



Voicing the Public Interest:

Listening to the public on press regulation

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Executive summary

Introduction

The phone-hacking scandal and the subsequent Leveson Inquiry have opened up a national debate on press ethics, central to which is the notion of the public interest.

This report sets out to examine how this ubiquitous term has been used and understood in a variety of legal and ethical contexts, and presents the results of new polling that explores public attitudes to the public interest. It suggests how the public interest might be better defined to improve the quality of journalism and argues that to secure the public interest in any future regulatory settlement, the public's voice needs to be heard - and given stronger representation. It presents a range of measures to achieve this.

1. The trust deficit

Journalism suffers from a longstanding lack of trust. In polling conducted for this report, a majority of people expressed the view that the UK's three biggest selling daily newspapers did not operate ethically 'with due regard to the public interest', with significant minorities recording the same verdict on the traditional broadsheet papers.

This lack of trust is particularly problematic for an industry that is widely regarded as an essential part of a healthy democracy, a role that has allowed it the unusual privilege of operating under a system of self-regulation for almost 60 years.

2. In search of a definition

The notion of the 'public interest' is central to the debate about press ethics and media law. It helps determine not just the law, but also where the law can be justifiably contravened for a wider public benefit.

Yet whilst the 'public interest' is widely cited in a number of legal and professional codes, there is no single agreed definition and it is often not defined at all. Three of the most significant areas of law affecting media conduct - defamation, privacy and freedom of information - all make use of the concept of the public interest, but offer no cast-iron definition. The Press Complaints Commission, Ofcom and BBC all define the public interest by listing examples of stories where ostensibly unethical journalism could be justified. This lack of firm definition has made it hard for journalists to know where legal and ethical boundaries lie, leaving considerable scope for deliberate misinterpretation. While it is probably futile to attempt too tight a definition, a clearer and more widely applied set of criteria to apprehend the public interest is necessary to make judgements more consistent and transparent. It is best to see the public interest as something identified through a balancing exercise between competing priorities.

3. Public views on the public interest

There is a public interest in free speech itself. Beyond this, judgements about what is in the public interest tend to focus on three essential elements of any news story - **what** the story is, **who** it is about, and **how** the information for it was acquired.

The polling for this report explores the interplay between these three variables in an attempt to pin down the public's notion of the public interest. With five types of story, six kinds of subject and three different methods of gathering information, we explored 90 different scenarios and for each of them, asked the public whether the story should be allowed to be published.

Our key findings:

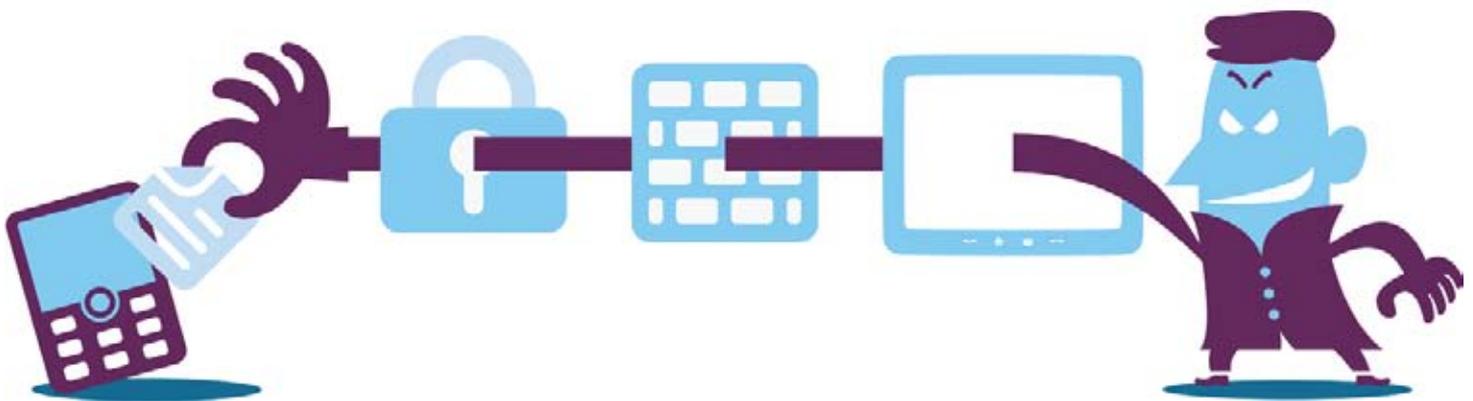
- **What:** the public's support for publication increased the greater the harm to the public revealed by a story. Stories revealing incompetence tended to receive more support for publication than those revealing dishonesty.
- **Who:** the public was more likely to support the publication of stories about people with power and responsibility than those about members of the public or celebrities; there was more support for publishing stories about senior members of the public sector (judges and politicians) than for those in the private sector (FTSE 100 company directors), and more support for publishing stories about elected politicians than about judges.
- **How:** the public's support for publication declined as the level of intrusion involved in the story increased. Some methods of

intrusion were seen as justified by only a small number of people.

- The public are reluctant publishers - 50% of the public backed publication in just one in six scenarios (15 out of 90).
- Despite this reluctance to publish when confronted with specific examples, the public are also reluctant to make generalised rules about what should, and should not, be published.
- When asked if they supported a proposal to force newspapers to give prior notification of publication to the subjects of stories, a majority of the public (61%) agreed.

4. Circulation or regulation?

How to make the leap from public opinion to the 'public interest' is a central question. It has been argued that the public interest is simply a matter



of what the public is interested in and that the market provides a necessary corrective to errant behaviour. However, there are three reasons to be sceptical of this view. First, purchasing a newspaper does not mean a reader endorses a particular story within it. Second, the reader is not necessarily fully informed about how stories were acquired - an important element of any public interest judgement. Third, the presence of demand is not sufficient to trump all other concerns, such as protecting the privacy of third parties. A more deliberative approach than the current consumer model is required.

5. Regulation and the public interest

Our polling also explored public attitudes to regulation and who should be involved in it.

Our key findings:

- The majority of people (correctly) felt that the public had no current role in developing the guidelines on the public interest, but a majority also (incorrectly) thought parliament did play a role.
- People felt the newspaper industry should be excluded from drawing up guidelines on what the public interest means in practice. They did, however, see a role for parliament, an independent regulator, judges and the general public.
- As for adjudicating on whether specific stories are in the public interest following complaints, the public most favoured a regulator funded by - but independent of - government. They also endorsed a regulator funded by - but independent of - the newspaper industry, and supported the involvement of members of the general public and judges. However, they rejected the idea of MPs or newspapers having any role.

To secure the public interest in any future regulatory settlement, the public's voice needs to be acknowledged, and there should be greater recognition that the public can be involved in determining what is in the public interest. Among the options that could help to achieve this, we suggest:

- **Transparency:** wherever it is possible to do so, without jeopardising confidential sources, newspapers should become far more open about how the information contained in stories has been acquired, enabling consumers to make much more informed decisions.
- **Governance:** newspapers should seek ways to give formal representation to readers in the way they are governed. For example, more newspapers could appoint readers' editors and give regular space to considering complaints and matters of ethics.
- **Advocacy:** the new press regulator should find ways to amplify the voice of the public within its structure. One option would be to learn from consumer advocacy models used by other regulators - and to create a public panel that could provide a public interest audit of the PCC's successor on a yearly basis.

Conclusion

This report is not a blueprint for the future of newspaper regulation, but it seeks to challenge the idea that the public can be detached from judgements about the public interest. Their views must be taken into account in forging a stronger, clearer and more consistently applied sense of what the public interest is, and in improving the ways in which the public interest is safeguarded in any future regulatory structure.



Introduction

The 2011 phone-hacking scandal and the dramatic closure of the UK's highest-selling newspaper has provided a once-in-a-generation chance to examine the way the media operates in this country. When the Prime Minister established the Leveson Inquiry in July, 2011, he gave it the scope to *'examine the culture, practices and ethics of the media'*.¹ Lord Justice Leveson has the chance to articulate, for the first time since the 1990 Calcutt Report, what kind of media we as a society want.

The inquiry has been exhaustive. Over eight months, it gathered testimony from 650 witnesses, among them cabinet ministers, former prime ministers, the proprietors and editors of the country's leading newspapers, a host of other journalists, a phalanx of aggrieved celebrities, a few of the lesser-known victims of sensationalist reporting, and many others.² It has provided an unprecedented opportunity to explore relationships at the apex of Britain's media and political classes and has shone a light on to the often unaccountable workings of the press. At the heart of the inquiry is a pivotal but contested term: 'the public interest'. As the inquiry's lead counsel, Robert Jay QC, put it in his opening statement to the inquiry:

*What can be justified in the public interest, and how it can be justified, lies at the very epicentre of this inquiry.*³

In determining the limits of press conduct, the public interest is often conceived as a balancing

exercise. When he was appointed, Leveson said that his inquiry *'must balance the desire for a robustly free press with the rights of the individual'*.⁴ Likewise, the trade-off between freedom of expression and privacy – both safeguarded by the Human Rights Act 1998⁵ – has been central to the evolving case law on privacy emerging from the courts over the past decade. The point at which this balance is struck is determined by the public interest.

The public interest can also be invoked to determine when the law can be broken for the sake of a wider public benefit. Witnesses at the inquiry, such as the Information Commissioner and the Justice Secretary insisted that journalists can deploy the 'dark arts' in pursuit of information for certain stories. As the then Justice Secretary, Ken Clarke, told Leveson:

*I do think journalists are entitled to bribe in an extreme case if it's the only way in which they can get information about some major public scandal . . . for example, if . . . the Daily Telegraph used bribery to obtain evidence of MPs cheating on their parliamentary expenses, I would be deeply shocked if anybody had prosecuted the journalist for using bribery.*⁶

This report, the product of a new joint project by the Carnegie UK Trust and Demos, focuses on journalistic practices, taking the notion of the public interest as its central theme. In particular, we explore how the public themselves interpret the public interest – and whether this matches up

¹ Leveson Inquiry (2012) <http://www.levesoninquiry.org.uk/> [accessed Sept 2012]

² BBC (2012) *Leveson Inquiry: Hearings to conclude after eight months* BBC Online (Last updated 24 July 2012) <http://www.bbc.co.uk/news/uk-18964165> [accessed Sept 2012]

³ Leveson Inquiry (2011) *Leveson Inquiry: transcript of morning heading, 14 November 2011* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-14-November-2011.txt> [accessed Oct 2012]

⁴ Leveson Inquiry (2012) *Leveson Inquiry: transcript of morning hearing, 14 November 2011* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-14-November-2011.pdf>, p1 [accessed Sept 2012]

⁵ *Human Rights Act 1998* London: HMSO <http://www.legislation.gov.uk/ukpga/1998/42/contents>

⁶ Leveson Inquiry (2012) *Leveson Inquiry: transcript of afternoon hearing, 30 May 2012* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-30-May-2012.pdf>, p34-35 [accessed Sept 2012]

Chapter 1: The trust deficit

The extent of criminality involved in the phone-hacking scandal has shocked many. What was initially dismissed as the work of a ‘rogue reporter’, operating for one particular newspaper, has since been proven to be a far more widespread practice than many first imagined.

The phone-hacking scandal has been a further blow to the reputation of an industry that already faced daunting challenges in winning public trust. The opinion pollsters Ipsos MORI have been tracking levels of public trust in the professions for three decades. Their research shows consistently low trust in journalists, both in absolute terms and relative to other professionals. When an average is calculated of the polls taken since the exercise began in 1983, only politicians emerge as less trusted than journalists. Doctors, teachers, professors, judges, scientists, the police, civil servants, trade union officials and business leaders all score higher than those working in the fourth estate. In 2011, fewer than one in five of us said we would generally trust journalists to tell the truth.⁸

This long-standing lack of trust in journalists is mirrored in the findings from our own polling, with strikingly low trust in the ability of newspapers to operate in ways that people would consider to be ethical. Tabloids fared particularly badly. The country’s three biggest-selling daily newspapers – *The Sun*, the *Daily Mirror* and the *Daily Mail* – were not thought to ‘generally operate in an ethical manner, with due regard to the public interest’. Only one in 10 of those surveyed said that they expected *The Sun* to behave ethically (72% did not, the remaining 18% said they didn’t know), with an only marginally higher score for the *Daily Mirror* (12% positive versus 63% negative). Broadsheets did noticeably better on the same test – more people think the broadsheets operate in an

ethical manner than do not – but even they divided opinion, failing to gain resounding endorsements. Only just over half of those surveyed trusted *The Times*, the *Financial Times*, the *Daily Telegraph* and the *Guardian* to operate ethically, with due regard to the public interest. Significant minorities, ranging from 17% for the FT to 22% for *The Times* and *Telegraph*, believed that these newspapers did not behave ethically (see Chart 1).

There is little evidence that the public’s views are determined by the ownership or political outlook of particular papers. Titles owned by Rupert Murdoch, for example, do not appear to be trusted much more or much less than their main competitors. *The Times*, the *Daily Telegraph* and the *Guardian* achieve very similar scores, indicating that there is no right/left pattern either. Despite the net positive ratings for broadsheets, the overriding message is of a generalised mistrust in the industry, which is higher for mid-market newspapers than for broadsheets and higher still for tabloids.

Such mistrust would be a problem for any industry, but it has particular implications given the role of the press in British public life. A free press has long been understood as a key part of our democratic settlement. As Rupert Murdoch put it in his evidence to Leveson:

I believe that News Corporation’s media interests in the UK play a vital role in our democracy. I cannot overstate this. Our media interests bear a responsibility to their audience to be their eyes and ears on matters of concern; to question and, where appropriate, to criticise elected officials and others who attract public interest; to voice opinions for public consideration and debate; to promote public accountability; and to practise and protect free expression.⁹

⁸ Ipsos MORI (2011) *Ipsos MORI Veracity Index* Ipsos MORI: online <http://www.ipsos-mori.com/Assets/Docs/Polls/Veracity2011.pdf> [accessed Sept 2012]

⁹ Rupert Murdoch (2012) *Witness statement to Leveson Inquiry* Leveson Inquiry: online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-Keith-Rupert-Murdoch2.pdf> paragraph 67 [accessed Sept 2012]

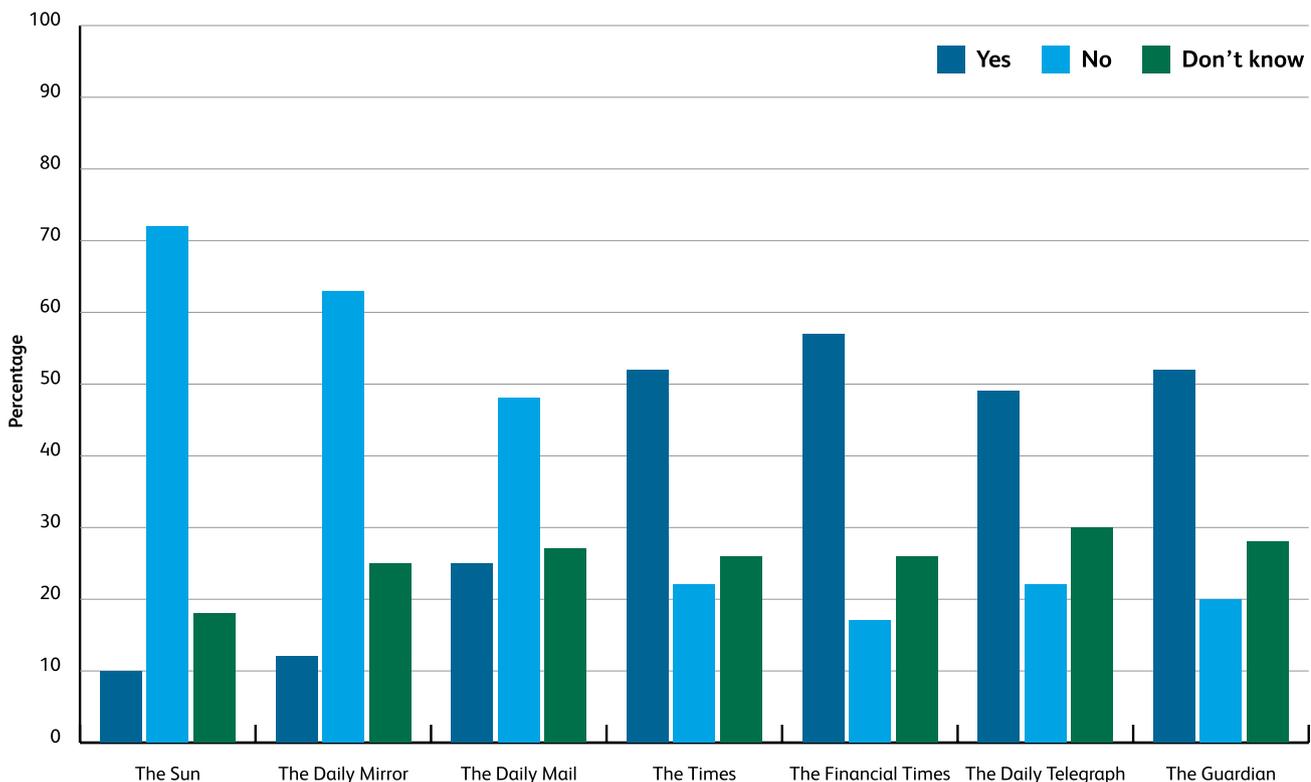
Recent history provides many examples to support Murdoch's case. The phone-hacking scandal was itself brought to light through a piece of investigative journalism, as was the MPs' expenses scandal in 2009 and the Trafalgar case later that year. Each demonstrated the role that a free press can play in helping society to hold the powerful to account by bringing wrongdoing out into the open.

It is because of this historic role that the press has not been subjected to formal regulatory oversight. Self-regulation of the British press dates to 1953, when the Press Council was established on the recommendation of a Royal Commission. The system was adopted

voluntarily by the press, but only in the face of parliamentary pressure.¹⁰ Over the years, the Press Council came to be regarded as insufficiently independent, as well as powerless to punish errant newspapers effectively; the newspapers in turn were resentful and contemptuous of their regulator. The 1980s are generally regarded as marking the nadir of irresponsible tabloid journalism, when the privacy of individuals could be invaded at will.

By the end of the 1980s, the Press Council system was so discredited that, in the face of private members' bills to reform the press, the Thatcher government announced a special committee of inquiry on privacy under David

CHART 1: WHICH OF THE FOLLOWING NEWSPAPERS DO YOU BELIEVE GENERALLY OPERATES IN AN ETHICAL MANNER, WITH DUE REGARD TO THE PUBLIC INTEREST?



¹⁰ Roy Greenslade (2003) *Press Gang: How Newspapers Make Profit from Propaganda* Macmillan; London p55

Calcutt QC. Calcutt's 1990 report suggested giving self-regulation one last chance in the form of a new watchdog, which was given 18 months to prove itself.

As a result, the Press Complaints Commission came into being in January, 1991 and, for the first time, the industry had an agreed code of practice. In 1993, Calcutt pushed for a statutory tribunal with greater powers to replace the PCC, but the Major government decided against further changes.¹¹ It was only after the phone-hacking scandal erupted in July 2011 that the PCC's workings faced significant criticism. Until then, self-regulation had been backed by a succession of select committee reports, the 1997-2010 Labour government and the Conservatives in opposition.¹²

The argument supporting self-regulation in the face of sustained criticism has always been that the scrutiny function the press performs is too important to be impaired by the state, not least because law-makers are among those who must be subjected to the most exacting scrutiny. However, when both journalists and newspapers inspire such low levels of trust, it is inevitable that there will be questions about whether this democratic function is being properly fulfilled - and at what cost. More than half of us read a daily or a Sunday newspaper, giving newspapers the capacity, even in a digital age, to make or break the reputations of individuals.¹³

When such widespread suspicion of the industry appears to be justified by cases like the phone-hacking scandal, people inevitably ask whether

it is healthy for such a powerful force in society to be afforded such freedom from external oversight. The evolving position of the National Union of Journalists sums up the impact of the scandal:

Whilst the NUJ is hugely disappointed that we have reached this point, despite more than 20 years of campaigning for reform of the Press Complaints Commission and press regulation, we now see it as inevitable that there should be some statutory provision for a new regulator.¹⁴

All this provides the backdrop to Lord Justice Leveson's deliberations - and the ongoing public debate about whether the model of self-regulation is still sustainable. Before addressing the question of what *powers* a regulator should have, however, there is a prior question about precisely what *purpose* any regulator - whatever its legal status - should be working towards. The standard answer to this is 'to promote the public interest', but attempts to define exactly what this means have proven to be desperately vague. Clarity about the goals of newspaper regulation, not just the method of oversight, is a precondition to restoring trust. The next chapter explores this further.

¹¹ Ibid, p534-542, 599-601

¹² Press Complaints Commission (2012) <http://www.pcc.org.uk/about/history.html> [accessed Sept 2012]

¹³ Duffy, B. and Rowden, L. (2005) *You are what you read* Ipsos MORI: online http://www.ipsos-mori.com/DownloadPublication/240_sri_you_are_what_you_read_042005.pdf [accessed Sept 2012]

¹⁴ National Union of Journalists (2012) *Core Principles on the Future of Press Regulation: Supplemental submission to Leveson Inquiry* Leveson Inquiry: online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Supplemental-Submission-by-NUJ-on-Press-Regulation.pdf>, p5 [accessed Sept 2012]



Chapter 2: In search of a definition

The public interest is widely cited across both legal and ethical codes to negotiate a path between the media's desire to investigate, report and expose on the one hand, and the preference of private individuals and bodies or state institutions for privacy, confidentiality and security on the other. How the public interest is understood or interpreted in different situations is therefore central to Britain's media culture.

In spite of its pivotal role, however, there is no single agreed definition of the public interest which can be relied upon to guide decision-making. In fact the term is often not defined at all, despite the regularity with which the concept is invoked in discussions about media policy and the conduct of journalists.

Various bodies have attempted a definition. The Press Complaints Commission, the broadcasting regulator Ofcom and the BBC all do so in their codes of conduct (see Appendix 1), but each rely on listing examples of stories where ostensibly unethical journalism might be deemed to be in the public interest, rather than offering a full definition or clear set of criteria.

Three of the most significant areas of law that affect media conduct - defamation, privacy and freedom of information - all make use of the concept of the public interest. In each case there is no rigorous or cast-iron definition given.

2.1 Defamation

The law of defamation hinges on the notion of reputation, specifically whether an individual or institution has had their good name besmirched by the publication of a particular story. There are various defences to this, the most obvious being

The Editors' Code description of the 'public interest'

The Press Complaints Commission uses the Editors' Code as guidance on the public interest. It states:

'There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:
 - i) Detecting or exposing crime or serious impropriety.
 - ii) Protecting public health and safety.
 - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.
3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
4. The PCC will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.¹⁵

¹⁵ Press Complaints Commission (2012) *Editors' Code of Practice* PCC; online <http://www.pcc.org.uk/cop/practice.html> [accessed Sept 2012]

that of justification - that the story was true, and provably so. The so-called Reynolds defence - named after a case involving the former Irish prime minister, Albert Reynolds - permits the publication of a story that turns out not to be true, but which could be justified as being in the public interest at the time of publication. It was successfully used in 2012 by *The Times* to defend a story about alleged police corruption.¹⁶

As part of the proposed reforms to defamation law contained in a bill included in the Queen's speech in May 2012, the Reynolds defence is to be superseded by a new statutory defence of 'responsible publication on [a] matter of public interest'.¹⁷ The bill, as presented to parliament, says that anyone seeking to use this defence must 'show that (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant acted responsibly in publishing the statement complained of'. The bill lists nine factors for determining whether the defendant acted responsibly, but leaves 'public interest' undefined.¹⁸

2.2 Privacy

There is no statutory law of privacy in the UK. Instead, judges have been called on to discriminate between the conflicting rights to freedom of expression and privacy set out in the Human Rights Act of 1998. The public interest will be claimed by both sides in such a dispute. For instance, when *The News of the World* lost the landmark case brought by Max Mosley in

2008 over a story detailing a sadomasochistic sex session, the paper's editor said it had believed 'publication was justified by the public interest in exposing Mr Mosley's serious impropriety'. The judge, Mr Justice Eady, thought otherwise:

*There was no public interest or other justification for the clandestine recording, for the publication of the resulting information and still photographs, or for the placing of the extracts on The News of the World website - all of this on a massive scale. The public interest is thus keenly fought over as a crucial badge of legitimacy in such cases, as the key factor on which the judgement will turn. But there is no law giving a clear definition of this concept.*¹⁹

2.3 Freedom of information

The Freedom of Information Act 2000 does not provide a single, clear definition of the public interest. But the concept of the public interest is supposed to determine the decisions made by public authorities when they are asked to disclose information under the Act. They have to decide whether the information requested is exempt from disclosure under the terms of the Act by applying a public interest test. According to guidance from the Information Commissioner's Office (ICO):

*A public authority can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.*²⁰

¹⁶ The Guardian (2012) *Times libel ruling restores Reynolds public interest defence* Wednesday 21 March 2012 Guardian (online) <http://www.guardian.co.uk/media/2012/mar/21/times-libel-reynolds-defence> [accessed Sept 2012]

¹⁷ The Guardian (2012) *Queen's speech launches overhaul of libel law* Wednesday 9 May 2012 <http://www.guardian.co.uk/politics/2012/may/09/queens-speech-libel-law-defamation> [accessed Sept 2012]

¹⁸ UK Parliament (2012) *Defamation Bill* http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0005/cbill_2012-20130005_en_2.htm, paragraph 4 [accessed Sept 2012]

¹⁹ The Guardian (2008) *Max Mosley wins £60,000 in privacy case* Thursday 24 July 2008 <http://www.guardian.co.uk/2008/jul/24/mosley.privacy> [accessed Sept 2012]

²⁰ Information Commissioner's Office (2012) *The public interest test, Freedom of Information Act* ICO online http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx, p2 [accessed Sept 2012]

The ICO guidance goes on to explore what the public interest might mean:

The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.²¹

2.4 Scope for misinterpretation

In his evidence to the Leveson Inquiry, the Deputy Prime Minister, Nick Clegg, drew attention to this curious gap in the public discourse:

The Inquiry may want to consider how we protect investigative journalism through a properly defined public interest test . . . we may need a more widely understood definition of public interest, with greater coherence and clarity over where it applies. This would not place journalists above the law, but bring them within.²²

It may be that the public interest is simply too hard to codify given the unique circumstances of each particular case that it is applied to. Two ostensibly similar cases may be treated differently due to subtle differences in how the information

was gained or who else might be affected by the story. But preserving the public interest as an almost mystical concept produces at least two problems. The first is that those working in the industry cannot be clear about where and why to draw ethical and legal boundaries. If it is not clear how a public interest judgement will be arrived at, then journalists find themselves on deeply uncertain legal ground. As the Guardian's Nick Davies put it in his appearance before the inquiry:

If I'm working on a particular story in particular circumstances, do I or do I not have the public interest on my side? The answer very often is: I don't have the faintest idea because we don't know where the boundary lines are.²³

The second problem is that this lack of clarity leaves considerable scope for deliberate misinterpretation or malpractice. Leveson's lead counsel, Robert Jay QC, addressed this problem in his opening address to the inquiry, when he put the 'anti-press case' (one of two 'competing narratives' he outlined):

Put simply, the public interest is very often deployed as some sort of trump card. If it is too loosely defined, it ends up with the press delving into the affairs of those who are celebrities and those who are not in a way which unethically penetrates a domain which ought to remain private.²⁴

Those who have argued that any attempt to define the public interest too tightly is a futile exercise are surely right - the subtleties of individual cases mean that answers simply cannot

²¹ Ibid, p5-6

²² Nick Clegg (2012) *Witness statement to Leveson Inquiry* Leveson Inquiry: online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Nick-Clegg-MP2.pdf>, paragraph 84 [accessed Sept 2012]

²³ Leveson Inquiry (2011) *Transcript of morning hearing, 29 November 2011* Leveson Inquiry: online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-29-November-2011.pdf>, p75 [accessed Sept 2012]

²⁴ Leveson Inquiry (2011) *Transcript of morning hearing, 14 November 2011* Leveson Inquiry: online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-14-November-2011.pdf>, p27-28 [accessed Sept 2012]

be worked out in advance. But while a precise definition may not be possible, it is necessary to develop a clearer and more broadly applied set of criteria with some sense of their relative importance, so that the way in which judgements are made becomes more consistent and transparent.

One attempt to get closer to a definition of the public interest was undertaken earlier this year by the Crown Prosecution Service. At Leveson's request, the CPS provided guidance as to the circumstances in which it might be in the public interest not to prosecute journalists for breaking the law. It framed this as a balancing exercise between two sets of variables to ascertain *'whether the public interest served by the conduct in question outweighs the overall criminality'*.²⁵

This notion of a balancing exercise - a process that is inherent in the structure of privacy judgements, and in freedom of information rulings, too - gets us closer to a sense of how the public interest might be arrived at. It accepts that rights, such as those to privacy and freedom of expression, serve not as trump cards but as competing priorities which must be weighed against one another. In each case, the public interest emerges from a consideration of these different priorities in a particular context, so that a judgement can be made about the best interests of the public.

Such judgements are, of course, frequently both complex and controversial. Public interest judgments are, by their nature deeply subjective - often pitting one set of values and priorities against another. Some argue that freedom of speech must take priority in almost every instance - both because free speech is valuable in itself and because there are risks to neutering

free expression. Others believe that privacy must be protected far more assertively from the kind of intrusive journalism that promotes no wider public benefit beyond satisfying readers' curiosity. Similarly, there are fervent disagreements about when and where the law can be contravened for the wider public benefit. Just how far can investigation go beyond the usual legal boundaries and with what kinds of justification?

Such debates have animated the Leveson Inquiry and much of the coverage and commentary surrounding it. Celebrities, experts and power brokers from a range of fields have been asked to testify before the judge to offer their views, often contributing valuable insights to the inquiry. There is, however, an important voice missing in this debate about the public interest - that of the public themselves. The inquiry has been broadcast to the public, all the evidence submitted to it has been published online, and the public and the public interest are regularly invoked by witnesses. But we know strikingly little about how people weigh up competing priorities to decipher their own interests and those of society as a whole.

The risk is that policy will continue to be made in the name of the public, without any voice for the public. Experts are being asked to determine what is in people's best interests, without any clear sense of where the public stand, or any clear process for finding that out. This is a democratic deficit that needs addressing with some urgency if the notion of the 'public interest' is going to command any real legitimacy. This research begins to fill that gap. In the next chapter, we turn to the question of where the public themselves stand.

²⁵ Crown Prosecution Service (2012) *DPP launches public consultation on cases affecting the media* CPS; online http://www.cps.gov.uk/news/press_releases/109_12/ [accessed Sept 2012]

Chapter 3: Public views on the public interest

I would never have thought that private information would have been obtained and used by the press in the way that it has been. I certainly never thought that ordinary or vulnerable people like us would have been subject to phone-hacking.

Sally and Bob Dowler, Witness Statement to the Leveson Inquiry, 2011²⁶

This statement, made by the parents of Milly Dowler to the Leveson Inquiry, encapsulates the fundamental elements involved in any public interest consideration of the ethics of intrusive journalism. The Dowlers identify three separate aspects of their mistreatment:

1. The **what**: *'I would never have thought that private information would have been obtained and used by the press in the way that it has been'*
2. The **who**: *'ordinary or vulnerable people like us'*
3. The **how**: *'subject to phone-hacking'*

The reason that the hacking of Milly Dowler's phone has been so universally condemned is that *The News of the World* had scant justification on any of these other three counts. The information printed by the paper was intensely personal and of little consequence to its readership - the Dowlers were not powerful, nor had they invited fame or intrusion; and the information had been acquired through illicit means. This combination explains the widespread agreement that the treatment of the Dowlers could scarcely be judged to be in the public interest.

Aside from reinforcing the gravity of the phone-hacking scandal, the Dowlers' statement also serves to clarify the terms of debate. There is, of course, a public interest in freedom of speech. But this alone is not enough to come to a public interest judgement - the value of free speech

must be weighed against other factors. People tend to make judgements about the public interest using these three tests – **what** the content of the story is, **who** it is about, and **how** the information for it was acquired. It is through the interplay of these different factors that the public interest is established. The polling we undertook for this project sought to explore this balancing act.

3.1 What the public think – explaining the poll

In our poll of a representative sample of 2,000 adults in the UK, we asked a series of questions using the same formula, but changing only one variable at a time. In this way, by conducting our own balancing act between the 'what', the 'who', and the 'how', we attempted to shed light on the public's notion of the public interest. The text box below offers a sample question, with the variables in bold.

Sample question:

1. A newspaper wants to publish a story revealing **details of someone's sex life** – such as a kiss and tell story. The information has been gained **through interviewing friends and neighbours**. About which, if any, of the following groups should this be allowed:

- a) A member of the public (yes/no/don't know)
- b) A sports star or famous actor (yes/no/don't know)
- c) A reality TV star (yes/no/don't know)
- d) A FTSE 100 company director (yes/no/don't know)
- e) A judge (yes/no/don't know)
- f) A member of parliament or local councillor (yes/no/don't know)
- g) It should never be allowed

²⁶ Sally and Bob Dowler (2011) *Witness statement to Leveson Inquiry* Leveson Inquiry (online) <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Sally-Bob-Dowler.pdf>, paragraph 21 [accessed Sept 2012]

Each question, therefore, contained six options for the **who**. There were members of the public, two categories of celebrities – those who have become famous indirectly as a result of their talents (sports stars and famous actors) and those who have courted fame directly (reality TV stars) – and three kinds of people in positions of power or responsibility, such as FTSE 100 company directors, judges, and MPs and local councillors. This allowed us to explore any potential differences in public attitudes to the private and public sectors, and to those appointed to high public office and those who have been elected.

By changing one of the variables, we explored the public reaction to five different types of story, or the **what**. These five stories ranged from a scenario that might reasonably be understood as personal and therefore private, through moral and professional shortcomings, to manifestly illegal actions with tangible effects on others. The five types of story explored in our survey were:

- Information about someone's sex life.
- Details of someone lying to others but not breaking the law.
- Information that calls someone's professional competence into question.
- Details of someone making money illegally.
- Details of someone putting the safety of others at risk.

We also tested attitudes to three different methods of information gathering – the **how** – by changing another variable. These comprised commonplace and widely-accepted journalistic conduct, an ethical and legal grey area, and a method of information gathering involving significant intrusion and illegality. Our three methods of information gathering were described as follows:

- The information has been gained through interviewing friends and neighbours.
- The information has been gained by going through the dustbins outside of their house.
- The information has been gained through entering premises illegally.

This formula thus gave us a total of 90 different scenarios and allowed us to explore what effect our three variables – the 'what', 'who' and 'how' – had on public attitudes as to whether stories should be published, as well as the relative importance of each when weighed against the others. For what reasons might intrusion into someone's private life be justified? How much difference does it make who is the subject of the story? And how important is the method through which information is gathered?

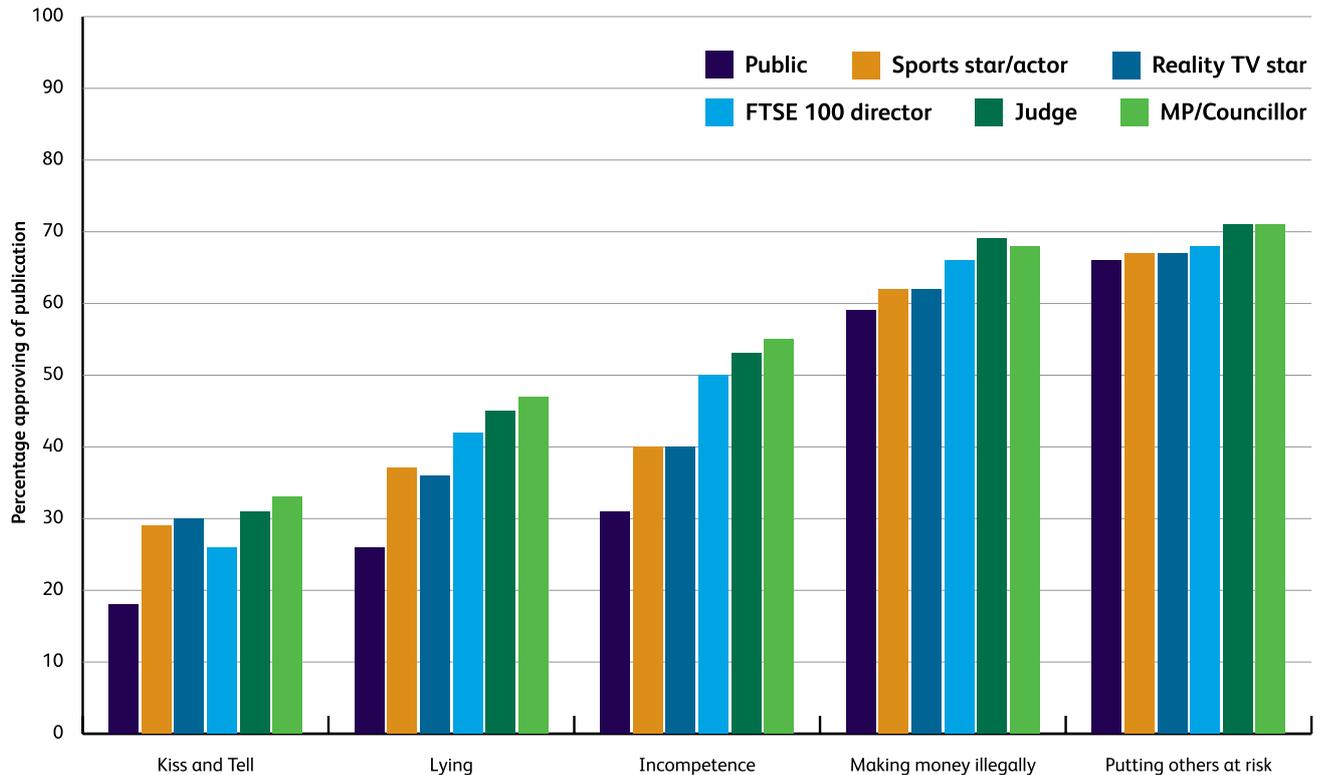
3.2 Harm, power and intrusion

Looking first at the subject matter of stories – the 'what' – the public's willingness to back publication increased for stories that involved a tangible impact on others in society. Stories about people's sex lives inspired the lowest level of support for publication, while stories about people putting the health and safety of others at risk had the highest ratings (see Chart 2).

Other studies on the topic have identified 'the seriousness of wrongdoing' as one scale used by the public when comparing different cases.²⁷ Our poll found something subtly different. The public seem to support publication for stories where there is greater evidence of *harm* to others, rather than signs of wrongdoing per se. Stories calling someone's professional competence into question enjoyed higher support for publication than those revealing deceit, for example. On this evidence, the public appear more inclined to make

²⁷ Barnett, S. (2012) 'Public Interest: The Public Decides' *British Journalism Review* June 2012 23: 15-23 Sage; online <http://bjr.sagepub.com/content/23/2/15.citation> [accessed Sept 2012]

CHART 2: INFORMATION GATHERED FROM FRIENDS AND NEIGHBOURS



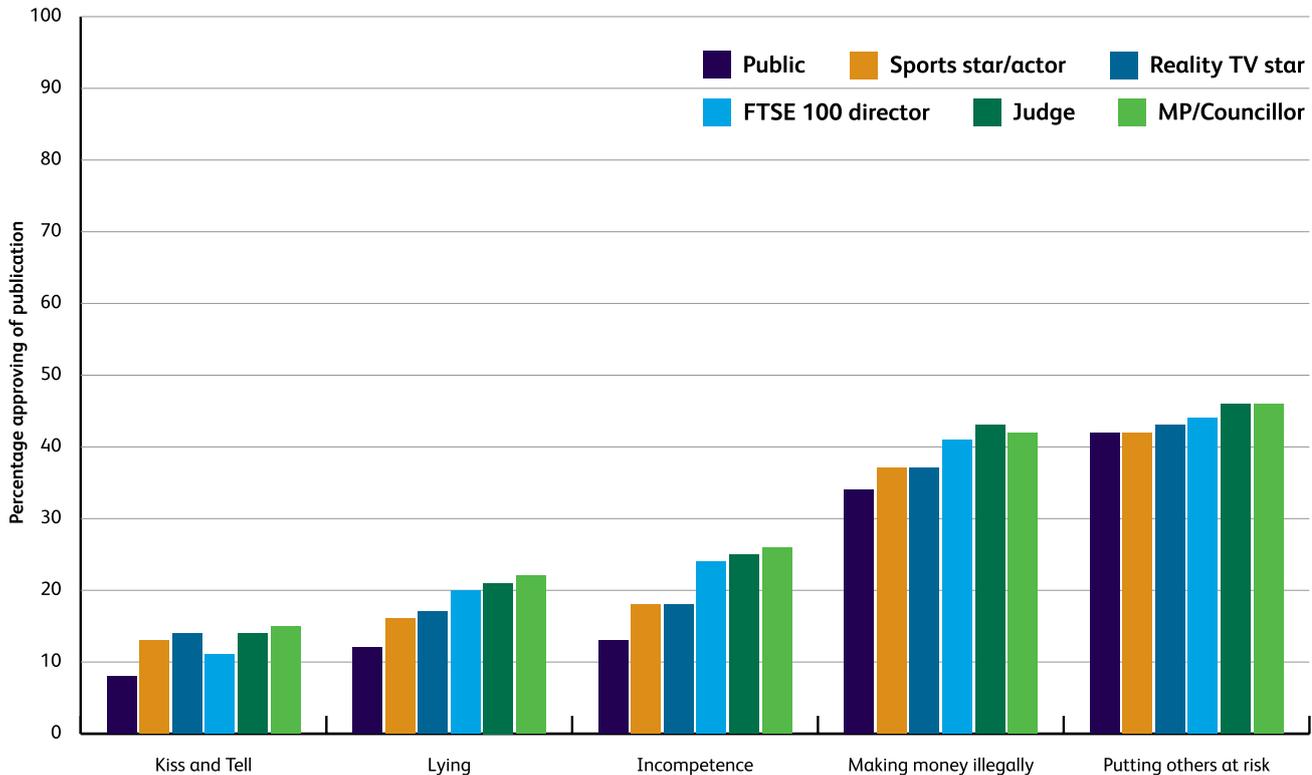
pragmatic judgements than moral ones when weighing up what is in the public interest.

On the question of 'who', people were more likely to support the publication of stories about people in positions of power and responsibility. Members of the public were afforded the most protection, with MPs and local councillors the least. Celebrities were afforded less protection than the general public, though the public made little distinction between those who were famous by design (reality TV stars) and those who were famous as a by-product of their career (footballers or actors).

The differing results for stories about the general public and about celebrities suggest that to some extent, privacy is viewed as a commodity

that people trade in when they make conscious decisions to live in the public eye. This is a finding that would be worth exploring further - for example, to test whether it is related to expectations that celebrities ought to act as role models, or rather is driven by a desire to know more about people who produce and endorse products that the public buys. Such subtleties are not merely matters of academic interest, but potentially important distinctions that could tip the balance of specific 'public interest' cases.

Support for publication was highest for a third group, comprising FTSE 100 company directors, judges and politicians. This seems to reflect the idea of there being a public interest in holding those with power to account. The public appear to make a distinction between those operating in

CHART 3: INFORMATION GATHERED BY GOING THROUGH DUSTBINS

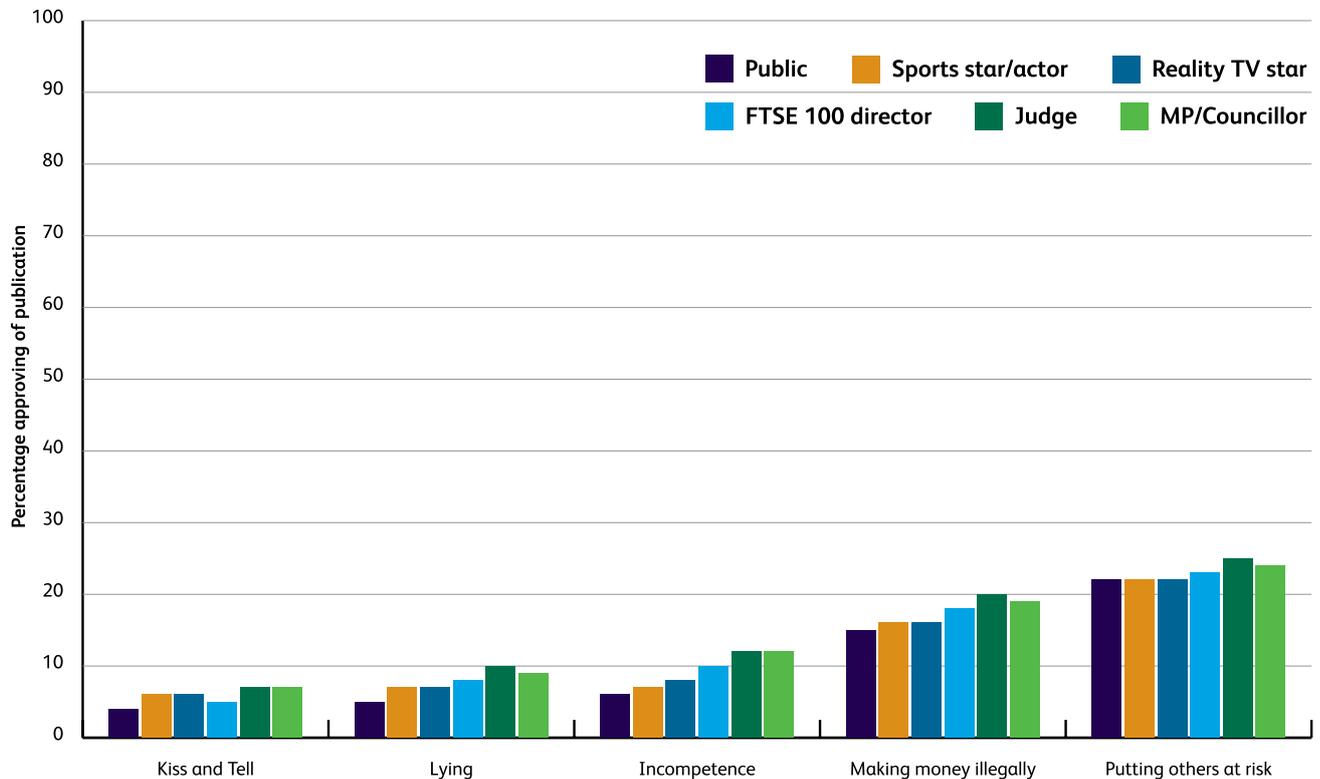
the public and private sectors, with slightly more support for publication for stories about judges than for those concerning company directors, and more support still for stories about elected politicians.

On the question of how information is acquired, there was a clear pattern of declining support for publication as the level of intrusion involved increased, with our scale moving from standard journalistic practice (interviews with friends and neighbours) to ethical and legal grey areas (going through the bins outside of someone's house) to methods that are both illegal and highly unusual (entering premises illegally) (see Chart 4).

The way in which questions of 'what', 'who' and 'how' are traded off against one another

in the polling has implications for how public interest judgements are made. In our polling, the least influential factor of the three was the 'who' of the story. The more intrusive the source of information became, the less difference the 'who' of the story made to overall approval ratings for publication.

For example, with the story revealing someone lying, with the least intrusive source, 'interviewing friends and neighbours', there was a spread of 29 percentage points between approval ratings for different people (ranging from 18% for a member of the public to 47% for an MP or councillor). When the source was 'entering premises illegally', that spread narrowed to just five percentage points (5% for a member of the public, 10% for a judge). This suggests that certain ways of acquiring

CHART 4: INFORMATION GATHERED BY ENTERING PREMISES ILLEGALLY

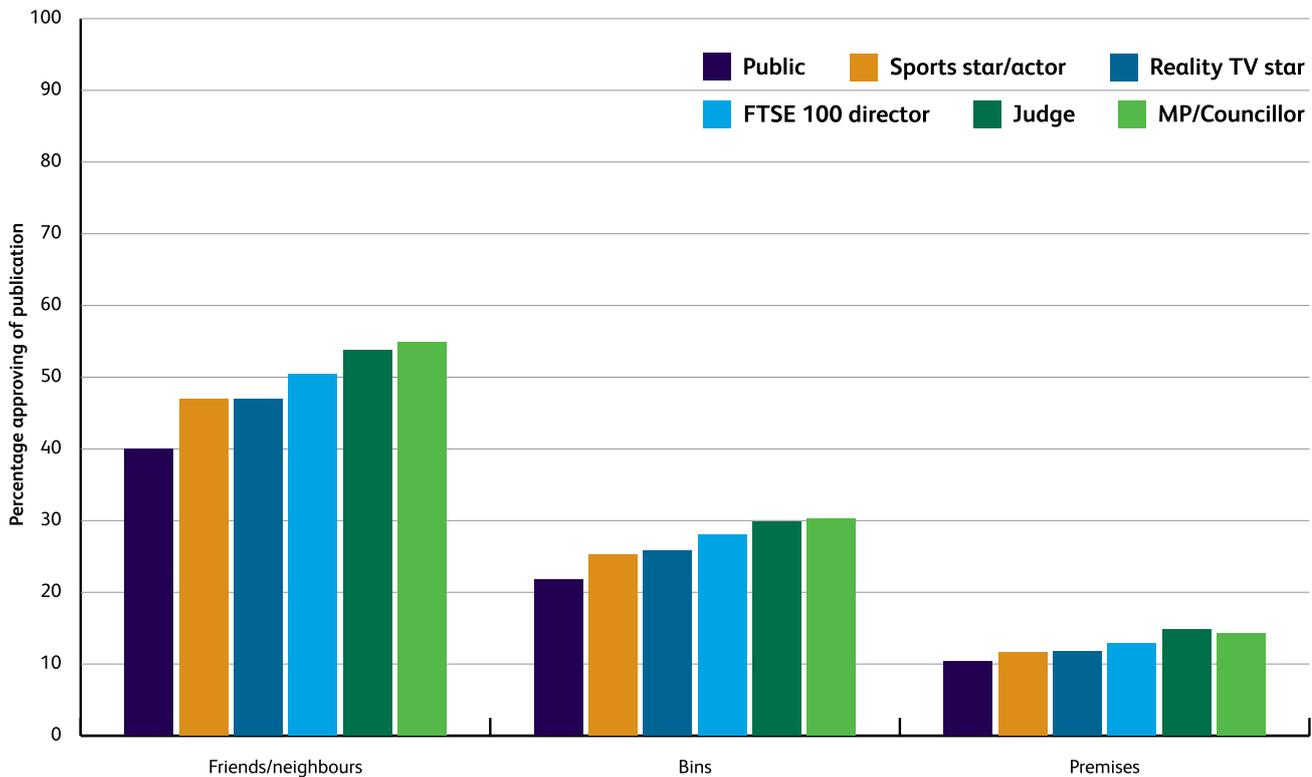
information are unacceptable almost completely across the board - the 'who' makes relatively little difference because the 'how' is more important.

Similarly, when the 'what' of the story involves illegal or harmful behaviour, the 'who' made less of a difference to overall approval ratings for publication. It would appear that people are more concerned about consequences than personalities. Rights to privacy are overridden as the consequences of the 'what' become greater. This suggests that while the public make some distinctions between those who are famous and those who are not, and between those who have power and those who do not, this factor should not be overstated in public interest judgements.

3.3 Reluctant publishers

Perhaps the most striking message from the polling is that the public are reluctant publishers (see Table 1). Only a relatively small minority of scenarios (15 out of 90) saw at least 50% of the public backing publication. The only scenarios reaching the 50% approval mark involved the least intrusive kind of information gathering, 'interviews with friends and neighbours', and the three most serious types of revelation: 'professional incompetence', 'making money illegally', or 'putting others at risk'.

On the evidence of this poll at least, the public are much more guarded about publication than many of those in authority - whether newspaper editors, regulators or judges - who are used to making judgements about where the public interest lies.

CHART 5: AVERAGE APPROVAL RATINGS BY SOURCE AND FIGURE

Privacy concerns weigh especially heavily, with at least two thirds opposed to the publication of the ‘kiss and tell’ stories in our scenarios, regardless of which figure was involved or how the information was acquired.

The public’s sympathy with arguments in favour of privacy was also marked when we asked them whether they backed Max Mosley’s proposals for prior notification to be given to the subjects of stories (see Table 2).²⁸

It is worth remembering that an exercise like this can only ever provide a snapshot of opinion, often throwing up as many questions as answers. One such question is what lies behind the public’s reluctance to publish, given that even the scenario with the highest approval rating - about

an elected official putting others at risk, with information gained through the innocuous means of interviewing friends and neighbours - gained a mere 71% approval for publication.

3.4 Never say never

Two other findings are worth noting. The first is just how context-specific judgements about the public interest tend to be. For example, judges were afforded relatively less protection from publication compared to other groups on the one topic that explicitly involved breaking the law. Similarly, more people supported the publication of ‘kiss and tell’ stories about celebrities than they did for FTSE 100 company directors - the only topic where this was the case. These examples illustrate the perils of attempting to define the

²⁸ Max Mosley (2011) *Witness statement to Leveson Inquiry* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Max-Mosley.pdf> , paragraphs 69-90 [accessed Sept 2012]

TABLE 1: STORIES WITH MOST SUPPORT FOR PUBLICATION

What	How	Who	Approval Rating %
Others at risk	Friends / neighbours	MP / Councillor	71
Others at risk	Friends / neighbours	Judge	71
Making money illegally	Friends / neighbours	Judge	69
Making money illegally	Friends / neighbours	MP / Councillor	68
Others at risk	Friends / neighbours	Director	68
Others at risk	Friends / neighbours	Reality TV Star	67
Others at risk	Friends / neighbours	Sports star / actor	67
Making money illegally	Friends / neighbours	Director	66
Others at risk	Friends / neighbours	Member of public	66
Making money illegally	Friends / neighbours	Reality TV Star	62
Making money illegally	Friends / neighbours	Sports star / actor	62
Making money illegally	Friends / neighbours	Member of public	59
Competence	Friends / neighbours	MP / Councillor	55
Competence	Friends / neighbours	Judge	53
Competence	Friends / neighbours	Director	50

public interest too tightly. More useful is to identify the criteria involved so that they can be applied to specific examples.

The second, related message from the polling is that while the public may be reluctant publishers, they also appear wary of making cast-iron rules against publication. Table 3 looks at the responses for scenarios involving MPs - the group from our survey of whom the public were least protective. It shows that although in many scenarios a large proportion of the public is against publication, even for this least-protected group, a much smaller proportion feels comfortable ruling out the idea that a story on the same subject, using the same methods of information collection, should ever be published. For example, while 86% will not support publication of a story about

TABLE 2: VIEWS ON PRE-PUBLICATION NOTICE

Statement	Support %
<i>People should be given prior notice of media stories that are about them, even if that means the courts prevent some stories being published. Deciding what is in the public interest after publication is too late, the damage is already done.</i>	61
<i>Newspapers should be free to publish what they believe to be in the public interest. It would be wrong to restrict free speech, so any formal complaints and procedures should take place after publication.</i>	39

TABLE 3: PUBLICATION IN PRACTICE AND IN PRINCIPLE

	MP + interviews with friends		MP + going through bins		MP + entering premises illegally	
	No %	Never %	No %	Never %	No %	Never %
Sex life	56	32	77	45	86	50
Lying	39	21	68	39	83	48
Professional Competence	34	16	64	37	80	47
Making money illegally	22	10	48	27	70	42
Putting others at risk	19	8	43	25	64	39

an MP's sex life, gained through illegal entry to a premises, only 50% are willing to endorse entirely the idea that a story on this topic, using information gained this way, should 'never' be published (see Table 3).

Further qualitative research on this would be required before drawing too many firm conclusions from the data, but the most plausible interpretation of this is that the public accept the notion of the public interest as a balancing exercise between different priorities - and believe the bar should be set very high for intrusion of this type - but are still willing to countenance the idea that publication might be justified in certain circumstances.

These findings give a clearer sense of the relative priorities of the public. The apparent gap between the views of the public and the views of those charged with making public interest judgements should not be taken lightly. At a minimum, decision-makers - whether in newsrooms, courtrooms or regulatory bodies - need to be aware of where the public stands on these questions. More research, involving opportunities for public reflection and deliberation, is required. Beyond this, though, the findings from our polling should trigger a wider debate about the

best mechanism through which these public preferences might be brought to bear on the newspaper industry. The next chapter addresses that question.

Chapter 4: Circulation or regulation?

For some, there is no great mystery as to what is the best mechanism for settling on the public interest - it happens each day in the marketplace. As one former tabloid journalist, Paul McMullan, put it in his evidence to the inquiry:

*Circulation defines what is the public interest. I see no distinction between what the public is interested in and the public interest. Surely they're clever enough to make a decision whether or not they want to put their hand in their pocket and bring out a pound and buy it.*²⁹

McMullan was one of the more outspoken witnesses to give evidence to the inquiry, but on this point, at least, he articulated a view that others appear to share. Rupert Murdoch expressed a similar sentiment when he compared his own position to that of would-be regulators of the press, arguing:

*I go to election . . . every day. People can stop buying my newspapers any time.*³⁰

On this analysis, it does not matter that only 10% of the public regard *The Sun* as likely to operate ethically, with due regard to the public interest. People can stop buying the newspaper at any time and more than 10% of us continue to read it in any case, whatever we may tell the pollsters.³¹

The position is that consumers know better than politicians or regulators what is in the best interests of society, and that they have a powerful means of expressing their views through their purchasing habits. It is better, in this view, that the public interest is not pre-defined by a small number of people in power, but rather

that it is allowed to emerge through the daily, decentralised decisions of those who produce newspapers and those who buy them. This follows the famous argument made by the economist Adam Smith:

*As every individual . . . neither intends to promote the public interest, nor knows how much he is promoting it . . . he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.*³²

This argument has strong rhetorical appeal. The implication that the public cannot be trusted to determine the public interest raises legitimate fears of snobbery and elitism. It is clearly not in the interests of the public that a few powerful individuals are able to impose their own subjective preferences and values on the rest of society.

Often the interests of the public are best served when supply and demand are able to interact in a relatively uninterrupted way. But such a world-view has its limits, for at least three reasons.

1. People simply do not read all of newspapers - some buy them for horoscopes, others for the sport pages, others for crosswords. Endorsement of the paper as a whole does not necessarily mean endorsement of particular stories that the paper carries, which many readers may never even set their eyes on.

²⁹ Leveson Inquiry (2011) *Transcript of afternoon hearing, 29 November 2011* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Afternoon-Hearing-29-November-2011.pdf>, p39 [accessed Sept 2012]

³⁰ Leveson Inquiry (2012) *Transcript of morning hearing, 25 April 2012* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf>, p51 [accessed Sept 2012]

³¹ Newsworks (2012) *Facts and Figures: The Sun* Newsworks; online <http://www.nmauk.co.uk/nma/do/live/factsAndFigures?newspaperID=17> [accessed Sept 2012]

³² Adam Smith (1776) *The Wealth Of Nations IV.2.9*

2. While sales of newspapers do tend to be higher when they carry certain types of story - which often involve the kind of intrusion that the polling suggests the public do not support – consumers do not have complete information about the products that they are buying. People may read stories without any real sense of how the information for them was acquired - a key element in any public interest judgement. In this case, reading a story or buying a newspaper can scarcely be interpreted as vindication of a particular investigative method.

To draw an analogy, buying a T-shirt without realising that it was made in a sweatshop does not imply an endorsement of exploitative labour practices. Consumers might act very differently if armed with more information. The example may be extreme, but the principle applies to newspapers - reading a story acquired through phone-hacking done in secret does not equate to endorsing that practice. The risk under the consumer model is that journalists and editors simply make their own choices about what they consider to be in the interests of the public, with little transparency or accountability about when such decisions are being taken, let alone on what terms.

3. Societies routinely place ethical limitations on markets, preventing supply from matching demand, in order to protect people from harm. To continue with the previous analogy, it would not matter if consumers were willing to buy goods that they knew had been made in sweatshops in Britain. This is because, collectively, we chose to proscribe employment at below the minimum wage. Again, the principle

can apply to the newspaper industry - even if there is a demand for a certain type of story it does not necessarily follow that free speech should trump all other priorities. Some consumers may well want to read newspaper stories about people's medical records, for example, but we judge there to be a public interest in protecting the privacy of patients. The public interest is, in part, about protecting third parties, not just the interaction between the producers of news coverage and the consumers of it.

It is, of course, arguable that the phone-hacking scandal did not represent a failure of regulation, but rather a failure of editorial judgement - and then a failure to enforce an existing law. The mechanisms to prevent misconduct happening, and then to investigate it fully, were in place. The problem is that they were not deployed properly. However, the Leveson Inquiry has laid bare a widespread unease about loose interpretations of the public interest, and about forms of journalism with which the public are uncomfortable.

What is clear is that the consumer model of determining the public interest is insufficient. This is partly because consumers lack information either about the existence of stories or how they are put together, and also because it leaves too little space to protect people whose lives may be interesting to others, but still worthy of privacy or protection. A more deliberative approach to establishing the public interest is required. The next chapter considers some strategies for reform.

Chapter 5: Regulation and the public interest

The regulation of the newspaper industry will almost certainly be overhauled as a result of the Leveson Inquiry. We can only guess at what Leveson will recommend and what the political upshot of his report will be when it comes out later in 2012. The judge has already said he would be *'surprised if I went down a route that sought to recommend a system that replicated Ofcom [the independent broadcasting regulator that was created by the Communications Act 2003 and is part-funded by the government]'*.³³

He has also cast doubt on parliament's appetite to legislate:

*Looking at the experience of the last 50 years, I've seen no evidence of parliament wanting to get more involved and to go further than the press has been prepared to go.*³⁴

This suggests the most likely outcome will be a type of enhanced self-regulation, or a new regulator with some kind of statutory underpinning - in either case, one that would probably have the power to fine newspapers and to tackle systemic failure rather than just react to specific complaints.

Many in the industry are hoping to salvage the system of self-regulation, by enhancing its powers in various ways and to ensure comprehensive participation (a problem with the current system is that publications can choose to opt out, as the *Daily Express*, *Daily Star*, and *Private Eye* all have done).³⁵

5.1 Who should be involved in regulating the press?

Our polling explored public attitudes to regulation, asking who people thought were involved in drawing up the current guidelines and who should be involved in setting guidelines for newspapers. The public appear unsure about who exactly - from a choice of journalists, newspapers editors, newspaper owners, parliament, independent regulators, judges and the public - was currently involved 'in drawing up guidelines to what the public interest means in practice'. The clearest positive verdicts were for parliament (63% thought parliament was involved, against 18% who did not) and independent regulators (54% thought they were involved, 22% did not), while the highest negative score was for the public (25% thought they were involved, 54% thought they were not) (see Chart 6).

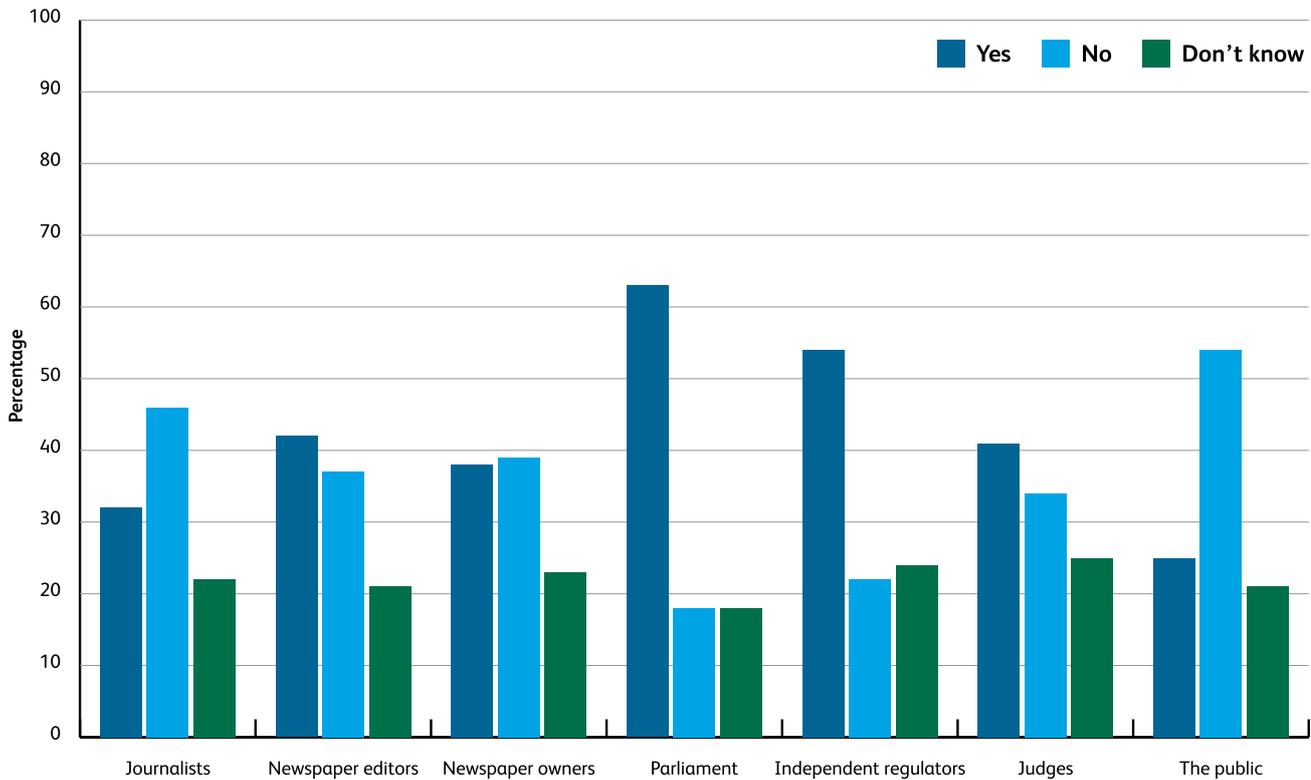
The Press Complaints Commission uses the Editors' Code for guidance on the public interest. As its name suggests, the Editors' Code is drawn up by editors, with no current role for the public in this process, other than its ratification by the PCC with its majority of 'lay' commissioners (See 5.3 Options for reform). The majority of the public (54%) correctly felt that the public had had no role in setting the existing guidelines, around two in five (42%) correctly identified that editors had a role in this process. In the context of current debates, it is interesting to note that almost two-thirds of the public (63%) already think that Parliament has a role in setting the guidelines, which they do not.

³³ Leveson Inquiry (2012) *Transcript of afternoon hearing, 23 July 2012* Leveson Inquiry; online <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Transcript-of-Afternoon-Hearing-23-July-2012.pdf>, p38-39 [accessed Sept 2012]

³⁴ *Ibid*, p41

³⁵ The Guardian (2012) *Desmond titles face PA and adverts ban if PCC reform plans get green light Wednesday 20 June 2012* The Guardian; online <http://www.guardian.co.uk/media/2012/jun/20/desmond-titles-pcc-reform> [accessed Sept 2012]

CHART 6: WHICH OF THE FOLLOWING GROUPS DO YOU BELIEVE ARE **CURRENTLY** INVOLVED IN DRAWING UP GUIDELINES TO DEFINE WHAT THE PUBLIC INTEREST MEANS IN PRACTICE?



When it came to who should be involved in this debate, it was clear that people felt the newspaper industry should be excluded from drawing up guidelines (see Chart 7). The public were **against** the involvement of:

- Journalists by a score of 66% against to 21% in favour;
- Editors by a score of 59% against to 28% in favour; or
- Newspaper owners by a score of 64% against to 23% in favour.

However, people did see a role for other groups and were **in favour** of the involvement of:

- Parliament by a score of 63% in favour to 24% against;

- An independent regulator by a score of 77% in favour to 12% against;
- Judges by a score of 53% in favour to 31% against; and
- The general public by a score of 63% in favour to 23% against.

It is important to note that the public's dislike for providers (be they journalists, editors or newspaper owners) to be involved in their own regulation is against best practice in most regulated industries. Most regulatory systems do involve the businesses in question in agreeing the guidelines and framework for regulation. The issue here is that the interests of providers need to be balanced by the voices of a far wider group of people, including the public themselves.

5.2 Handling complaints about the public interest

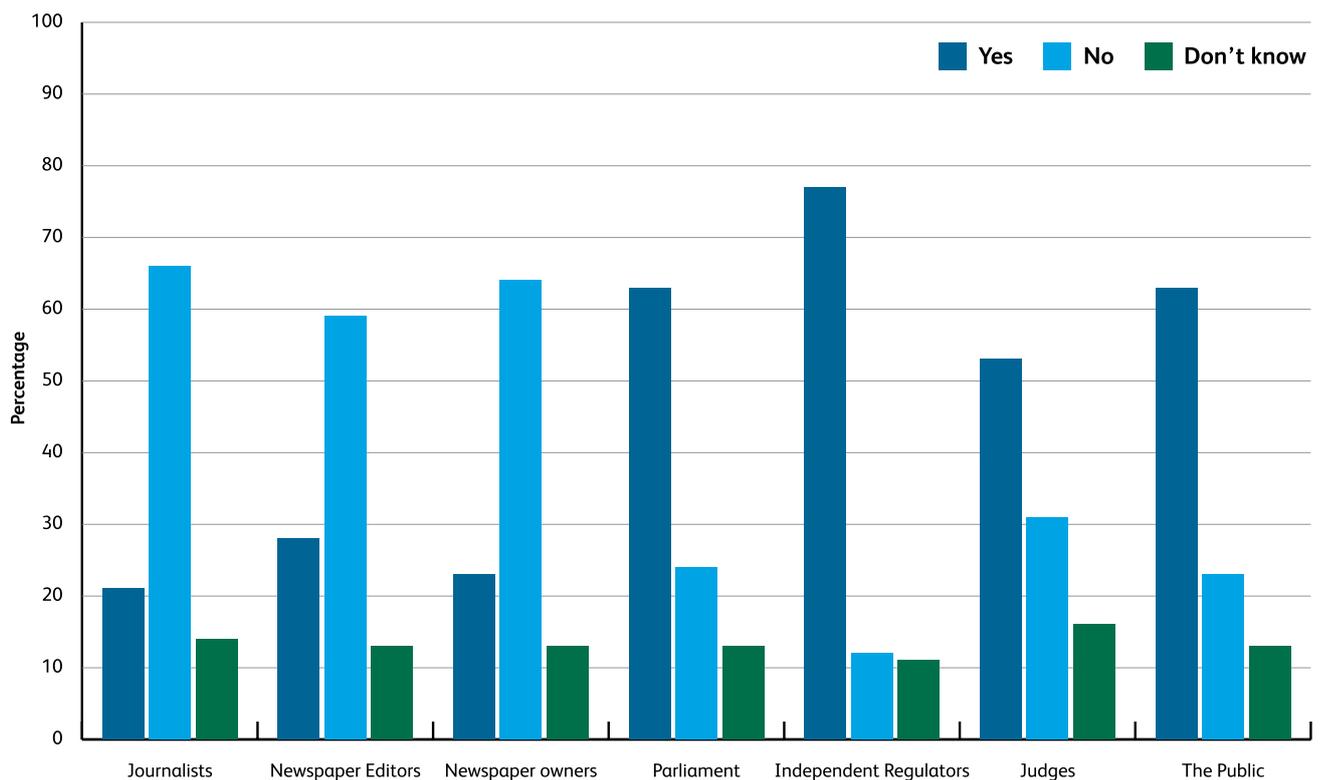
As for who should adjudicate on whether a specific story is in the public interest when a complaint is made, the public most favoured **a regulator funded by, but independent of, government** by a margin of 71% in favour to 17% against (see Chart 8). Also endorsed were:

- A regulator funded by but independent from the newspaper industry (by a score of 58% in favour to 29% against);
- Members of the general public (by a score of 55% in favour to 32% against);and
- Judges (by a score of 53% in favour to 33% against).

However, the public did not want MPs (by a margin of 55% against, to 31% in favour) or newspapers themselves to have any role (by a margin of 65% against, to 21% in favour). Here, the public appear to agree with media commentators who are concerned that too much political involvement might impact on freedom of speech.

To secure the public interest in any future regulatory settlement, however it is constituted, the public's voice on these issues should be acknowledged. As the low ethical ratings given to many newspapers show, the industry suffers from a trust problem. Building greater trust into the system should therefore be a key goal for reformers. There should also be a greater

CHART 7: WHICH OF THE FOLLOWING GROUPS SHOULD BE INVOLVED IN DRAWING UP GUIDELINES TO DEFINE WHAT THE PUBLIC INTEREST MEANS IN PRACTICE?



recognition that the public can be involved in determining what is in the public interest. Here we explore some options for reform.

5.3 Options for reform

5.3.1 Transparency

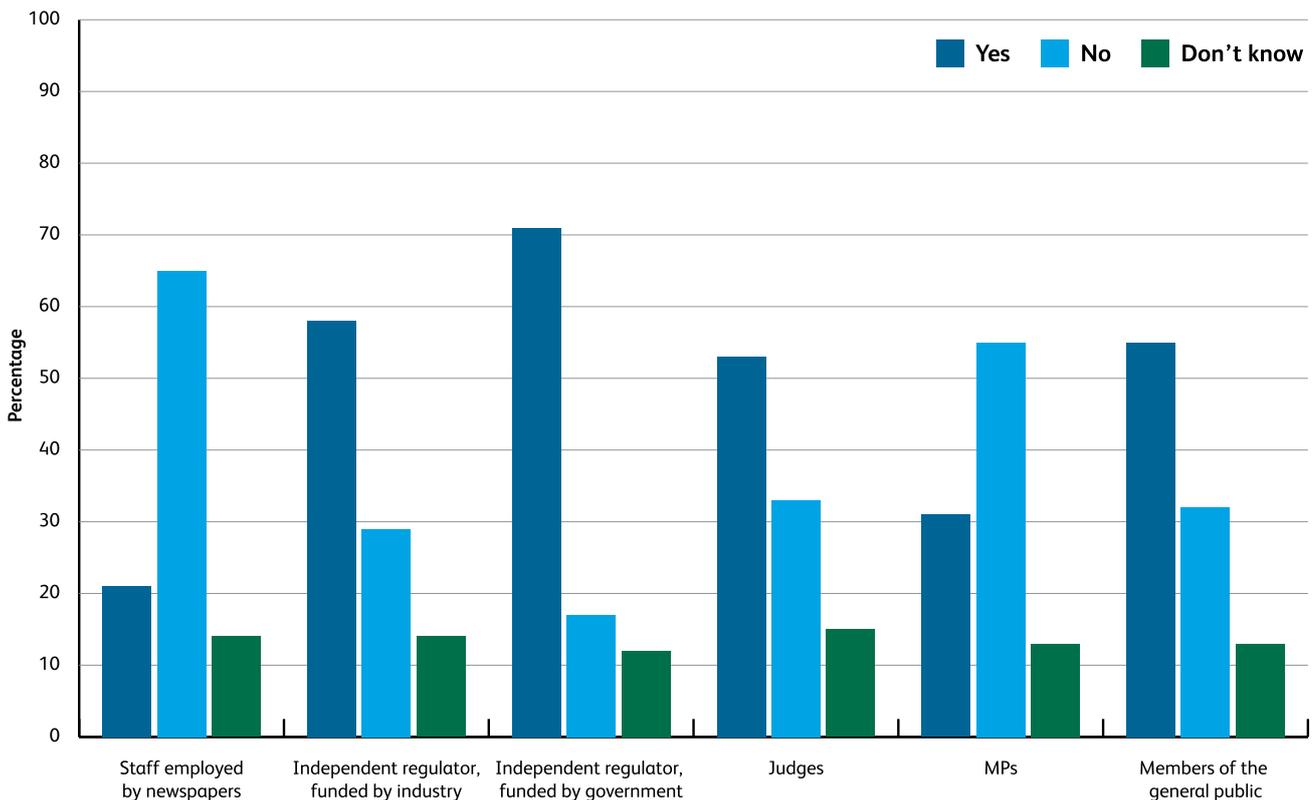
Those who favour self-regulation and the consumer model of accountability advocated by Rupert Murdoch would do well to embrace a step change in transparency for journalism. If consumers are going to be expected to hold newspapers to account then they must know much more about the ways in which they work.

Our polling found a strong preoccupation among the public with the ‘how’ of newsgathering, yet this is often the element that consumers

have least information about. People can see for themselves what and who a story is about, but the way in which the story has been put together is often far from clear. If newspapers are confident that the methods used to acquire a story can be justified in the public interest then they should also be willing to inform their customers about the approach taken in pursuit of a particular story.

To bolster the consumer model, then, both editors and regulators should consider how to make newspapers more open and transparent for their readers. This might include newspapers disclosing how the information contained in stories has been acquired wherever possible, without jeopardising confidential sources. This ought to include more openness about any methods of surveillance

CHART 8: WHEN COMPLAINTS ARE MADE, WHICH OF THE FOLLOWING GROUPS SHOULD BE INVOLVED IN MAKING JUDGEMENTS ABOUT WHETHER SPECIFIC STORIES ARE IN THE PUBLIC INTEREST?



employed, as well as when people have been paid for information or for giving an interview. Many journalists do these things already, but should it become standard practice across the industry, it would be a significant step in enhancing trust and accountability.

5.3.2 Governance

Another (potentially complementary) option would be to consider the governance structures of newspapers and the extent to which the public has a voice within them. One growing trend within British newspapers in recent years has been the introduction of readers' editors, whose job is to act as a readers' representative from within the newspaper itself, dealing with complaints and exploring matters of journalistic ethics. This form of internal self-regulation is designed to improve the newspaper's relationship with its readers and to provide another way to resolve conflict or defuse controversy. It is the first line of self-defence.

The Guardian pioneered this system in the UK, appointing Ian Mayes to be its first readers' editor in 1997. The paper describes the readers' editor's job as 'to collect, consider, investigate, respond to and, where appropriate come to a conclusion about readers' comments, concerns, and complaints in a prompt and timely manner, from a position of independence within the paper'.³⁶ Other newspapers to have introduced a readers' editor include the *Observer*, the *Independent on Sunday* and the *Daily Mirror*. *The Guardian*, *Mirror* and *Daily Mail* run a 'Corrections and Clarifications' column each day.

It would be a welcome move for the industry if other newspapers followed suit, introducing readers' editors and giving a regular space in the paper to consider specific complaints and more

general matters of conduct and ethics. Whereas newspapers have traditionally sought to save face by glossing over or failing to admit errors, a more open and self-critical approach would gain credibility for all kinds of publication. In an era of instant web feedback on online articles, taking readers' views on board should have already become second nature. More radical measures might include some formal representation for readers at board level within newspaper governance structures. This would ensure that the public's views are mediated not just through circulation figures, but also through allowing people to offer more detailed and constructive feedback.

5.3.3 Advocacy

A third and final approach would be to amplify the voice of the public within regulatory structures. This applies however much or little formal power the successor to the PCC is given.

Regulators require legitimacy as independent arbiters who are not held captive by the industry they regulate. This can be difficult because effective regulation requires a constructive relationship with industry and relies on the expertise of those currently or previously employed by the companies that are subject to the regulator's oversight. Nevertheless, it seems only fair that the voice of the public in whose name the industry is being regulated is given some kind of hearing. Unless strenuous efforts are made in this direction then the accusations that the press is not acting in the interest of the public will continue to grow - and with good reason.

The current arrangements at the PCC provide a base from which its successor body can build, with a majority of 'lay members' on its board. Ten of the PCC's 17 commission members have

³⁶ The Guardian (2012) <http://www.guardian.co.uk/theguardian/page/readerseditor> [accessed Sept 2012]

no formal connection with the press - they are styled 'public members' alongside the seven 'editorial members' (all senior newspaper and magazine editors). However, these people are not exactly 'ordinary' members of the public: there is a former cabinet minister, an ex-Old Bailey judge, a former press secretary to the Queen, a former broadcasting executive, a law professor, a headteacher, a trades unionist, a former chief constable, a onetime partner in a City law firm, and the chair of a voluntary organisation.³⁷

Although the Press Complaints Commission does not come within the remit of the Commissioner of Public Appointments it has agreed to use a process which takes into account the Commissioner's Code of Practice as best practice. The key principles include appointments being made on merit, being subject to independent scrutiny by the independent assessor, and having due regard to equal opportunities, probity, openness and transparency and proportionality. Consideration could be given as to whether the successor body to the PCC could more formally come under the remit of the Commissioner of Public Appointments, as the Chair of Ofcom and the Office of Fair Trading currently do.

The PCC and its successor organisation should look to other models to further democratise its governance structure and to ensure that the public has a clear voice. One model to consider is the advocacy model, adopted in a number of British industries, which sees consumer panels established with a particular remit to represent consumer interests inside a regulatory structure. The benefits of such an approach have been

outlined in a report by the consumer champion Consumer Focus, which has argued:

Experience suggests that regulators and regulated businesses can sometimes frame issues in a similar way, with common views on what the key questions are, even if they may have different perspectives on the answers. There needs to be some countervailing input that unapologetically favours the consumer interest, to give the regulator a wider range of perspectives and a more rounded evidence base on which to make decisions . . . Such external challenge can improve the quality of regulation, by testing the robustness of the evidence and analysis underpinning decisions, providing different thinking and solutions, and raising new issues.³⁸

In the case of financial services, the role of these panels has a statutory basis. The Financial Services Consumer Panel monitors how far the Financial Services Authority fulfils its statutory objectives in relation to consumers. The panel is appointed and funded by the FSA, but 'independent and free to publish its views on our work and to commission research on consumers' views'.³⁹ Similarly, the communications regulator Ofcom is advised by the Communications Consumer Panel, made up of 'independent experts with experience from many different fields: consumer advocacy, regulation, the third sector, academia, the trade union movement, market research and industry'.⁴⁰

The new regulator could look to this model to see how it can be adapted or learned from. For example, one option is to establish a consumer

³⁷ Press Complaints Commission (2012) <http://www.pcc.org.uk/about/whoswho/members.html> [accessed Sept 2012]

³⁸ Consumer Focus (March 2011) *Regulated industries and consumers Consumer Focus*; London <http://www.consumerfocus.org.uk/files/2011/10/Regulated-industries-and-consumers.pdf>, p14 [accessed Sept 2012]

³⁹ Financial Services Authority (2012) <http://www.fsa.gov.uk/about/who/accountability/consumer> [accessed Sept 2012]

⁴⁰ Communications Consumer Panel (2012) <http://www.communicationsconsumerpanel.org.uk/smartweb/about-us/about-us> ([accessed Sept 2012]

panel that could feed into reviews of the guidance on the public interest. The panel would be selected at random from the general public and trained for their role.

In addition to a consultative role on guidance on the public interest, a consumer panel could go further and provide a 'public interest audit' on a yearly basis. The audit would provide members with an opportunity to discuss and review an agreed number of specific public interest judgements made that year by the regulator and offer its view on the judgements reached. Such a panel would serve as a reminder to those with decision-making powers to have due regard to the views of the public in whose name decisions are made. This effect would be particularly strong if public panels consistently reached different conclusions about public interest judgements than the regulators themselves.



Conclusion

Throughout the course of the Leveson Inquiry it has become increasingly clear that determining where the public interest lies is the critical question at the heart of press regulation. Both Demos and the Carnegie UK Trust, which actively contributed to the inquiry, were surprised to find that there was limited contemporary research with the public on what they themselves deemed to be in the public interest. This research project aimed to fill that gap, to avoid the pitfall of making assumptions about how the general public think about these issues.

The question of what we mean by the public interest needs to be addressed regardless of the type of regulatory system that Leveson recommends. We have not attempted to provide a thorough blueprint for the future of newspaper regulation. Our intention was rather to challenge the notion, implicit in much of the debate, that the public can easily be detached from judgements about their best interests. This is a trap that must be avoided whatever powers are eventually afforded to the new press regulator.

The research was carefully constructed to avoid knee-jerk reactions from the public of the kind often published following a press debate about intrusion (such as recent polls on whether *The Sun* should have published the controversial pictures of Prince Harry). As such, the results have allowed us to make three broad conclusions on a way forward.

1. The public interest must be much more clearly defined

One of the most interesting findings from our research is that the public values privacy more highly than either the press or indeed the courts has so far judged to be the case. The concerns that Leveson has been addressing are shared by many people beyond his courtroom. Our polling findings are a reminder to the newspaper industry that there are deep public misgivings

about intrusions into personal privacy and about investigative practices that may work outside of the law.

In setting guidelines on the public interest, citing examples is not enough - much clearer criteria must be established. We suggest that alongside the value of free speech, the 'what', the 'who' and the 'how' are a good place to start as the central components of any public interest guidelines. Our research consistently showed that the public are far more concerned with **what** a story is about and **how** it was gathered than **who** it is about when making judgements about whether publication is in the public interest.

But despite these clear indications, the public is also against hard and fast rules. They appear to support the key point made by media commentators that each case has to be judged on its own merits. The challenge is to define the public interest more clearly whilst avoiding rigid rules that may have unintended consequences.

2. The press must be more transparent to become more accountable

One of our key findings is that how a story is gathered is of critical importance in determining whether its publication is in the public interest. But this information is rarely provided by newspapers. Without providing this information, it is disingenuous to use the market-based argument that buying a paper is endorsing the story. Newspaper editors must be encouraged to be far more **transparent** about how they have gathered a story, wherever it is possible to do so, without jeopardising confidential sources, allowing consumers to make informed judgements about whether they find those methods acceptable.

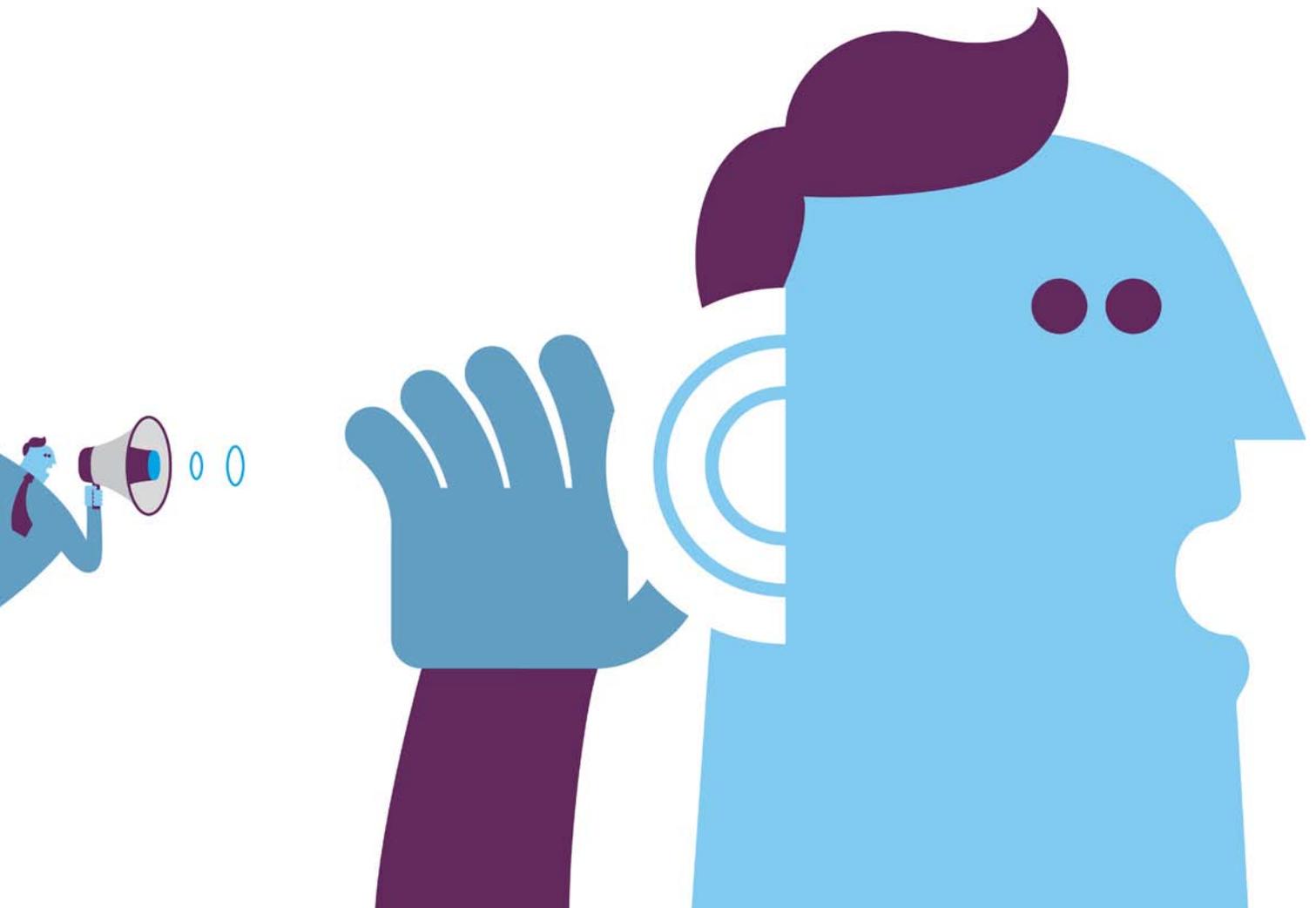
Part of the answer is for newspapers to give readers a formal voice in **governance** structures

which give readers a clearer voice to raise questions, debate points of contention and air complaints where necessary. Readers' editors are the most obvious recent innovation to be learnt from. Together these mechanisms may help newspapers to rebuild trust with the public.

3. The public must have a much stronger voice in press regulation and determining the public interest

Most people (correctly) think that the public has no current role in setting guidelines for the press but a majority think there should be a role for the public in setting such guidelines in the future. Decisions on what is and is not acceptable in the public interest must not be made behind closed doors.

How do we ensure that the public has a greater voice in debates about the public interest? Here, the **advocacy** models adopted by other regulatory bodies could be learnt from; there is no need to start from a blank sheet of paper. Consumer research, consultations and standing consumer panels are commonplace in other industries. These approaches should be embedded in the new press regulator from the start. The Leveson Inquiry and any reforms that result from it should concentrate not just on the powers of a new regulator, but also its legitimacy and connection to the public it will be asked to speak for.



Appendix 1: Definitions of the public interest

A number of industry bodies have developed ethical codes to guide journalists about appropriate conduct and to judge whether journalists have acted ethically in cases that have given rise to complaint. The concept of the public interest is of crucial importance here, and these codes contain some examples of the kinds of stories that might be in the public interest, while stopping short of any all-embracing definition.

The **Press Complaints Commission** posits the public interest as a kind of get-out clause that gives journalists scope to break the rules of its code of practice. Otherwise, proscribed practices such as invasion of privacy, harassment, using subterfuge, and paying criminals or trial witnesses can be justified so long as there is a demonstrable public interest.

The PCC uses the Editors' Code as guidance on the public interest, which:

includes, but is not confined to:

- i) Detecting or exposing crime or serious impropriety.*
- ii) Protecting public health and safety.*
- iii) Preventing the public from being misled by an action or statement of an individual or organization.*

It adds: *'There is a public interest in freedom of expression itself'. Editors are required 'to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time'.⁴¹*

Likewise, the **National Union of Journalists'** code of conduct invokes the public interest to allow journalists scope to use otherwise proscribed tactics, without giving any definition of the term:

[A journalist] obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means. [A journalist] does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.⁴²

The broadcasting regulator **Ofcom's** code, which oversees material broadcast on television and radio, covers similar ground to the Editors' Code used by the PCC. It cites a public interest justification for paying criminals and trial witnesses, withholding information from programme participants, using deception or misrepresentation, infringing privacy, and engaging in surreptitious filming. It sketches a definition of public interest:

Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.⁴³

In the **BBC's** editorial guidelines, the corporation's list of editorial values includes 'serving the public interest', which is explained as a list of aims:

We seek to report stories of significance to our audiences. We will be rigorous in establishing the truth of the story and well informed when

⁴¹ Press Complaints Commission (2012) *Editors' Code of Practice* PCC; online <http://www.pcc.org.uk/cop/practice.html> [accessed Sept 2012]

⁴² National Union of Journalists (2012) Code of conduct NUJ; online <http://www.nuj.org.uk/innerPagenuj.html?docid=174> [accessed Sept 2012]

⁴³ Ofcom (2009) *The Ofcom Broadcasting Code* (revised 2009) Ofcom; online <http://stakeholders.ofcom.org.uk/binaries/broadcast/code09/bcode09.pdf>, p38 [accessed Sept 2012]

*explaining it. Our specialist expertise will bring authority and analysis to the complex world in which we live. We will ask searching questions of those who hold public office and others who are accountable, and provide a comprehensive forum for public debate.*⁴⁴

The document contains many references to the public interest, a concept which is explored most fully in the section covering privacy and the grounds on which it might justifiably be infringed:

Private behaviour, information, correspondence and conversation should not be brought into the public domain unless there is a public interest that outweighs the expectation of privacy.

There is no single definition of public interest. It includes, but is not confined to:

- exposing or detecting crime
- exposing significantly anti-social behaviour
- exposing corruption or injustice
- disclosing significant incompetence or negligence
- protecting people's health and safety
- preventing people from being misled by some statement or action of an individual or organisation
- disclosing information that assists people to better comprehend or make
- decisions on matters of public importance.

There is also a public interest in freedom of expression itself.

When considering what is in the public interest, we also need to take account of information already in the public domain or about to become available to the public.

*When using the public interest to justify an intrusion, consideration should be given to proportionality the greater the intrusion, the greater the public interest required to justify it.*⁴⁵

In April, 2012, the **Crown Prosecution Service** published interim guidelines on the approach prosecutors should take when assessing the public interest in cases involving the activities of the media. This was produced after the Director of Public Prosecutions undertook to do so at the Leveson Inquiry. From the media's point of view, this guidance gives a sense of whether they can ever break the law in pursuit of public interest journalism without fear of prosecution (it can never guarantee them immunity, however). It builds on the code already used by the CPS to decide whether it is in the public interest to launch any prosecution. The code is framed as a carefully calibrated balancing exercise - the prosecutors have to weigh the potential public interest served by what a journalist has done against the type of criminal conduct involved. The guidelines cite the following factors as relevant in deciding whether the public interest might have been served:

- Conduct which is capable of disclosing that a criminal offence has been committed, is being committed, or is likely to be committed.
- Conduct which is capable of disclosing that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which they are subject.
- Conduct which is capable of disclosing that a miscarriage of justice has occurred, is occurring, or is likely to occur.
- Conduct which is capable of raising or contributing to an important matter of public debate.

⁴⁴ BBC (undated) *BBC Editorial Guidelines* BBC; online http://downloads.bbc.co.uk/guidelines/editorialguidelines/pdfs/Editorial_Guidelines_in_full.pdf, para 1.2.6 [accessed Sept 2012]

⁴⁵ *Ibid*, para 7.1

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- Conduct which is capable of disclosing that anything falling within any one of the above is being, or is likely to be, deliberately concealed.

Against this, prosecutors must consider:

- The impact on the victims of the conduct in question, including the consequences for the victims,
- Whether the victim was under 18 or in a vulnerable position,
- The overall loss and damage caused by the conduct in question,
- Whether the conduct was repeated or likely to continue,
- Whether there was any element of corruption in the conduct in question,
- Whether the conduct in question included the use of threats, harassment or intimidation,
- The impact on any course of justice, for example whether a criminal investigation or proceedings may have been put in jeopardy,
- The motivation of the suspect in so far as it can be ascertained (examples might range from malice or financial gain at one extreme, to a belief that the conduct would be in the public interest at the other), and
- Whether the public interest in question could equally well have been served by some lawful means.⁴⁶

⁴⁶Crown Prosecution Service (2012) *DPP launches public consultation on cases affecting the media* CPS; online http://www.cps.gov.uk/news/press_releases/109_12/ [accessed Sept 2012]

Appendix 2: Approval ratings of stories in the polling

Story	Source	Figure	Approval Rating
Others at risk	Friends / neighbours	MP / Councillor	71
Others at risk	Friends / neighbours	Judge	71
Making money illegally	Friends / neighbours	Judge	69
Making money illegally	Friends / neighbours	MP / Councillor	68
Others at risk	Friends / neighbours	Director	68
Others at risk	Friends / neighbours	Reality TV Star	67
Others at risk	Friends / neighbours	Sports star / actor	67
Making money illegally	Friends / neighbours	Director	66
Others at risk	Friends / neighbours	Member of public	66
Making money illegally	Friends / neighbours	Reality TV Star	62
Making money illegally	Friends / neighbours	Sports star / actor	62
Making money illegally	Friends / neighbours	Member of public	59
Competence	Friends / neighbours	MP / Councillor	55
Competence	Friends / neighbours	Judge	53
Competence	Friends / neighbours	Director	50
Lying	Friends / neighbours	MP / Councillor	47
Others at risk	Bins	MP / Councillor	46
Others at risk	Bins	Judge	46
Lying	Friends / neighbours	Judge	45
Others at risk	Bins	Director	44
Making money illegally	Bins	Judge	43
Others at risk	Bins	Reality TV Star	43
Making money illegally	Bins	MP / Councillor	42
Lying	Friends / neighbours	Director	42
Others at risk	Bins	Sports star / actor	42
Others at risk	Bins	Member of public	42
Making money illegally	Bins	Director	41
Competence	Friends / neighbours	Reality TV Star	40
Competence	Friends / neighbours	Sports star / actor	40
Making money illegally	Bins	Reality TV Star	37
Making money illegally	Bins	Sports star / actor	37
Lying	Friends / neighbours	Sports star / actor	37
Lying	Friends / neighbours	Reality TV Star	36
Making money illegally	Bins	Member of public	34
Kiss and Tell	Friends / neighbours	MP / Councillor	33

Appendix 2: Approval ratings of stories in the polling

Story	Source	Figure	Approval Rating
Kiss and Tell	Friends / neighbours	Judge	31
Competence	Friends / neighbours	Member of public	31
Kiss and Tell	Friends / neighbours	Reality TV Star	30
Kiss and Tell	Friends / neighbours	Sports star / actor	29
Competence	Bins	MP / Councillor	26
Kiss and Tell	Friends / neighbours	Director	26
Lying	Friends / neighbours	Member of public	26
Competence	Bins	Judge	25
Others at risk	Premises	Judge	25
Others at risk	Premises	MP / Councillor	24
Competence	Bins	Director	24
Others at risk	Premises	Director	23
Lying	Bins	MP / Councillor	22
Others at risk	Premises	Reality TV Star	22
Others at risk	Premises	Sports star / actor	22
Others at risk	Premises	Member of public	22
Lying	Bins	Judge	21
Making money illegally	Premises	Judge	20
Lying	Bins	Director	20
Making money illegally	Premises	MP / Councillor	19
Making money illegally	Premises	Director	18
Competence	Bins	Reality TV Star	18
Competence	Bins	Sports star / actor	18
Kiss and Tell	Friends / neighbours	Member of public	18
Lying	Bins	Reality TV Star	17
Making money illegally	Premises	Reality TV Star	16
Making money illegally	Premises	Sports star / actor	16
Lying	Bins	Sports star / actor	16
Kiss and Tell	Bins	MP / Councillor	15
Making money illegally	Premises	Member of public	15
Kiss and Tell	Bins	Judge	14
Kiss and Tell	Bins	Reality TV Star	14
Kiss and Tell	Bins	Sports star / actor	13
Competence	Bins	Member of public	13
Competence	Premises	MP / Councillor	12

Appendix 2: Approval ratings of stories in the polling

Story	Source	Figure	Approval Rating
Competence	Premises	Judge	12
Lying	Bins	Member of public	12
Kiss and Tell	Bins	Director	11
Lying	Premises	Judge	10
Competence	Premises	Director	10
Lying	Premises	MP / Councillor	9
Lying	Premises	Director	8
Competence	Premises	Reality TV Star	8
Kiss and Tell	Bins	Member of public	8
Kiss and Tell	Premises	MP / Councillor	7
Kiss and Tell	Premises	Judge	7
Lying	Premises	Reality TV Star	7
Competence	Premises	Sports star / actor	7
Lying	Premises	Sports star / actor	7
Kiss and Tell	Premises	Reality TV Star	6
Kiss and Tell	Premises	Sports star / actor	6
Competence	Premises	Member of public	6
Kiss and Tell	Premises	Director	5
Lying	Premises	Member of public	5
Kiss and Tell	Premises	Member of public	4

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