerns expressed about the development of a de facto privacy law based on the Human Rights Act and the use of the no win, no fee arrangements in privacy and libel cases having a profound adverse impact across the industry both in terms of press freedom and commercially. So PressBoF, as it's entitled to do, is adopting a very clear position in relation to what it sees to be the burgeoning growth of a privacy law and the pernicious impact of CFA arrangements; that's right, isn't it?</td>
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<td>A. Correct. I've always seen the role of PressBoF, which is meant to and indeed does represent all the different constituent parts of the industry, to have a forceful role in press freedom matters.</td>
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<td>Q. It might be said that that philosophy might feed its way into the development of the code of practice. Is that a fair point or not?</td>
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<td>1. A. There is nobody from the Press Standards Board of Finance who sits on -- there is one member, but of the 17 members, I think it's 17 members of the Code of Practice Committee, I don't remember ever having a substantive discussion as chairman of PressBoF. The editors who sit on the Code Committee will all have profound feelings about press freedom in their own right, so I would be surprised if there was any divergence of view.</td>
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<td>11. Q. Okay. Your first report is the next page, 03108. This is dated March 2010 --</td>
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<td>12. A. Yes.</td>
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<td>13. Q. Sorry, it must date after March 2010. We don't have the exact date of this, because the financial results are set out and your ends on 31 March.</td>
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<td>17. A. I think this would have been the summer of 2010.</td>
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<td>18. Q. Thank you very much. You refer to the DCMS report, February 2010, in the first two paragraphs. You say in the third paragraph: &quot;PressBoF commended the Select Committee in our thoughtful report covering a large number of areas of vital interest to our industry. Much of it we would welcome, but there are some significant differences between us. We concur with the view from the committee...&quot;</td>
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<td>that self-regulation of the press is greatly preferable to statutory regulation and should continue, but we cannot accept its conclusion that the PCC is toothless. For the industry, the PCC has real bite, which is why it has done so much to raise standards of reporting since it was established in 1991.&quot;</td>
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<td>7. Now, the toothless point includes, of course, the inability to fine or otherwise sanction editors and newspapers with financial penalty. Is that a statement which you would still adhere to, Lord Black?</td>
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<td>11. A. I think the point that I was trying to refer to there was that the power of adjudication which the Press Complaints Commission has is a very powerful sanction in its armoury, and indeed it has other sanctions in that in cases of serious breaches of the code it can refer a matter to a publisher. So it has real bite within the industry. I don't think I was referring there to the wider issues of whether the PCC should have investigative powers, but merely observing that the powers that it did have of adjudication and exhortation on general issues of importance to the industry had raised standards.</td>
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<td>23. Q. In the next paragraph, though, you specifically refer to the committee's proposal in relation to the introduction of a system of fines and you say that that would be</td>
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Q. Is it just the phone-hacking scandal then which has led you to change your view, rather than any other factor?

A. In terms of the architecture of the system, I think that has been the most obvious example of why urgent reform of the system is needed.

Q. Out of interest, was this report written before or after 9 July -- actually, it's 9 July 2009, when the Guardian wrote its first important piece on phone hacking. There had been earlier pieces as well. This postdated that, didn't it?

A. It did indeed, yes.

Q. Okay. Would it be fair to say, though, Lord Black, that the overall message you were communicating in this report was that the status quo should be retained, albeit perhaps with certain adjustments at the edges?

A. I've never believed that the system of self-regulation is actually about the status quo. In the 20 years it has existed, it's changed considerably. The way the PCC operates has changed, the code has changed on more than 30 occasions, the remit of the Press Complaints Commission is a very alive entity. It's taken on board websites, changes in digital technology, the introduction of audiovisual services and so forth. So I've never recognised the phrase "status quo" in terms of where the Press Complaints Commission has got to. It's changed in every year of its existence.

Q. May we come now to constitution of the PCC and PressBoF's role in appointments. The position now, notwithstanding what the articles of association of the PCC say, they haven't been amended since 2006, is that the press members are nominated by the trade bodies, the public members are now nominated by a nominations committee, but PressBoF does the formal appointment. In relation to the appointment of the chair, you deal with this in your second statement, Lord Black. Could you explain the role of PressBoF in the context of what happened in relation to the appointment of Lord Hunt, please?

A. PressBoF's role is to appoint the chairman. The independent governance review of the Press Complaints Commission which took place, I think, the year before, made a number of suggestions about how the lay members might be involved in that process, and we took that on board. And we also decided that the time was right, as had not happened at previous appointments, to have an independent assessor throughout the process.

The position was advertised in the national press in August 2011, and we appointed headhunters to manage the process. Applications were made to them, Korn/Ferry Whitehead Mann. They produced for us a long list of potential candidates of about 40 to 45 people and the subcommittee of PressBoF then scrutinised those with them.

Is this the sort of detail you would like me to go into?

Q. Yes.

A. And we had a very thorough discussion with the independent assessor and with the headhunters on that list, and produced from that a list -- a much shorter list for Korn/Ferry to go away and talk to and to do due diligence on. At that point we produced a short list of I think it was around half a dozen candidates who we were going to interview. Interviews took place towards the end of September 2011. The subcommittee of five members who was involved in the interviewing, they made a recommendation to the PressBoF board.

During that process, I did seek to involve the lay members as the governance review had suggested.

I offered to each of them at the start of it an individual meeting where I could hear their views on the sort of chairman they thought was going to be needed, gave them the opportunity to put forward any names, and gave them the opportunity to put themselves forward if they wished to do so. That was a very useful process.

I think I talked to all of the lay members bar one who was just leaving and thought it not appropriate for him to speak to me, and at that point I then suggested that the deputy chairman of the Commission, Ian Nichol, was appointed to liaise with both the independent assessor and the independent recruitment consultants to monitor the process going forward and I believe that's what happened.

At the end of that, after the appointment had taken place, Andrew Ramsay, who had undertaken the independent assessment, recorded what was in effect an audit note of the process, which I provided you with in my second witness statement.

Q. To what extent, aside, of course, from the personal qualities of the candidate, was the process geared to...
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looking for someone who would be committed to the principles of self-regulation, might be hostile to a privacy law -- and we see that hostility in the PressBoF chairman's reports -- and would also be an Upholder of the freedom of the press? To what extent were those thought to be desirable criteria?

A. A belief in self-regulation and a belief in freedom of the press were fundamental criteria and they were mentioned in the advertisement, or certainly the job specification. I think it would be impossible for anyone to do that job if they started from the point of view of complete hostility to the system of regulation that they were supervising.

LORD JUSTICE LEVESON: Not hostility, of course, but what about open-minded? The vital thing for the PCC to do is to be able to judge; in other words, to say, working on the code, because the code is a given for them: does this come on the right side of the line?

A. Mm.

LORD JUSTICE LEVESON: So why isn't a willingness to be open-minded, obviously with a very real interest in freedom of expression, I understand that, but open-minded? The vital thing for the PCC to do is to be able to judge; in other words, to say, working on the code, because the code is a given for them: does this come on the right side of the line?

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A. Mm.

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A. Indeed.

LORD JUSTICE LEVESON: If one of the -- one of the issues that we explored with each of the candidates who were before us was to say to them, "We know that this system has to change, we'd be very interested in hearing your proposals". Lord Hunt has frequently spoken about his blank sheet of paper. That's indeed what the industry gave him and said, "Please go away, look at what needs to be done, examine the possibilities, and produce proposals for change", so that is -- to the extent of that being an open mind, that was absolutely right, sir. That's what we were looking for in candidates.

LORD JUSTICE LEVESON: A blank sheet of paper subject only to the absolute prerequisite that it's self-regulation.

A. Indeed.

LORD JUSTICE LEVESON: Because that was the definition in the job description.

A. Indeed.

LORD JUSTICE LEVESON: Yes.

A. But the industry, sir, has a fundamental belief in self-regulation.

LORD JUSTICE LEVESON: I understand that, but are you appointing somebody to try and find the best solution for the problem that undeniably last autumn you were facing, or are you trying to find somebody who is going to be first and foremost an advocate for self-regulation?

A. I think if any candidate who had been successful and was involved in a process of study of the system came to us with specific proposals and they might say, "We believe there needs to be statutory underpinning of the system or statutory intervention there", we would clearly have a strong debate about it, but we didn't put any brakes on what a successful candidate would come forward with, but the starting point as having a fundamental belief in self-regulation was a very important quality, sir.

LORD JUSTICE LEVESON: On the basis that if somebody had said, "I'm actually open-minded", they wouldn't have got through.

A. Lord Hunt was open-minded, sir.

LORD JUSTICE LEVESON: Lord Hunt made it very clear that he was absolutely in favour of self-regulation and you may have seen when I asked yesterday, or Mr Jay asked about that, he was asked that question, he gave his answer, and I said, "What would have been the position if you'd said something different?" and I think he made it quite clear what he thought the position would be.

A. There are, of course, many different models of self-regulation that somebody can come up with, while maintaining an inherent belief that it's right for the press to regulate itself.

LORD JUSTICE LEVESON: But one therefore must aim off a little bit for recognising that the very important work that is being done on ways forward, which doubtless Mr Jay will come to, has to be read in the light of the fact that this is being approached from a particular perspective.

A. From the importance of self-regulation.

LORD JUSTICE LEVESON: Yes. I mean, I'm entirely open-minded about everything. I have certain principles which I've made no secret about as the months have passed, but it seems to me that if I'd come into this with that sort of mindset, then I would probably be wasting a lot of people's time because somebody would say, from a different perspective, "Well, we think actually the answer is very different".

A. But I think, sir, as you say Mr Jay may come on to this, the proposals that Lord Hunt is putting forward is a very dramatic shift in the way that the industry would supervise self-regulation going forward. I don't think, if I'd been looking at it six months ago, I would have begun to think that we could have got to this position now. It's a tribute to him that he's actually carried the industry on a journey to a point where we are facing a very different system of regulation going forward, but I think everybody is going to start from a belief with...
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<td>Q.</td>
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<td>MR JAY: Some have said under the old structure that there is a lack of independence owing to the proximity of PressBoF to the PCC and the control PressBoF has over the PCC. In the new system, which we're going to come to in a moment, how is that at least perception of lack of independence, if not reality of it, going to be addressed?</td>
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<td>A.</td>
<td>I think the first point I must make is that PressBoF does not seek to control the PCC. PressBoF provides the funds and PressBoF promulgates the Code, but the decision-making powers of the Commission on individual complaints are -- the independence of that process is absolutely sacrosanct. So while there may be a perception in some quarters that there is a degree of control there, that does not exist. I only meet the members of the Commission, I think, on a formal basis once a year when I'm asked along to a Commission meeting to talk generally about industry and to answer any questions they may have, but there is absolutely no formal control.</td>
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<td>Q.</td>
<td>Under the new architecture, would the funding body have the same ability to appoint the chair of PCC mark two?</td>
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<td>A.</td>
<td>That's not an issue that we've looked at yet.</td>
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<td>Q.</td>
<td>Is this right, it's not an issue which any thought has been given to?</td>
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<td>A.</td>
<td>There are only so many ways that you can appoint a chairman. The industry could continue to have the primary role, PressBoF could make the appointment of any successor, chairman of any successor body, with involvement of Commission members or public input, or indeed we could look at methods of public appointments procedure. We do need to give more thought to that so I can't give you an answer on that today.</td>
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<td>Q.</td>
<td>In terms of public confidence, I'm sure the public would want the last option: a wholly independent body who appoints members to the PCC, rather than any control from PressBoF; PressBoF, as we've seen, adopting a certain position, as it's entitled to do, in relation to some of the fundamental issues of philosophy and principle we've been discussing?</td>
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<td>A.</td>
<td>It's a subject that I need to look in more detail at, but I do believe that there are ways which, if you look at the way the chairman has been appointed over the 20 years of the Press Complaints Commission, it has changed very markedly in the time. When Lord Wakeham was appointed, I think it was still the -- what was known as the tap on the shoulder. By the time Sir Christopher Meyer was appointed, headhunters were involved the first time. When Baroness Buscombe was appointed, we'd moved to a position of public advertisement, and the situation we had last time I think was getting pretty close to what a public appointments procedure would be with a form of independent assessment and public advertisement.</td>
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<td>Q.</td>
<td>Under the new system, has any thought been given to how the successors of the Code of Practice Committee, maybe part of the standards arm, might operate, in particular whether there would no longer be 100 per cent press representation on that committee?</td>
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<td>A.</td>
<td>The issue of whether there should be no representation on the Code Committee is one that's going to be very actively looked at. I do believe that in any form of self-regulation system that there needs to be further, but I can't give you a model today, I'm afraid.</td>
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<td>Q.</td>
<td>I'm not asking this question disparagingly, it's just an observation. We see a preponderance of Conservative peers wherever we look, both in the PCC -- apart from Sir Christopher Meyer; he, of course, is independent -- and in PressBoF at the moment. That doesn't necessarily create the degree of full public confidence in an independent system. Would you accept that observation?</td>
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<td>A.</td>
<td>No. I would also point out that the first chairman of the Commission was a Liberal Democrat peer, Lord McGregor of Durris. This is not a political appointment. The chairman of the Press Complaints Commission is not dealing with political matters. There were people of all parties and of none who applied for the job and the politics of the successful candidate had absolutely no role in that whatsoever.</td>
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a preponderance of serving editors on that committee,
but if there are ways that can be found to introduce
a public element into it, that's certainly one that
I think we should look at.
LORD JUSTICE LEVESON: So when you say "preponderance", they
should always be in the majority?
A. That would be the norm with any self-regulatory body,
sir.
LORD JUSTICE LEVESON: Well, it's not necessary, is it? We
heard -- I think we may hear that -- I think Lord Grade
mentioned organisations in which he'd been involved --
I mean, they may have statutory backing -- where codes
and practices were set by independent people, by
obviously those who had an interest in the subject and
were knowledgeable, but they drew in to their
deliberations the benefit to be obtained from speaking
to serving editors or programme directors, I think he
was talking about.
A. I think, sir, if you look at press codes across the
globe, because of the unique position of the press as
opposed to the broadcasters, which Lord Grade may well
have been talking about, the vast majority of -- outside
the totalitarian countries like Egypt or wherever it
might be where there is a government code, the vast
majority of codes are professional codes, written

sometimes by media owners, very rarely, sometimes by
trade unions; I think that is the case, for instance, in
Switzerland, but the vast majority of professional codes
are written by editors and journalists themselves, and
I think that is a very important thing. I think editors
are the ones who understand the real dilemmas that they
face in the newsroom and what the code of practice needs
to reflect in that.
That is not to rule out some form of introduction of
a lay element into it. I readily accept that that would
be an important part of increasing public confidence and
we will look at that.
MR JAY: The proposal which has been put forward, which is
based on the idea of a contract or series of contracts,
it doesn't matter precisely how one defines it, that on
the evidence we heard yesterday has the strong
commitment of the industry as a whole; is that correct?
A. It is indeed.
Q. May I test that? How do we know that it has the
commitment of the industry as a whole?
A. Lord Hunt was appointed in October and spent a number of
months working on his proposals. In the middle of
December, I think it was the 15th, there was a meeting
which was hosted at the Telegraph Group for the various
trade associations, for members of the NPA and Newspaper

Society Council, for senior editors, I think there was
either an editor or a deputy editor there from every
single national newspaper, some of the main regional
editors and the magazine editors and editors from
Scotland as well.

Lord Hunt set out his proposals in some detail at
that meeting, and people there were very clearly asked,
"Is there anyone who objects to the direction of
totalitarian countries, like Egypt or wherever it
might be where there is a government code, the vast
majority of codes are professional codes, written
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LORD JUSTICE LEVESON: I've made clear, and I'm happy to
repeat to you, that for the last four months I have been
saying to the industry that this is their problem and
they have to solve it, but they have to solve it in
a way that satisfies the public, and although I am not
the public, I am representing at least one aspect of the
public in the conduct of this Inquiry, so I welcome the
work that's being done.
I make a comment, contrary to some of the press
reports overnight, that I don't for a moment think that
I can just sit back and consider myself redundant. I am
going to press on with the Inquiry that I'm conducting,
but that's not to say that you shouldn't equally press
on.
I hope that ultimately a system can be devised that
works for everybody. That is my earnest wish. But so
that there is no doubt, I'm not going to stop looking
for ways that the system can be improved and I'm going
to wait and see whether what is delivered is what is
hoped will be delivered.
A. Indeed, sir, and we're very grateful for that guidance.
We will press on with the proposals that were put to
you, and I'm sure we would be delighted to keep the
Inquiry in touch with where we've got to and any
difficulties that we face.

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LORD JUSTICE LEVESON: I think that's very important, and, needless to say, I will ensure that the Inquiry is keeping in touch the various bodies that have given evidence, so that I have the widest possible views.

A. Thank you, sir.

MR JAY: Lord Black, is it a real desire for change in the positive sense or is it a realisation that unless proposals are put forward, changes will be imposed?

A. I suspect that any changes that have been made in the regulatory arrangements for the press throughout its history have been a combination of both.

Q. So is this right, that there is a recognition that something has to be done, otherwise there will be coercion by Parliament or whatever?

A. Appetite for change is a very real one and I think, as I've been trying to say, it springs from two sources. First of all, as an industry we are very committed to self-regulation, we are proud of our self-regulation, but we have seen that it has weaknesses. We need to bring forward proposals for radical change in that area and we need to work with the independent chairman of the PCC, and indeed whatever successor body takes place, in order to deliver that.

But also, of course, the flipside of that coin is that we do realise, as citizens, that if there isn't something which may be far worse for you. But more to the point, I think we do need to define important parts of the new structure and this Inquiry has absolutely rightly looked at the whole issue of how defamation law might be changed, which would be to the benefit of publishers, but only publishers who were part of the new self-regulatory structure.

So there are a number of things that can be looked at, I think, to try to propel people into the contracts. Indeed, once they're there, they will be bound by the terms.

Q. Have you had discussions with Mr Desmond on this very point?

A. I haven't spoken to Mr Desmond recently. I obviously had dealings with Mr Desmond towards the end of last year. I've seen Mr Desmond on a number of occasions since then, but I haven't engaged with him yet on the promises for a new structure, but as you heard from Lord Hunt yesterday, he has been keeping in touch with him.

Although I would point out that the editors of the Northern & Shell titles and the legal representatives of the Northern & Shell titles were present at the meeting of the Telegraph on 15 December where there was clear support for the proposals that were being put forward.

change to the regulatory regime which delivers the sorts of things that Lord Justice Leveson has just been talking about, that the threat of statute is there, so it is a combination of both of those.

Q. Is it also a recognition that the only way to save the principle of self-regulation is to come up with a contractual model?

A. Of the proposals that we've looked at, it's the most effective one that I've seen so far, because it gives some form of legal underpinning to the system, but does so in a way which doesn't require the imposition of statute.

Q. Fair enough. One of the aspects of a contract, self-evidently, is that its participation is voluntary. I don't think you're proposing that there should be any statutory means of coercing people to sign on the dotted line; is that correct?

A. Correct.

Q. In terms then of incentives to sign on the dotted line, this might arise in the context of Northern & Shell: what incentives do you see there existing?

A. I think that it's going to be a combination of things that I was talking about just now. I think that the case very clearly needs to be put to them that if you don't enter into this system, there is going to be something which may be far worse for you. But more to the point, I think we do need to define important parts of the new structure and this Inquiry has absolutely rightly looked at the whole issue of how defamation law might be changed, which would be to the benefit of publishers, but only publishers who were part of the new self-regulatory structure.

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Although I would point out that the editors of the Northern & Shell titles and the legal representatives of the Northern & Shell titles were present at the meeting of the Telegraph on 15 December where there was clear support for the proposals that were being put forward.
Q. But as you pointed out that principle hasn't yet been applied to -- no thought has been given to the Code of Practice Committee, or more precisely the successor body to that committee; is that correct?

A. The question of lay membership for the Code Committee has been raised. I know it's a subject Mr Dacre has been looking at. It may be something you want to talk to him further about in evidence. I certainly before giving a further opinion need to talk to members of the Committee about it. But I think there is generally a widespread view that some lay membership on that Committee would be of benefit.

Q. Has any thought been given to the issue which you touched on actually in paragraph 41 of your first witness statement at 03030? That's the interrelationship between the code and other aspects of regulatory law, whether it be criminal law or civil law.

A. I think the point you're making here, the code was never meant just to replicate the law. Rather, it's a set of ethical standards which in many ways go beyond the law. Obviously there's a clear overlap between criminal law and the Code. Are you suggesting that in an area which falls within the overlap that is not a matter for the PCC or the successor body but is only a matter for the police or are you suggesting that there is a complementary role?

A. I think in the new structure there would be a complementary role, not that necessarily the standards body which is being proposed should play a role while the police investigation is going on, if it was say a matter for the criminal law and the police, but one which could actually help in uncovering material which might be of use to the police in that investigation, and indeed having a role after the events have taken place in working out within a publisher why something had gone wrong, how internal compliance and governance had broken down, making recommendations for the future not just for that publisher but which would be of relevance across the industry. I know that's a subject you've touched on with previous witnesses. So to that extent, they would be complementary.

LORD JUSTICE LEVESON: That's very different because previously the PCC has said if it's a matter for the police, that's the end of it.

A. I think in the structure that we're looking at now, where the police -- I don't think while a police investigation is going on it would probably ever be right for a standards body or any other regulator to take part in that investigation. But where that had finished, I think the proposal now is that the standards compliance body would actually want to look at what had happened, look at the results of the police investigation, and make recommendations for the future. I think that's a very important part of the new system.

MR JAY: Would the new body also be interested in adjudicating on breaches of the code which replicated the police investigation?

A. At the time the investigation was going on, I think it would be difficult for that body to do it. Q. I understand that. Imagine that the investigation has finished, there may have been a conviction following a criminal trial, there may not have been, but would the successor body say: there's prima facie evidence of a breach of the code, we must investigate and if necessary adjudicate on that very issue?

A. I see no problem with that, and indeed I think that has happened to the PCC in the past. I remember a case when I was there involving a complaint which related to the theft of some diaries, I think it was relating to the widow of Harold Shipman. Once the trial had completed, the PCC then went on to adjudicate on the complaint. So there is no objection in principle to that happening.

LORD JUSTICE LEVESON: What do you think about the civil position, where the present stance is: well, you have to come down the PCC route or you go to the civil courts, but you can't do both.

A. In terms of privacy or libel?

LORD JUSTICE LEVESON: Yes.

A. I thinking that people do have to make a choice.

I don't think the PCC, certainly as it stands at the moment, could get involved in one of those actions. I would see no issue, and I have never seen any issue, that once a libel or a privacy case had been settled that somebody who had outstanding issues under the code of practice could not come back to the Press Complaints Commission as it stands and certainly not to the new body to take up further issues.

LORD JUSTICE LEVESON: Why can't they both run parallel?

They do in every other disciplinary system.

A. I think in the case of the Press Complaints Commission it has always been a concern about becoming actually involved in the legal process.

LORD JUSTICE LEVESON: But accountants face civil actions while their regulatory body investigates them, solicitors face civil actions while their regulatory body investigates them, body investigates them, doctors do. I just don't see why there is a difference for journalists.

A. To be honest, sir, I don't actually recall an occasion when somebody who was likely to bring a libel or privacy action would be difficulty for that body to do it.
a privacy action also, just as a matter of practice, wanted to bring a complaint at the same time. This is not really an issue which has frequently been grappled with.

LORD JUSTICE LEVESON: Well they had been told -- I mean Sir Christopher made it quite clear, you're given a choice. You either go down this route or you go down that route.

A. That's always been the way the PCC has operated in the past, sir, yes.

MR JAY: Has any thought been given in the context of this contractual proposal and new architecture to whether that would be the principle which applied in the future?

A. We'd need to look at that, sir.

Q. Clearly there's a lot of detail here which remains to be considered, is that fair?

A. I think that we are very mindful of the structure that Lord Justice Leveson has set out and of the continuing role of this Inquiry. We have approached this with Lord Hunt on -- as an iterative process, looking at the first instance at the structure and architecture of the system, which is what he wanted to talk to you about yesterday. We're well aware that there is a lot of detail that needs to be put on to that now, not least in terms of what goes into the contract and rules and regulations that go alongside it, and we would like to now move to that next stage and keep you informed of how that is working.

Q. Thank you, Lord Black. Is there anything else you would like to say to the Inquiry in relation to the new proposals?

A. No, I think that is --

Q. You've covered the ground?

A. Yes.

MR JAY: Those are all the questions I have for you.

LORD JUSTICE LEVESON: Lord Black, thank you very much.

Q. Thank you very much. You've both provided statements to the Inquiry. You should find them behind tab 1 and tab 2 of file 1. The statements to the Inquiry aren't signed but could you please confirm that the contents of your respective statements are true and accurate to the best of your knowledge and belief?

A. Indeed, sir. Message received and understood.

Q. Thank you. Thank you very much.

LORD JUSTICE LEVESON: Thank you. There seems to be some general movement so I'll rise for a couple of minutes.

A. (A short break)

LORD JUSTICE LEVESON: Thank you.

DR COLETTE BOWE (sworn)

MR EDWARD CHARLES RICHARDS (affirmed)

Questions by MS PATRY HOSKINS

MS PATRY HOSKINS: Thank you very much. Please make yourselves comfortable. Could you please state your full names to the Inquiry? I'll start with you,

Dr Bowe.

MR RICHARDS: I am Colette Bowe and I am the chairman of Ofcom.

DR BOWE: I am Colette Bowe and I am the chairman of Ofcom.

MR RICHARDS: I am Edward Charles Richards and I am the chief executive of Ofcom.

MS PATRY HOSKINS: The way I'm going to conduct this session is I'm going to ask the questions, feel free to answer them. You will decide between yourselves who is the best person placed to answer the question, and if you both want to answer it, that's fine as well.

I'm going to touch first of all on your career histories, if I can. I'm going to start with you,

Mr Richards. In your statement which is behind tab 1, you explain at 1.1 that you are Ofcom's chief executive, that you were appointed in October 2006; correct?

MR RICHARDS: Yes.

Q. At 1.3 you explain that you in fact joined Ofcom in 2003. At that stage, you were partner, strategy and market developments, before becoming its chief operating officer responsible for strategy, market, research,
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<td>finance, HR and other functions in 2005. Prior to joining Ofcom, you were senior policy adviser to the Prime Minister, at that time Tony Blair, for media, telecoms, the Internet and e-Government, and prior to that you were controller of corporate strategy at the BBC. Pause there. Is that all accurate?</td>
<td>created by section 1 of the Office of Communications Act 2002, and all its powers and duties are statutory; correct?</td>
<td>MR RICHARDS: Mm-hm.</td>
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<td>Q. Thank you. Dr Bowe, you explain at paragraph 1.1 of your statement that you have been chairman of the Ofcom board, which is Ofcom's main decision-making body, providing strategic direction for the rest of the organisation, since 11 March 2009. You explain your other appointments at 1.2, but you explain at 1.3 that you were first appointed to the board of Ofcom on 1 January 2008, and then you explain that you held prior to that a number of senior roles in both the public and private sectors?</td>
<td>Q. In relation to broadcasting, it's a real statutory regulator, as I've described, subject to what we'll come on to discuss about self-regulation in different forms. Although it was created by the 2002 Act, most of the functions of Ofcom are conferred on it by the Communications Act 2003, that would be accurate. I'll probably refer to that as the Comms Act for short and we'll be looking at various of its provisions.</td>
<td>Q. In relation to broadcasting, it's a real statutory regulator, as I've described, subject to what we'll come on to discuss about self-regulation in different forms. Although it was created by the 2002 Act, most of the functions of Ofcom are conferred on it by the Communications Act 2003, that would be accurate. I'll probably refer to that as the Comms Act for short and we'll be looking at various of its provisions.</td>
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<td>Q. So that we can focus our discussion today, we can't possibly hope to cover everything that Ofcom does, it's a very large organisation, it has a very large number of functions, many different powers and duties. What we're going to do is we're going to look at various aspects of the Ofcom regulatory models, picking out some aspects which might be particularly interesting to the chairman of this Inquiry in considering his terms of reference. So, for example, we'll be looking at the fact that Ofcom in some senses and some areas is a true statutory regulator, various aspects of that, it's a co-regulator in other areas, we'll be discussing how those roles work in practice, and we'll be looking at the strengths and weaknesses of different models. That's essentially how we're going to take it through today. I'm going to start by touching briefly on the statutory basis of Ofcom and questions about independence of government. I'm going to start with the witness statement of Mr Richards, behind tab 1, paragraphs 2.1 onwards. Before we turn to the legislation, Ofcom is the central and competition regulator for the UK communications industries. That covers, correct me if I'm wrong, fixed and mobile phones, broadcasting, wireless telegraphy and also very recently postal services. But it has no regulatory role at all in relation to newspaper content? MR RICHARDS: That's right. Q. And only a very narrowly defined role in relation to regulation of newspapers at all, which I will come back to in more detail. We know that it's a statutory body,</td>
<td>MS PATRY HOSKINS: Yes, you're absolutely right, the paragraph is in the schedule. You were appointed by the Secretary of State, you can see that from paragraph (a), and then there may be a number of other members appointed by the Secretary of State as he may determine. So you're appointed by the Secretary of State, the non-executive members are appointed by the Secretary of State, and we can see from subparagraph (6) that Ofcom must have a majority non-executive board. Accordingly, the board majority is appointed by the Secretary of State. Would that be fair and accurate?</td>
<td>Q. You, Mr Richards, the chief executive, you're appointed by the chairman, and we can see that from paragraph 5. Internally it will say page 7 of 15 or 03369 at the bottom. You see that?</td>
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<td>DR BOWE: That's all correct.</td>
<td>LEAD COUNSEL: It would. Q. You, Mr Richards, the chief executive, you're appointed by the chairman, and we can see that from paragraph 5. Internally it will say page 7 of 15 or 03369 at the bottom. You see that?</td>
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<td>Q. There shall be a chief executive of Ofcom. You're appointed by the chairman and other non-executive members with the approval of the Secretary of State? DR BOWE: Yes.</td>
<td>Q. The executive members of the board are appointed by the chairman, the chief executive and the non-executive members of the board.</td>
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Q. Of course.

DR BOWE: I, like my predecessor, was appointed after an open competition. The process of the appointment was conducted not by ministers but by two permanent secretaries, who were advised by two people from outside of Whitehall, with substantial knowledge of the sector.

My name, and I assume that of at least one other person, was then put forward to ministers, who then announced that -- and this is the important point -- subject to a confirmation hearing by Parliament, they were minded to appoint me.

I then went, as other chairmen of similar regulatory bodies have been, in front of a joint committee of two different parts of the Select Committee structure of the House of Commons and they -- I would say they grilled me for several hours in order to determine whether they believed that I had the right competence, experience and skills to lead this organisation.

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1. the board of Ofcom is the ultimate decision-making body of the organisation, which ultimately takes responsibility for all actions of the organisation. It doesn't just set its strategic direction, but as I say, it takes full responsibility.

Q. Shall we move on to the role --

MR RICHARDS: May I add one small point, which is I would say that the importance of independence in the organisation is difficult to overstate. It is exemplified by the approach and attitude of the board, beginning with Colette, but I would say that it is probably the most prized characteristic of the entire organisation. Culturally, the independence of the organisation is in many ways what matters more than anything else, or as much as anything else, to almost every employee. It is part of what they believe they are there to do. It is absolutely at the heart of the functioning and meaning and purpose of the organisation.

Q. All right. Let's talk very briefly about the chief executive. We saw earlier that you were appointed by the chairman, but that the appointment must be approved by the Secretary of State. To your knowledge, has the Secretary of State ever vetoed the appointment of a chief executive? I know there's only been two --

DR BOWE: I think I had better be the person that responds to that, with the rather unhelpful comment that I don't know, as I inherited Ed Richards. Inherited him very happily, I have to say, from my predecessor, but you may well have ways of discovering the answer to that question from my predecessor. I would be most surprised, but I don't know.

Q. Do you have any understanding of what "approved" actually means in practice? Do you have any understanding of the basis on which someone would not be approved?

DR BOWE: It's never come up in my tenure as chairman, and I think it would be foolish to speculate. What I do know is that the structure of that approval is that the Secretary of State is given one name as the proposed chief executive of the organisation. The Secretary of State is not given a menu of names and asked to choose.

Q. I understand. So there's no choice, they either approve or don't?

DR BOWE: You either approve or you don't approve.

Q. I understand. Given what you've said about the structure, the way that you're appointed, the cultural importance of independence, is there anything more that could be done? Do you think that the independence of Ofcom would be greater if government wasn't involved in the appointment of the board?

DR BOWE: I think there's two ways you could answer that. One is in practical terms and one is in perception terms. I think in practical terms, the answer is no, because, as I hope I've explained, the primary relationship is with Parliament once one is appointed.

I have noticed, however, that at various points throughout both this hearing and in other parts of life where people comment on regulatory matters, there is occasionally comment about whether the independence of boards such as ours, and indeed the board of other regulators, could be buttressed by an alternative appointments mechanism. I have to say I've never been able to think of one that betters this system we have of Government proposes and Parliament disposes, which is essentially what it is, and I and I believe my fellow chairmen of economic regulators actually take a lot of comfort, I would say, from the deep interest that Parliament takes in our appointments and our affairs.

LORD JUSTICE LEVESON: In the light of the evidence that I heard yesterday, it may be that the press would not take such comfort in the fact that Parliament were involved in the appointment of such a regulator.

DR BOWE: Yes. I understand why you say that. I have to say that from my point of view an active, engaged, well-informed select committee, which holds me and the chief executive to account for what we do on behalf of our fellow citizens, seems to be not a bad model for public accountability.

MS PATRY HOSKINS: Does Ofcom allow board participation from people who are active in the industry being regulated?

DR BOWE: Sorry, the question is?

Q. Does Ofcom allow board participation from people who are active in the industry --

DR BOWE: No. We have quite strict rules around that. And if in some oblique way a board member may even peripherally become involved in, let us say, a business that might have some connection with a regulated firm, then a judgment is made about the seriousness of that connection, and very occasionally a board member who has got a very peripheral connection with a regulated business has stood aside from part of a discussion, but we do not have people on the board who are part of the regulated industry.

What we do have is people who have been in various ways parts of it.

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<th>Q.</th>
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<td>DR BOWE: Because of conflicts. I'm sure you're familiar with the sorts of issues that arise, and you can manage small conflicts on boards; you can't manage large, endemic ones.</td>
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<td>Q.</td>
<td>I understand. I think you've probably answered my next question, which was going to be: if you don't allow such participation, how do you ensure that you have the relevant expertise, but is the answer to that simply that you appoint people who have in the past had significant expertise in the area?</td>
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<td>21</td>
<td>DR BOWE: Yes. I'm sure you have in front of you the list of names of those who are on the Ofcom board and you will see that they have a range of expertise. Some in broadcasting, some in quite different parts of the other industry sectors that we regulate.</td>
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<td>Q.</td>
<td>Thank you.</td>
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<td>LORD JUSTICE LEVESON: And you don't find it a disadvantage that they're no longer working in that capacity?</td>
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<td>DR BOWE: No. No, we don't, because these are all people who are extremely well-informed professionals, even if they are no longer actively engaged. For example, my deputy chairman, Dame Patricia Hodgson, who was formerly the chief executive of one of the previous regulators, the Independent Television Commission, and until very recently a member of the BBC Trust, brings a very active, informed experience of the matters we're talking about today of a kind that does not rapidly, as it were, decay.</td>
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<td>MS PATRY HOSKINS:</td>
<td>I'll move away from appointments to functions and duties of Ofcom. Mr Richards, again, I will look at your statement. Look, please, at 2.4 of your statement, tab 1.</td>
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<td>MR RICHARDS:</td>
<td>Statement 1?</td>
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<td>MS PATRY HOSKINS:</td>
<td>Statement 1. You explain in summary that Ofcom's main functions since creation have been as follows: broadcasting regulatory functions, mainly under the Broadcasting Acts 1990 and 1996, functions in relation to electronic communications, networks and services from under the Communications Act 2003, spectrum management functions, now under the consolidated Wireless Telegraphy Act 2006, and concurrent competition and consumer enforcement powers under the Competition Act and the Enterprise Act 2002. But you say as time has passed, you've been given more functions under the Digital Economy Act 2010 and the Postal Services Act 2011 which I don't think we will need to look at. I said at the outset that I recognise that Ofcom had this wide range of roles, but much of the question here will focus on evidence relevant to Ofcom's broadcasting regulatory functions. I'd like to start, before we move on to specifics, with the general duties of the regulator and I will need to look at the Comms Act in order to do that. Look behind tab 8, at the Communications Act section 3. For the technician, the last five numbers will be 03405. It's internally page 26 of 879.</td>
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| Q. | I promise we won’t go through all 879 pages of the contract, but I do want to look at the general duties of Ofcom under section 3. Starting with section 3(1): “It shall be the principal duty of Ofcom in carrying out their functions (a) to further the interests of citizens in relation to communication matters, and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.” It then goes on at subparagraph 2 to set out the things that Ofcom are required to secure in the carrying out of their functions. There's a number of them. For the purposes of this section, I simply want to concentrate on the duties to uphold standards in broadcasting. If we look at subsection (2)(e), there has to be application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services, and then (f): “The application in the case of all TV and radio assistance of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment, and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.” I'll come back to the specific standards to be applied in a moment, but I just want before we move away from this section to point out that the broadcasting duties go much wider than simply the application of standards, so in particular, you are required to secure a sufficient plurality of providers -- that's subsection (2)(d), so section 3(2)(d), maintenance of a sufficient plurality of providers, and you also have to secure, by }
subsection (2)(c), the availability throughout the UK of a wide range of TV and radio services which are both of high quality and calculated to appeal to a variety of tastes and interests.

Before I turn back to the standards aspects of the matters that you're required to secure, I want to ask you about the meaning of high quality services. Is it an appropriate role for a regulator to ensure high quality services rather than simply services that comply with published standards?

MR RICHARDS: It clearly was regarded as being so by Parliament, but for me, to be a bit more helpful, I think the distinction to make is between what we typically call negative content regulation, which are standards and we'll come on to those, and what we also refer to as positive content regulation. So we really have two functions in this area. One is the standards function; the second is to use a range of powers to secure high quality content. Now, that is principally associated with public service broadcasting and the levers that we have at our disposal to secure certain positive outcomes.

So not just that a broadcaster adheres to the standards side of life, but also that, for example, they are investing a substantial amount of money in original British production, for example the amount of production outside of London. Those are some of the examples of the dimensions of what we think about in terms of high quality broadcasting, so it's a rather different task than the standards task.

Q. Who decides, who judges what that high quality is?

MR RICHARDS: There is -- I think that takes place in different forms. I think the first determinant of that is really set out in more detail in the statute, so Parliament sets out more detail later in the Act as to certain aspects which are taken to be proxies for quality. So, for example, your level of original British production, for example the amount of production outside of London. Those are some of the things that we've referred to already. So there are in a sense proxies.

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British production, that original British production is of a wide range of genres and therefore appeals to a wide range of people, that that production reflects aspects of the whole of the UK, rather than just London, for example.

So those are some of the examples of the dimensions of what we think about in terms of high quality broadcasting, so it's a rather different task than the standards task.

Q. What high quality means to them?

DR BOWE: Could I just add to that. You might be wondering how it is we think we understand what the viewing public wants, we undertake a large amount of research at Ofcom in this and other areas, which we constantly update to try to ensure that we do keep ourselves aware of how all the people in the kingdom rate their broadcasting, what they want, what they like to see.

Q. Before we turn away from section 3, we also need to look at subparagraphs (3) and (4). These are the factors that you must have regard to in performing your duties.

DR BOWE: Yes, yes.

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Q. Before we turn away from section 3, we also need to look at subparagraphs (3) and (4). These are the factors that you must have regard to in performing your duties. So we see subparagraph (3): in performing your duties under subsection (1), those were the general duties that we've looked at, Ofcom must have regard in all cases to a number of things. The first of those is:

"The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed."

We'll come back to that in due course. It must also have regard in all cases to any other principles appearing to you to represent the best regulatory practice.

Then at subsection (4), you must also have regard to a number of other factors if they are relevant in the circumstances.

We don't have to look at all of these, but I'd like to look at (c) and (g). (c) is:

"The desirability of promoting and facilitating the development and use of effective forms of self-regulation."

Which again we will come back to, because it's important. And then (g):

"The need to secure that the application in the case of television and radio services of standards falling within subsection (2)(c) and (f) is in the manner that best guarantees an appropriate level of freedom of expression."
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Taking those three things together, only taking action when it is needed, best guaranteeing an appropriate level of freedom of expression, always having to have regard to the desirability of promoting and facilitating the desirability and use of self-regulation, together do these principles, these requirements, effectively mean that you are required to adopt a light touch approach as a regulator?

MR RICHARDS: I think I would put it slightly differently. I think the problem with the phrase "light touch" is that it means different things to different people. I think what this is really saying needs a more precise formulation. I think it's asking to us be -- to find the least intrusive, the least burdensome mechanism of achieving the public interest objective, and that will vary. It's asking us to exercise judgment in relation to that, and sometimes, for a whole set of reasons that I'm sure we will come on to, it's possible to do that, to achieve the public interest objective in a very unintrusive way, which might involve self-regulation and a very minimal role for us. And other times, on other occasions, that is far harder, and because of conflicts of interest, the fact that the public interest is not the same as perhaps the industry interests or the interests of a particular company, that requires much firmer and in some ways more intrusive regulation.

Q. Thank you. We'll come back to discuss self-regulatory and co-regulatory models, but that leads me neatly into my approach to this as a regulator is that our touch should be proportionate, and I think lightness or heaviness is not exactly the right dimension along which to judge that. Q. Thank you. We'll come back to discuss self-regulatory and co-regulatory models, but that leads me neatly into myth-busting. Can I ask you about prior restraint duties? I think there is still a section of people who believe that somehow there is a duty in broadcasting cases for Ofcom to watch or pre-approve programmes before they are broadcast. Is that something that happened, is that a requirement?

MR RICHARDS: It's absolutely not a requirement. It is something that we never do, but it is also true that I still meet people regularly who presume that we do do that, but we don't. We're a post-broadcast regulator. We do not intervene in advance of the broadcast of any programme, and if anybody asked us to do so, we very calmly would explain to them that that's not what happens and if there is an issue after the broadcast, then of course they can complain and raise the issue with us, and that's what is typically happens, but we do not intervene ever in advance of broadcast.

Q. Do you think there would be any merit in being able to do so?

MR RICHARDS: I think the negatives way outweigh the positives, in my view. I think you are then into a very difficult territory which, not to over dramatise it, takes you potentially into the area of censorship and suppression, and I would feel extraordinarily uncomfortable having to discharge a duty of that kind.

Q. Could I see you nodding --

DR BOWE: I'm nodding because, as you will see from my CV, I previously worked in -- 25 years ago in a broadcasting regulator that operated a different regime, and I would strongly agree with what Ed Richards has said, that that poses real difficulties in a sense of a danger of restrictions on freedom of speech and expression, and I lived through one particular episode, which I'm happy to say was firmly resisted by the then chairman of that regulator, when a very serious attempt was made by the government of the day to impede the broadcasting of a programme whose tenor they didn't agree with, and I saw that at first hand, and I have seen the dangers of that approach, which I think take us into an area where, in this country, we do not want to be.

Q. I'm going to ask you now about broadcast licensing, if I can. We know that Ofcom regulates television and video broadcasting in the UK through a statutory licensing scheme, and all TV and radio broadcasting services that you regulate must be provided under a licence issued by Ofcom. A fair and accurate summary?

I'm not going to go into public service broadcasting or the different types of licence. Suffice it to say that not all TV and radio services are regulated by Ofcom. Most are, and there are a ranges of different licences available which impose different requirements. I should also probably point out that the BBC doesn't
need to be licensed in the same way, it's a regulator in its own right, but its charter and also the Comms Act do provide that Ofcom regulates BBC radio and TV in certain ways, importantly in relation to the privacy provisions of the Broadcasting Code, and we'll come back to that in a moment.

I'm going to turn back to your statement, Mr Richards. You deal at sections 6 onwards with television and radio licensing. I appreciate that it wasn't your decision to create a licensing scheme for broadcasters, but what's your understanding, please, of the rationale for licensing broadcasters in this way?

MR RICHARDS: Well, I think it's a historic rationale. I think this an extremely interesting subject. Historically it was, as I understand it, to do with spectrum scarcity. So there is a limited amount of spectrum, so it has to be licensed. Not everybody can use it. So that was the origin of it.

Clearly it's now possible -- actually, that was the first origin of it, that was the technological origin. The other argument for licensing broadcasting historically was also the one that is associated with the scale and the impact and the nature of the medium, and that argument is concerned with the fact that broadcasting very quickly became an act of absolutely enormous scale. It was in everybody's house and became universal, with many millions of people watching it. So that's a scale and significance argument.

But it was also to do with the medium, and that is something to do with the fact that you have very vivid moving pictures being beamed into everybody's living room, and some people have called that -- have said that television is therefore an intrusive medium, it's being broadcast in -- what it's broadcasting is decided by somebody else and it's particularly graphic and vivid because of the nature of the pictures, in contrast, for example, to a still photograph.

Those are the two historic reasons. Clearly today you can run a broadcasting service and you don't actually need spectrum at all. You can run it over satellite, over cable, over Internet protocol television and so on.

I think there have become two other reasons which are at the heart of why the licensing model works and why we do it the way we do. They are firstly what I would call convention. It is a system which has grown up. New broadcasters have seen the system, have been comfortable with it and have therefore adopted it without any apparent objection. So a satellite broadcaster, for example, we don't come across difficulties in that area, so there's a set of reasons about convention.

The fourth, which I think is in some ways now arguably the most important, is to do with audience expectations and what the viewer understands and is comfortable with, and ultimately, since we're concerned here with the public interest and what the public feels it wants and how that's expressed through Parliament, that is very important, and I would say that that aspect of this, in other words audience expectation, where viewers are comfortable, is now equally important, if not more important, than any technological justification or indeed actually the justification about the nature of the medium.

So I think it's that collection of reasons that bring us to where we are today.

Q. Do you have any views on whether that is fundamentally different, the rationale for the licensing system is fundamentally different from the rationale that would be applied to for example licensing of the press?

MR RICHARDS: I think you have to consider all those four elements of why we are where we are in broadcasting and I think they are important. The press starts with a very, very different tradition in relation to every single one of those arguments, I think. It didn't have the same technological provenance. Indeed, it was the opposite. Any of us could go and publish at will, we didn't need spectrum, so I think its origins in that sense were very, very different.

LORD JUSTICE LEVESON: Even more so now.

MR RICHARDS: Absolutely. So I think the fact that I could go home this evening and publish a blog in about 20 minutes in my bedroom, and anybody else could, is highly relevant to that fact. It is a different nature. The medium has historically been different, in the sense it's still pictures, it's not as intrusive as a medium, it's more selected by the individual. Though that is, of course, blurring, and we might come back to that. That is a less strong argument in a digital environment. That seems to me to be an argument which is weakening.

But then you also have convention and audience expectations and it is self-evidently the case that the press and indeed the Internet publishing world starts from a very, very different set of conventions and orthodoxies and culture to broadcasters, and I do think that's pertinent.

And finally, audience expectations, where again people I think understand that if they go and buy a newspaper they understand that it is regulated in a very different way and they understand that they...
should expect something very different to that which they expect beamed into their television through a broadcaster.

So I think saying what's different today and should there be a difference, in my view you do have to go back and really understand the underlying arguments as to why broadcasting is as it is.

MS PATRY HOSKINS: Moving back to the licensing system, the Broadcasting Act 1990, part 2 of schedule 2, sets out bodies which are just disqualified from holding a licence. We could turn them up, I don't think we need to. There are a number of bodies that would be disqualified. Examples are bodies whose objects are wholly or mainly political, religious bodies, various publicly funded bodies and so on. Can you just again --

I know it wasn't your decision to disqualify those bodies, but what's the rationale for excluding bodies just because of particular attributes? Some might say is it not an unjustified limitation on freedom of expression.

MR RICHARDS: You certainly can mount that argument and I think any judgment of that kind needs to consider the freedom of expression argument extremely carefully.

I think -- it clearly wasn't our judgment, but I think the rationale for it would go back to the argument that...

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I made about the power of broadcasting. I think the judgment would have been associated with the concern that if political bodies or religious bodies could exploit the unusual ubiquity and power of broadcasting, that would be a concern for all of us as citizens, and I think in essence that is what it's about.

Q. All right.

DR BOWE: I do think it's worth noting as well that this is not a truth universally acknowledged. We are all aware of other countries, other jurisdictions, in which a completely different approach is taken, and I think the point you're on here is about something that is cultural to the United Kingdom, which is expressed in the point you're on here is about something that is a completely different approach is taken, and I think of other countries, other jurisdictions, in which the rationale for it would go back to the argument that...
Q. All right.

LORD JUSTICE LEVESON: Plurality?

MR RICHARDS: No. Plurality is not a test that we associate with fit and proper. Plurality, in a sense, is a separate standard and a separate test, which may be invoked or may be relevant at the point of transfer of a licence, but it's not a part of the fit and proper application environment.

LORD JUSTICE LEVESON: So it's just focusing entirely on the human being or the entity that wants the licence, there's no wider consideration than that?

MR RICHARDS: No. I think that's right.

DR BOWE: Yes.

MS PATRY HOSKINS: We'll come back to discuss plurality issues if we can, but still remaining on the fit and proper test at the moment, would the decision, for example, of a proprietor of a newspaper group to withdraw from a different regulatory body be relevant to the assessment of whether or not they are a fit and proper person? You've probably guessed who I'm referring to there.

MR RICHARDS: There is, as I mentioned, a general catch-all which permits us some discretion. So we have a degree of discretion in which we can take into account quite a wide range of factors. So I think I wouldn't want to say that things of that kind could never be considered, because I don't think that's right, but it's not our -- it wouldn't necessarily be our primary focus. Our primary focus would be on the specific questions that are set out, so I think in relation to something which is out beyond those sorts of questions, we would be in the territory of asking ourselves, well, how significant is it, how pertinent is it to the holding the broadcast licence, and how do we make a judgment about it?

So it's in the area -- something like that would be in the area of that broad discretion.

LORD JUSTICE LEVESON: The problem is, you'd have to unpick the reasons and indulge in an entirely different inquiry, which is a complete siding to your primary responsibility. A red herring, if you like.

MR RICHARDS: You would, I think that's right.

MS PATRY HOSKINS: Let me perhaps give you a different specific example of a situation where you've decided to revoke a licence on the basis that someone was no longer fit or proper to hold it. It's the Bang Media decision.

If we look at tab 28, which is in file 2, I don't want us to go into this in a huge amount of detail, but I just want us to understand in previous terms why the decision was made to revoke.

LORD JUSTICE LEVESON: I think you talked about this during the course of the --

MS PATRY HOSKINS: Yes, you did. I don't want to go into it in any detail, but just give us an overview. The reason I turn it up is so you can refer to parts of it, if you wish.

MR RICHARDS: I'm struggling with my file, slightly.

In essence, this is really concerned with the compliance regime. It's as straightforward as that, to be honest. The question in our mind here was -- or we were confronted by serious and repeated breaches of the code. So we would not revoke a licence for a single breach of the code, unless it was of such an extremity that we felt that that was the right thing to do, but I would say that is extremely unlikely, and I cannot think of a case in which we even considered that.

In this case, we had repeated breaches such that we concluded that there was no compliance regime in place, there was no prospect of compliance, and that therefore we were really left no alternative but to revoke the licence.

In no circumstances, I should emphasise -- this is not something we like doing. In some ways, we feel a degree of failure, or at least disappointment, if we ever reach this point, because we, as you know, I think we have a gradation of sanctions. We work very hard to try and ensure that licensees understand what is necessary for them to be compliant. We, I would say, bend over backwards to do that. We would have invited the company in, we would have sought to talk to them and offer guidance.

But in a circumstance like this, where there are serious breaches and repeated breaches, and they have had warnings and sanctions and there's still no compliance, I think we felt that ultimately we had no alternative but to revoke the licence.

Q. And applying the fit and proper assessment, you note at 1.39 of that decision, right at the end, that on that basis, and that includes the repeated breaches, Ofcom had ceased to be satisfied that the licensees are fit and proper persons to hold licences under the Acts and has decided to revoke them.

MR RICHARDS: That's right.

Q. I want to understand regulatory position from there on in. Presumably Bang Media could, if they chose, set up a separate standard and a separate test, which may be necessary.

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But in a circumstance like this, where there are serious breaches and repeated breaches, and they have had warnings and sanctions and there's still no compliance, I think we felt that ultimately we had no alternative but to revoke the licence.
MR RICHARDS: That's absolutely right. In fact, there's a number of things they could have done. They could have sought to go to other platform operators and say, "This is just a broadcast licence and surely we can stay on your satellite platform", for example, but happily the broadcast environment works rather well in that case, and, for example, the satellite operator has, I think, a clause in its contract which says that services they carry must be compliant with the Ofcom Broadcasting Code, so that dealt with that issue.

But certainly there is nothing to stop them, to address the question directly, setting up an Internet site, operating an IP TV service, locating it anywhere in the world and they could carry on running the service in that form, and they may well be doing that, for all I know. What I do know is they are not broadcasting in the UK any more.

Q. What effect does the revocation of a licence have then?

MR RICHARDS: It takes them off the broadcast platforms, and that's both the terrestrial and, because of the judgments made by the satellite and cable operators, off the satellite and cable platforms as well. That is very, very significant, because that means that you have eliminated your route to market, your way of reaching the audience, through by far the most significant distribution platforms today.

That will change over time, but it will change very gradually over time, so it does seem to me to still be quite an effective sanction.

Q. I say that it wouldn't be regulated, but of course I suppose it would depend, if an on-demand service was being provided, there might be regulation through at body.

MR RICHARDS: Yes, that's right.

Q. But it all depends, and you tell me they're not broadcasting so we don't have to worry.

Moving back to standards, section 10 of your statement, I said we'd come back to standards and content and here we are. If we take up file 1 again.

If we look back at the Comms Act, please, it's behind tab 8, section 3. It's just for your reference. We've looked at this in some detail, and I don't want to read it out again.

The Act confers statutory duties to Ofcom to regulate the content of TV and radio services, as we've seen, but as we've also seen, you must only interfere where action is needed and in a manner which best guarantees an appropriate level of freedom of expression.

Now, section 319 of the Comms Act, which again we don't need to turn up, but that requires you to set standards for the content of programming on television and radio that are designed to achieve a number of standards objectives which are laid down by Parliament.

We can turn that up if it would assist. If you look on in the same tab to internally page 846 of 879, you will find section 319. For the technician, it's 03611. This section is headed "Programme and fairness standards for television and radio" and it sets out at 319 Ofcom's standards code.

At subparagraph (2), you'll see the relevant standards objectives. Many of them will not need to be read out, but we can summarise, for example, persons under the age of 18 have to be protected, material that's likely to encourage or incite the commission of crime or lead to disorder can't be included, news has to be presented with due impartiality, news also has to be accurate, and there are various provisions relating to religious programmes, offensive and harmful material and so on. Again, it would take too long to read everything out.

That leads us on, achieving those standards objectives leads us on to the Broadcasting Code, because by -- not turning this up but by section 107 of the 1996 Broadcasting Act, you must prepare a code which gives guidance on principles and practices to be followed by broadcasters in connection with the avoidance of -- and then I'll read out the relevant part: 

"... unjust or unfair treatment in programmes or unwarranted infringement of privacy or in connection with the obtaining of material included in such programmes."

Have I accurately summarised how we get to the code?

MR RICHARDS: Yes.

Q. Again we could turn the relevant provisions up but I don't think it's necessary to do so, but if you at any point want to look at any of the references, let me know. You set out the standards for the content of programmes in the Broadcasting Code, which is at tab 16.

We will need to look at that, so we can put away file 1 and take up file 2, which contains the Broadcasting Code. If we just turn to the first page of it and then I will -- I see you have your own little copy.

LORD JUSTICE LEVESON: Tab 16.

MS PATRY HOSKINS: It's in tab 16.
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1 LORD JUSTICE LEVESON: You get used to the heavy lifting of these files.
2 MS PATRY HOSKINS: We will come on to look at the fairness and privacy standards. They're found in the code at sections 7 and 8. But just some general questions and some general points. The most recent version of the code is February 2011 and it's accurate to say, isn't it, that broadcasters are required as part of their licence terms to observe the Broadcasting Code, breach of it is a breach of the licence conditions and enforcement action may be taken?
3 MR RICHARDS: That is absolutely right, yes.
4 Q. The first thing to note about tab 16, if you flick your finger through it, is that the code is long and detailed. In your view, is that an advantage or a disadvantage? Can broadcasters be expected to know it inside out, remember all the relevant parts?
5 MR RICHARDS: I'm not sure how long it is, actually, in the sense that if you look at your copy in the file, or indeed my actual version here, a substantial body of it is appendices.
6 Q. And in plain English.
7 DR BOWE: And also written in plain English.
8
9 LORD JUSTICE LEVESON: Have you found it necessary -- I'm sorry, Ms Patry Hoskins -- to involve actual programme makers or editors in the creation of this document?
10 MR RICHARDS: I would say that they are involved very closely in its evolution. We have a very close dialogue with actual programme makers, working journalists, experience, but the decision on the code would then be ours, and the decision would be made by the content board, which is where the hub of our broadcasting expertise lies.
11 MS PATRY HOSKINS: I was coming on to ask you about section 7. I was going to ask you the same question about who is involved in writing this section, but is that the same as the answer that you've already just given?
12 MR RICHARDS: Section 7, fairness?
13 Q. Sections 7 and 8.
14 MR RICHARDS: Absolutely.
15 Q. Can we start, please, with the foreword to section 7, because it says this: "This section and the following section on privacy are different from other sections of the code. They apply to how broadcasters treat the individuals or organisations directly affected by programmes rather than to what the general public sees and/or hears as

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I don't think for working journalists, for example, or working producers, it is a massive or particularly highly complex document. One of the things we've tried to do over the years is to simplify and to make sure that principles lie at the heart of it. If people understand principles, and are incentivised and inclined to adhere to the principles, I think that takes you a very, very long way, and in my experience that is broadly the case in broadcasting, and when you look at the principles, most of them are reasonably straightforward, in my view, so there is a degree of complexity that lies behind in the legislative scheme, in the details set out in the appendices, but I think I would want to say to you that we strive, and I hope we've made a reasonable job of setting out the core issues in a reasonably succinct way at the front end of the code.

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is that half a dozen people in Ofcom hide in a room and write a code. What actually happens is that those people talk on an open way over an extended period, test ideas, examine them, review them, and that process would involve working journalists, working producers, working editors, as well as those of -- with previous experience, but the decision on the code would then be ours, and the decision would be made by the content board, so it's incorporating, understanding latest practice and things of that nature, but the decision absolutely remains with us.

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MR RICHARDS: No, the way the code would work is so we review it from time to time and it's right this version is from last February, so it's just under a year old, so we try and update it in the light of practice. It would be drafted by full-time Ofcom employees, and it would then go through our decision-making process for approval, and in this case would be approved by our content board, which is where the hub of our broadcasting expertise lies.

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It could always, as with any Ofcom decision, be then referred upwards to the main board, but as I recall, I think this would have been signed off by the content board in their delegated responsibilities.

23 (Pages 89 to 92)
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1. views and listeners.’
2. In that sense, it is rather different.
3. MR RICHARDS: Yes, it is subtly different, that’s right.
4. Q. In relation to fairness, if we look at the general principle just under the foreword:
5. “The general principle is to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.”
6. And then it sets out practices -- well, there’s a rule and then it sets out various practices to be followed. That’s set out right through to 7.14.
7. There’s essentially some guidance on how to ensure that you avoid unjust or unfair treatment of individuals or organisations.
8. MR RICHARDS: Can I just make one quick observation?
9. MR RICHARDS: Because that is -- in a sense, there we are, that is fairness in one, two, three, four short pages.
10. What of course also lies behind this is substantial, in that is fairness in one, two, three, four short pages.
11. LORD JUSTICE LEVESON: -- you can still be in breach, but if you don’t follow, you won’t be in breach if there’s no unfairness. So actually you’ve put it both ways. You are seeking to identify a way of working and, if you like, a culture of fairness, making the point that, unlike legislation, we’re not trying to set it down in such black and white rigid terms that you can say, “Oh, well, I actually did this”, and still not be in breach.
12. MR RICHARDS: I think that’s a very important point.
13. DR BOWE: Yes, it’s trying to get away from ever having a sort of box-ticking compliance culture that doesn’t really go to the heart of what people do, and we’ve tried to express this in a way that encourages people to think about what they actually do, rather than “Have I ticked a box?”.
14. LORD JUSTICE LEVESON: Mm.
15. MS PATRY HOSKINS: Turn to section 8, which has a very similar provision halfway down the first page:
16. “If you follow the letter of this but not the spirit, you can still be in breach, but if you don’t follow, you won’t be in breach if there’s no unfairness. So actually you’ve put it both ways. You are seeking to identify a way of working and, if you like, a culture of fairness, making the point that, unlike legislation, we’re not trying to set it down in such black and white rigid terms that you can say, “Oh, well, I actually did this”, and still not be in breach.
17. Q. Of course.
18. MR RICHARDS: Because that is -- in a sense, there we are, that is fairness in one, two, three, four short pages.
19. What of course also lies behind this is substantial, in that is fairness in one, two, three, four short pages.
20. LORD JUSTICE LEVESON: -- you can still be in breach, but if you don’t follow, you won’t be in breach if there’s no unfairness. So actually you’ve put it both ways. You are seeking to identify a way of working and, if you like, a culture of fairness, making the point that, unlike legislation, we’re not trying to set it down in such black and white rigid terms that you can say, “Oh, well, I actually did this”, and still not be in breach.
21. Q. Because it specifically says if the reason is that it’s in the public interest? Can you help us with that?
22. DR BOWE: Yes.
23. Q. Because it specifically says if the reason is that it’s in the public interest, then X.
24. Because it specifically says if the reason is that it’s in the public interest, then X.
25. MR RICHARDS: That’s absolutely right.

---

Q. How would they be aware? You said they would be very aware of those.

MR RICHARDS: Those judgments are published and any judgments we make carries a reasoned decision and they are transparently available to everybody.

Q. All right. Thank you. I don’t want to read out this section, I’m sure that the chairman can read it at his leisure. Is there anything that you particularly want to draw out from this before I turn to the privacy section?

MR RICHARDS: I don’t think so, no. Probably merely to highlight again the point I began with, which is if you look at the principle, it’s very simple, and so long as it is backed by the organisations involved understanding that if they don’t adhere to it there will be sanctions and enforcement, it takes you a very long way.

LORD JUSTICE LEVESON: Actually, it’s rather more than that, because what you say in the foreword is: "If you follow the letter of this but not the spirit, you can still be in breach."

DR BOWE: Yes.

LORD JUSTICE LEVESON: And even if you follow every letter --

MR RICHARDS: That’s absolutely right.

---

I want to explore, please, what "warranted" or "unwarranted" means. It appears there within the general principle. It’s defined just below it, the meaning of "warranted". It has a particular meaning. I will read it out, it’s important: "It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."

No further guidance on what "in the public interest" means, but what is clear, I hope you’ll agree, is that "warranted" is wider than "in the public interest".

DR BOWE: Yes.

Q. Because it specifically says if the reason is that it’s in the public interest, then X.

What other reasons could there be, other than it is in the public interest? Can you help us with that?

DR BOWE: I’m sorry, I’m slightly struggling here. I don’t...
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think either of us really understood the question.
Q. Sorry if I haven't made it clear. There's a definition
of "warranted", and an infringement of privacy would
have to be, or must be, warranted, right?
DR BOWE: Yes.
Q. One of the reasons it might be warranted would be
because it was in the public interest. What other
reasons other than being in the public interest would
mean that an infringement of privacy was warranted?
What other kinds of reasons have you seen advanced?
MR RICHARDS: I think the direct answer to that is very few,
and I think we may be inferring more than intended.
I think our primary expectation of a broadcaster in this
area, if they are infringing privacy, is that it has to
be warranted, and our typical expectation of that would
be that there is a clear public interest justification.
So I don't think there is a significant area here which
is in some way obscured or hidden.
The typical justifications that we receive we deal
with a fair number of these cases, as you can imagine,
and I would say they are overwhelmingly concerned with
the items on that list.
LORD JUSTICE LEVESON: And the language is identical to the
language that we've been looking at in relation to the
public interest in the code.

MR RICHARDS: It's --
LORD JUSTICE LEVESON: I'm not trying to test you on that.
MS PATRY HOSKINS: I'm simply seeking to understand whether
"unwarranted" or "warranted" would be a better, more
inclusive term than "public interest", but it sounds to
me from what you say that by and large the reasons
advanced usually are that it's in the public interest.
DR BOWE: I think actually we're talking about this in
slightly different ways. I think why we're using the
word "warranted" is we're trying to convey the necessity
for making a judgment, where you on the one hand have,
let us say, the exposure of crime or independence,
versus the right to privacy, and we are using the word
"warranted" to describe that process of making
a defensible -- and I emphasise defensible -- judgment
about how that balance has been struck in the
journalistic decision-making. In other words, warranted
isn't the end of the argument, it's a description of how
you've made the judgment.
Q. All right. That's very clear.
If we look underneath the definition of "warranted",
we can see that there are various practices to be
followed. There's a heading, "Private lives, public
places and legitimate expectation of privacy", and then
the code goes on to define the meaning of "legitimate

expectation of privacy". Again I'll read it out because
I have a question to ask you about this:
"Legitimate expectations of privacy will vary
according to the place and nature of the information,
activity or condition in question, the extent to which
it is in the public domain (if at all) and whether the
individual concerned is already in the public eye."
Then it goes on to say a number of other things
which I don't need to ask you about.
Why is it a relevant consideration that the
individual concerned may already be in the public eye
when determining whether they have a legitimate
expectation of privacy?
MR RICHARDS: I think it's probably connected to the last
element, or at least in part, and really significantly
connects to the last part of the meaning of "warranted".
So in my mind there is a connection between, for
example, the disclosure of incompetence which affects
the public, and I think the connection to somebody in
the public eye is that there could be or we might expect
to be some sort of connection to a position of
power or influence, which might -- through which they
could influence the public more generally. So I think
that's the key connection that's being made there.
will be frustrated if the subject is approached openly and it is warranted to doorstep. However, normally broadcasters may, without prior warning, interview, film or record people in the news when in public places."

And then there's a definition of the meaning of "doorstepping".

Is that something that you have to consider -- I appreciate that you may not individually have to deal with this on a regular basis. Is this something that Ofcom has experience with that it could share with us?

MR RICHARDS: The origin of this is interesting. I don't have an encyclopaedic memory of all previous broadcasting codes, but I suspect this is something that would not have been in the original code. This is one of the things that has emerged as the evolution of media practice has changed, and doorstepping became a phenomenon, and therefore the code had to adapt to deal with it.

That would have been some years ago, but you can see here its latest manifestation.

We can come back to you and provide some information on the extent to which doorstepping is a problem with which we're dealing at the moment. I don't recall off the top of my head many recent instances.

DR BOWE: No.

MR RICHARDS: But we can provide the Inquiry with a precise answer to that.

Generally speaking I think the code here is relatively clear and I think I would be right in saying that generally speaking broadcasters understand it and adhere to it.

Q. I only raise it because in some circumstances some witnesses to this Inquiry have come and said, especially when they're being asked about photographs taken in a doorstepping situation, "It wasn't just us, the TV cameras were there as well". So I want to understand what the requirement is here. It seems to be that doorstepping shouldn't take place unless one of these situations arises and it is warranted to doorstep, so we come back again to a requirement that it be warranted.

MR RICHARDS: I think there are variants of doorstepping.

You notice the final line of 8.11, where we say: "However, normally broadcasters may, without prior warning, interview, film or record people in the news when in public places."

I think that kind of context is quite different to some of the incidences of doorstepping which I have seen, which is a far more aggressive and surprising intervention in relation to someone who is not at that point in the news. I think if somebody is in the news, they know that the media are interested in them, they know if they walk down Oxford Street there is going to be interest in photographing them. There is a difference between that and the more aggressive form of surprise doorstepping, on the doorstep of someone at 7 am or 6.30 am with a microphone thrust into the face and things of that nature. That seems to me to be a quite different approach.

LORD JUSTICE LEVESON: Which side of the line would it fall if somebody in the news -- and we could take an example from today without identifying it -- would it be appropriate and within the rules to knock on his door because he's in the news?

MR RICHARDS: I hesitate to answer --

LORD JUSTICE LEVESON: Because you might have to, that's fair enough.

MR RICHARDS: Absolutely. I think it is all about judgment, and I think that is a possibility that we might have -- it's conceivable we could deal with it.

LORD JUSTICE LEVESON: You're entirely right, Mr Richards. I see the point. But before I forget on this doorstepping issue, the PCC have developed this anti-harassment policy. Are you involved in that?

MR RICHARDS: We are. This was a -- I think a fairly straightforward positive step by the PCC with our agreement. Media scrums had become a problem. We were aware of that. We could have done something and were indeed, I think, considering doing something about it under our powers. The PCC succeeded in securing the commitment to an approach in this area amongst the newspapers, and there was a discussion or a proposal at some point about could the broadcasters join as well and we were very happy to support that.

LORD JUSTICE LEVESON: Is that in the code or not?

MR RICHARDS: It's not set out in the code, but it's well understood and as far as I'm aware, it works reasonably well.

LORD JUSTICE LEVESON: Does it mean you have to get involved to notify?

MR RICHARDS: I think the system is that an email is sent around by the PCC, the broadcasters we have encouraged to be recipients of that email, and therefore the system works in that way, and we're perfectly content for that to be the case.

LORD JUSTICE LEVESON: You don't have to send it on, it goes to everybody?

MR RICHARDS: No, I think it goes to everybody.

DR BOWE: It does.

MR RICHARDS: It's a constructive step forward.

DR BOWE: It goes back a bit to the question we were on much earlier.
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<td>earlier about proportionality. In this case, if another</td>
<td>on this basis. You explain in your statement,</td>
<td>day, but again I don't think we will need -- I will</td>
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<td>regulator or another organisation has got a perfectly</td>
<td>Mr Richards, that you are limited in your capacity to</td>
<td>provide you with a copy, of course, over lunchtime.</td>
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<td>good approach that you can hook onto, that seems to us</td>
<td>entertain privacy and fairness complaints. If we look</td>
<td>LORD JUSTICE LEVESON: Yes, thank you.</td>
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<td>to be a good way to develop.</td>
<td>back at your witness statement in file one, you'll find</td>
<td>MS PATRY HOSKINS: But we may not need to refer to it.</td>
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<td>LORD JUSTICE LEVESON: Yes.</td>
<td>this at section 12.3. I say first witness statement;</td>
<td>LORD JUSTICE LEVESON: I certainly want to read it.</td>
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<td>MS PATRY HOSKINS: The second practice I wanted to look at</td>
<td>I know there are three.</td>
<td>MS PATRY HOSKINS: Of course, we'll provide it.</td>
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<td>is contained at 8.13 onwards; it's about surreptitious</td>
<td>I forgot to check at the outset, sir, that you have</td>
<td>LORD JUSTICE LEVESON: Yes, thank you.</td>
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<td>filming or recording. Again, it should only be used</td>
<td>all three statements?</td>
<td>MS PATRY HOSKINS: 12.3 of the first witness statement. You</td>
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<td>where it's warranted and normally it will only be</td>
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<td>explain that by sections 111 to 114 and 130 of the 1996</td>
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<td>warranted in certain circumstances, so again there needs</td>
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<td>act, they provide for certain statutory criteria which</td>
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<td>to be some evidence of a story in the public interest,</td>
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<td>must be satisfied before you're entitled to proceed to</td>
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<td>reasonable grounds to suspect that further material</td>
<td>consider a fairness or privacy complaint. In summary</td>
<td>consider a fairness or privacy complaint. In summary</td>
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<td>evidence could be obtained, and it's necessary to the</td>
<td>terms, so that we don't have to turn it up, you explain</td>
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<td>credibility and authenticity of the programme. That</td>
<td>that fairness and/or privacy complaints may be made by</td>
<td>that fairness and/or privacy complaints may be made by</td>
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<td>could seem to rule out fishing expeditions; is that</td>
<td>an individual or by a body of persons, but you are</td>
<td>an individual or by a body of persons, but you are</td>
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<td>right?</td>
<td></td>
<td>normally under a duty not to entertain such a complaint</td>
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<td>MR RICHARDS: It is intended to rule out fishing expedition.</td>
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<td>unless it is either made by the person affected or by</td>
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<td>The first bullet point of 8.13 is intended to be the</td>
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<td>a person authorised by him or her to make a complaint on</td>
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<td>spirit of ruling out fishing expeditions, so you can't</td>
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<td>their behalf. And in relation to privacy, &quot;the person</td>
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<td>just go and have a look. Prima facie evidence of</td>
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<td>affected&quot; means a person whose privacy was infringed.</td>
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<td>a story on public interest seems to me to be reasonably</td>
<td></td>
<td>Although there are other provisions, for example, if</td>
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<td>clear in relation to that.</td>
<td></td>
<td>someone has died, a complaint can be made on their</td>
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<td>Q. All right, I don't think we need to say anything more.</td>
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<td>behalf --</td>
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<td>I want to move on to your adjudication role in fairness</td>
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<td>MR RICHARDS: Up to five years after the death.</td>
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<td>and privacy cases. Just so we understand where we are,</td>
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<td>Q. Exactly. So those are the limitations in the act on who</td>
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<td>can bring a complaint. That's in direct contrast, as</td>
<td>other words there are some broadcasters I know -- and</td>
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<td>I understand it, to the right of a viewer of a TV</td>
<td>I'm talking about individual practitioners rather than</td>
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<td>programme to complain about harm or accuracy; is that</td>
<td>a corporate position here -- there are certainly some</td>
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<td>correct?</td>
<td>people who would argue that it should be absolutely</td>
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<td>MR RICHARDS: That is correct, and that's because harm and</td>
<td>restricted to complaints made by the individuals</td>
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<td>offence is primarily concerned with viewers, so the</td>
<td>affected. We have not taken that view. We have taken</td>
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<td>receiving parties, and fairness and privacy is about</td>
<td>the view that there is a degree of latitude, it's not</td>
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<td>those affected by the making or broadcast of the</td>
<td>a huge degree of latitude, we wouldn't embark upon</td>
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<td>programmes.</td>
<td>a case of this kind without very careful consideration,</td>
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<td>Q. Exactly. So we can see it's a matter of general</td>
<td>but that there is a degree of latitude which would</td>
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<td>principle why that might be. A person who's been</td>
<td>permit us to take action of that kind, and in one</td>
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<td>unfairly treated or a person whose privacy is being</td>
<td>notable case we have, and I am sure I can think of one</td>
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<td>invaded may well be the person who should bring the</td>
<td>or two other cases where we weren't sure if a complaint</td>
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<td>complaint on that basis.</td>
<td>would be forthcoming, and where we would certainly have</td>
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<td>MR RICHARDS: Yes.</td>
<td>considered using that power as well, if a complaint had</td>
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<td>Q. But that would mean that the technical statutory</td>
<td>not been forthcoming. In those cases that I can recall,</td>
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<td>interpretation would be that even where a broadcast</td>
<td>a complaint was forthcoming and we ended up addressing</td>
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<td>contained a really egregious invasion of privacy, Ofcom</td>
<td>it --</td>
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<td>would be unable to consider any privacy complaints</td>
<td>LORD JUSTICE LEVESON: So it might be one of two ways. It</td>
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<td>unless the person affected had made a complaint. Is</td>
<td>might be that somebody else, who is not the aggrieved</td>
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<td>that how Ofcom interprets those provisions?</td>
<td>person, complains; a viewer.</td>
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<td>MR RICHARDS: No, not quite. We regard the central locus</td>
<td>LORD JUSTICE LEVESON: Or might it also be you've seen</td>
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<td>of our responsibility here as to concern with those</td>
<td>something which you feel breaches your standards and</td>
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<td>affected, hence the primary expectation is that</td>
<td>without anybody saying, &quot;I complain about this&quot;; you</td>
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<td>a complaint would be made by the individual or</td>
<td>could initiate a complaint? Is that right or does that</td>
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<td>organisation affected or someone acting on their behalf,</td>
<td>go too far?</td>
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<td>but we also interpret the statute to include a degree of</td>
<td>MR RICHARDS: No, that is right, but the threshold in both</td>
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<td>latitude, through which, under what we describe in our</td>
<td>cases is high.</td>
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<td>LORD JUSTICE LEVESON: Yes.</td>
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<td>the general duty to provide adequate protection to the</td>
<td>MR RICHARDS: It's considerable. So these are exceptional</td>
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<td>public at large in relation to unfairness and</td>
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<td>from the individual.</td>
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<td>Q. Pause there. That's going back to the general</td>
<td>extremely unlikely. I think the cases we're talking</td>
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<td>principles in section 3 of the Comms Act?</td>
<td>about are where we have particular evidence before us</td>
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<td>MR RICHARDS: Yes, that's right.</td>
<td>which would make us consider it, even though there were</td>
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<td>Q. So you would interpret section 3 and your general duty</td>
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<td>to secure the application of standards that provide</td>
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<td>adequate protection, et cetera, you consider that to</td>
<td>a question against our fulfilment of the more general</td>
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<td>mean that you can, in exceptional circumstances,</td>
<td>duty.</td>
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<td>consider a complaint even when the person affected has</td>
<td>LORD JUSTICE LEVESON: Although, presumably, somebody would</td>
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<td>not complained?</td>
<td>have had to have brought your attention to the</td>
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<td>MR RICHARDS: That's right, yes.</td>
<td>programme. You've not got people monitoring every</td>
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<td>Q. Is that a contentious application of the section or --</td>
<td>programme.</td>
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<td>MR RICHARDS: Yes. Well, &quot;contentious&quot;, I would say, is</td>
<td>DR BOWE: No.</td>
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<td>slightly too strong. It is not an application with</td>
<td>LORD JUSTICE LEVESON: Somebody has to have seen it.</td>
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<td>which everybody wholeheartedly agrees. There are --</td>
<td>MR RICHARDS: Yes, and typically where something is</td>
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<td>there is a body of opinion amongst the broadcasters that</td>
<td>particularly egregious, someone will be making a noise</td>
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<td>that is an extension beyond which we should go, so in</td>
<td>could initiate a complaint? Is that right or does that</td>
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<td>Q. But that would mean that the technical statutory</td>
<td>go too far?</td>
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<td>interpretation would be that even where a broadcast</td>
<td>MR RICHARDS: No, that is right, but the threshold in both</td>
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<td>contained a really egregious invasion of privacy, Ofcom</td>
<td>cases is high.</td>
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<td>would be unable to consider any privacy complaints</td>
<td>LORD JUSTICE LEVESON: Yes.</td>
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<td>unless the person affected had made a complaint. Is</td>
<td>MR RICHARDS: It's considerable. So these are exceptional</td>
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<td>that how Ofcom interprets those provisions?</td>
<td>cases. I don't want to give you the impression that</td>
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<td>MR RICHARDS: No, not quite. We regard the central locus</td>
<td>because we had a flurry of complaints whipped up by</td>
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<td>of our responsibility here as to concern with those</td>
<td>media interest that somehow that would lead us to making</td>
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<td>affected, hence the primary expectation is that</td>
<td>a judgment of that kind. I think that would be</td>
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<td>a complaint would be made by the individual or</td>
<td>extremely unlikely. I think the cases we're talking</td>
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<td>organisation affected or someone acting on their behalf,</td>
<td>about are where we have particular evidence before us</td>
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<td>but we also interpret the statute to include a degree of</td>
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somewhere, we obviously monitor what's happening and therefore we would expect to have noticed it.

MS PATRY HOSKINS: All right. But you say to me exceptional circumstances would not necessarily simply arise because there was a media frenzy about a particular issue. Let me give you a specific example. The Russell Brand/Jonathan Ross example. As I understand that, there was no complaint by Andrew Sachs or Georgina Bailey in that case, but nevertheless there were a number of -- clearly something that the press took an interest in. What was the application of exceptional circumstances in that case?

MR RICHARDS: Particularly interesting case because there was a huge media outrage about it, and therefore that was taking place, but that was absolutely not the reason that we took that case forward.

There were two sets of reasons for invoking the exceptional circumstances for that case. The first was the particularly extreme nature of the offence, so Andrew Sachs and Georgina Bailey, very, very serious infringement of their privacy. They did not seek to be on the programme, they did not seek to be subject of the broadcast, and that's a big distinction with some other cases. The infringement was repeated more than once, and it was then indeed underscored or amplified by the apology, which, of course, was largely sarcastic. So you had a particularly egregious case. You also had a situation in which the BBC themselves said relatively quickly that there was substantial editorial compliance failure, there was editorial misjudgment, and there were compliance -- procedural compliance issues weaknesses as well, in addition to the fact that the BBC Trust then said, quite openly, this was a wholly unacceptable breach of privacy.

So we had both the facts of the case in front of us already, we then also had concrete evidence of the significance of the case accepted by the broadcaster, and in those circumstances, we took the view that this was an exceptional case, Andrew Sachs and Georgina Bailey did not complain, but we invoked the exceptional circumstances when confronted with that body of evidence.

LORD JUSTICE LEVESON: And you would argue that was absolutely in the public interest?

MR RICHARDS: I absolutely would argue that was in the public interest. I think it was entirely the right thing to do and I think it was extremely important for not only the BBC Trust but then ourselves as the statutory regulator for all of broadcasting to send a very, very clear signal that this kind of behaviour was wholly unacceptable.

MS PATRY HOSKINS: Yes. My next question was going to be some may say that this duty or this power to act independently of complaints is what strengthens your position as a regulator. Would you agree with that sentiment?

MR RICHARDS: I think it's very important that we have the power, for the reasons that I think we've just been describing. It's obviously also important that we exercise it very carefully and in light of the facts. I say that because I'm not in favour of us having such latitude and such unqualified power that we would be exercising that power in an undue or incautious way, so I think it's important that it's pitched appropriately, but the general point you're asking me about: is it important that we have, in a sense, an own initiative power?

Q. Yes.

MR RICHARDS: I think yes, it's extremely important.

Q. My last question before lunch is this, and it touches on what you've just said: why is there a need to limit the exercise of such powers to exceptional circumstances?

MR RICHARDS: I think because everybody needs to know -- everybody needs to know where they stand, and you don't want to take the risk of a regulatory authority or any public authority that has power that is unchecked or unqualified. I think that's wise in all circumstances. It's particularly important in these circumstances, because of the risks of such overweening power in relation to freedom of expression, so it's always important, but I think particularly important in this context.

MS PATRY HOSKINS: Right. Thank you.

LORD JUSTICE LEVESON: Very good. Well, we'll resume at 2 o'clock. Is that right? Thank you.

(1.01 pm)

(The luncheon adjournment)
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