

<p>1 Tuesday, 17 July 2012</p> <p>2 (10.00 am)</p> <p>3 LORD JUSTICE LEVESON: Good morning.</p> <p>4 MR JAY: Good morning. The first witness today is</p> <p>5 Mr Philip Coppel, please.</p> <p>6 LORD JUSTICE LEVESON: Thank you.</p> <p>7 MR PHILIP ANTONY COPPEL (sworn)</p> <p>8 Questions by MR JAY</p> <p>9 MR JAY: Thank you, Mr Coppel. Your full name, please?</p> <p>10 A. Philip Antony (with no H) Coppel.</p> <p>11 Q. Thank you. You've kindly provided us with a statement</p> <p>12 dated 28 June 2012. It starts at our page 01178. Are</p> <p>13 you content to confirm the truth of the facts and</p> <p>14 matters set out?</p> <p>15 A. I confirm the truth of facts and matters.</p> <p>16 Q. Thank you. Now, Mr Coppel, you are a barrister</p> <p>17 practising at 4-5 Gray's Inn Square. You were called to</p> <p>18 the bar in 1994, appointed Queen's Counsel in 2009. You</p> <p>19 practise in the realms of public law and commercial law</p> <p>20 with a particular interest in data protection and</p> <p>21 freedom of information; is that a fair summary?</p> <p>22 A. Correct.</p> <p>23 Q. You were asked to deal with a number of aspects of the</p> <p>24 Data Protection Act so far as they bear on the press and</p> <p>25 the scope of your evidence. That is set out in</p> <p style="text-align: center;">Page 1</p>	<p>1 the same entities as the EU or is it wider?</p> <p>2 A. It's wider than the EU. So for example, the</p> <p>3 United States, Australia, are all members of the OECD.</p> <p>4 Q. Thank you. The Data Protection Act, which is the first</p> <p>5 piece of legislation in this area, was enacted in 1984,</p> <p>6 and you say in paragraph 11:</p> <p>7 "It did provide some protection against mishandling</p> <p>8 of personal, private information."</p> <p>9 And there was litigation in the House of Lords in</p> <p>10 relation to that. Could you tell us, please, in</p> <p>11 a nutshell, what the protections were in the first Act?</p> <p>12 A. Well, the protections were more limited insofar as they</p> <p>13 didn't give much rise -- sorry, much opportunity for an</p> <p>14 individual to bring personal claims for abuse of</p> <p>15 personal information, unlike the 1998 Act. It was more</p> <p>16 concerned with the actual processing itself to ensure</p> <p>17 that it adhered to the requirements which were set out</p> <p>18 in the act, so in terms of what it gave the individual</p> <p>19 in relation to information that related to that</p> <p>20 individual, it was less than that which was provided by</p> <p>21 the 1998 Act.</p> <p>22 Q. I think at that stage we weren't dealing with</p> <p>23 a commissioner; we were dealing with a registrar. The</p> <p>24 name changed between 1984 and just before the</p> <p>25 implementation of the 1998 Act in the year 2000? Is</p> <p style="text-align: center;">Page 3</p>
<p>1 paragraphs 3 and 4 of your statement; is that right?</p> <p>2 A. Correct.</p> <p>3 Q. May we move straight to paragraph 7, the introduction to</p> <p>4 the DPA, in particular the background. I'm going to ask</p> <p>5 you to assume that your listeners may or may not be that</p> <p>6 familiar with the minutiae of data protection law. All</p> <p>7 the lawyers here will carefully have pre-read your</p> <p>8 statement but no everybody --</p> <p>9 A. I understand.</p> <p>10 Q. -- watching this, so we need to find the right balance</p> <p>11 between too much detail and too little. Could you tell</p> <p>12 us in other words, please, about the background to the</p> <p>13 first Data Protection Act, which was, of course, enacted</p> <p>14 in 1984 in the light of international, European and</p> <p>15 common law obligations?</p> <p>16 A. The 1984 Act was not the product of a directive, unlike</p> <p>17 the 1998 Act. It emanated from the parliament of this</p> <p>18 country, although it was responsive to certain</p> <p>19 international moves which had taken place in the 1960s</p> <p>20 and 1970s and 1980 in particular, when the OECD issued</p> <p>21 guidelines to countries as to the manner in which</p> <p>22 personal data was to be handled by states that were</p> <p>23 members of the OECD, of which the United Kingdom is one.</p> <p>24 Q. Thank you. The OECD, of course, is the Organisation for</p> <p>25 Economic Co-operation and Development. Does that cover</p> <p style="text-align: center;">Page 2</p>	<p>1 that right?</p> <p>2 A. Yes, the office was called the Data Protection</p> <p>3 Registrar. It became the Information Commissioner,</p> <p>4 I believe, after 1998 through amendments effected by the</p> <p>5 Freedom of Information Act 2000.</p> <p>6 Q. And what happened in the 1990s is that consideration was</p> <p>7 given to a new directive and in October 1995, the</p> <p>8 European Parliament, as you remind us, formally adopted</p> <p>9 the directive, but the UK abstained in the vote. Is</p> <p>10 anything to be deduced from our abstention?</p> <p>11 A. Well, I couldn't possibly say, other than we didn't want</p> <p>12 to vote in favour and we didn't want to vote against,</p> <p>13 presumably.</p> <p>14 LORD JUSTICE LEVESON: Yes, I think that's called</p> <p>15 mind-bogglingly obvious. Yes.</p> <p>16 MR JAY: Following the directive, the Home Office, under the</p> <p>17 then Conservative government, issued a consultation</p> <p>18 paper. The government itself said it didn't see the</p> <p>19 need for the directive, but nonetheless, in line with</p> <p>20 its principles, had to consider implementation. There</p> <p>21 was then a consultation exercise. The directive</p> <p>22 required implementation by the end of October 1998, but</p> <p>23 the DPA was, I think, just before then with</p> <p>24 implementation on 1 March 2000; is that right?</p> <p>25 A. I think it was enacted on 24 October 1998. There was</p> <p style="text-align: center;">Page 4</p>

<p>1 a sunrise provision in relation to various parts of the 2 Act itself, but it came fully into force on 1 March 3 2000. 4 Q. You make an important point in paragraph 15, which 5 anybody who understands European law will be fully 6 familiar with, but then not everybody will know the 7 detail of this. You explain the directive is 8 a harmonisation measure. There's nothing to prevent 9 a member state from doing more, provided that which 10 is done more is not expressly prevented by some other 11 provision of Community law, but a member state can't do 12 less than that which the directive specifies. 13 A. Correct. 14 Q. Is that right? And that may or may not be relevant to 15 Section 32, when we come to consideration of that 16 difficult provision. 17 The Lisbon Treaty. You deal with this in 18 paragraph 17. What, please, is the significance of that 19 apart from the fact it amended the Treaty of Rome? 20 A. The significance is that there is a specific article in 21 there recognising the protection of personal data 22 relating to an individual. So there is a more 23 fundamental recognition than previously existed of the 24 importance of protecting the individual's personal 25 information.</p> <p style="text-align: center;">Page 5</p>	<p>1 Q. Thank you. And personal data? Maybe that's a more 2 straightforward one. It relates to an identifiable live 3 and natural person; in other words, not to a body 4 corporate? 5 A. Not to a body corporate, not to somebody who has 6 deceased, and then the issue is whether something 7 relates to them, and there has been authority in 8 relation to how close the nexus must be between the data 9 and the individual said to be so identified. 10 Q. Thank you. Certain species of data are in a special 11 category owing to their higher sensitivity. 12 Unsurprisingly, they are called "sensitive personal 13 data". As you explain in paragraph 20, these relate to 14 matters such as racial or ethnic origin, political 15 opinions, religious beliefs, et cetera. 16 A. All the things you would expect to see treated more 17 sensitively. In particular, health matters. 18 Q. The activity related by Act is called "processing". 19 Again, in a nutshell, what is processing? 20 A. In a nutshell, it's basically any activity, including 21 the state in which data is. So it means holding, 22 getting, receiving, disseminating, publishing, 23 manipulating or using in any way. It's as wide as it 24 possibly could be. 25 Q. The Act bites on those responsible for the data in two</p> <p style="text-align: center;">Page 7</p>
<p>1 Q. Thank you. The scheme of the Data Protection Act -- 2 first of all you point out, paragraph 18, that the 3 obligations, generally speaking, under the Act are 4 imposed on government bodies, companies and individuals. 5 So -- I think those concepts are self-explanatory. What 6 may be a little bit more difficult is the matter caught 7 by the Act: personal data. Could you explain for us, 8 please, the concepts of data and personal data? 9 A. Data is probably best characterised as information, but 10 unlike information, we think of data not necessarily 11 being internally explicable. So if I draw the analogy 12 of a jigsaw puzzle. We have a completed jigsaw puzzle. 13 We say that's information. We see an image, and that's 14 information. Data may be regarded as the individual 15 pieces themselves. The shape of those pieces tells you 16 how it relates to the other data, but it's only when you 17 put them together that an ordinary person -- or at least 18 most of the pieces together, that an ordinary person 19 understands what it is that is being conveyed. 20 Nevertheless, each of the individual pieces may be said 21 to constitute data, and that is the distinction, 22 metaphorically, between data and information. But it 23 is, nevertheless, informative of something, albeit that 24 you might have to assemble it with other data to get 25 that information.</p> <p style="text-align: center;">Page 6</p>	<p>1 ways. We have a data controller and a data processor. 2 What's the difference between those? 3 A. The data controller is the guiding mind in relation to 4 what is done or not done in relation to the data that is 5 held. The processor is the one who may do the actual 6 work but at the instruction of the data controller. So 7 if, for example, the data was shifted off site from the 8 particular entity -- the company, let us say -- it's the 9 data controller who may tell the data processor what to 10 do or what not to do in relation to those data and 11 that's the difference between the two. 12 Q. Thank you. And paragraph 28: 13 "The standard of processing required by the Act is 14 defined through the data protection principles." 15 Of which there are eight. Then you go on in 16 paragraph 24 and following to explain each of these 17 principles. Most of them are self-explanatory, but the 18 first data protection principle -- can I ask you, 19 please, to amplify that one? As you say, there are 20 three requirements: the requirement to process personal 21 data fairly, to process it lawfully, and then to meet at 22 least one of the schedule 2 conditions, and when we have 23 sensitive personal data, it's one of the schedule 3 24 conditions as well. But the concepts, please, of 25 "fairly", "lawfully" and then these scheduled</p> <p style="text-align: center;">Page 8</p>

<p>1 conditions?</p> <p>2 A. "Fairly" is spelled out in greater detail in part 2 of</p> <p>3 schedule 1, and essentially it means with some sort of</p> <p>4 consent from the data subject. The data subject is the</p> <p>5 person to whom the information relates. There are</p> <p>6 let-outs specified in part 2 of schedule 1, but in</p> <p>7 general terms, that is what is meant by "fairly".</p> <p>8 Q. "Lawfully"?</p> <p>9 A. "Lawfully" means that it doesn't otherwise contravene</p> <p>10 the law. For example, there may be provisions which</p> <p>11 prohibit certain dissemination of information. There</p> <p>12 may be provisions that prohibit other sorts of activity</p> <p>13 in relation to information. Breach of confidence is</p> <p>14 said to constitute not lawful processing of data, and</p> <p>15 indeed a breach of the DPA itself is said to be not</p> <p>16 lawful.</p> <p>17 Q. The schedule 2 conditions -- there are six of those, on</p> <p>18 my understanding. One we might focus on is condition</p> <p>19 6(1), which, as you explain, embodies a balancing of the</p> <p>20 interest protected by the European Convention of Human</p> <p>21 Rights, in particular articles 8 and 10. So this is the</p> <p>22 balancing exercise we see in the realm of privacy more</p> <p>23 generally; is that right?</p> <p>24 A. Yes. It brings into the mainstream of the first data</p> <p>25 protection principle that balancing between the two</p> <p style="text-align: center;">Page 9</p>	<p>1 there is, and a resolution is expected by the directive</p> <p>2 itself.</p> <p>3 Q. Could you explain, please, the difference between a pure</p> <p>4 class-based protected interest and</p> <p>5 a class-prejudice-based protected interest?</p> <p>6 A. A class-based -- a pure class-based interest simply</p> <p>7 looks at the nature of the information itself and</p> <p>8 doesn't require that it's processing or, let's say, its</p> <p>9 disclosure cause any harm. For example, if I say that</p> <p>10 personal information is purely class-based if it gets</p> <p>11 released into the -- more widely.</p> <p>12 Class plus prejudice require it to belong to a class</p> <p>13 and if you do something with it, some harm will result.</p> <p>14 So, for example, you might have information that relates</p> <p>15 to the defence of the country, the disclosure of which</p> <p>16 would be harmful to national security interests. So</p> <p>17 there's the class defence, there's the prejudice harmful</p> <p>18 to national security interest. In fact, there isn't one</p> <p>19 in those terms -- there is a national security</p> <p>20 exemption -- but that is one which embodies class plus</p> <p>21 harm.</p> <p>22 LORD JUSTICE LEVESON: Can you give me an example from</p> <p>23 personal circumstances in relation to personal data?</p> <p>24 A. Well, if we look at the exemptions themselves. I don't</p> <p>25 think all of them I've included -- in fact, I know</p> <p style="text-align: center;">Page 11</p>
<p>1 interests embodied in Article 8 and in Article 10.</p> <p>2 Q. Is it right to visualise data protection law as</p> <p>3 a detailed particularisation of Article 8 privacy law in</p> <p>4 the specific limited context of personal data?</p> <p>5 A. It probably does more than just that, but certainly it</p> <p>6 does do that.</p> <p>7 Q. It does at least that?</p> <p>8 A. It does at least that, I agree.</p> <p>9 Q. We're not going to look at the other principles; they'll</p> <p>10 speak for themselves. Those are the principles which</p> <p>11 bring one within the Act, and within the Act explain</p> <p>12 what a data controller and data processor must do, but</p> <p>13 there are also exemptions from those or some of those</p> <p>14 requirements. Paragraph 35 of your statement. You say,</p> <p>15 first of all, that the directive gave Member States</p> <p>16 latitude in defining the extent of exemptions. Can you</p> <p>17 please explain the degree of latitude?</p> <p>18 A. Well, the example that I give specifically later on in</p> <p>19 my statement is the latitude given in relation to the</p> <p>20 press exemption, where it is left up to Member States as</p> <p>21 to how they choose to give effect to the broad principle</p> <p>22 which is stated in the directive. So the directive</p> <p>23 itself recognises a contest or competition between</p> <p>24 Article 8 and Article 10 rights. How that contest is to</p> <p>25 be resolved is left up to Member States, but contest</p> <p style="text-align: center;">Page 10</p>	<p>1 I haven't included all of them in the schedule to my</p> <p>2 provision, but, for example, section 29 provides an</p> <p>3 exemption for the prevention or detection of crime or</p> <p>4 the apprehension or prosecution of offenders, where the</p> <p>5 disclosure of the information or otherwise prejudice --</p> <p>6 or otherwise processing would be likely to prejudice any</p> <p>7 of the matters identified in this subsection. So it's</p> <p>8 of a nature and the processing is likely to harm what</p> <p>9 the protected interest, namely the detection of crime,</p> <p>10 the apprehension or prosecution of offenders.</p> <p>11 LORD JUSTICE LEVESON: Yes. I understand what you are</p> <p>12 saying, but I'm just going back to the point that Mr Jay</p> <p>13 made at the beginning. It may be that those listening</p> <p>14 to your evidence will not be able to colour the language</p> <p>15 in which you have described the legislation with an</p> <p>16 example in their mind that explains precisely the point</p> <p>17 you are seeking to make. Now, there's a challenge. Can</p> <p>18 you think of an example that would --</p> <p>19 A. Be pure class-based? Well, journalism is one of the</p> <p>20 pure class-based exemptions. I -- provided it falls</p> <p>21 within the definition of special -- sorry, journalistic,</p> <p>22 literary or artistic material, then it doesn't actually</p> <p>23 require any harm to those particular interests -- ie</p> <p>24 journalism, literature or art -- to result from the</p> <p>25 processing in order for the exemption to bite.</p> <p style="text-align: center;">Page 12</p>

3 (Pages 9 to 12)

<p>1 MR JAY: Thank you. The rights of the data subject against 2 the data controller. The data subject, of course, is 3 anybody whose data is held by a data controller. So it 4 would be a private individual, ordinarily, but it could, 5 I suppose, be a body corporate. 6 A. No, it's a private individual, alive and well. Well, 7 alive, anyway. 8 Q. Yes, sorry, you've told us that already. There's 9 a right, first of all, under section 7. Could you, 10 please, summarise the nature of that right, Mr Coppel? 11 A. The right is often termed the subject access right, but 12 in fact it has four separate sub-rights within it, 13 namely: to be informed by the data controller where the 14 personal data of which the individual is the data 15 subject are being processed by the data controller -- 16 and to make that more intelligible, if we simply think 17 of processing in this instance as being held by the data 18 controller. So you write off to the data controller and 19 essentially the first limb of the section 7 right is: 20 "I hold or I do not hold any personal information 21 relating to you." That's the first aspect of it. 22 If yes to the first aspect or limb, to be given 23 a description of those data -- it's self-evident what 24 that means -- then thirdly, to be given a copy of those 25 data and a statement of their source. Generally <p style="text-align: center;">Page 13</p> </p>	<p>1 violation of the right, if I can put it in those terms; 2 is that correct? 3 A. Essentially, section 4(4) creates a statutory duty 4 which -- we know where there's a statutory duty which an 5 individual can enforce, it constitutes a tort and the 6 Act describes what the remedies are for that tort. 7 Q. Thank you. In terms of what the courts have done in 8 relation to this right, paragraph 42, they've narrowly 9 interpreted the matters for which compensation may be 10 ordered -- so there isn't a claim for general damages, 11 there's only a claim for pecuniary loss -- and also the 12 levels of damages, as we can see from the examples 13 given, have not been massive. 14 A. Yes. It's fair to say that this is where the efficacy 15 of section 4(4) has been diminished. In particular, the 16 requirement that damage be confined to pecuniary loss 17 has obvious importance for an Act like this, which is 18 concerned not necessarily with things that sound in 19 pecuniary loss but are concerned with an individual's 20 privacy. 21 LORD JUSTICE LEVESON: In most circumstances, it's unlikely 22 to cause pecuniary loss, isn't it? 23 A. Correct. Very rarely will it cause pecuniary loss, and 24 only by, very often, imagining circumstances is that 25 going to be the case. But it's the invasion which -- <p style="text-align: center;">Page 15</p> </p>
<p>1 speaking, when people exercise their Section 7 right, 2 that's actually what they're after. "I want to see what 3 you, the data controller, have got in relation to me." 4 And by giving that information, the data controller has 5 effectively complied with the first three limbs in 6 a single Act. 7 Then fourthly, where those data are being used to 8 evaluate a person's suitability needed for the making of 9 the decision to be informed of the logic involved in 10 that decision-making process. In my experience, very 11 rarely are people interested in the fourth limb. 12 Really, what they're interested in is just getting what 13 the data controller holds on themselves. 14 Q. Thank you. The courts have had a go at narrowing the 15 apparent breadth of the right and the courts have acted 16 in a similar way elsewhere. We might come back in due 17 course to the possible policy reasons for that. 18 The extent of the narrowing you explain in 19 paragraph 40, but the detail of that I don't think we 20 need address now. The second right in paragraph 41 is 21 a right against the data controller who has breached the 22 data protection principles, and that right, if 23 successfully exercised, gives you a claim for 24 compensation and a claim to rectify, block, erase or 25 destroy the personal data which has been generated in</p> <p style="text-align: center;">Page 14</p>	<p>1 I make no bones about it; I say it's that invasion of 2 privacy which falls to be compensated and that's very 3 difficult, because unless you have a tariff which is 4 generally stated and generally applicable, it's very 5 difficult for an individual judge to say, "Well, how 6 much is this worth?" 7 MR JAY: The level of damages may well be highly relevant 8 when we look later on at your evidence as to the 9 possible extension of the role of the Information 10 Commissioner. Just remind us, please: the £50 awarded 11 to Mr Douglas and Ms Zeta-Jones--- I think they were 12 married at that stage, or was it their wedding? 13 A. It was their wedding which was disclosed through 14 photographs. 15 Q. In either OK! Magazine or Hello! magazine -- I don't 16 recall which -- 17 A. Something like that. 18 Q. Why was it only £50, in a nutshell? 19 A. Because -- well, the explanation given, so far as one 20 can ascertain, is that both of them were high -- sorry, 21 were figures of a high public profile and true it was 22 that their wedding was by invitation only and intended 23 to be kept private. However, they -- having the profile 24 they do, it was thought that this was the correct 25 measure of the damage which they had suffered through <p style="text-align: center;">Page 16</p> </p>

<p>1 breach of their rights under the Data Protection Act.</p> <p>2 Q. Fair enough. The third right, the right to compel</p> <p>3 a data controller to cease or not to start processing</p> <p>4 data, that's under section 10. It's necessary to go</p> <p>5 into that.</p> <p>6 Fourth right, section 11, the right to compel a data</p> <p>7 controller to cease or not to start processing personal</p> <p>8 data for the purpose of direct marketing. Again, we</p> <p>9 needn't going into that.</p> <p>10 The fifth right, section 12, a right to require</p> <p>11 a data controller to ensure he takes no evaluative</p> <p>12 decision concerning the individual based solely on</p> <p>13 automatic processing of the personal data. Again,</p> <p>14 that's unlikely to be of great relevance to journalism.</p> <p>15 Can we move to the position of Commissioner and</p> <p>16 explain first of all what the obligation is under the</p> <p>17 directive and what the United Kingdom has done in</p> <p>18 reaction to that obligation?</p> <p>19 A. Well, the directive requires each member state to ensure</p> <p>20 that there is a public authority or a public officer who</p> <p>21 has both investigative and policing powers in relation</p> <p>22 to the implementation of data protection law within that</p> <p>23 member state, and they are characterised essentially as</p> <p>24 being guardians of the rights and freedoms which are</p> <p>25 embodied in the directive and which are supposed to find</p> <p style="text-align: center;">Page 17</p>	<p>1 is required to make the assessment but the manner in</p> <p>2 which that is done is left in the hands of the</p> <p>3 Commissioner himself.</p> <p>4 The outcome of that the Commissioner must obviously</p> <p>5 let the person who has made the request for an</p> <p>6 assessment know. Secondly, under section 41A, the</p> <p>7 Commissioner may serve on a public authority an</p> <p>8 assessment notice, and the object of that is to enable</p> <p>9 the Commissioner to determine whether the data</p> <p>10 controller is complying with the principles.</p> <p>11 Then thirdly, the Information Commissioner can serve</p> <p>12 what's known as an information notice, and this is to</p> <p>13 enable the Information Commissioner to understand more</p> <p>14 about what the data controller is doing. It's really as</p> <p>15 a prelude to taking further steps thereafter. The</p> <p>16 individual or the body which has been served with the</p> <p>17 information notice obviously has to supply the</p> <p>18 information which is requested in the notice.</p> <p>19 Then fourthly, and very often finally, the</p> <p>20 Commissioner can serve what's known as an enforcement</p> <p>21 notice and this is to compel the data controller to do</p> <p>22 things or to desist from doing certain things which the</p> <p>23 Information Commissioner considers to be non-compliant</p> <p>24 with the Act.</p> <p>25 Q. We know that the Commissioner didn't exercise any of</p> <p style="text-align: center;">Page 19</p>
<p>1 expression in domestic legislation.</p> <p>2 Q. Presumably in line with general standards of EU law, the</p> <p>3 Commissioner must have a degree of independence; is that</p> <p>4 right?</p> <p>5 A. Correct.</p> <p>6 Q. As we've seen earlier in relation to the directive,</p> <p>7 there's nothing to stop Member States doing more than</p> <p>8 that which the directive requires in relation to the</p> <p>9 Commissioner.</p> <p>10 A. I agree.</p> <p>11 Q. His or her functions may be greater.</p> <p>12 Now, the powers of the Commissioner depend on</p> <p>13 whether we're within the special purposes of which</p> <p>14 journalism is an example or whether we're not. If we're</p> <p>15 not within the special purposes, then there are four</p> <p>16 main avenues of enforcement. These basic avenues of</p> <p>17 enforcement I ventured to take up with Mr Thomas when he</p> <p>18 gave evidence back in December, and I probably had</p> <p>19 another go with Mr Graham, but can you remind us,</p> <p>20 please, of the essential avenues starting with</p> <p>21 section 42?</p> <p>22 A. Section 42 provides for assessment. That's initiated by</p> <p>23 an individual who believes that he's been directly</p> <p>24 affected by the processing of personal data relating to</p> <p>25 him or herself. Then, if that is done, the Commissioner</p> <p style="text-align: center;">Page 18</p>	<p>1 those powers in relation to Operation Motorman. How</p> <p>2 often are these powers exercised?</p> <p>3 A. Well, I don't have any first-hand knowledge, but it</p> <p>4 would appear on the ground very, very rarely indeed.</p> <p>5 Q. As you point out in paragraph 53, their general</p> <p>6 obligations under section 51 of the Act -- again, that</p> <p>7 was a provision that I took Mr Thomas to but that</p> <p>8 empowers the Commissioner, for example, to issue</p> <p>9 guidance and recommendations both in general and in</p> <p>10 particular; is that right?</p> <p>11 A. Correct.</p> <p>12 Q. A power to carry out audits? Or not?</p> <p>13 A. I don't know one way or the other is the answer to that.</p> <p>14 Q. I think we've seen elsewhere in section 51, if my memory</p> <p>15 serves me right, a power to report to Parliament either</p> <p>16 annually or in a special case. Of course, the two</p> <p>17 reports in 2006, "What price privacy?" and "What price</p> <p>18 privacy now?", were issued in compliance with that</p> <p>19 power, weren't they?</p> <p>20 A. Correct.</p> <p>21 Q. What is the position in contradistinction, Mr Coppel, if</p> <p>22 we fall within the special purposes, in terms of what</p> <p>23 the Commissioner can do?</p> <p>24 A. It results in a disapplication of the power to serve an</p> <p>25 enforcement notice -- that's the first important thing</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 that it does -- and then secondly, where an individual 2 has brought a claim, a section 4(4) claim for breach of 3 statutory duty through the DPA, then the court must stay 4 those proceedings until there has been a determination 5 under section 45, and section 45 is a special procedure 6 relating to the so-called special purposes, ie 7 journalism, literature and art, to see whether in fact 8 that is the case.</p> <p>9 In practice, what happens is that it becomes so 10 convoluted -- the individual disgruntled has commenced 11 proceedings under section 4(4). If they -- if the point 12 is taken that these are special purposes, then 13 a satellite set of proceedings is effectively launched, 14 namely the section 45 one. That, if one ever gets to 15 the end of it, reaches its end, it might come up with 16 a conclusion. If the conclusion is in favour of the 17 individual, then they resume their claim, by which time, 18 of course, matters have marched on significantly and it 19 may be of cold comfort, any such relief --</p> <p>20 LORD JUSTICE LEVESON: They may have lost interest in living 21 by then.</p> <p>22 A. Quite possibly, and particularly if one realises that at 23 the end of it all one is going to get like, for example, 24 Catherine Zeta Jones, £50, one can well understand why 25 interest might be a little bit diminished.</p> <p style="text-align: center;">Page 21</p>	<p>1 did not know about an important Court of Appeal decision 2 which is relevant here, but can you --</p> <p>3 LORD JUSTICE LEVESON: Only you know whether you knew about 4 the decision.</p> <p>5 MR JAY: That's true.</p> <p>6 LORD JUSTICE LEVESON: It's hardly arguable.</p> <p>7 MR JAY: Yes, well, to be frank, I did not know about it.</p> <p>8 LORD JUSTICE LEVESON: I see.</p> <p>9 MR JAY: Or rather, had forgotten it, because I had, of 10 course, read the Campbell case in the House of Lords. 11 But anyway, we're in danger of digressing.</p> <p>12 First of all, please, the way in which the Data 13 Protection Act has affected the requirements of 14 Article 9 of the directive, paragraph 57 of your 15 statement?</p> <p>16 A. Is essentially through section 32. The first point that 17 must be made in relation to the exemptions which are set 18 out in part 4 of the Act is although there are a list of 19 exemptions, what they exempt from varies from exemption 20 to exemption, and the basic statement of what gets 21 exempted is set out in section 27. So we see certain 22 protections which are effected through the Act are 23 disapplied and others remain in force.</p> <p>24 What is notable about Section 32 is its complete 25 exemption from the larger part of the protections which</p> <p style="text-align: center;">Page 23</p>
<p>1 MR JAY: The adjudicator of the claim is the Commissioner 2 not the court; is that correct?</p> <p>3 A. Under section 45; correct.</p> <p>4 Q. You explain in paragraph 55 the position under 5 section 45, subsection 1:</p> <p>6 "Where it appears to be the Commissioner that the 7 personal data are not being processed only for a special 8 purpose or are not being processed with a view to the 9 publication by any person of any journalistic, or 10 artistic material, the Commissioner may make 11 a determination to that effect."</p> <p>12 So the adverb "only" means what, Mr Coppel, in this 13 context?</p> <p>14 A. Exclusively.</p> <p>15 Q. Exclusively. So if you have mixed special purposes and 16 not special purposes, then the section 45 adjudication 17 or determination is not made in favour of the data 18 controller; is that correct?</p> <p>19 A. Subject to paragraph (b) also of 45(1) being satisfied.</p> <p>20 Q. Yes. Can you explain now, please, the reach of the 21 exemption in Section 32, because this is highly relevant 22 in the context of lines of questioning I embarked on 23 with Mr Thomas and with Mr Graham. It may be that I was 24 a little bit boisterous in the context of some of the 25 points I was taking because I overlooked and arguably</p> <p style="text-align: center;">Page 22</p>	<p>1 are given by the Act, and thus we see in 32(2), which 2 enumerates what gets disapplied, it's the data 3 protection principles, except the seventh data 4 protection principle, which for most people doesn't loom 5 large, whereas the other exemptions will very often 6 simply exempt a lesser number or fewer number of the 7 data protection principles.</p> <p>8 So that's the first thing to note about Section 32, 9 is its almost complete disapplication of all of the 10 protection which is effected by the Act itself.</p> <p>11 Then secondly, in order for the exemption to be 12 engaged, the three paragraphs in 32(1) have to be 13 satisfied, of which two of them are the belief of the 14 individual themselves -- so in other words, the press 15 being a judge in its own cause, it might be said -- and 16 it's only the first -- that is to say, the processing 17 that's undertaken with the view to the publication by 18 any person of any journalistic, literary or artistic 19 material -- which is purely objective.</p> <p>20 Q. Thank you.</p> <p>21 LORD JUSTICE LEVESON: That's not very much of a hurdle if 22 you're concerned with a journalist.</p> <p>23 A. I agree. Very much so. I've expressed a view in 24 relation to the effect of Section 32 but undoubtedly 25 once you're in Section 32 territory, then the protection</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 which is given to an individual's privacy almost 2 entirely falls away. All you have to do is touch 3 Section 32 in some way, shape or for form, and the 4 contest which the Act is supposed to embody between the 5 right of expression, freedom of precision, and an 6 individual's personal privacy has all been tilted one 7 way.</p> <p>8 LORD JUSTICE LEVESON: Because it's the subjective opinion 9 of the journalist?</p> <p>10 MR JAY: It's "reasonably believes".</p> <p>11 A. "Reasonably believes".</p> <p>12 LORD JUSTICE LEVESON: So there's an be objective --</p> <p>13 A. Colour which is introduced, but nevertheless it's not 14 difficult, I would have said, for most journalists -- 15 and certainly that's what the authorities have 16 indicated, and one which seems to have been missed for a 17 point, that it is very much for the press to make their 18 own judgment in relation to Section 32 --</p> <p>19 LORD JUSTICE LEVESON: But that judgment -- you say it's 20 objective. In one sense, it's objective, but it's 21 objective based upon facts within the knowledge of the 22 journalist, which might include, for example, 23 information that he's received from a source which is 24 unidentified.</p> <p>25 A. Correct.</p> <p style="text-align: center;">Page 25</p>	<p>1 MR JAY: The first criterion, that the processing is being 2 undertaken with a view to the publication, that is an 3 objective test, isn't it? It doesn't depend on the 4 assessment of the data controller; it depends on the 5 assessment of the Commissioner. Is that right?</p> <p>6 A. It's -- well, if a claim is being made for a breach of 7 the section 4(4) statutory duty, the way this would come 8 forward, assuming one had cleared the Commissioner's 9 involvement, would be that would be a matter for the 10 court. The question is: is the processing undertaken 11 with a view to the publication of any person of any 12 journalistic et cetera material? So that issue, at the 13 end of the day, would come before a court, as we've seen 14 in the proceedings that have come before the courts 15 themselves.</p> <p>16 There's a slight subjective element insofar as the 17 view is the view of the journalist, so the journalist 18 can say --</p> <p>19 LORD JUSTICE LEVESON: How do you get behind it? The 20 journalist is a journalist, employed to publish 21 material, and the journalist asserts, "Well, I was doing 22 this in order to publish a story." Well, of course, one 23 could imagine circumstances in which that couldn't 24 possibly be so -- for example, if it touched the 25 journalist's private life, and therefore it might have</p> <p style="text-align: center;">Page 27</p>
<p>1 LORD JUSTICE LEVESON: "I have heard this from my source, 2 which of course I'm not going to tell you about, which 3 actually brings me within all these protections."</p> <p>4 A. And in any event, it may be that when you drill down to 5 that source itself, it is found to be not a good source, 6 but nevertheless the belief which is held by the 7 journalist themselves, who has not had the opportunity 8 of drilling down, is that: "I think it's a decent 9 source", and therefore reasonably believes is 10 satisfied --</p> <p>11 LORD JUSTICE LEVESON: But you never get the ability to 12 drill down into it.</p> <p>13 A. Correct.</p> <p>14 LORD JUSTICE LEVESON: Because once you ask the journalist 15 to provide further and better particulars of his or her 16 source, you'll be met with an Article 10 argument.</p> <p>17 A. Well, you'll probably be met with the argument that this 18 is within section 45 territory, namely relating to 19 special purposes, and so the whole thing goes off for 20 the special assessment procedure, which we've spoken to 21 ten minutes ago, and by the time you get to the end of 22 it, to use your words, the will to carry on is a little 23 bit diminished.</p> <p>24 LORD JUSTICE LEVESON: Yes. I think I didn't quite express 25 it like that. All right.</p> <p style="text-align: center;">Page 26</p>	<p>1 some oblique motive -- but in the general course of 2 events, that's going to be unchallengeable, isn't it?</p> <p>3 A. Yes, and that's why the Campbell decision, which said 4 that "with a view to publication" didn't stop at the 5 moment of publication but carried on beyond that, 6 effectively made the thing run forever and give the 7 press a complete protection under Section 32, not just 8 up to the moment of publication but ever thereafter.</p> <p>9 MR JAY: We'll look at that in a moment. You've told us 10 earlier that Member States were given considerable 11 latitude in relation to the directive, but at the very 12 least had got to meet its basic standards but could do 13 more.</p> <p>14 If one looks at the directive, Article 9 in this 15 context. You set it out at paragraph 56 of your 16 statement. Where do we get the "with a view to" 17 restriction, looking at the language of Article 9? 18 Because that refers to "only for processing of personal 19 data carried out solely for journalistic purposes". So 20 the concept there is "for journalistic purposes", not 21 "with a view to the publication by a person of 22 journalistic material".</p> <p>23 A. Yes. I mean, one could argue the phrase "journalistic 24 purposes" carries on to the publication itself. My 25 point that I make in relation to Article 9 and its</p> <p style="text-align: center;">Page 28</p>

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<p>1 translation into Section 32 is that Article 9 recognises 2 the contest between the right to privacy and freedom of 3 expression, but Section 32 is all one way. It does not 4 recognise any right to privacy. It's there, its sole 5 objective is to cut away at the right of privacy, and at 6 the end of it, certainly after the decisions of the 7 court, there is nothing left of that right.</p> <p>8 Q. The directive says "only if they are necessary to 9 reconcile the right to privacy with the rules governing 10 freedom of expression". Now, the necessity test might 11 suggest a wholly objective yardstick, yet the Act 12 refers, as we've seen, to a part subjective/part 13 objective test, namely "reasonably believes". So hasn't 14 the United Kingdom done less than Article 9 requires?</p> <p>15 A. That is my view and I would also go further in saying 16 that the word "necessary" implies that something must be 17 shown that this is needed in order for the 18 reconciliation, and that is difficult to see in the 19 Section 32 provision, which is supposed to give effect 20 to Article 9.</p> <p>21 LORD JUSTICE LEVESON: That's a debate that they had in the 22 House of Lords, as you explain, with Lord Lester of 23 Hearne Hill taking the point that you are making, and 24 Lord Williams of Mostyn, Lord Wakeham and the then 25 Solicitor General, Lord Falconer, endorsing the contrary</p> <p style="text-align: center;">Page 29</p>	<p>1 and the photographs were published in the newspaper. 2 She brought a claim against the newspaper for that. She 3 brought the claim both as a breach of confidence and 4 also under the Data Protection Act. Again, her claim 5 was based on section 4(4) statutory duty which was owed 6 to her, and in the High Court -- so in the first 7 instance, so far as the Data Protection Act claim was 8 concerned -- it was found that the published 9 information, namely the nature and details of her 10 therapy, had constituted sensitive personal data, and 11 we'll remember that that includes medical matters. It 12 was not lawful because it constituted a breach of 13 confidence. It was not fair, as it had been obtained 14 surreptitiously through a long-range lens. It didn't 15 satisfy any of the conditions in schedule 2. It didn't 16 satisfy any of the conditions in schedule 3.</p> <p>17 So just pausing there, it offended at every level 18 the first data protection principle --</p> <p>19 LORD JUSTICE LEVESON: Was this Mr Justice Morland?</p> <p>20 A. Yes, and the view taken by Mr Justice Morland was that 21 the Section 32 exemption -- we'll remember we were 22 looking at the phrase in paragraph A -- only applied to 23 processing with a view to publication, so up to that 24 moment, and not to the processing involved in the 25 publication itself, and then he went forward and</p> <p style="text-align: center;">Page 31</p>
<p>1 view.</p> <p>2 A. Yes, and the passages which I referred to in the end 3 note from the Hansard, which were included as 4 attachments, show that the concerns which were 5 articulated by Lord Lester were very prescient indeed. 6 He anticipated many of the difficulties which have been 7 shown to have resulted from Section 32.</p> <p>8 MR JAY: We don't know on this occasion whether Lord Wakeham 9 was speaking for the press or speaking for the PCC or 10 was speaking on his own behalf. We've seen his 11 contributions in relation to section 12 of the Human 12 Rights Act where he expressed himself as, I think, 13 speaking for the press.</p> <p>14 May we move on to authority, paragraph 62 of your 15 report. The main authority on this is the decision in 16 the Court of Appeal, possibly the House of Lords. It 17 depends on how you interpret the House of Lords 18 decision --</p> <p>19 A. Agreed.</p> <p>20 Q. -- whether it bears on this issue or whether they didn't 21 decide it. It's the well-known case of Campbell v MGN. 22 Could you remain us, please, of the essential facts of 23 that case?</p> <p>24 A. Campbell was the model who most people know. She was 25 photographed leaving a -- her therapy for drug addiction</p> <p style="text-align: center;">Page 30</p>	<p>1 assessed the damages to her in the sum of £2,500, with 2 aggravated damages in the sum of £1,000.</p> <p>3 So that's where she got on the first stage. In the 4 Court of Appeal on the Data Protection Act claim, she 5 was unsuccessful insofar as his ruling was overturned. 6 The court accepted that processing including 7 publications, so she was in that far, but it reversed 8 Mr Justice Morland by extending the duration of 9 Section 32 to cover processing on and after publication. 10 So if publication constitutes processing, they said that 11 the 32(1)(a) exemption applied to that as well, and as 12 a result of that, the DPA claim failed.</p> <p>13 You mentioned about how the matter proceeded in the 14 House of Lords. Essentially, what took place is that 15 the appellant, now Ms Campbell, majored on her breach of 16 confidence claim and very little, other than a few 17 sentences, were said about the Data Protection Act 18 itself, and all that we get is a short statement that 19 that claim itself stands or falls with the breach of 20 confidence claim.</p> <p>21 Now, since she stood with the breach of confidence 22 claim, there is an argument that what's happened is that 23 there has been a restoration of Mr Justice Morland's 24 treatment of the DPA claim, but the fact remains that 25 the greater treatment that is to be found reported is</p> <p style="text-align: center;">Page 32</p>

<p>1 that of the Court of Appeal in Campbell v MGN. 2 LORD JUSTICE LEVESON: Which went the other way. 3 A. Correct. 4 MR JAY: But there was no consideration in the Lords of the 5 temporal point, that whether the adjectival phrase "with 6 a view to" ended at the instance just before publication 7 or whether it continued to the moments of publication 8 and beyond, so arguably the House of Lords have not 9 impacted on the Court of Appeal's reasoning; is that 10 right? 11 A. I would agree with that. 12 Q. The point which was exercising us -- me indeed -- when 13 we were looking at Mr Thomas was not this subtle 14 temporal point, "with a view to ending at the moment 15 just before publication", but a rather different point 16 on the Operation Motorman material, which, as you're 17 probably aware -- for example, obtaining personal data 18 with the intention of asking the target of a story for 19 his or her version of events before the story is 20 published, so to find out the person's contact 21 details -- whether that is with a view to publication, 22 which is a slightly different point from the one which 23 exercised the courts in the Campbell v MGN case, and 24 I think I, rightly or wrongly, expressed some scepticism 25 that it could be with a view to publication because that</p> <p style="text-align: center;">Page 33</p>	<p>1 or he may say, "I'll take it into account", but "with 2 a view to publication" does presuppose, doesn't it, that 3 the version of events will be taken into account, not 4 might be taken into account. So could it be said it's 5 still too remote, even though it's anterior in time to 6 the publication? 7 A. It certainly could be argued and I'd be prepared to 8 argue it. The contrary would be that there's 9 a difference between the phrase "with a view to" and 10 "for the purpose of". "For the purpose of" has that 11 definiteness that you are referring to. "With a view 12 to" contemplates that it's possible but nevertheless you 13 have a change of heart along the path to publication. 14 Q. Mm, I can see that. Yes. 15 LORD JUSTICE LEVESON: There's always room for argument. 16 A. In our trade. 17 MR JAY: Mm. 18 I think the better view, contrary to the scepticism 19 I expressed six or seven months ago, is the broad view 20 which the press would wish to advance, the difference 21 between "with a view to" and "for the purpose of". It 22 does have to depend on the contact with the target 23 actually yielding to you words in the publication 24 itself. 25 A. The phrase "with a view to" is problematic for that very</p> <p style="text-align: center;">Page 35</p>
<p>1 was stretching the language of "with a view to 2 publication" in the Act. I don't know whether you can 3 assist us one way or another, whether my scepticism, in 4 the light of the Campbell decision, was justified or 5 not. 6 A. Well, in Campbell you've had the stretching of the end 7 of the process. The part of the process you're now 8 considering is at the beginning, and arguably if it's 9 stretched at the end of the process, it should equally 10 be stretched at the beginning of the process, and the 11 reasoning behind the Court of Appeal's approach in 12 Campbell v MGN would probably be supportive of that. It 13 was obviously not directed to the beginning of the 14 process, it was directed to the end of the process, but 15 there was a genre receptiveness to the concerns of the 16 press that they be given wide latitude in what they do 17 because they move in a very fast operating environment 18 and they can't be hamstrung by having DPA principles 19 applying to them. 20 Q. I can see that, though. But it might be said if the 21 press want to contact the subject of a story to find out 22 his or her version of events, and that version of events 23 is given, it may or may not find its way into the story 24 which is eventually published. The journalist may say, 25 "Well, that's very interesting, I'm going to ignore it",</p> <p style="text-align: center;">Page 34</p>	<p>1 reason. 2 Q. Mm. 3 Paragraph 68 of your statement, personal privacy 4 protection after the case. You point out that people 5 have lost the appetite, following Campbell, to pursue 6 DPA claims. They now pursue Article 8 claims; is that 7 it? 8 A. The appetite was limited to begin with. It's diminished 9 to the point of nonexistence, almost, I would have said, 10 post Campbell. 11 LORD JUSTICE LEVESON: It's never-ending litigation with no 12 reward at the end. 13 A. Correct. Just the opposite, I would suggest, from what 14 it should have been. 15 MR JAY: The explanation that you give -- it's end note 16 Number 102, but the citation there beginning: 17 "Data protection law is technical and unfamiliar to 18 most judges." 19 Judges preferring the fluidity and flexibility, 20 I suppose, of the Human Rights Act, which most of them 21 are more familiar with, than the arcane corners of the 22 Data Protection Act, which, although very important, is 23 not well understood by everyone; is that a reasonable 24 summary? 25 A. My experience is that whenever the Data Protection Act</p> <p style="text-align: center;">Page 36</p>

<p>1 is raised in court, it doesn't get a very favourable 2 reception because it is daunting to most. The concepts 3 are unfamiliar and the way in which the Act is worded 4 and structured doesn't help to that level of 5 understanding, so one immediately is confronted with 6 difficulties, which it's very often impossible to 7 overcome. 8 LORD JUSTICE LEVESON: I don't need to resolve what the law 9 is, do I, and I don't need to go into -- 10 MR JAY: No. 11 LORD JUSTICE LEVESON: -- the rights or wrongs of the 12 decisions either of Mr Justice Morland or the Court of 13 Appeal, even if I was minded to do so. It just doesn't 14 advance the process. We are where we are. The question 15 is whether it's the best place to be. 16 MR JAY: You inform us, Mr Coppel, of forthcoming changes to 17 the directive. The Commissioner has proposed a new 18 regime for regulation and a new directive. What's the 19 upshot of that, in a nutshell? 20 A. The regulation will be directly applicable in Member 21 States, replacing the directive, and therefore the Data 22 Protection Act 1998. However, the proposed 23 regulation -- and that's all it is at the moment -- 24 itself leaves it to individual Member States to provide 25 for exemptions or derogations from the general Page 37</p>	<p>1 statement, you'll summarise these propositions in this 2 way: 3 "The DPA provides a code to protect the privacy of 4 an individual's personal information, in whatever form 5 recorded other than in an ad hoc manual record. The 6 protection required by the directive and provided by the 7 Act begins from the moment a person handling personal 8 information acquires it and only ends once that person 9 no longer holds it. The directive -- to which the DPA 10 is intended to give effect -- permits Member States to 11 relieve the press of obligations otherwise applicable to 12 the processing of personal information where that is 13 required to reconcile the convention right of privacy 14 and with the convention right of freedom of expression. 15 Freed from judicial authority, the Act provides an 16 individual with a measure of protection against press 17 invasions of personal information privacy, but, because 18 the exemption does not provide for any balancing of the 19 fundamental right to privacy against the fundamental 20 right to freedom of expression, the measure of 21 protection is less than that provided under the 22 Article 8 provisions." 23 Of course, "judge-made authority" properly so 24 interpreted is judges trying to make sense of the 25 provisions, not just making it up on the hoof. Page 39</p>
<p>1 principles which it articulates, and that in particular 2 relates to the processing of personal data for 3 journalistic purposes. So we get back to the very issue 4 which was presented by the directive that led to the 5 1998 Act. It's for the Parliament of this country to 6 come up with a formulation which respects the 7 requirements, in this case of the regulation itself, but 8 how it does that is a matter for Parliament itself. 9 LORD JUSTICE LEVESON: Would that mean that Parliament would 10 have to revisit this topic in any event? 11 A. Correct. 12 LORD JUSTICE LEVESON: So it's worthwhile looking at this 13 area, because if a regulation is coming up the lift, 14 then Parliament might as well have the benefit, if 15 benefit it is, of any consideration of the exemptions 16 within the context of the terms of reference of the 17 Inquiry? 18 A. I agree. 19 MR JAY: Can we look at your conclusions now, Mr Coppel? 20 I think the first three are self-explanatory. The 21 fourth is clear from what you've told us already, but 22 the way the courts have interpreted the Section 32 23 exemption is that the measure of protection is less than 24 that provided under Article 8 of the ECHR. 25 LORD JUSTICE LEVESON: Just for those who don't have the Page 38</p>	<p>1 A. We would hope so. 2 LORD JUSTICE LEVESON: Yes. 3 MR JAY: Your fifth point, Mr Coppel, is that you point out 4 that in principle, at least, if you prune away, 5 I suppose, at the judge-made authority, we have here 6 a sophisticated and a predictable regime which in many 7 ways is better than the uncertain regime afforded by 8 Article 8 and privacy or breach of confidence claims; is 9 that right? 10 A. That is right. The point I make has two sides to it. 11 There's the side of the individual, who knows where he 12 or she stands and has certain rights which are 13 protected. But it also assists the bodies that are 14 processing the data themselves to know what it is they 15 can do with an individual's personal data and to do so 16 in a fashion which is compliant with the law and 17 compliant with the contest between Article 8 and 18 Article 10 rights, rather than leaving it to the 19 idiosyncratic world of an ECHR action. 20 Q. Can we look at the eighth point. The point about the 21 way the judges have cut away the DPA to the point that 22 it arguably doesn't give full effect to the directive -- 23 that, I think, is clear from what you've told us 24 already. The eighth point is on page 01195: 25 "The practicality, ease and economy of remedying Page 40</p>

<p>1 press mishandling of an individual's personal 2 information would be enhanced by ..."</p> <p>3 And then you come up with four proposals. Could you 4 explain each of those to us, please?</p> <p>5 A. The first is a redrafting of Section 32 to address what 6 I consider to be the shortcomings in the provision as it 7 is currently worded and also as magnified through 8 judge-made authority. In so doing, what I've suggested 9 is to actually articulate the contest between the 10 Article 8 rights and the article 10 rights.</p> <p>11 Secondly -- and this picks up the point that I made 12 about damage -- for the Commissioner to set a tariff of 13 how much ought to be paid to an individual who brings 14 a section 4(4) claim, and that should be referable to 15 the duration, the extent, the gravity and the 16 profitability of contravention -- a bit like one has, 17 for example, in personal injury. There are tariffs set 18 for losses of limbs and other disabilities which an 19 individual sits(?), and in that way, again, it moves 20 away from the idiosyncratic, it becomes more fixed, and 21 enables the parties more easily to reach settlement.</p> <p>22 The third suggestion I made is that instead of going 23 through the court system, there could be the opportunity 24 for the Information Commissioner to administer these 25 tariffs, freed of legal cost and all the rest of it,</p> <p style="text-align: center;">Page 41</p>	<p>1 interest? In other words, investigative journalism and 2 the like?</p> <p>3 A. It wouldn't impair that at all, and there certainly 4 wouldn't be anything behind my submission that that 5 would be impaired. Indeed, freed of all of the other 6 stuff, what would come out is that it is that which is 7 being protected and having paramountcy over personal 8 privacy in that sort of a contest.</p> <p>9 MR JAY: Can we just understand how that would work in 10 relation to your proposed amended Section 32(1)(a)? 11 Your wording now is far closer to the language of 12 Article 9 of the directive. Indeed, I think it 13 precisely replicates it:</p> <p>14 "... the processing is necessary for the 15 publication."</p> <p>16 Can we just look at a paradigm case of investigative 17 journalism, that there's a lot of preparatory work 18 efficiently before the publication. If the journalist 19 can show that all the work is necessary for the 20 publication, then he or she is protected both in 21 relation to the preparatory work and to the publication 22 itself.</p> <p>23 A. Correct.</p> <p>24 Q. Is that the correct analysis?</p> <p>25 A. If recognises that particularly for investigative</p> <p style="text-align: center;">Page 43</p>
<p>1 quicker, one would hope.</p> <p>2 Fourthly, I said removing all of the provisions in 3 the enforcement sections relating to special information 4 notices and so forth, and simply bring it into line with 5 the enforcement regime which applies to everyone else, 6 and of course prevent section 4(4) claims from being 7 tied up with special information notices.</p> <p>8 Q. I understand. Then subparagraph 9 sets out the 9 advantages of bringing into being your recommendations. 10 Could you tell us about those, please?</p> <p>11 A. Well, my view is that were these amendments to be 12 effected -- or amendments along these lines to be 13 effected -- then what would happen is the DPA would be 14 restored to its right position, namely as the primary 15 mechanism of remedying press mishandling of personal 16 information. It would provide proper and predictable 17 recompense for mishandling of personal information. It 18 would simplify the bringing of those complaints and 19 cheapen them. It would unify the enforcement regimes so 20 that there wasn't a special regime which applied to the 21 press, and possibly, most significantly, would bring the 22 DPA really into line with what the directive required of 23 this country.</p> <p>24 LORD JUSTICE LEVESON: To what extent does it protect the 25 legitimate activities of the press acting in the public</p> <p style="text-align: center;">Page 42</p>	<p>1 journalism, in which there may be a long trail leading 2 up to the publication itself -- and some of those 3 sub-trails may turn out to be fruitless in 4 themselves but are nevertheless necessary in order to 5 explore all the avenues to produce the article itself. 6 That will be captured by my proposed 32(1) 7 paragraph (a).</p> <p>8 Q. Thank you. In relation to (b), we still have reasonable 9 belief, but this is in the context now -- because these 10 are cumulative requirements, as we can see the "and" 11 between (b) and (c):</p> <p>12 "... the reasonable belief that publication would be 13 or is in the public interest."</p> <p>14 So that would reflect what may be, if the statutory 15 instrument is brought in, the amendment to Section 55 16 through, I think, Section 78 of the criminal justice -- 17 sorry, it's the 2008 Act.</p> <p>18 A. The object of paragraph (b), as I've expressed it, is to 19 bring in essentially the article 10 right of the press, 20 the freedom of expression, recognising the public 21 Watchdog function which they carry out, and yes, it 22 keeps it as a reasonable belief because necessarily, to 23 be effective, it seemed to me that that is what is 24 required, rather than being able to show it objectively.</p> <p>25 Q. How is (c) different from (b)?</p> <p style="text-align: center;">Page 44</p>

11 (Pages 41 to 44)

<p>1 A. (c) is concerned with Article 8, so it's looking at the 2 individual. So (b) and (c) set up the contest which 3 articles 10 and 8 respectively contain. It's concerned 4 with the likely interference with the privacy of the 5 data subject, and it looks to how that occurs from the 6 publication of that journalism material. So it's not 7 concerned in a sense with the journalist, as it were, 8 beavering away to make the story; it's concerned with 9 the invasion which happens upon the publication of that 10 journalistic material. 11 LORD JUSTICE LEVESON: So to provide some colour to that 12 provision, what you're saying is you're recognising that 13 in order to get to what is or may be a legitimate story, 14 there may be all sorts of processing of data necessary, 15 but at the end of the day one also has to look at what 16 was actually published, because it may not be 17 justifiable to publish some of the data which you've had 18 to process to get to the end story, because that data -- 19 the publication of that data may not be in the public 20 interest. 21 A. Correct. That's exactly what I've sought -- I've 22 striven, with the suggested wording of (a), (b) and (c), 23 is to recognise that the process of getting to the end 24 of an investigative journalistic story may involve 25 picking up material which ought not form part of the Page 45</p>	<p>1 story along the lines anticipated -- 2 LORD JUSTICE LEVESON: If you've picked up a different 3 story, which has no public interest and you publish 4 that, then you wouldn't be able to satisfy the 5 requirements of the provision? 6 A. Correct. 7 MR JAY: Yes, so it's an elegant solution, which -- whether 8 or not it goes slightly further than Article 9, the 9 United Kingdom would be entitled to do that because the 10 directive sets out a minimum standard not a maximum 11 standard. Some would say this meets precisely what 12 Article 9 is contemplating. 13 A. Yes. I mean, my object wasn't to go further than is 14 required of the directive but really to express what the 15 directive requires. 16 Q. The only other point -- the rest of this is drafting 17 which meets the principles you've articulated before -- 18 when we come to compensation, you're contemplating the 19 Commissioner sets tariffs. These are, as it were, akin 20 to general damages for distress and it might include 21 pecuniary damage as well but that would be special 22 damage and separate. Are you contemplating reasonably 23 modest levels of compensation but slightly higher than 24 those that we've seen to date? What's the sort of 25 policy? Page 47</p>
<p>1 publication itself. What one looks to is: what comes 2 out of the investigative story at the end and does it 3 justify what has been done along the way? 4 MR JAY: Because we don't get to (c) if there isn't 5 a publication; that's right, isn't it? 6 A. Correct. 7 Q. (b) is looking at all stages up to and including 8 publication? 9 A. Correct. 10 Q. So (b) is -- the privacy issue is not relevant because 11 one's just considering the wider question of public 12 interest. Privacy only comes in if there's publication 13 because then the whole world can see the article 14 published and you logically must weigh up privacy rights 15 against freedom of expression. 16 A. Although, that said, paragraph (c) will still operate -- 17 if, for example, a journalist embarks upon an 18 investigation which is thought to be of massive 19 importance but, a little way down the track, realises 20 that all of these threads aren't going to justify the 21 publication of anything, nevertheless, the fact that he 22 has in mind, reasonably, a story at the end of it which 23 of is important public interest will justify what has 24 been done, provided that the journalist stops at the 25 point when the threads make it obvious that there is no Page 46</p>	<p>1 A. It will depend entirely on the extent of the breach of 2 the principles themselves. What I had in mind -- one 3 can anticipate, for example, that if something has 4 a very wide dissemination of very sensitive personal 5 information -- let's say a person's medical reports were 6 disseminated in a national newspaper. I find it 7 difficult to see why that should be only modestly 8 compensated. That, it seems to me, is a fundamental 9 breach of what the Act is there to protect. In 10 particular, sensitive personal data has been 11 disseminated abroad, and the fact that the individual 12 doesn't break out into boils or doesn't show some other 13 physical manifestation of -- in a sense, the nakedness 14 of that individual's personal medical details being put 15 in a public forum is, so far as I'm concerned, neither 16 here nor there. What we are concerned with is the 17 deviation from the principles which the Act and the 18 directive require. 19 LORD JUSTICE LEVESON: There is a problem here, which we 20 would have to find a way of resolving, and that is the 21 way in which we commensurate that which is 22 incommensurable. 23 Let me give you the example from personal injuries, 24 although there are others in the law as well. In 25 personal injury litigation, the figures awarded for Page 48</p>

<p>1 pain, suffering, loss of ability(?) are conventional, in 2 the sense that there isn't a logical analogy between the 3 loss of an eye or the loss of a leg and a sum of money. 4 There has to be an assessment made -- which, of course, 5 in Hyall v Rank(?) and other cases was increased -- to 6 provide some measure of compensation, but there is no 7 logical basis for saying, "Well, it's X thousand pounds 8 as opposed to Y thousand pounds." 9 What the judiciary then do is they can create 10 a shopping list, if you like, of values for different 11 claims, comparing and contrasting the pain, suffering 12 and loss involved. So on the one end, a tetraplegic, on 13 the other, a comparatively modest injury, which might 14 itself range from whiplash through to a broken arm or 15 a broken leg, and putting everything in between. There 16 are, as you know, four volumes of a book that reduce the 17 decisions of the court into researchable format. 18 A. Mm-hm. 19 LORD JUSTICE LEVESON: And the judicial studies or the 20 judicial college have produced booklets on it. Exactly 21 the same problem for sentencing -- I won't develop that 22 analogy -- but therefore the problem is going to be 23 trying to find an appropriate touchstone against which 24 to make this assessment. 25 A. I agree. What I've suggested is the things that, let us Page 49</p>	<p>1 this tariff or regime should be prescribed by the 2 Commissioner. What would the role of the Tribunal be, 3 if any? 4 A. What the court would do is look at the tariff which has 5 been set by the Commissioner, see where the events that 6 are described and shown to have occurred fall within 7 that tariff, and make an award accordingly. 8 LORD JUSTICE LEVESON: So that would be a judicial 9 assessment? 10 A. If one went down the judicial route. I've also made the 11 suggestion that a disgruntled individual should have the 12 option of simply going to the Information Commissioner 13 and saying, "Here's what's happened, I want an award, 14 you give me an award", in a process which doesn't 15 involve going to court. Obviously, the Commissioner 16 would take the views from the would-be defendant 17 themselves -- let's say, in this case, the press -- and 18 make an award accordingly, and that would be a simpler, 19 more straightforward method of proceeding which won't 20 result in the publicity of a judgment itself. 21 LORD JUSTICE LEVESON: But would have to be appealable or 22 challengable in some way. 23 A. Correct. 24 MR JAY: Thank you, Mr Coppel. Those were all the questions 25 I had on your evidence. Page 51</p>
<p>1 say the Information Commissioner, he being charged with 2 coming up with this assessment, should look to are the 3 extent of deviation from the data protection principles, 4 the period of time over which there has been that 5 deviation, the manner of deviation -- has it had wider 6 publicity than others, for example -- and also the 7 profitability to the breaching data controller. 8 One of the differences between this sort of tariff 9 and the one for personal injury is that in this 10 situation there's a greater degree of deliberateness 11 than there will normally be in personal injury. 12 Personal injury will normally result from an act of 13 negligence by the defendant. Here there's a greater 14 degree of deliberateness by the defendant to any such 15 claim, so that needs to be reflected, I think, in the 16 tariff. 17 I've called it a tariff of solace. It's intended to 18 give solace to the wronged individual through the 19 invasion of their personal privacy. 20 LORD JUSTICE LEVESON: Rather than being intended to be 21 punitive? 22 A. No, not intended to be punitive, although I suspect 23 individuals get solace from the fact that the wrongdoer 24 has been punished. 25 LORD JUSTICE LEVESON: I understand that. You're suggesting Page 50</p>	<p>1 LORD JUSTICE LEVESON: Mr Coppel, I'm very grateful to you 2 for the thought you've put into this. Is there any 3 other aspect of this area of the law which you yourself 4 have described might be thought of by some as somewhat 5 arcane that you'd like to draw to my attention? 6 A. No. I think if one works one's way through the document 7 which I've provided, the written document, and 8 particularly all of the links and the end notes, that's 9 more than ample for the purposes of this Inquiry and 10 indeed what I would wish to say in relation to it all. 11 LORD JUSTICE LEVESON: Thank you very much at all. 12 A. Not at all. I'm grateful. 13 LORD JUSTICE LEVESON: Thank you. 14 MR JAY: Our break? 15 LORD JUSTICE LEVESON: Yes, that's a good idea. 16 (11.23 am) 17 (A short break) 18 (11.30 am) 19 MR JAY: The next witnesses are being taken together. 20 Mr Macintosh and Dr Unger, please. 21 MR STUART MACINTOSH (sworn) 22 DR STEVEN WILLIAM UNGER (sworn) 23 Questions by MR JAY 24 MR JAY: May I ask each you your full names, please? 25 MR MACINTOSH: Stuart Macintosh. Page 52</p>

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<p>1 DR UNGER: Steven William Unger.</p> <p>2</p> <p>3 Q. Thank you very much. You are speaking jointly to</p> <p>4 a paper which Ofcom produced in answer to questions</p> <p>5 posed to Ofcom by the Secretary of State published on</p> <p>6 19 June 2012, starting at our page 00526. Do you attest</p> <p>7 to the truth of the facts and opinions set out in?</p> <p>8 MR MACINTOSH: Yes.</p> <p>9 DR UNGER: Yes.</p> <p>10 LORD JUSTICE LEVESON: Thank you very much indeed for this</p> <p>11 very thorough piece of work. As you can appreciate --</p> <p>12 and doubtless it was also in the mind of the Secretary</p> <p>13 of State when he asked you to do it -- aspects of it</p> <p>14 touched very much on the terms of reference which I have</p> <p>15 to address. So I'm grateful to you both.</p> <p>16 MR JAY: Mr Macintosh, first of all, you are an executive</p> <p>17 member of Ofcom's board?</p> <p>18 MR MACINTOSH: That's correct, yes.</p> <p>19 Q. And Dr Unger, you are group director responsible for</p> <p>20 Ofcom's strategic approach to communications regulation,</p> <p>21 which includes leading the executive work on media</p> <p>22 plurality; is that correct?</p> <p>23 DR UNGER: That's correct, yes.</p> <p>24 Q. So although this report may include the work of others,</p> <p>25 you have each contributed to it; is that correct?</p> <p style="text-align: center;">Page 53</p>	<p>1 MR JAY: Pardon me.</p> <p>2 DR UNGER: We provided it to the Secretary of State on</p> <p>3 31 December. I can't -- I think it may be that</p> <p>4 the publication was at the point where he made his final</p> <p>5 decision, which would have been somewhat later.</p> <p>6 Q. There were two stages. The first stage was whether</p> <p>7 there was an issue worthy of consideration by the</p> <p>8 Competition Commission at the end of December 2010. You</p> <p>9 decided that there was. The second report of June 2011</p> <p>10 was your assessment of the adequacy of the undertakings</p> <p>11 in lieu and you, having considered them, were of the</p> <p>12 conclusion that they did meet the plurality concerns</p> <p>13 which you'd earlier identified; is that a reasonable</p> <p>14 summary?</p> <p>15 MR MACINTOSH: Yes.</p> <p>16 DR UNGER: That's right. There was also an intervening</p> <p>17 report on an early set of undertakings which didn't meet</p> <p>18 our concerns.</p> <p>19 Q. Thank you. Can I ask you, please, to explain your</p> <p>20 methodology, section 2.7, page 00533. The four basic</p> <p>21 concepts there starting with goals and scope of</p> <p>22 plurality.</p> <p>23 DR UNGER: In very general terms, we felt it was important</p> <p>24 that before we answered the specific questions we</p> <p>25 understood what was the underlying purpose of any plural</p> <p style="text-align: center;">Page 55</p>
<p>1 MR MACINTOSH: Yes, yes.</p> <p>2 Q. Thank you. Now, as I indicated first of all, the</p> <p>3 Secretary of State in October last year asked you to</p> <p>4 address five questions relating to media plurality, and</p> <p>5 that is what you've done. In the executive summary, you</p> <p>6 supply us with the answers, but I think it's going to be</p> <p>7 more helpful to us if we move to the introduction, which</p> <p>8 is section 2, 00532, because some of the concepts will</p> <p>9 be unfamiliar to many of us.</p> <p>10 The five questions the Secretary of State asked are</p> <p>11 paragraph 2.1 at 00532. These presumably were very</p> <p>12 reasonable and appropriate questions; is that fair?</p> <p>13 MR MACINTOSH: Yes. There are roads from earlier</p> <p>14 consideration of the public interest test, which was</p> <p>15 a question that the Secretary of State had put to us at</p> <p>16 the time of News Corp's proposed acquisition of Sky.</p> <p>17 Q. So it really flowed from your report, which you call the</p> <p>18 public interest report. That was, as you say, prepared</p> <p>19 in the context of the Secretary of State's intervention</p> <p>20 notice following News Corp's bid for the remaining</p> <p>21 publicly owned shares in BSkyB. The report, I think --</p> <p>22 the BIT report -- was published in June of last year; is</p> <p>23 that correct?</p> <p>24 MR MACINTOSH: The public interest test report was published</p> <p>25 in December of 2010.</p> <p style="text-align: center;">Page 54</p>	<p>1 regime. That was what the discussion about goals and</p> <p>2 scope was about. What we were trying to achieve was the</p> <p>3 scope of the regulation that might achieve that.</p> <p>4 Q. Market context?</p> <p>5 DR UNGER: That was understanding, both on the supply side</p> <p>6 and the demand side, what was the structure of the</p> <p>7 market. So there we commissioned consumer research to</p> <p>8 understand consumers' preference for different types of</p> <p>9 news and we commissioned a study into ways which news</p> <p>10 was supplied.</p> <p>11 Q. "International case studies" -- that's probably</p> <p>12 self-explanatory, as indeed "review of academic</p> <p>13 thinking". You make it clear that during this process</p> <p>14 of considering your answers to the Secretary of State's</p> <p>15 questions, you put the matter out to consultation, as it</p> <p>16 were. You issued an invitation to comment, presumably</p> <p>17 on the basis of that being standard practice in this</p> <p>18 sort of domain. You've explained that you received</p> <p>19 a significant number of responses from the sort of</p> <p>20 entities whom you might expect to respond, including --</p> <p>21 all the non-confidential ones were put on your websites.</p> <p>22 Can I ask you, please, for your approach,</p> <p>23 paragraph 2.12, and the four principles which you set</p> <p>24 out there. The principles obviously made good common</p> <p>25 sense but did you apply them simply because they were</p> <p style="text-align: center;">Page 56</p>

14 (Pages 53 to 56)

<p>1 good common sense or did you get them from somewhere 2 else? 3 DR UNGER: They partially come from our own duties, 4 particularly around proportionality. So I think it was 5 also in recognition that in reaching our set of 6 conclusion we were often trading off different factors 7 against each other and that there needed to be some set 8 of guiding principles in making those trades. 9 Q. Thank you. Section 3, "Why media plurality matters". 10 The public policy goals, 3.2: 11 "... not a goal in itself but a means to an end." 12 Can I invite you, please, to develop that point? 13 MR MACINTOSH: Well, based on the research which we did in 14 the context of this and our own related work, it does 15 seem to be fairly clear that in order for there to be 16 an informed democratic process and debate, it's very 17 important that the public and participants more 18 generally have access to news and information on current 19 topics and events. There is, in a sense, no single 20 truth in relation to events and circumstances and it's 21 thus therefore important that there is some diversity in 22 the sources of news and information and opinion that are 23 available to the public if they're going to be able to 24 interpret and understand what is going on and contribute 25 to that democratic debate.</p> <p style="text-align: center;">Page 57</p>	<p>1 about informed citizens, which is making sure that there 2 is supply and that the supply is diverse, and making 3 sure that no one owner or collection of owners is able 4 to have an undue influence. 5 MR JAY: We know as a matter of policy, because Parliament 6 has so said, that there's a difference between the idea 7 of competition and the idea of plurality, but can you 8 encapsulate that difference for us, please? 9 A. Competition is essentially to do with ensuring that 10 there's no one party in a position where they have 11 economic power, and the way that that is traditionally 12 approached in the competitions sphere is that entity 13 having the ability to act independently of their 14 customers and their competitors. A simple translation 15 of that is that they can raise the price and increase 16 their profitability without fear of losing customers. 17 LORD JUSTICE LEVESON: Or reduce the price to drive 18 competition away. 19 MR MACINTOSH: Or reduce the price to drive competition 20 away. It can work on both sides of the market. 21 Plurality is a different concern because it's not so 22 much acting independently of customers in that sense. 23 If an individual party has a very powerful and loud 24 voice, the economic disciplines which might act in 25 a competitive market do not necessarily come into play</p> <p style="text-align: center;">Page 59</p>
<p>1 So I think the reason why plurality matters is 2 largely grounded in that. There is a related question 3 as to ensuring that no one voice in particular dominates 4 the information going to the public, which is 5 a secondary concern. 6 LORD JUSTICE LEVESON: Is it one voice or is it a restricted 7 number of voices? 8 MR MACINTOSH: It's probably more a restricted number than 9 one single voice. I mean, ideally one would like to see 10 a diversity and arguably the more, the better. 11 As we discuss in the report later on, however, in 12 different media and different platforms, there may be 13 economic constraints on the extent to which it may be 14 possible to sustain a large number of different voices. 15 But all other things equal, the more voices, the better. 16 LORD JUSTICE LEVESON: When you're considering these issues, 17 were you simply doing so from the perspective of diverse 18 opinion being available to the public or were you also 19 taking into account the power that might accrue to one 20 or more voices, even if there are a large number, if 21 they are, as it were, Gullivers as opposed to 22 Lilluputians in the market? 23 MR MACINTOSH: Yes. We were very conscious of both 24 considerations and in point 3.5 of the introduction, 25 I think we make reference to the fact our concerns were</p> <p style="text-align: center;">Page 58</p>	<p>1 in a media plurality consideration. 2 LORD JUSTICE LEVESON: So just to provide a bit of texture 3 to it, you'd be concerned with competition in 4 supermarkets, but one tin of baked beans sold by one 5 supermarket is very much like the same tin of baked 6 beans sold by a different supermarket, so it's 7 a competition issue? 8 MR MACINTOSH: Yes. 9 LORD JUSTICE LEVESON: But for the media it would absolutely 10 focus on plurality? 11 MR MACINTOSH: Yes, I think that's correct. That's not to 12 say there aren't competition issues -- 13 LORD JUSTICE LEVESON: No, I agree, and as I used the word 14 "absolutely" I thought: no, that goes too far. 15 MR MACINTOSH: Yes. 16 MR JAY: Yes. Well, the competition issue in the BskyB bid 17 was dealt with very quickly by Brussels? 18 MR MACINTOSH: That's correct. 19 Q. The difference, please, between external plurality -- 20 well, I think that's a concept we can understand, but 21 internal plurality, that may be a slightly more 22 difficult one. Could you help us with that idea? 23 MR MACINTOSH: Internal plurality is the notion that you may 24 have a particular news medium which chooses to provide 25 opportunities for a variety of different parties to</p> <p style="text-align: center;">Page 60</p>

<p>1 portray their perspective on current events through that 2 one channel. There may, on the other hand, be news 3 media who want to provide a more unified theme and 4 perspective to their readership and so are less inclined 5 to do that. So in the former case, there's more variety 6 of views and diversity even though it's being channelled 7 through one particular medium. 8 Q. I've been asked to raise this question with you: to what 9 extent is it possible for an organisation genuinely to 10 deliver internal plurality? In other words, do you 11 think that internal plurality can exist effectively 12 within one channel of communication? 13 MR MACINTOSH: I think a view that it can exist to some 14 extent and the extent to which that is significant in 15 the market is something that we would seek to take 16 account of. I think in our consideration, we felt it 17 was important to recognise that there is a distinction 18 between the two that it would be inappropriate to assume 19 that internal plurality did not exist and did not need 20 to be taken into account of in any consideration of the 21 state of plurality in the market. 22 DR UNGER: I would add that I think it's fair to say that 23 internal plurality is a more difficult concept. 24 The undertakings that we discussed with News Corporation 25 around Sky News were, in many ways, trying to ensure</p> <p style="text-align: center;">Page 61</p>	<p>1 I think that we recognise that one can make a legitimate 2 argument. 3 In this context, we focused on news and on current 4 affairs partly because the evidence that's available to 5 us does suggest that news and current affairs are 6 particularly important to consumers in the UK. They 7 consume news and current affairs very significantly. 8 They tell us that that genre is very important to them. 9 We were also very mindful of the fact that we were 10 looking to come up with practical solutions, and thus it 11 was appropriate not to extend the net too wide, 12 otherwise it's very, very difficult to do that. 13 The third thing is in the context of the UK, it's 14 important to take account of other regulation and 15 obligations which is designed to achieve some of these 16 broader objectives relating to other genre which relate 17 specifically to the obligations on some of the PSB 18 operators, for example, which, again, we've set out in 19 the report. 20 So we could see the arguments but we felt there were 21 good reasons for focusing specifically on news and 22 current affairs. 23 Q. Thank you. The concept of geographic scope I'm sure we 24 can grapple with ourselves, but the value chain for the 25 supply of news, you say that that is complex. Is the</p> <p style="text-align: center;">Page 63</p>
<p>1 internal plurality by maintaining some degree of 2 editorial independence for Sky News, and you inevitably 3 end up constructing a set of behavioural rules which 4 require an associated set of arrangements for monitoring 5 and enforcing. So it is more complex. 6 Q. Within the scope of media plurality, the first sub-issue 7 is genre and the point here is: do you focus on news and 8 current affairs primarily or do you bring into 9 consideration everything else within the scope of media 10 such as drama, comedy, other factual formats, since 11 those are capable, although perhaps to a lesser extent, 12 of shaping people's opinions? 13 You've come to the conclusion, as we see, that you 14 should focus on news and current affairs primarily, but 15 other witnesses are going to tell us that one should 16 broaden the scope of the inquiry. Could you assist us 17 here as to why the narrow approach is the one that found 18 favour with you? 19 MR MACINTOSH: The broader interpretation does have some 20 validity. I don't think that we would challenge that 21 for one moment, and indeed I think that as is reflected 22 in the report, to the extent that these issues are 23 looked at in some other countries, in some of them, they 24 do take this broader perspective to look out to broader 25 cultural issues and the impact of different genres. So</p> <p style="text-align: center;">Page 62</p>	<p>1 difference here, I think, between the retail and the 2 wholesale? 3 MR MACINTOSH: Yes. 4 Q. If we want a definition of that, we get it from 5 footnote 16, which clearly explains that. 6 DR UNGER: I think it's maybe worth adding on that point 7 that we also recognise that could become more complex 8 going forward, with the role of new types of aggregators 9 online, for example. 10 Q. Your recommendation -- this is point 3.21: 11 "Flexibility is required to consider at which points 12 in the value chain editorial control is most likely to 13 be exercised and therefore how best to measure diversity 14 and influence." 15 Do you have a view as to whether one should be 16 focusing more on wholesale rather than retail or vice 17 versa or is each equally valid as a metric? 18 DR UNGER: In the public interest test and I think also 19 here, we looked at both sets of metrics and we 20 essentially assessed them in the round. There are 21 different reasons for focusing on wholesale and retail. 22 I don't think at the moment it's possible to say that 23 one should particularly look at one of those. 24 Q. Then the concluding part of this section, what would 25 a plural outcome look like when you characterise the</p> <p style="text-align: center;">Page 64</p>

<p>1 ideal plural outcome -- well, there are six bullet 2 points and I think they're each self-explanatory. So we 3 attain that state of affairs and they would each be 4 subjected to diversity in the fuller sense of the term 5 and that's the gold standard. 6 The market and regulatory context now, which is 7 section 4. We're looking at a range of suppliers: 8 television, radio, newspapers, online. You see them as 9 complementary, not as direct substitutes, I suppose for 10 the obvious reason that many people dip into at least 11 one and don't regard them as substitutes for one or each 12 other; is that right? 13 DR UNGER: Yes. I think it's also partially that we weren't 14 only talking about substitutes in economic terms; we 15 were also trying to describe the different 16 characteristic of the different types of platforms and 17 the way in which they were consumed, which is quite 18 different. 19 Q. You've provided us, in your second annex, with a table 20 of the major news media providers in the UK. Of course, 21 that spreads into the broadcast news. It's not very 22 clear to read in the copy I have here but it helpfully 23 sets out the areas. Is there anything you wish to add 24 to 4.4, which explains the clear differences between 25 television on the one hand, for example, and newspapers</p> <p style="text-align: center;">Page 65</p>	<p>1 likely to be more qualitative, is that right, than 2 quantitative? 3 DR UNGER: It's partially quantitative. We've looked at our 4 own measures but we also here summarise some of the 5 results from some the industry measurement systems, such 6 as Barb, RAJAR and so on. 7 LORD JUSTICE LEVESON: Such as -- pardon? 8 DR UNGER: Sorry, there are several industry measurement 9 systems. Barb is the systems used in TV. RAJAR is the 10 measurement used in radio. Within newspapers, there are 11 the ABC and NRS systems, and then online, there is the 12 UCOM just Nielsen system. So what we are also 13 summarising here are some of the results from those 14 platform-specific industry measurement systems. 15 MR JAY: The significance of newspapers you explain in the 16 bullet points. Although, of course, there has been 17 a decline in readership, the impact and influence of the 18 printed word, coupled with the headline, coupled very 19 often with a photograph still remains important, 20 particularly in the context of a news medium which 21 doesn't have to be impartial. A partial one is going to 22 influence people in various obvious ways. 23 Can I ask you, please, about the regulatory context 24 and your duties. The last bullet point of 4.9: 25 "Positive mechanisms to promote media plurality". Can</p> <p style="text-align: center;">Page 67</p>
<p>1 on the other, and the growth of the Internet? 2 DR UNGER: I don't think so. It summarises more detail 3 that's in the annexes but that summary is reasonably 4 complete. 5 Q. 4.5, this is your quantitative consumer research: 6 "TV remains the most used and important platform." 7 The reasons for that, I think, are clear enough. 8 "Online news is significantly growing." 9 Well, we understand that likewise. But 10 multi-sourcing, could you help us through that bullet 11 point? 12 DR UNGER: So this, I think, goes back to the earlier 13 discussion about the underlying goals. I think earlier 14 on we established that what was important was both 15 a share of voice, that no one voice should be too 16 powerful, but also the idea there should be a diversity 17 of voices in the market. Multi-sourcing is one 18 particular measure, which really is complementary to 19 looking at market share, which allows one to assess what 20 range of views individual citizens might be consuming. 21 So if individual citizens consuming a wide range of 22 different sources of news, then I think one would be 23 more comfortable about the extent of plurality in the 24 market. 25 Q. You looked at other evidence in 476, which I think is</p> <p style="text-align: center;">Page 66</p>	<p>1 you help us about those, in particular the -- what you 2 set out in annex 3 and the implicit subsidies? 3 DR UNGER: So particularly in relation to the public service 4 broadcasters. The public service broadcasters receive 5 certain benefits, mainly in kind, in terms of access to 6 spectrum and the prominence of, for example, electronic 7 programming guides. In return for those benefits, they 8 face obligations. For example, they face quotas they 9 have to provide in relation to national and regional 10 news. So that positive set of commitments which 11 promotes the provision of news in circumstances where it 12 would otherwise not take place is like a positive lever 13 for delivering plurality. 14 Q. Thank you. There's some further explanation between 15 paragraphs 4.20 and 4.23, which we're going to come to. 16 We're still on the regulatory regime. Media 17 mergers. We looked at this with, I think, both 18 secretaries of state -- that's Dr Cable and Mr Hunt. 19 The relevant provisions are in the Enterprise Act of 20 2002, which carry forward into the Communications Act. 21 We've examined the difference between section 58(2)B and 22 section 58 (2)C(a). If I remember rightly, the first of 23 those provisions was relevant to the intervention notice 24 of 4 November 2010, but when you came into the saddle 25 a bit later on considering the UILs, I think you were</p> <p style="text-align: center;">Page 68</p>

<p>1 considering section 58(2)(a); is that right?</p> <p>2 DR UNGER: I can't remember which is which. I do know that</p> <p>3 there is one set of considerations which deal</p> <p>4 specifically with newspapers and there's another set of</p> <p>5 considerations which is really around cross-media</p> <p>6 mergers and we were focused on the cross-media aspects</p> <p>7 of these mergers.</p> <p>8 Q. Thank you.</p> <p>9 DR UNGER: I think in both cases, Sky, ITV and News Corp Sky</p> <p>10 is essentially treated as a cross-media merger.</p> <p>11 Q. Thank you. Controls on media ownership at the bottom of</p> <p>12 this page, 4.16:</p> <p>13 "The main remaining ex-ante statutory restrictions</p> <p>14 on media ownership are ..."</p> <p>15 The 20/20 rule. Now, that came into the</p> <p>16 Communications Act of 2003. I can't remember whether it</p> <p>17 existed in some different --</p> <p>18 DR UNGER: In previous Acts, yes.</p> <p>19 Q. Maybe it was in the 1996 Act.</p> <p>20 MR MACINTOSH: I believe that's correct.</p> <p>21 Q. Yes, Sir John Major explained that to us, didn't he?</p> <p>22 That rule prohibits a newspaper group with more than</p> <p>23 20 per cent of national newspaper share from holding</p> <p>24 a Channel 3 licence or stake in a Channel 3 licensee</p> <p>25 that is greater than 20 per cent. Then there are other</p> <p style="text-align: center;">Page 69</p>	<p>1 a measure of plurality.</p> <p>2 Q. I've been asked to put this point to you. You say in</p> <p>3 paragraph 4.18 -- you've just told us that impartiality</p> <p>4 cannot be measured precisely and that the rules would</p> <p>5 not necessarily prevent an individual with control of</p> <p>6 a media organisation from influencing the news agenda</p> <p>7 through the selection or omission of stories. But does</p> <p>8 this mean that you consider an impartiality requirement</p> <p>9 as not capable of being enforced if a media enterprise</p> <p>10 aims to thwart it?</p> <p>11 DR UNGER: I think the issue is more that it is not</p> <p>12 a complete set of obligations, that one can be impartial</p> <p>13 in relation to the stories that you run with, but it's</p> <p>14 still possible to determine an agenda through</p> <p>15 the selection of stories. I think that's quite well</p> <p>16 acknowledged. I think the Competition Commission</p> <p>17 acknowledged it in the context of Sky ITV. I think</p> <p>18 James Murdoch acknowledged it in his 2009 MacTaggart</p> <p>19 lecture. So I think it's well acknowledged that the</p> <p>20 selection of stories is somewhat different from the</p> <p>21 question of whether you're impartial when you cover</p> <p>22 those stories.</p> <p>23 Q. Positive obligations on public service broadcasters.</p> <p>24 I think we can just note those because they are not</p> <p>25 likely to be central to this Inquiry's consideration of</p> <p style="text-align: center;">Page 71</p>
<p>1 ex-ante rules which are also to be found in the 2003</p> <p>2 Act.</p> <p>3 The position in relation to broadcasters -- as we</p> <p>4 know, there's an obligation to be impartial and that</p> <p>5 naturally has a knock-on effect to the issue of</p> <p>6 plurality; is that correct?</p> <p>7 MR MACINTOSH: That's correct.</p> <p>8 Q. The reason for that is probably obvious but can I ask</p> <p>9 you to make that explicit?</p> <p>10 MR MACINTOSH: It's helpful insofar as it creates an</p> <p>11 expectation that there will be some measure of balance</p> <p>12 in the news selection and the way that news stories are</p> <p>13 presented. However, a couple of qualifications in</p> <p>14 relation to that. The legislation calls for due</p> <p>15 impartiality, so it's not an absolute concept, and that</p> <p>16 inevitably means that the broadcasters in question</p> <p>17 exercise some measure of judgment in that context as to</p> <p>18 whether or not they're bringing all of the different</p> <p>19 perspectives to an issue that they might.</p> <p>20 The second consideration is that when it comes to</p> <p>21 the selection of topics to be covered, impartiality does</p> <p>22 not ensure that there is a diversity with regard to</p> <p>23 that, so while impartiality is helpful as a concept and</p> <p>24 provides some reassurance to listeners to TV, radio and</p> <p>25 news, it doesn't necessarily go all the way and provide</p> <p style="text-align: center;">Page 70</p>	<p>1 the issues. It's page 17, 00545.</p> <p>2 If I can move on to section 5, your advice on media</p> <p>3 plurality. First of all, measuring media plurality</p> <p>4 across platforms. The Secretary of State had asked you</p> <p>5 to recommend the best approach. Across platforms --</p> <p>6 well, television, radio, press and online. I think</p> <p>7 those are self-explanatory. But can you help us,</p> <p>8 please, with the various measures or metrics, to use the</p> <p>9 term deployed in this area? Availability, consumption</p> <p>10 and impact. Can you talk us through those, please?</p> <p>11 DR UNGER: So availability is a measure which there's been</p> <p>12 quite a lot of focus on in the past. The view we took</p> <p>13 here is that availability provides some sense of shelf</p> <p>14 space. So there's, I think, an analogy with a library,</p> <p>15 where the sum of the books available in the library,</p> <p>16 that's the sum of content that's available to citizens.</p> <p>17 That, however, only tells you a certain amount of</p> <p>18 influence. It's only when you actually consume a book</p> <p>19 by reading it that that can start influencing opinion,</p> <p>20 and that's therefore why we've moved fairly quickly from</p> <p>21 availability metrics to consumption metrics. Ideally,</p> <p>22 you would like to move further and start assessing</p> <p>23 impact, which is really the third set of metrics in</p> <p>24 ideal world. I think the problem there is that there</p> <p>25 are not very many quantitative metrics to allow you to</p> <p style="text-align: center;">Page 72</p>

<p>1 assess impact. That's why we end up focusing on 2 consumption metrics as something that is better than 3 simply assessing the availability but also a set of 4 metrics where it's practical to gain quantitative data. 5 Q. So you're looking for metrics then which are 6 quantitative, which, because they're quantitative, 7 they're more likely to be objective, but also are not 8 too complicated because if they're too complicated, 9 well, the dangers of that are obvious, and if they're 10 too judgmental, then there might be too much argument 11 about what the right outcome is. Is that a reasonable 12 assessment of where we are? 13 DR UNGER: That is a reasonable assessment. I think it's 14 worth highlighting though that -- I don't think we can 15 shy away from the need to make judgments here. So we 16 have noted in this section that there's a set of metrics 17 that are useful but they have to be looked at alongside 18 a number of contextual factors, many of which are 19 qualitative. 20 LORD JUSTICE LEVESON: Throughout all this work, there are 21 a number of judgments that have to be made, which may 22 not be absolutely crystal clear on the face of the page 23 but inevitably flow from the nature of the exercise that 24 you're undertaking. 25 DR UNGER: That's correct and I think all one can do is try</p> <p style="text-align: center;">Page 73</p>	<p>1 about the relationships between these parameters. So we 2 can look at market power and we can test them using 3 tools which economists have developed and so forth to 4 help us do a our work and reach conclusions. 5 It's much more challenging looking at that in the 6 context of information or consumption and understanding 7 that in the context of the impact on public opinions and 8 views, and it would appear to be the case that those 9 were among the reasons why Parliament decided that some 10 aspects of this should be reserved for the political 11 process as opposed to being done from a technical 12 perspective. 13 LORD JUSTICE LEVESON: You're two steps ahead of me, because 14 of course, at the end of the discussion has to be 15 addressing the issue that was raised by a number of -- 16 MR MACINTOSH: Yes. 17 LORD JUSTICE LEVESON: -- witnesses as to who should be 18 making this decision. That's precisely why I asked you 19 about -- this isn't a machine that you can press buttons 20 in and get out an answer. 21 MR MACINTOSH: Correct. 22 LORD JUSTICE LEVESON: There is an enormous amount of scope 23 for -- potential scope for subjectivity, which is fine, 24 it's understandable, but we just have to be aware of it. 25 MR MACINTOSH: Yes.</p> <p style="text-align: center;">Page 75</p>
<p>1 and gather what evidence there is. So if I -- for 2 example, if I take this point about impact. We did 3 carry out consumer research, which looked at the 4 personal importance that individual citizens attach to 5 different titles, different types of media, and that 6 gives you some sense of influence, but you then do have 7 to apply judgment in how you apply that. 8 LORD JUSTICE LEVESON: And that judgment isn't necessarily 9 unaffected by policy considerations. 10 DR UNGER: I think that is why it is important to have 11 a very clear articulation of the underlying principles 12 of what you're trying to achieve. It goes back to that 13 early discussion about: what are the underlying 14 objectives? I think there was a witness yesterday who 15 talked about the animating principles of a framework. 16 We have to be very clear what are the underlying duties, 17 what are the underlying things we're trying to achieve 18 and we apply judgment in that context. 19 LORD JUSTICE LEVESON: Yes. 20 MR MACINTOSH: I think it's also quite interesting -- if you 21 go back to when this was framed or looked at again in 22 the context of the Act in 2002 and 2003, there were 23 changes in economic regulation where, in a sense, those 24 are now being confined to the domain of regulators and 25 the CC, and there you can have a bit more confidence</p> <p style="text-align: center;">Page 74</p>	<p>1 LORD JUSTICE LEVESON: So I'm pleased you're prepared to 2 deal with the ultimate question at the end. Yes. 3 MR JAY: On this issue more generally, we've had some 4 evidence that one of the concerns around the impact of 5 the media on freedom of expression is the risk of those 6 who control the media effectively drowning out other 7 voices. Is this an issue that you've considered at all 8 in your work on plurality, particularly when we're 9 looking at the measures? 10 DR UNGER: This goes back to the twin set of measures, part 11 of which are around no individual -- part of it's around 12 diversity. We identify consumption metrics, 13 particularly reach and multi-sourcing, which are around 14 diversity, but we also say that share is important. If 15 there's too high a share, then that creates a risk that 16 a particular voice might drown out others. 17 Q. Thank you. You don't, as it were, stop with your 18 quantitative measures. You also consider contextual 19 factors which, I suppose, are likely to be softer, more 20 qualitative, but could you just summarise what those are 21 and how you take those into account? 22 DR UNGER: Some of them relate to regulations. So in 23 particular, we've noted that the existence of 24 impartiality regulation in TV broadcasting has to be 25 relevant when considering plurality. Some other</p> <p style="text-align: center;">Page 76</p>

<p>1 contextual factors might relate to the way in which 2 particular titles or particular platforms behave absent 3 regulation. So the particular positions that 4 proprietors take, whether they take a very active role 5 in influencing the views expressed in their titles or 6 whether there's a greater degree of editorial freedom, 7 editorial independence. Those are all factors that 8 might be relevant and you would have to look at the 9 specific circumstances.</p> <p>10 Q. Thank you. So you bring all these points together in 11 paragraph 5.31. We can see figure 3, which is a useful 12 table, which includes the quantitative and the 13 contextual measures. It's also part of your advice to 14 the Secretary of State at the bottom of this page, 5.33, 15 that the metrics framework itself should be assessed 16 during each main plurality review:</p> <p>17 "This will ensure that it continues to capture what 18 we cannot predict or measure today."</p> <p>19 Because obviously this framework is only going for 20 work for today and the immediately foreseeable future. 21 It may in due course, or fairly soon indeed, become 22 redundant.</p> <p>23 On the next page, our page 55002, online and the 24 measurement framework. Can you help us, in particular 25 paragraph 5.36, with the different types of service</p> <p style="text-align: center;">Page 77</p>	<p>1 You then have blogs, which are run by individuals, 2 on which they post views and post information regarding 3 current events, and then you have new entities who are 4 establishing up effectively as provider of news services 5 online, of which there are quite a number.</p> <p>6 So there's quite a proliferation and it's a market 7 which is changing and developing very, very rapidly, and 8 one which increasingly is being used by citizens and 9 consumers to gain access to news content.</p> <p>10 MR JAY: Thank you. 5.39: 11 "The move to online distribution has created a rich 12 diversity of online news supply." 13 I think each of these categories is self-explanatory 14 really: 15 "Different online formats allow a range of 16 consumption patterns ... low barriers to entry have 17 facilitated a growing diversity of viewpoints ... online 18 news and social media enable high levels of 19 participation, including unmediated comments." 20 The rapid innovation point. 21 In terms of where we are today, the importance of 22 the Internet vis-a-vis other more traditional suppliers 23 of news, how would you describe that?</p> <p>24 MR MACINTOSH: It is becoming very important. I think in 25 one of the charts which we showed earlier, something</p> <p style="text-align: center;">Page 79</p>
<p>1 which are available to the Internet?</p> <p>2 MR MACINTOSH: There are a number of different services and 3 they continue to evolve.</p> <p>4 LORD JUSTICE LEVESON: Could I ask you if you could speak up 5 a bit? It doesn't actually magnify the voice, this 6 thing. It records it but it doesn't amplify.</p> <p>7 MR MACINTOSH: Okay. I have the softer Scottish accent, not 8 the harsh Glasgow accent. I shouldn't say "harsh"; my 9 fellow Scots will not thank me for that.</p> <p>10 Several developments. Existing media companies have 11 obviously realised that the Internet is a potential very 12 important means of distributing their content and 13 consumers are going increasingly to the Internet. So 14 we've had a lot of traditional media companies, 15 newspapers and others establishing a very, very strong 16 presence on the web. So people who have previously 17 relied solely on the physical newspaper either rely on 18 that and online, and some are actually just going 19 completely online.</p> <p>20 Secondly, you have aggregators, organisations like 21 Google, who provide a way for users of their services to 22 get to a whole variety of different news sources. 23 I don't believe that Google employs any journalists, but 24 they're becoming a very, very important channel, 25 a conduit through which users get access to news.</p> <p style="text-align: center;">Page 78</p>	<p>1 like over 40 per cent -- I think the number is currently 2 around 41 per cent -- of users use the Internet to get 3 access to news services in one form or another. That 4 appears to have doubled over a relatively short period, 5 i.e. over the past three or four years. So it is very, 6 very important and it's growing very rapidly and may 7 continue to grow rapidly because of the evolution in the 8 devices and the way that people get access to the 9 Internet.</p> <p>10 LORD JUSTICE LEVESON: That would also include using 11 traditional news online, newspapers online?</p> <p>12 MR MACINTOSH: That's completely correct. One of the 13 interesting facets of the way the online environment has 14 evolved is that some of the major very, very well 15 established players like the BBC are actually the most 16 popular online sites today.</p> <p>17 DR UNGER: There was an interesting contrast, I think, 18 though, in its conclusions. An important conclusion 19 there was that most of what we see online is essentially 20 offline players now going online. So existing newspaper 21 titles, for example, opening up online sites. One of 22 the interesting conclusions here was I think the 23 increasing importance -- if you look at the online 24 rankings, Facebook and Google appearing joint second and 25 third, if you like, in the rankings online, companies</p> <p style="text-align: center;">Page 80</p>

<p>1 that didn't exist a few years ago.</p> <p>2 MR JAY: The risks of the development of the online</p> <p>3 platform. We can see those in 5.44, page 00553. Again,</p> <p>4 most of these are fairly clear. Disruption to</p> <p>5 traditional news markets, the potential of navigation</p> <p>6 tools to reduce plurality of consumption. Could you</p> <p>7 explain that one for us?</p> <p>8 MR MACINTOSH: When consumers are accessing news through</p> <p>9 aggregation sites and so forth, the search algorithms</p> <p>10 which guide them towards particular websites will have</p> <p>11 an influence on what they see and consume. At present,</p> <p>12 that doesn't appear to be an issue or concern, although</p> <p>13 one could imagine circumstances in the future where</p> <p>14 there's a more active role played by the aggregators to</p> <p>15 steer people towards particular sites for particular</p> <p>16 reasons.</p> <p>17 LORD JUSTICE LEVESON: Or for commercial reasons.</p> <p>18 MR MACINTOSH: Yes. Very largely for commercial reasons.</p> <p>19 DR UNGER: I think we were also -- that comes particularly</p> <p>20 in the fourth bullet point. I think at this point we</p> <p>21 were also concerned about the potential risk that people</p> <p>22 would seek out content which reinforce their own views</p> <p>23 or the views of their friends, if you like. So as</p> <p>24 opposed to a medium where you are presented with content</p> <p>25 which has been collected by somebody else, if you're in</p> <p style="text-align: center;">Page 81</p>	<p>1 be able to include effectively online, it seems likely</p> <p>2 that there need to be a change, yes.</p> <p>3 DR UNGER: It may not be necessarily the case that requires</p> <p>4 primary legislation, so we note there are different</p> <p>5 options in the footnote.</p> <p>6 Q. What would need to be done to the public interest</p> <p>7 considerations though, which are set out -- indeed,</p> <p>8 I know -- in the Enterprise Act? Are you suggesting</p> <p>9 amendments to those to deal with the online</p> <p>10 considerations?</p> <p>11 MR MACINTOSH: I think insofar as those constrained our</p> <p>12 ability to encompass online in a review, we were really</p> <p>13 party to do it, yes, would be the answer.</p> <p>14 Q. Can you tell us, please, which types of online service</p> <p>15 you think should be included? In other words, news</p> <p>16 sites, aggregators, blogs, all or some of them?</p> <p>17 MR MACINTOSH: I think it goes back to what we said earlier</p> <p>18 about this being a dynamic market where one needs to be</p> <p>19 open to the circumstances as you find them. If you find</p> <p>20 that there are different sorts of sites through which</p> <p>21 people are gaining access to news, information, opinion</p> <p>22 and comment that counts towards plurality, ideally you</p> <p>23 would want to have the flexibility to include those in</p> <p>24 your assessment.</p> <p>25 Q. How would you measure the impact of these services --</p> <p style="text-align: center;">Page 83</p>
<p>1 a situation where you're selecting the content that you</p> <p>2 access, you may seek content that reinforces your own</p> <p>3 views.</p> <p>4 LORD JUSTICE LEVESON: That might be so if you by</p> <p>5 a newspaper, because those who have certain political</p> <p>6 views will choose one newspaper; those who have</p> <p>7 different political views are unlikely to choose the</p> <p>8 first but will choose the second. I won't put names or</p> <p>9 labels to any of that.</p> <p>10 MR MACINTOSH: Absolutely.</p> <p>11 DR UNGER: It's clear that it's already a potential issue</p> <p>12 with newspapers. I think the point we're making is</p> <p>13 simply where you're able to search for individual</p> <p>14 stories, that risk may be increased. We did not put</p> <p>15 a great deal of weight on that point, but I think that</p> <p>16 is the point.</p> <p>17 LORD JUSTICE LEVESON: Yes.</p> <p>18 MR JAY: Your conclusion or your recommendation is that</p> <p>19 online be included in any market assessment. Are you</p> <p>20 saying though, in paragraph 5.50, that there would need</p> <p>21 to be a change of the law in order to achieve this</p> <p>22 recommendation?</p> <p>23 MR MACINTOSH: Potentially so. I mean, "media enterprise"</p> <p>24 as currently defined in the law would not encompass</p> <p>25 online. Therefore if one was going to do a review and</p> <p style="text-align: center;">Page 82</p>	<p>1 take aggregators or blogs -- on plurality?</p> <p>2 DR UNGER: So we've identified a measurement system that's</p> <p>3 available at the moment, this UCOM/Nielsen system. At</p> <p>4 the moment, that allows you to gain certain consumption</p> <p>5 metrics, so for example, what's referred to as dwell</p> <p>6 time, so the amount of time that individuals spend</p> <p>7 looking at particular pages. It allows you to measure</p> <p>8 click throughs, essentially, something that's important</p> <p>9 from the perspective of advertisers.</p> <p>10 So there is quantitative data available through</p> <p>11 those measurement systems and that's what we have used</p> <p>12 at the moment in assessing plurality. But I think we've</p> <p>13 been very conscious that particularly in relation to</p> <p>14 online, that is likely to evolve over time, not least</p> <p>15 because the nature of the concern might change and</p> <p>16 therefore that is exactly where there needs to be</p> <p>17 flexibility.</p> <p>18 LORD JUSTICE LEVESON: But do you have to be careful that</p> <p>19 you're not comparing apples and pears? You can see how</p> <p>20 long a person looks at a page on a website. What you</p> <p>21 can never determine -- maybe you can, I don't know --</p> <p>22 you're way ahead of me.</p> <p>23 DR UNGER: No, sorry, it is exactly the problem we talked</p> <p>24 about previously, which is that a consumption metric is</p> <p>25 helpful, it tells you what people are looking at, but it</p> <p style="text-align: center;">Page 84</p>

<p>1 doesn't tell you the extent to which the act of looking 2 at that content has an impact on their are opinion. 3 LORD JUSTICE LEVESON: Or for how long they've looked at it. 4 They may do online, but you can't say how long I read 5 the front page, or the second page or fifth page of my 6 newspaper. 7 DR UNGER: We have the same problem with all of these 8 platforms. Radio is another good example where we know 9 what people listen to and broadly for how long, but we 10 don't know whether it's a background task, whether 11 they're really focusing on it -- these things all go to 12 this point about impact. The assumption is it's 13 a useful quantitative measure but I think you have to be 14 cautious not to apply too much weight to that 15 consumption measure and reach -- 16 LORD JUSTICE LEVESON: I'm taken back to the evidence of 17 a witness at the very beginning of the Inquiry who spoke 18 about his choice of newspaper because of the crossword. 19 DR UNGER: Yes. 20 LORD JUSTICE LEVESON: Which actually doesn't tell us much 21 about his interest in news. 22 DR UNGER: I think there is some evidence we can look at, so 23 we did look at the importance that people attach to 24 different types of content and you can see that -- 25 there's some interesting results there. So, for</p> <p style="text-align: center;">Page 85</p>	<p>1 a merger involving online providers would be a relevant 2 merger under the Act or are you just looking at how the 3 market is to be understood when considering the impact 4 of a proposed merger on plurality? 5 MR MACINTOSH: It may not be a relevant merger under the Act 6 as it stands today, but I think that the substance 7 behind what we have set out in the report is that it 8 should be encompassed in looking at plurality. 9 Q. I see. 10 Triggers for a plurality review. The questions you 11 set out at paragraph 5.58 at least really flow from the 12 Secretary of State's questions which we looked at at the 13 start but can we just understand the difference, insofar 14 as it isn't obvious, between a metric based figure and 15 a time-based figure. 16 DR UNGER: So the idea behind a metric-based figure, which 17 I think a number of people have supported, is that if 18 a particular company exceeded some metric -- I think 19 normally market share is the metric that's discussed -- 20 that would trigger a review. The difference with 21 a time-based trigger is simply that the elapse of time 22 would trigger a review. 23 Q. The advantages and disadvantages of the metric-based 24 trigger, please? 25 DR UNGER: The metric-based trigger has some attractions in</p> <p style="text-align: center;">Page 87</p>
<p>1 example, there are some titles with relatively low 2 shares but where individual consumers attach a high 3 importance to that media. So Al Jazeera is an example 4 of a title -- of a newspaper -- of a TV broadcaster that 5 has a very low share but where those people who view it 6 attach a high personal importance. 7 At the other extreme, I think the consumer evidence 8 we reproduce suggests that the Sun, which has a very 9 high share -- the readers of that newspaper attach 10 a relatively low personal importance to the newspaper. 11 There may be reasons. They are reading it for the 12 entertainment value rather than the news, for example. 13 That is covered, I think, in one of the annexes around 14 consumer research. 15 I think that's the type of contextual evidence one 16 can take into account, but it's not a simple metric. 17 MR JAY: Thank you. On the next page, page 23, 00555, the 18 sector, you say, is innovating rapidly, changes can't be 19 forecast, et cetera, and so you conclude, in 5.55: 20 "The suitability of online measures in the broadest 21 sense could be assessed during any full plurality 22 review." 23 So it's the same point that you made previously. 24 MR MACINTOSH: Yes. 25 Q. Can I ask you this: would these changes mean that</p> <p style="text-align: center;">Page 86</p>	<p>1 principle, in the sense that it might allow you to carry 2 out a review in a way that is at that point in time when 3 the concern arises and potentially targeted to the type 4 of concern that arises. So we see some attractions in 5 principle to a metrics based trigger. In practice, 6 we're concerned -- this goes back to our broader 7 concerns about the availability of metrics which, 8 I suppose, are complete. We are concerned that that 9 there is not a particular metric which would be ideal in 10 these circumstances, and furthermore that the use of 11 a metric-based trigger would, in some sense, subject the 12 market to a continuous review. 13 So really, I think particularly in the interests of 14 certainty, we felt that the time-based trigger was 15 better and that as long as the time period between 16 reviews wasn't too long, then a periodic review would be 17 able to take account of events that had taken place 18 between the periods of reviews. 19 LORD JUSTICE LEVESON: Isn't there another disadvantage with 20 a metric-based trigger, that if because some metric has 21 been exceeded, like market share, you're suddenly going 22 to require action to be taken to divest or whatever, 23 whereas time based, there is an opportunity for warnings 24 or discussion, for a rather more measured or less jerky 25 response to changes in conditions?</p> <p style="text-align: center;">Page 88</p>

<p>1 DR UNGER: Yes. We talk about this particularly in the 2 context of the exit of the News of the World, where 3 deciding the right answer at the point where the News of 4 the World had exited would not be the right thing to do 5 because we did not know what the final outcome was going 6 to be. 7 LORD JUSTICE LEVESON: Or deciding immediately before, not 8 knowing it was about to exit. 9 DR UNGER: Absolutely. So the point is the market is 10 continuously changing. There must be a point in time 11 every so often when one looks at the market, but to not 12 want that to turn into a continuous process of review 13 where the market is continuously subject to the 14 uncertainty that comes with that process of review. 15 LORD JUSTICE LEVESON: Another advantage of this, I suppose, 16 is that if it's time-based, then there is less scope for 17 concern that it is politically motivated? 18 DR UNGER: That's also true. The proponents of 19 a metric-based review I think would argue that as long 20 as the metric is sufficiently well defined, then it is 21 still possible to have a trigger which is essentially 22 automatic, and therefore -- 23 LORD JUSTICE LEVESON: I understand, but that assumes that 24 you can press the switch and the answer comes out, that 25 it doesn't require any subjectivity in the measurement</p> <p style="text-align: center;">Page 89</p>	<p>1 You say there may be merit in introducing an exit 2 trigger but I think the suggestion is that you may be 3 inclining against that; is that how you see it? 4 DR UNGER: I think we're cautious. We've left the option 5 open at this stage and one of the further questions 6 we've been asked is to consider whether that option may 7 be realisable in practice. I think we're very conscious 8 of the issues set out here, which are essentially overt: 9 firstly, one doesn't know the final outcome at the point 10 of exit and secondly, that in practice one may not be 11 able to do much about an exit. 12 So the situation is very different from a merger 13 where the outcome is clearer and you can do something 14 about it. 15 Q. And you can always assess the position ex-ante with 16 a merger, but with an exit, as we've discussed already, 17 it's difficult. 18 The current position in relation to mergers I think 19 is fairly clear. Again, one or more secretaries of 20 state explained it to us. I think the position we're at 21 is that the overall framework will continue to apply, 22 but the issue is 5.78, for example, where they are going 23 to bring online suppliers within the framework. Have 24 I correctly understood the position? 25 DR UNGER: That's correct, and I think, as Stuart said</p> <p style="text-align: center;">Page 91</p>
<p>1 of the metric. 2 DR UNGER: I think that's right, although this is not -- we 3 did not end up going with the metric-based trigger, but 4 I think that it is more straightforward to define 5 a trigger that relates to metrics because you're not 6 then making the final decision. 7 LORD JUSTICE LEVESON: All right. 8 DR UNGER: We are very clear that the final decision has to 9 take into account judgment. It's not impossible, 10 I think, to define a trigger which is automatic. 11 LORD JUSTICE LEVESON: All right. 12 MR JAY: Is there a danger, though, with your time-based 13 review, that in a rapidly moving market, damage can be 14 done to the interests of plurality where you have to 15 wait four or five years? 16 DR UNGER: There is that risk in the time period. The time 17 period would have to be short enough that you're able to 18 deal with that. 19 Q. If it's too short, though, there are other 20 countervailing -- 21 DR UNGER: If it's too short, you're making decisions before 22 you know how the market would respond to the changes. 23 You're making -- again, you're subjecting the market to 24 continual review. So that is the trade-off. 25 Q. Your conclusion on the issue of exit triggers, 5.73.</p> <p style="text-align: center;">Page 90</p>	<p>1 earlier, our assumption is that online does need to be 2 brought within the framework. The question is how. 3 Q. Your feeling is that it could be done by amendments to 4 regulations rather than to primary legislation. Have 5 I correctly understood you? 6 DR UNGER: That's our understanding, yes. I think there are 7 different options. I think the public interest 8 considerations could be more defined without changes to 9 primary legislation. However, if there was a new 10 framework that encompassing periodic review, then that's 11 a different question. 12 LORD JUSTICE LEVESON: I don't see how you could perform 13 a balanced exercise without taking online into account. 14 MR MACINTOSH: Absolutely. 15 DR UNGER: At a level of principle, it felt to us very easy 16 to say online has to be included and then you get to the 17 practicality. 18 LORD JUSTICE LEVESON: The whole question of plurality is 19 very different from regulation, because of course, Ofcom 20 is conscious that there is everything from Ofcom 21 regulation of broadcast media to no regulation at all 22 for some of these services, and then 23 co-regulation/self-regulation in between the two. 24 DR UNGER: That's right. 25 MR MACINTOSH: Yes.</p> <p style="text-align: center;">Page 92</p>

<p>1 MR JAY: In terms of the definition of the media 2 organisation, I think you're saying that aggregators 3 should not be included within the definition, but online 4 news providers and wholesalers should. Have I correctly 5 understood it? 6 DR UNGER: I don't think that's what we were intending to 7 say. 8 Q. Pardon me. 9 DR UNGER: I think we can see circumstances where 10 aggregators might need to be included, but we also need 11 to be careful that doesn't go too broad. I think the 12 underlying principle is around where the exercise of 13 editorial control is. If an aggregator is exercising 14 editorial control as part of that process, then it may 15 be important to include them. If not, then one wouldn't 16 automatically want to bring in any aggregators. 17 Q. I've been asked to raise this with you. Can you 18 explain, please, how you see a plurality review carried 19 out because of a media merger will relate to any public 20 interest consideration under the Communications Act? 21 DR UNGER: So is this the distinction between the periodic 22 review we're proposing and the merger-based review? 23 Sorry, can I just clarify the question? 24 Q. I believe it is. (Pause) 25 Oh right. The question was more about the nature of</p> <p style="text-align: center;">Page 93</p>	<p>1 On the one hand, if there's discretion, there is an 2 opportunity to do that. You can see what's happening in 3 the market, you can decide whether or not that 4 potentially is having an impact on plurality and call 5 for a review. However, as Steve has described in 6 discussing the issue regarding metrics, that potentially 7 creates an environment where there is ongoing and 8 continuing uncertainty regarding the regulation of the 9 sector and whether or not there will be future reviews, 10 and it also does result in a situation where there's 11 potentially considerable politicisation of the process, 12 so that we basically concluded, at the end of our 13 consideration, that it would be more appropriate to come 14 down on the side of opting for time-based reviews 15 without there being discretion or indeed without there 16 being an opportunity to use complaints to trigger 17 a review. That's essentially our conclusion. 18 Q. Yes. Can you explain for us though the point you're 19 making in paragraph 5.87? 20 "It's important there's some mechanism for deciding 21 at an early stage what type of market events are likely 22 not to be material." 23 I'm not sure I followed that one. 24 DR UNGER: This was one particular issue, which is that at 25 the moment, in relation to mergers, there is discretion</p> <p style="text-align: center;">Page 95</p>
<p>1 the public interest test under the Enterprise Act. 2 DR UNGER: So our assumption is that that would continue in 3 some form. That public interest, as I understand, is 4 potentially triggered in a merger and that would need to 5 continue in some form. That would need to sit alongside 6 a new framework in some way. There are essentially two 7 options there. One is that the two frameworks might 8 co-exist, in which case -- I think we say here, the 9 importance to avoid, for example, situations of double 10 jeopardy -- or the two frameworks could be brought 11 together. Those are both possibilities. 12 Q. A separate matter now is the role of discretion and 13 complaints. Some have argued there should be an 14 additional discretionary trigger, which immediately 15 raises political questions: on what basis is the trigger 16 going to be exercised? Who's going to make judgments? 17 You come to the conclusion that there shouldn't be 18 a discretionary means of triggering a review between 19 periodic reviews but in other words, please, what is 20 your objection to that? 21 MR MACINTOSH: I think it goes back to the question we've 22 discussed earlier regarding whether or not we have 23 a metrics-based system as opposed to time-based. It's 24 the question of flexibility and ability to respond to 25 events.</p> <p style="text-align: center;">Page 94</p>	<p>1 essentially to decide not to carry out a review as well 2 as to decide to carry out a review. We thought it was 3 important that -- there may be a number of relatively 4 small mergers between different media enterprises and we 5 thought it was important those things automatically 6 trigger a review every time that there was a fairly 7 modest merger. So there's needs to be some mechanism 8 for filtering those out early on in the process. At the 9 moment, that's provided within the current merger regime 10 and that needs to continue in some way. 11 Q. Thank you. The next topic is one where the Inquiry has 12 received a range of opinions and that's the issue of 13 caps, limits or prohibitions, as you put it, on news 14 market share. You divide that question into three 15 parts, as you explain in 5.89: 16 "Is it practical or advisable to set absolute 17 limits? What does a good plural outcome look like?" 18 The question of sufficiency: 19 "How do we balance absolute limits or prohibitions 20 with issues of economic sustainability?" 21 Now, the absolute limits or prohibition points -- 22 we've had a number of witness who is have said there 23 should be an absolute limit of 15 per cent, 20 per cent 24 or wherever on one news provider in a sector and if it 25 overtops the limit, there should be, I suppose on</p> <p style="text-align: center;">Page 96</p>

<p>1 an extreme version, a divestment to bring that person 2 lower than the limit. But what are the advantages and 3 disadvantages of that sort of measure? 4 DR UNGER: Clearly the advantage of that type of measure is 5 certainty, again. It's very clear what rules everyone 6 has to abide by, so it is an advantage. 7 The disadvantage we saw here was around a lack of 8 flexibility and I think at a high level there are two 9 reasons why flexibility is important here. Firstly, 10 I think we've already acknowledged that these metrics do 11 not map on uniquely to a certain level of influence, 12 that in considering influence it's important to 13 understand a range of contextual factors, and implicit 14 in any such structure based on absolute limits, you do 15 not have the discretion to consider those contextual 16 factors. That's the first point. 17 The second point is really around sustainability. 18 I think we recognised that I think particularly the 19 newspaper sector is in decline, so you could have 20 a situation where the application of absolute limits 21 might go against the need effectively to build market 22 share in order to survive. That's not to say that one 23 would automatically allow that market share to just keep 24 growing, but one at least needs the flexibility to 25 balance off these issues of sustainability and</p> <p style="text-align: center;">Page 97</p>	<p>1 news. That doesn't seem right, at least in this 2 context. 3 Q. Is that what you're hinting at when you say that there 4 are practical challenges associated with defining what 5 revenues would be relevant for such a test? 6 DR UNGER: Practical challenges are beyond that point of 7 principle. There are also, I think, questions for 8 a company such as Virgin Media, which both provides 9 content but a range of other services. There's 10 a practical challenge as to how you separate out those 11 different revenues. Quite often, the different services 12 are bundled together. It's common to bundle TV and 13 telecom services, for example. If you were to factor in 14 the telecommunications revenues of companies such as 15 Virgin Media and British Telecom into this sort of 16 assessment, then I think you would get to the wrong 17 conclusion. 18 Q. Thank you. You also look at the idea of 19 platform-specific limits. Can I ask you, please, what 20 was the rationale for doing that? 21 DR UNGER: Again, it comes backs particularly to this point 22 about flexibility. We talked about this in the context 23 specifically of both newspapers and TV. For newspapers, 24 we were particularly concerned about this point about 25 sustainability, that one needs to take account of the</p> <p style="text-align: center;">Page 99</p>
<p>1 plurality. 2 Q. You have commented expressly on the Enders Analysis 3 proposal, which is having revenue as a suitable metric 4 for an absolute limit, and we're going to hear that 5 point elaborated this afternoon with Claire Enders. She 6 is proposing 15 per cent of revenue, but that doesn't 7 favour with you for the reasons you explain in 8 paragraph 5.96. Can I ask you, please, to develop the 9 points you're making there? 10 DR UNGER: The underlying point of principle is one that 11 Stuart referred to earlier, which is that revenue is 12 a good proxy for economic power, and I think the -- 13 I think Claire Enders has been reasonably explicit about 14 what their intention is, which is -- the intention their 15 proposal is, I think, to limit economic influence, if 16 you like, economic power. So it works in that sense. 17 It clearly would limit economic power. 18 That he is not what we are trying to do. What we 19 are looking at is the question of influence over opinion 20 and we do not think that revenue is a good proxy for 21 ability to influence opinion. I suppose, to give an 22 example, if one was to look at the revenues generated by 23 Sky as a broadcaster and assume that its revenues were 24 a proxy for the ability to influence opinion, then one 25 would apply much more weight to sports broadcasting than</p> <p style="text-align: center;">Page 98</p>	<p>1 fact that it might be necessary to grow market share to 2 survive. In the case of TV, we were conscious that 3 applying simple limits without thinking about, for 4 example, the governance structures that apply to the BBC 5 would also be misleading. 6 Q. But I think you told us earlier on about the need to 7 look across the different media to get a proper measure 8 of plurality, so why is concentration within a platform 9 relevant to plurality at all as opposed to competition? 10 DR UNGER: We felt they were both potentially relevant, but 11 in an ideal world you would have a single metric which 12 applies across media. Given that you don't have such 13 a metric in quite that perfect form, it might be 14 appropriate to look at platform-specific metrics within 15 particularly newspapers and TV, because they are, 16 I suppose, better established than those cross platform 17 metrics that are available. So it's at least worth 18 asking the question. 19 Q. Can I ask you, please, about the declining newspaper 20 market point. It's basically an industry in decline -- 21 we understand that. You say that: 22 "Limitations in the declining market run counter to 23 the need for newspaper groups to build a market share in 24 order to survive." 25 Is that in itself a sufficient reason not to apply</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 market share limitations in the newspaper market?</p> <p>2 DR UNGER: I think there's a reason for applying them</p> <p>3 flexibly. I think -- this doesn't say that you wouldn't</p> <p>4 be concerned if market shares became too high. It's</p> <p>5 simply that in thinking about that it's important to</p> <p>6 bear in mind also sustainability.</p> <p>7 I think it's worth noting that -- I think at the</p> <p>8 moment that is not such a big issue in the national</p> <p>9 press. It is already a very big issue in terms of local</p> <p>10 media, where I think we're already in a position where,</p> <p>11 in many local markets, the issue is really about</p> <p>12 sustainability, whether there's any local media, rather</p> <p>13 than the idea of plurality.</p> <p>14 LORD JUSTICE LEVESON: Aren't there some rather softer</p> <p>15 factors in play here too? One could visualise</p> <p>16 a situation of a company that owned an enormously large</p> <p>17 number of local newspapers but sought to exercise no</p> <p>18 editorial influence whatsoever --</p> <p>19 DR UNGER: Yes.</p> <p>20 LORD JUSTICE LEVESON: -- upon any of them. The</p> <p>21 considerations that would arise with such a company</p> <p>22 would be very different to a company that had fewer</p> <p>23 national titles, where the proprietor or owner, whether</p> <p>24 it be a company or individual, sought to exercise</p> <p>25 enormous editorial influence over what was in the press.</p> <p style="text-align: center;">Page 101</p>	<p>1 remit to promote a liberal agenda. So it is clear what</p> <p>2 the position is. In other cases, arguments are made --</p> <p>3 I think, for example, there's a particularly argument</p> <p>4 that's been made around the Times, which is around the</p> <p>5 extent to which the existence of the independent</p> <p>6 directors preserves editorial independence of that</p> <p>7 particular newspaper. That's contentious, but it's</p> <p>8 something that could be looked at.</p> <p>9 MR MACINTOSH: Just to add to that, I think that one of the</p> <p>10 things that a review of this form might do is to shine</p> <p>11 a light on all these considerations so that whoever does</p> <p>12 this review tries to articulate factually what the</p> <p>13 position is in terms of consumption, who is using what</p> <p>14 media, who is active in the market, and, insofar as</p> <p>15 there are contextual factors which have a bearing on how</p> <p>16 you interpret what you see happening, that those are</p> <p>17 highlighted and made clear. Yes, judgment needs to be</p> <p>18 exercised at the end of it, but hopefully the review</p> <p>19 would help dispel prejudice insofar as there is</p> <p>20 prejudice influencing what is actually going on in the</p> <p>21 market today.</p> <p>22 LORD JUSTICE LEVESON: Yes. You'll find it difficult to get</p> <p>23 to the facts too because if you take the particular</p> <p>24 example that you last mentioned in relation to the</p> <p>25 Times, there are different accounts of how that</p> <p style="text-align: center;">Page 103</p>
<p>1 DR UNGER: That's right. I think the local newspaper</p> <p>2 question is a good example to take, because I think</p> <p>3 there's a general acceptance that what is important for</p> <p>4 local newspapers is their ability to hold local councils</p> <p>5 to account, therefore there is something important about</p> <p>6 having a certain level of local investigative</p> <p>7 journalism, but they do not generally take a particular</p> <p>8 political stance and therefore plurality is less</p> <p>9 important. That goes back to this point about these</p> <p>10 contextual factors, that the way in which proprietors</p> <p>11 influence the editorial process is really important.</p> <p>12 LORD JUSTICE LEVESON: But then it becomes extremely</p> <p>13 judgmental, because you might have three different</p> <p>14 proprietors or four different proprietors whose approach</p> <p>15 to their own particular newspapers is extremely</p> <p>16 different, and to try and judge that and assess where it</p> <p>17 becomes inappropriate I would have thought was extremely</p> <p>18 difficult.</p> <p>19 DR UNGER: Yes.</p> <p>20 LORD JUSTICE LEVESON: And also very, very subjective.</p> <p>21 DR UNGER: It involves a degree of judgment, but I don't</p> <p>22 think it's intractable, in the sense that if you look at</p> <p>23 newspapers, it is clear that some newspapers explicitly</p> <p>24 take a particular position. So the Scott Trust which</p> <p>25 governs the Guardian newspaper, that has a very specific</p> <p style="text-align: center;">Page 102</p>	<p>1 particular exercise has operated, which have been heard</p> <p>2 by the Inquiry, and how you would have to try and judge</p> <p>3 that sort of issue in the context of the technical work</p> <p>4 you're doing I would have thought would be not entirely</p> <p>5 easy to determine.</p> <p>6 MR MACINTOSH: Yes. I don't think we've said anywhere in</p> <p>7 the document that we anticipate that doing this would be</p> <p>8 easy.</p> <p>9 DR UNGER: I think I would add on that that we -- in the</p> <p>10 context of the PIT work, we essentially conclude there</p> <p>11 was a number of wide range of anecdotal evidence in</p> <p>12 relation to this is point and we didn't reach any</p> <p>13 conclusion on it. It's difficult.</p> <p>14 LORD JUSTICE LEVESON: Right.</p> <p>15 MR JAY: In the next section, you look at the 20/20 rule</p> <p>16 which, I suppose in line with your thinking about caps</p> <p>17 and about metrics, might lead you to conclude that this</p> <p>18 rule is right to be abolished, but your conclusion is</p> <p>19 I think, in a nutshell, that it should be considered by</p> <p>20 Parliament in the near future; is that a fair summary?</p> <p>21 DR UNGER: Yes. I think the position is somewhat different</p> <p>22 from the general case, in that in this case it is very</p> <p>23 clear what the purpose is of the rule. It's to prevent</p> <p>24 a powerful newspaper owner from also taking control of</p> <p>25 the most powerful commercial TV broadcaster. So it's</p> <p style="text-align: center;">Page 104</p>

<p>1 clear what the facts are, it's clear what the context 2 is, so that differentiates this from our more general 3 discussion. 4 What we've said though is it really is a judgment 5 for Parliament and I think particularly in the context 6 of any new plurality regime, it would be necessary to 7 consider in that context whether it was then possible to 8 move this wall or not. 9 LORD JUSTICE LEVESON: The trouble with having a fixed 20/20 10 regime is that it puts it into stone and doesn't allow 11 you to take into account the context or all the 12 circumstances but it requires an over-arching review of 13 the way in which you look at the issue, I suppose. 14 DR UNGER: That's right, and I think that point is 15 illustrated by the evolution over, perhaps, the last 16 decade or more, of these various ownership rules 17 which -- 18 LORD JUSTICE LEVESON: And the evolution of digital 19 television, which has multiplied up the number of 20 channels and removed the original justification for 21 regulation through the mechanism of the state which was 22 to do with broadband width. 23 DR UNGER: That's right. So we've certainly not said -- 24 LORD JUSTICE LEVESON: Bandwidth, not broadband. Bandwidth. 25 DR UNGER: So we're certainly not suggesting it shouldn't be</p> <p style="text-align: center;">Page 105</p>	<p>1 understanding? 2 MR MACINTOSH: That's correct, although I think what we've 3 tried to do in the document, and in particular in 4 paragraph 5.119, is to illustrate the broad factors and 5 the sort of framework that one might bring to this. If 6 you look at that, there is actually quite a lot there 7 that can be described in quantitative analytical terms, 8 to which you would add your understanding of context and 9 to which you would apply your judgment. 10 Q. I've been asked to raise with you an issue about the 11 fifth bullet point in 5.19, which is overall investment 12 of commercial returns. The basic question is: why have 13 you included that? Because some of those matters are 14 about consumer behaviour, not market structure. 15 MR MACINTOSH: I think this is partly in looking at the 16 state of the market at any one point in time, you would 17 have to understand whether or not the operations were 18 sustainable, because you may reach a conclusion based on 19 today's judgment that everything is fine, but if it is 20 actually the case that the economic pressures acting on 21 the players in the market are such that they're not 22 going to be able to continue, you would need to be aware 23 of that in understanding how things might evolve. 24 So an environment where there is plurality, where 25 the actors in the market are earning sufficient returns</p> <p style="text-align: center;">Page 107</p>
<p>1 removed but this is really on -- our initial view was 2 this was for Parliament. This was one of the questions 3 that's been put back to us in the further questions from 4 the Secretary of State and we'll need to consider that 5 carefully. 6 LORD JUSTICE LEVESON: When are you going to come up with 7 a conclusion? 8 MR MACINTOSH: I think we've said by the end of September. 9 LORD JUSTICE LEVESON: By the end of ...? 10 MR MACINTOSH: September. 11 LORD JUSTICE LEVESON: September? I'd be very interested 12 today see any of the conclusions you reach. 13 MR JAY: On the concept of sufficiency, on my understanding, 14 sufficiency comes in once a plurality review begins and 15 it's part of the wider public interest considerations 16 under the statute? 17 MR MACINTOSH: That's correct, yes. 18 Q. So we're not here concerned with triggers; we're 19 concerned with part of the qualitative assessment that 20 you make as part and parcel of -- 21 MR MACINTOSH: Is there sufficient clarity of not, yes. 22 Q. That necessarily involves questions of judgment, of 23 quality and I suppose quantity to some extent as well. 24 You put everything into the mix in answering the 25 question which the statute poses of you; is that a fair</p> <p style="text-align: center;">Page 106</p>	<p>1 to stay in the market is one where you could have 2 confidence that plurality will be sustained as well. 3 Q. Is this a sufficiency issue or sustainability issue or 4 both? 5 MR MACINTOSH: It's a sustainability issue. 6 DR UNGER: I think we saw sufficiency as being a matter of 7 balance between those two. The risk is one takes an 8 idealised view of what you would like as a plural media 9 which doesn't take into account the economic realities 10 and we need to take into account both. 11 Q. Your conclusion on sufficiency is 5.121: 12 "It will be for Parliament to consider whether it 13 can provide any further guidance on how sufficiency 14 should be defined." 15 Is this an area, though, where the Secretary of 16 State could give statutory guidance? We've seen that 17 statutory guidance has been given on the issue of media 18 mergers because the Secretary of State, Dr Cable, 19 referred us to the relevant guidance. Is this another 20 area where it could be done by exclusive action rather 21 than legislation? 22 MR MACINTOSH: I think the answer to that is yes and that's 23 probably a matter for the Secretary of State to decide 24 whether or not it's something that he or she would do as 25 opposed to something that he or she would expose to</p> <p style="text-align: center;">Page 108</p>

<p>1 Parliamentary debate.</p> <p>2 Q. Sustainability. We've touched on sustainability, but</p> <p>3 where does this come into the plurality assessment? Is</p> <p>4 it part of the wider public interest concern which</p> <p>5 arises on any review?</p> <p>6 DR UNGER: I think we saw this particularly as coming in, as</p> <p>7 I said, when we assess sufficiency. In assessing</p> <p>8 sufficiency, there's no point in something this</p> <p>9 idealised view of a plural market. It has to be</p> <p>10 a plural market that's economic and sustainable.</p> <p>11 Q. So sustainability is a subset of sufficiency?</p> <p>12 DR UNGER: Yes. That's an important element of sufficiency.</p> <p>13 It's the thing which -- it's the consideration that</p> <p>14 might lead you to take a less ambitious view of what is</p> <p>15 sufficient than you might otherwise.</p> <p>16 MR MACINTOSH: Yes.</p> <p>17 Q. I think in paragraph 5.126 you draw attention to the</p> <p>18 tension between plurality and commercial sustainability</p> <p>19 and that's exacerbated if you look at smaller geographic</p> <p>20 units. I suppose the tension is that the larger</p> <p>21 entities may be more commercially sustainable?</p> <p>22 MR MACINTOSH: Yes, exactly. You could imagine a small</p> <p>23 geographic location where, if arbitrarily, one said no</p> <p>24 media provider can have more than 50 per cent of the</p> <p>25 local newspaper market, it may also be the case that</p> <p style="text-align: center;">Page 109</p>	<p>1 DR UNGER: I should say that this is a further question we</p> <p>2 have been asked. It relates to remedies. It wasn't one</p> <p>3 of the original questions. So we haven't yet looked at</p> <p>4 the question in detail, but I think you can separate</p> <p>5 remedies into broadly four categories. I think that</p> <p>6 there are some behavioural remedies which promote</p> <p>7 internal plurality. Editorial independence and</p> <p>8 the undertakings that we negotiated with News Corp</p> <p>9 Sky -- that would be an example of those kind of</p> <p>10 behavioural remedies.</p> <p>11 There are clearly structural remedies, divestments,</p> <p>12 which increase external plurality. There's another</p> <p>13 category of behavioural remedies which may be relevant,</p> <p>14 which are really around the standards that apply to</p> <p>15 different platforms. There's obviously some overlap</p> <p>16 there with the board of discussion around standards.</p> <p>17 Finally, there are these positive levers to increase</p> <p>18 plurality funding, benefits in kind and so on.</p> <p>19 Q. I see. Then this final question. If, hypothetically,</p> <p>20 a periodic review were to identify a lack of plurality,</p> <p>21 how would you identify which players ought to be subject</p> <p>22 to any remedies?</p> <p>23 MR MACINTOSH: I think it's a little bit difficult to do in</p> <p>24 the abstract, in the sense that you need to conduct</p> <p>25 a review to understand whether or not there does seem to</p> <p style="text-align: center;">Page 111</p>
<p>1 no one can build a sustainable commercial business</p> <p>2 subject to that constraint.</p> <p>3 Q. Does it follow from this that plurality may have to be</p> <p>4 sacrificed because of these economic realities?</p> <p>5 MR MACINTOSH: It's more of a trade off than sacrifice but</p> <p>6 there certainly needs to be a balance struck, yes.</p> <p>7 Q. Okay. Well, it's fair to say that you do see it as</p> <p>8 a trade off. It's paragraph 5.131:</p> <p>9 "The right balance between promoting plurality on</p> <p>10 the one hand and encouraging economically sustainable</p> <p>11 news media organisations on the other ..."</p> <p>12 Again, you say that's a matter for the government</p> <p>13 and Parliament to consider. Parliament would be</p> <p>14 amending primarily legislation. Government might be</p> <p>15 doing it by issuing statutory guidance under the</p> <p>16 existing Enterprise Act provisions; is that right?</p> <p>17 MR MACINTOSH: Yes.</p> <p>18 Q. Can I ask you, please -- not going to ask you about the</p> <p>19 BBC since that probably is outside our remit but just</p> <p>20 some general points, finally, about solutions. Your</p> <p>21 report doesn't cover what solutions or remedies might be</p> <p>22 appropriate if a plurality review were to be find</p> <p>23 a plurality problem. What sort of remedies do you think</p> <p>24 are available and do they include behavioural and</p> <p>25 structural remedies?</p> <p style="text-align: center;">Page 110</p>	<p>1 be a problem, why that problem's arising, and then</p> <p>2 decide on what might be the appropriate remedies, which</p> <p>3 may or may not have implications for individual players.</p> <p>4 Q. I suppose it depends on what the diagnosis was --</p> <p>5 MR MACINTOSH: Absolutely, absolutely.</p> <p>6 MR JAY: That question was a bit ambitious. Those are all</p> <p>7 the questions I have for you.</p> <p>8 LORD JUSTICE LEVESON: Do we know, Mr Jay -- maybe you'll be</p> <p>9 told from your right -- what questions the Secretary of</p> <p>10 State has put back to Ofcom?</p> <p>11 MR MACINTOSH: Those are in the public domain.</p> <p>12 LORD JUSTICE LEVESON: Right, that's very good.</p> <p>13 You're probably aware that my terms of reference</p> <p>14 include making recommendations for a new more effective</p> <p>15 policy and regulatory regime which supports, among other</p> <p>16 things, the plurality of the media, and to make</p> <p>17 recommendations for how future concerns, among other</p> <p>18 things, about regulation and cross-media ownership</p> <p>19 should be dealt with by all the relevant authorities.</p> <p>20 Here, of course, you were answering questions which</p> <p>21 the Secretary of State specifically asked you and</p> <p>22 I appreciate that you now have another series of</p> <p>23 questions. By the time you've dealt with all those</p> <p>24 questions -- obviously you're not me and I'm not bound</p> <p>25 by it -- but will you have provided a view on each of</p> <p style="text-align: center;">Page 112</p>

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<p>1 these issues that I've just raised with you?</p> <p>2 MR MACINTOSH: I hesitate to say that we will have done so</p> <p>3 comprehensively, but we will have touched on a number of</p> <p>4 the essential features. At this stage we have not been</p> <p>5 asked by the Secretary of State to architect a new</p> <p>6 structure for the way in which plurality might be</p> <p>7 considered, but rather to respond to a series of</p> <p>8 specific questions which in turn have led to a number of</p> <p>9 follow-up questions. Those touch on many of the key</p> <p>10 issues which you identified, but if one were then to</p> <p>11 proceed to a set of recommendations in future, there may</p> <p>12 be some other issues which are not on the list of</p> <p>13 questions the Secretary of State has asked us.</p> <p>14 DR UNGER: I would add it may also be that in relation to</p> <p>15 many of the -- some of the questions we've been asked,</p> <p>16 I suppose, are essentially technical in nature around</p> <p>17 implementation of some of our earlier recommendations.</p> <p>18 Some still go to matters of judgments, which we may</p> <p>19 still conclude are more for Parliament, and that is the</p> <p>20 discussion we need to have with our board still.</p> <p>21 LORD JUSTICE LEVESON: Well, it would be absurd for me to</p> <p>22 reach my conclusions in ignorance of where you are on</p> <p>23 these various matters, and it would be absurd for me to</p> <p>24 do so without having the benefit of such experience you</p> <p>25 have in these areas, even if the Secretary of State</p> <p style="text-align: center;">Page 113</p>	
<p>1 hasn't specifically asked you.</p> <p>2 DR UNGER: Okay.</p> <p>3 LORD JUSTICE LEVESON: So I would be very grateful if,</p> <p>4 within the same time frame that you're already working</p> <p>5 to, you cast an eye back on the issues that I have to</p> <p>6 consider. I'm not asking you to provide me with answers</p> <p>7 in the back of the book, but the benefit of your</p> <p>8 experience to such extent as you feel able.</p> <p>9 MR MACINTOSH: We'll be more than pleased to consider that,</p> <p>10 obviously.</p> <p>11 LORD JUSTICE LEVESON: Thank you very much indeed. Thank</p> <p>12 you both very much for your assistance.</p> <p>13 2 o'clock.</p> <p>14 (1.00 pm)</p> <p>15 (The luncheon adjournment)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 114</p>	

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