

Written evidence submitted by News Media Association (DPB24)

Submission to Data Protection [Lords] Bill, including the Opinion of Antony White QC

Summary

1. The News Media Association (NMA) is the voice of Britain's national, regional and local news media. Our members publish around 1000 newspaper titles read by 48 million adults a month, in print and online, including nearly 250 independent local newspapers. They are the biggest investors in original news content accounting for 58 per cent of the total spent on news provision in the UK.
2. The NMA and its members strongly support the Government's amendments (Nos. 50, 60, 61 and 72) to excise clauses inimical to freedom of expression from the Data Protection Bill:
 - Publishers of news-related material: damages and costs (clause 168);
 - Publishers of news-related material: interpretative provisions (clauses 169 and 205(2)(b));
 - Inquiry into issues arising from data protection breaches by news publishers (clause 142).
3. Our submission includes the Opinion of Antony White QC on clause 168 (damages and costs sanctions) to which the Committee is referred in full. This sets out clear and compelling legal reasons why clause 168 must not be enacted and must be removed from the Bill.
4. We propose other special purposes and freedom of expression amendments for the protection of journalistic, academic, literary and artistic processing against pre-publication intervention by the Information Commissioner's Office (ICO) and exploitation by claimants, contrary to the freedom of expression rights (clauses 174 and 176).
5. It is also vital that GDPR implementation results in extremely robust and comprehensive protection of media archives, private and public, over and above any present safeguards provided by the special purposes exemptions. The GDPR exemptions and protections must be used to maximum effect to protect media archives (clause 19).

Amendment of the Bill to leave out clauses 168, 169, 205 (2)(b)

6. The NMA strongly opposes clauses 168, 169 and 205(2)(b). Clause 168 is unlawful to enact and the NMA supports the removal of the clauses from the Bill as set out in the Government's amendments.
7. The Data Protection Bill is intended to implement GDPR and make our data protection laws fit for this digital age. The GDPR makes specific protection for freedom of expression and information and mandates special exemptions for journalistic, academic, literary and artistic processing and news archives.
8. Instead clauses 168 and 169 would subvert data protection legislation into an instrument of state control of news publishers by requiring the courts to punish publishers by use of costs sanctions, for doing nothing wrong, but simply because they have, lawfully and for reasons of principle, chosen not to join a regulator approved by the Press Recognition Panel under the Royal Charter system. The clauses would require the courts to order such publishers to pay the claimants' costs in any data protection action, even though the court has found that the publisher has acted lawfully. Thus Clauses 168 and 169 are intended to force publishers into the system of press regulation by Royal Charter, underpinned by statute.

9. This is inimical to press freedom. The clauses breach the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It would be unlawful for Parliament to enact these clauses and, if it did so, these provisions would be liable to be struck down by the UK courts as in breach of the Charter of Fundamental Rights and directly applicable EU law and also likely to be found by the European Court of Human Rights to be a violation of the Convention on Human Rights. We refer you to the views of Lord Pannick QC, Lord Lester QC and Lord Brown of Eaton-under-Heywood on these clauses, expressed in debates during the passage of the Bill through the House of Lords.

Opinion of Antony White QC: Clause 168 Unlawful to Enact

10. The Opinion of Antony White QC is submitted as part of this NMA evidence. This sets out clear and compelling legal reasons why clause 168 of the Data Protection Bill must not be enacted and must be removed from the Bill.
11. The Opinion addresses the compatibility of clause 168, as brought from the House of Lords on 18 January 2018, with the right to freedom of expression and information contained in Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (the Charter). It explains the legal consequences of any incompatibility.
12. **It concludes that clause 168 is incompatible with Articles 6, 10 and 14 ECHR and Articles 11, 21(1) and 47(2) of the Charter. If enacted it would be liable to be struck down by the UK courts on the basis that it is inconsistent with directly applicable EU law, and/or liable to be found by the European Court of Human Rights (ECtHR) to be in violation of the ECHR.**
13. This is clear and compelling evidence for amendment of the Bill and removal of Clauses 168, 169 and 205(2)(b).
14. In setting out the reasons, the Opinion clearly explains the operation and effect of clause 168 upon all caught within its ambit, from the most local of newspapers to international news services. It explains how the clause would impact not only on *“all of the national, local and regional newspapers in the country, but also on online news providers, magazines, and news agencies such as the PA, Reuters, Bloomberg etc.”* The Opinion outlines the ambit and potential seriousness of the data protection claims against the media and their chilling effect, describing how the data protection regime inevitably embraces all the activities of journalism, pre-publication and post-publication, from journalistic inquiry to day-to-day operational equipment including the laptop, the printing press or other equipment that translate the information to printed newspaper or online media.
15. The Opinion outlines how data protection claims and costs sanctions *“will impact not just upon investigative journalism but to all day-to-day reporting of the courts, local and national government, the police, health service, education, public authorities, businesses, the charitable and voluntary sectors, and any other field of human activity which might be newsworthy.”* It describes how and why *“it will always be possible for individuals who are of interest to the media to formulate claims under that legislation in relation to the publication of any articles about them, or in relation to pre-publication journalistic enquiries about them.”*
16. The Opinion sets out the inevitable chilling effect upon freedom of expression created by clause 168. *“There is no doubt that the markedly less favourable costs regime imposed on defendants who are not members of an approved regulator will have a chilling effect on the journalistic activities of publishers who have chosen not to join IMPRESS. They will inevitably be less willing to investigate and publish articles about living individuals which might attract claims for breach of*

the data protection legislation. That chilling effect will have an impact even where a publisher believes it has grounds to defend such a claim, because the effect of clause 168(3) is that it will be unlikely to recover its costs even if the claim fails.”

17. Most importantly, the Opinion sets out the compelling legal basis for amendment of the Bill and removal of Clause 168. Paragraphs 15-18 state that clause 168 if enacted would be in violation of Article 10 ECHR and Article 11 Charter right to freedom of expression and information. Paragraphs 19-21 state that clause 168 is contrary to the prohibitions on discrimination contained in Article 14 ECHR and Article 21(1) of the Charter. Paragraphs 22- 25 state the incompatibility of clause 168 with Article 6 ECHR and Article 47(2) Charter right of access to the court in respect of coerced arbitration. Paragraphs 26- 29 set out the legal consequences of clause 168 breach of Articles 10, 14 and 6 of the European Convention on Human Rights and Articles 11,21 and 47(2) of the Charter.
- 18. The Opinion unequivocally concludes that Parliament cannot lawfully enact clause 168 and, if it did so, it would be liable to be struck down by the UK courts as incompatible with directly applicable EU law and also liable to be found by the European Court of Human Rights to be in violation of the European Convention on Human Rights.**
19. Parliament cannot lawfully enact legislation which is incompatible with directly applicable EU law measures and any such legislative provisions, whether contained in primary or secondary legislation, are liable to be struck down by the UK courts.
20. The rights to freedom of expression and information, non-discrimination and access to the court now contained in Articles 11, 21 and 47(2) of the Charter have direct effect in UK law, and any legislative provision which is incompatible with those Charter rights is liable to be struck down by the UK courts. An example of this happening in the case of the existing data protection legislation can be seen in the decision of the Court of Appeal in *Vidal-Hall v Google Inc* [2016] QB 1003 where the court struck down part of section 13 of the Data Protection Act 1998 on the ground that it was incompatible with the Charter.
21. The disadvantageous costs regime imposed by clause 168 on media publishers which make the lawful and principled choice to join IPSO and not to join IMPRESS violates these directly effective Charter rights and if enacted clause 168 would be liable to be struck down by the English court.
22. Alternatively, the compatibility of the provision could in due course be tested before the ECtHR, and a finding that it violates the Convention rights would be likely to be made.

Cost sanctions: unlawful, unnecessary, unjust and unsustainable for a free press

23. If clause 168 is enacted, the consequences for journalism would be catastrophic, especially for local newspapers, but also for international and national newspapers and magazines ranging from the FT and the Mirror, to the Economist and Nursing Times, news websites like HuffPost and the Independent, and news agencies such as the Press Association, all of whom, for reasons of principle, have not joined and will not join a Press Recognition Panel recognised regulator. The additional legal costs for this data protection version of section 40 Crime and Courts Act 2013, would be likely to exceed the cost of implementation of the original section 40, which were estimated as £52 million a year in additional legal costs for the national newspaper sector and £48 million for the regional and local press for libel and privacy actions.
24. This is because of the nature of data protection controls and the nature of journalism and the media. Practically anything relating to an identifiable living individual is encompassed by the data protection regime. Any article, piece of information or inquiry relating to an identifiable living

person is encompassed by the data protection regime. Newspapers would not be able to survive if they were only able to run stories about the deceased and anonymised events.

25. As the Opinion sets out, claimants already seek to exploit the data protection regime and allegations of breach will be applied to any journalistic activity or media operation, before, after publication and irrespective of publication. These clauses will be exploited as instruments of repression and suppression, with state sanction of the press enforced by the courts. They will punish good journalism through costs sanctions, even after vindication by the court. They will chill investigation and publication, thereby preventing the press from performing its proper role in democracy.
26. These clauses would result in a flood of ill-founded threats, claims and litigation, with attendant crippling costs of defence, even if rebutted at the earliest stage. Clause 168 would have a chilling effect on investigation, reporting and publication, from the inception of a story right through to the keeping of news archives which chronicle our national and local life. The reporting of courts, councils or even Parliament itself would be targeted by those seeking to repress unwelcome reporting or the removal of historic reports from archives. Clause 168 would make investigations such as the Paradise Papers or Oxfam scandal all but impossible to publish.
27. The section 40-style clauses discriminate against all news media publishers, magazine publishers and news agencies but exempt other publishers and broadcasters. Therefore, if there was a joint investigation by, say, the Guardian and ITV, it is the newspaper which would be sued (at no risk to the claimant) and not the broadcaster. Even if the court vindicates its journalism it must order the newspaper to pay the unsuccessful claimant's costs as well as bearing its own.
28. The threat of costly litigation would chill all newspaper journalism. Editors would be forced to be infinitely more cautious with practically all stories, resulting in bland and supine newspapers unable to investigate wrongdoing or hold the powerful to account.
29. This chilling effect upon freedom of expression is not justifiable. Clause 168 would punish local, regional and national newspapers and magazines merely for lawfully deciding to join IPSO and rejecting the Royal Charter system, for reasons of principle. Clause 168 would be in breach of the ECHR and the Charter of Fundamental Rights of the European Union.

Publishers will not be forced into Royal Charter state sponsored regulation

30. Clause 168 is designed as an instrument of coercion. If enacted, publishers will maintain their lawful, reasonable and principled refusal to be forced into joining a regulator recognized by the Press Recognition Panel. The industry holds fundamental objections to the Royal Charter system because it amounts to state-sponsored regulation of the press. The industry does not want to be part of a press regulatory system established by the state and changeable by politicians. The Royal Charter was written by politicians, brought into existence through the Privy Council and underpinned by legislation which can be changed at any time by politicians. This is the thin end of the wedge to full blown statutory regulation of the press which is incompatible with press freedom in a democratic society.
31. There is no justification whatsoever for clause 168 as a means to coerce publishers into a system of press regulation against their will. Leveson himself stressed that the system should be voluntary. The idea of having some form of 'incentive' to join a press self-regulatory system stemmed from unfounded fears at the time that the press might not bind itself to any regulator and a view that certain significant national titles such as the Daily Express or others then outside of the PCC would need to be persuaded into membership. Instead the industry established a powerful new regulator, IPSO, which will never apply for statutory recognition by the PRP on press freedom grounds and because it is unnecessary. Membership of IPSO is underpinned by

binding contracts in civil law, rather than by statute. More than 1500 print and 1100 online titles are contracted in law to be regulated by IPSO. Its members include the vast majority of national, regional and local newspapers and magazines including Express Newspapers. The only national or significant regional newspapers not in membership of IPSO are the Guardian, the FT and the Evening Standard and they are united with the rest of the industry in their opposition to the Royal Charter system of state-sponsored press regulation and to another public inquiry.

32. Currently, the only recognised regulator is IMPRESS (funded by the IPRT which has its funding guaranteed by the Alexander Mosley Charitable Trust, the family trust set up by press reform campaigner Max Moxley). IMPRESS is run by a chief executive who was found to have brought the organisation into disrepute by sharing tweets attacking senior journalists and national newspapers he disliked. Clause 168 will not succeed in forcing publishers to join IMPRESS.

There is no ‘opt-out’ for local newspapers

33. The regime also compels local papers to sign up to a costly arbitration scheme which would only increase the financial pressure on the sector. Under the Royal Charter system, the local press cannot opt out of arbitration, much less any individual local title choose to do so, however hard-pressed financially. The Royal Charter ([Schedule 2, Cyclical Reviews \(5-7\)](#)) says that any decision to allow local publishers in membership of a state-recognised regulator a possible voluntary exemption from arbitration - which is entirely at the discretion of the PRP – can only be announced when a cyclical review of the recognition of a regulator is published. These occur once every three years so local publishers would have to (a) agree to sign up to IMPRESS and its compulsory arbitration system, which they oppose on press freedom grounds, and (b) wait up to three years for evidence to be submitted to and considered by the PRP, for the PRP to then determine whether the arbitral process causes those publishers serious financial harm and, on that basis, for the PRP to decide whether arbitration should be voluntary or mandatory for such publishers. Sadly, a struggling local paper could go under in much less time than that, particularly in the current climate.
34. IPSO provides low-cost arbitration and access to justice routes are available, including ICO funding for data protection court proceedings against the media and conditional fee agreements. There is no ‘access to justice’ problem to justify the clause 168 costs sanctions as a means to force membership of IMPRESS and use of its arbitration scheme. Initially, editors seek to resolve complaints directly or via IPSO, without any cost to complainants.
35. In accordance with the Leveson recommendations, IPSO not only upholds the Editors’ Code of Practice, adjudicates complaints, orders corrections and upholds standards with powers to fine up to £1 million but it provides a low-cost arbitration scheme, under which no claimant would normally pay more than £100 for making and pursuing a legal claim to determination. The IPSO arbitration scheme covers data protection claims (which IMPRESS does not), defamation, malicious falsehood, misuse of private information, breach of confidence and harassment (for full details of the IPSO arbitration scheme and fees, see IPSO [Arbitration](#)).

Arbitration cannot be compulsory

36. Leveson did not recommend compulsory arbitration, he recommended a “fair, quick and inexpensive” system which is what IPSO provides, offering an arbitration service for a maximum of £100. All national titles in IPSO membership have signed up to the arbitration service. For all intents and purposes, IPSO’s procedures are fully Leveson compliant.

37. By its very nature, arbitration cannot be compulsory, it must be entered into voluntarily by both sides. Furthermore, as explained in the Opinion, coercive arbitration under clause 168 is likely to be in breach of the ECHR and the EU Charter of Fundamental Rights.
38. Claimants can also still bring legal actions under the 'no win no fee' conditional fee agreements and if successful can continue to recover from publisher defendants the success fee uplifts for their lawyers (up to 100%) and huge ATE premiums, in addition to their legal costs and damages in respect of defamation, privacy and related media law claims. In addition, the Data Protection Bill uniquely allows the Information Commissioner to fund any claimant's litigation brought against journalistic, artistic, literary and academic activities, be it for court enforcement action or court proceedings for damages.

Another inquiry: unnecessary, costly and threatens further freedom of expression restrictions

39. The NMA strongly supports Government amendment no. 50 to leave out clause 142.

40. Yet another statutory inquiry into the news media is unnecessary, a waste of taxpayers' money, open to exploitation by those seeking to destabilise media investigations and publications, and could result in more recommendations damaging to freedom of speech.
41. The public has firmly rejected reopening the Leveson Inquiry (with 66 per cent of direct respondents to the Government consultation against and just 12 per cent in favour). The Government has now announced its decision not to continue with Leveson Part 2. The clause added by peers to the Data Protection Bill calls for a different type of inquiry: one which conveniently excludes politicians and the police but which would drag the entire media – broadcast, print and online – into a far-reaching and costly inquiry into any editorial coverage of any matter past, present or future. It could be exploited through allegations and complaints intended to deter and disrupt investigation.
42. All media, including broadcasters and local papers which were vindicated by Leveson, would be dragged into this and tarred with the same brush. The spectre of a second inquiry is already being weaponised to shut down legitimate debate and investigation in the public interest. Its terms of reference appear framed to lead to recommendations damaging to freedom of expression. Its wide terms would draw in broadcasters, newspapers, news agencies, NGOs and bloggers, any organisations within the media and other persons combined with its open-ended remit would result in an inquiry that would take many years to report and cost the state millions which could be better spent on public services.
43. Thorough investigations have already taken place and a new statutory inquiry into the media would represent a profound waste of taxpayers' money.
44. The well-documented issues of the past have been forensically investigated and addressed through a multitude of criminal and civil cases brought against newspapers in recent years. These have provided explanation, punishment and compensation. The News of the World was closed down. Police investigations led to the arrests of 67 journalists; 57 were cleared and 10 were convicted in addition to convictions of 11 police officers and staff and 19 public officials. The DPP announced in 2015 that no further action was merited against individuals or in respect of corporate liability. The US Department of Justice announced that, following investigation, there would be no corporate prosecutions.
45. A new inquiry and recommendations are unnecessary to formulate new media controls. The press is regulated by a myriad mixture of criminal and civil laws. This includes the Bribery Act 2010, Regulation of Investigatory Powers Act 2016, Official Secrets Acts 1911-1989, Computer Misuse Act 1990, anti-terrorism legislation, Contempt of Court Act 1981 and numerous other

restrictions on court reporting, data protection (offences, civil remedies, enforcement action and sanctions), the law of confidence, defamation, slander, malicious falsehood, misuse of private information, intellectual property, law regulating public order, harassment, trespass, against incitement to racial and religious hatred and other discrimination. The criminal and civil law is ever expanding. As a result of the Leveson review there are criminal law reforms under consideration by the Law Commission to tighten the law yet further on misconduct in public office, protection of official data, and criminalising leaks in ways that threaten journalists and their sources such as whistleblowers. The Law Commission is also conducting a review of the law relating to offensive online content and other controls are under consideration as a result of the Government's internet safety strategy.

46. A new inquiry would be an unnecessary burden on the public purse. The Leveson Inquiry and resulting investigations cost taxpayers £49 million. Sir Brian Leveson himself questioned the value of a second inquiry, saying in May 2012 that it would *"involve yet more enormous cost (both to the public purse and the participants); it will trawl over material then more years out of date and is likely to take longer"* than the first. He now says he would like there to be another inquiry but that he is not available to chair this and that its original terms of reference are no longer appropriate. A public consultation has firmly rejected reopening the inquiry and the Government has rightly concluded that Part 2 is not in the public interest.

IPSO provides tough, independent regulation – with a low-cost arbitration scheme

47. Neither clause 168 costs sanctions nor a new statutory inquiry are necessary to effect reform of independent press regulation. Publishers and editors have faced up to their responsibilities since the Leveson Report. The Press Complaints Commission was disbanded. A new regulator IPSO was established, led by former appeal court judge Sir Alan Moses, with real powers based in civil law allowing it to extract real penalties including £1 million fines for the most serious breaches. It offers a low-cost arbitration scheme to claimants. It has also brought about a transformation in the internal complaints handling procedures at all newspaper companies.
48. IPSO regulates over 2,600 print and online titles including the vast majority of national, regional and local newspapers and magazines. An independent review by Sir Joseph Pilling found it to be effective, independent and largely Leveson-compliant. IPSO has since introduced a low-cost arbitration system in which the national titles in IPSO membership are all participating – one of the key Leveson recommendations.

Conclusion

49. The clauses on a new statutory media inquiry and costs sanctions, intended to force membership of a state-sponsored system of press regulation and creating a backdoor to Leveson 2 and Section 40, would be damaging to freedom of expression and contrary to the European Convention on Human Rights and the Charter of Fundamental Rights. They would be devastating for journalism – especially for the hard-pressed local newspapers whom Sir Brian Leveson considered should be supported. These clauses must be removed from the Bill. We support the Government's amendments to leave out clauses 142, 168, 169 and 205(2) (b).
50. We welcome the Government's commitment to terminate the Leveson Inquiry and to repeal section 40 of the Crime of Courts Act 2013 which represents a grave threat to freedom of speech and has been overwhelmingly rejected by the public in one of the largest responses to any government consultation (79 per cent to 7 per cent). The challenges facing the industry are well documented and these spectres in the background are an unwelcome distraction from the real issue at hand which is ensuring that news media journalism - which people are consuming in greater numbers than ever before - has a financially sustainable future. The Government should also look at ways to help the industry to do this, for example by exploring the impact of the big

tech platforms on newspapers, and investing much more of its taxpayer-funded ad spend in trusted and brand-safe news brands.

Improvement of freedom of expression safeguards

51. Archiving (clause 19)

Literary, artistic, journalistic and academic archives both private and public, are of huge cultural importance and must be rigorously safeguarded. The GDPR marks out news archives and press libraries for particular protection. It explicitly states that the protection for freedom of expression should extend to “news archives and press libraries.” It is vital that GDPR implementation results in extremely robust comprehensive protection of media archives, private and public, over and above any present safeguards provided by the special purposes exemptions. Media organisations, be they the most local of newspaper titles or a national title with global circulation, must not be under constant and costly legal attack, or the chilling effect of its threat, by any individual exploiting any potential loophole in order to erase any information about themselves, rewrite history and claim compensation for damage or distress. The GDPR exemptions and protections must be used to maximum effect to protect media archives.

52. Journalism Exemption - Use of the word ‘only’ (clauses 174(3) and 176)

The journalism exemption has been expanded to ensure it provides effective protection for processing for the special purposes which cannot be undermined by external factors. However, other provisions which have an impact on the application of the exemption in practice have not been consistently amended. Article 85 of the GDPR, which requires exemptions to be provided for the purposes of journalism, art or literature, does not require that processing only take place for those purposes in order to benefit from the journalism exemption. Whilst the word ‘only’ in relation to the special purpose of journalism has been removed from the journalism exemption in the Bill (Clause 170 (3)(c)(i)) the word ‘only’ remains in clauses 174 and 176.

53. This means that clauses 174 and 176 of the Bill could enable the ICO and the courts to intervene, prior to publication, in editorial judgments in circumstances where processing is not considered to be conducted only for the special purposes. If personal data is sought for the purposes of a police investigation, for example, such data may be considered to be processed for multiple purposes, but that would not diminish the importance of protecting the underlying journalistic material from interference by the subject of any investigation. The retention of these clauses in their current form could place the ICO, a public body sponsored by a government department - which could find itself as the subject of an investigation - and the courts in the position of a censor over literary, artistic, journalistic and academic activities and could deprive them of the power they currently have to resist attempts to require them to interfere prior to publication. This undermines the protection afforded by the journalism exemption to a significant degree and places a large amount of discretionary power in the ICO’s hands.

54. The word ‘only’ in clauses 174(3)(a) and 176(1)(a) should be removed to make these clauses consistent with the journalism exemption and ‘a’ changed to ‘any’ consistent with 1998 Act provision.

55. Suggested amendments

Clause 174: The special purposes

Clause 174, page 100, line 11, leave out ‘only’

Clause 174, page 100 line 13, leave out ‘a’ and insert ‘any’

Clause 176: Staying special purposes proceedings

Clause 176, page 101, line 28, leave out ‘only’

Examples of media coverage and editorials

[The Guardian view on Leveson part two: Look Ahead, Not Behind](#)

“... Leveson 2 would ultimately end up like a driver learning to steer by looking in the rear-view mirror at the road behind rather than the one ahead... The first part of Leveson had a substantial effect. Two press regulators are now in existence. The airing of illegal practices carried out by the press over years led to very public criminal trials. Forty individuals – including 10 journalists – were convicted... The Guardian played a major part in revealing criminal behaviour but this paper does not believe in a form of legislative retaliation that targets investigative journalism for the criminal and moral flaws of the few... Journalists must be responsible for standards and ethics but it is wrong to think a state body should hold the exercise of power by the press to account. A critical, investigative press exists independently. The freedom to do so needs to be protected because it is the lifeblood of democracy...” (*The Guardian*, 1 March 2018)

[Index welcomes announcement on Section 40](#)

“Implementing Section 40 would have meant that Index, which refuses to sign up to a state-backed regulator – and many other small publishers – could have faced crippling court costs in any dispute, whether they won or lost a case. This would have threatened investigative journalists publishing important public interest stories as well as those who challenge the powerful or the wealthy.” (Index on Censorship, 1 March 2018)

[Politicians haven't given up on getting back at the press: Data Protection Bill proves it](#)

“... the amendments to the bill could have a hugely negative impact on journalism in this country, especially investigative reporting. It would, at a stroke, empower people in positions of power – and with deep pockets – with the tools they need to stop journalists prying into things that they very much ought to be prying into... Fundamentally, the press has a duty to behave responsibly. But it must also be empowered to act in the interests of the public by investigating dodgy deals, murky secrets, hypocrites and charlatans of every sort – and even, should the need arise, the way elected representatives are remunerated beyond their basic salaries.” (*Will Gore, Independent*, 6 March 2018)

[Ashley Highfield: The House of Lords is risking the future of local newspapers](#)

“Just a few weeks before Theresa May underlined the vital importance of local papers to our democracy, the House of Lords did something astonishing to undermine our work. They used an entirely unrelated Bill on data protection to sneak through an amendment that could threaten the existence of many local newspapers. Now elected MPs need to protect the work of the local press – and local democracy – by undoing the work of unelected peers... If someone didn't like a critical story their local newspaper had run, they could threaten legal action in the knowledge that even if they lost they would face no cost and the newspaper would be damaged, possibly ruined. It would have a chilling effect on journalism... To be absolutely clear, we want – and expect – robust press regulation. But that cannot mean a choice between quasi-state regulation and the constant fear of financial annihilation at the hand of those who do not want to be held to account.” (*The Yorkshire Post*, 9 February 2018)

[Don't give elites a legal way to strangle investigative journalism](#)

“the casual aligning of arguments (if you oppose Leveson 2, you are betraying victims of phone hacking) has rather overshadowed the practical consequences... Over the past 18 months, the Guardian has challenged multinational companies, billionaires and oligarchs over their financial affairs. MPs and Lords have come under the microscope too. Would we do it again if the data protection bill goes through as it is? I doubt it. The financial risks would be too great... The forces

that most influence our lives now are not the Fleet Street media organisations of yesteryear, but corporations and individuals of eye-watering wealth, some of which use the secrecy of offshore jurisdictions to avoid the scrutiny that journalists should be attempting. These people, and their businesses, don't need more legal weapons to thwart us." (*Nick Hopkins, head of investigations, The Guardian, 6 March 2018*)

[Evening Standard comment: Mr Hancock is right – we don't need Leveson 2](#)

"Certainly when David Cameron first set up the Leveson Inquiry he envisaged the investigation would be in two parts, but the response of the industry to the first Leveson report has been sufficiently far-reaching to make a second redundant. Any new inquiry would be dealing with newspaper conduct then, not now; and some of the abuses in question would date back 15 years, an interval in which the world in which papers operate has changed beyond recognition... a flourishing press is critical to the health of democracy; social media, for all its welcome vitality, is no substitute for the standards of journalism practised by established titles." (*Evening Standard comment, 1 March 2018*)

[Hijacking of data bill will prevent press uncovering scandals like Oxfam, former culture secretary warns](#)

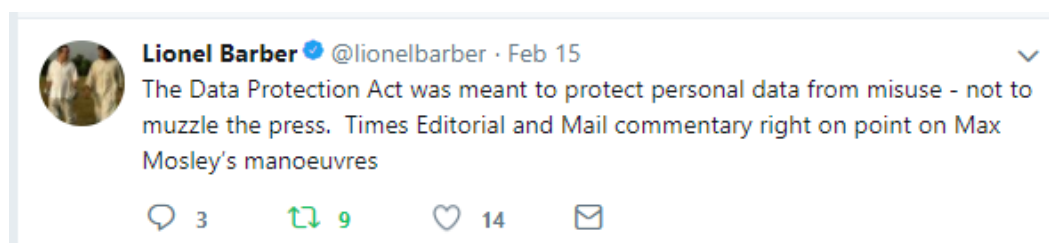
"'Deeply damaging' changes to data protection legislation by peers threaten press freedom and would have made it 'impossible' for newspapers to expose scandals such as the sexual misconduct of Oxfam workers in Haiti, [former culture secretary John Whittingdale has warned.]" (*The Sunday Telegraph, 4 March 2018*)

[Leveson Inquiry: Move welcomed to drop Section 40 which spelled 'hammer blow' to local newspapers](#)

"A controversial measure which would have been a 'hammer blow' for regional newspapers will be dropped by the Government." (*Express and Star, West Midlands, 1 March 2018*)

[In Self-Defence](#)

"Privacy campaigners have no business undermining press freedom and the rule of law, however deep their pockets... It is no coincidence that democracy and the free press have grown in tandem over the past two and a half centuries. They need each other... The traditions and liberties of a vibrant free press occasionally leave bruises but they serve the common good, and they cannot be taken for granted." (*The Times, 15 February 2018*)



March 2018

**ANNEX TO WRITTEN EVIDENCE SUBMITTED BY NEWS MEDIA ASSOCIATION –
OPINION OF ANTONY WHITE QC**

IN THE MATTER OF CLAUSE 168 OF THE DATA PROTECTION BILL

OPINION

Introduction

1. I am asked by the News Media Association to consider the compatibility of clause 168 of the Data Protection Bill, as brought from the House of Lords on 18 January 2018, with the right to freedom of expression and information contained in Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (the Charter). I am asked to explain the legal consequences of any incompatibility.
2. For the reasons I shall develop below I am of the view that clause 168 is incompatible with Articles 6, 10 and 14 ECHR and Articles 11, 21(1) and 47(2) of the Charter. For that reason it would if enacted be liable to be struck down by the UK courts on the basis that it is inconsistent with directly applicable EU law, and/or liable to be found by the European Court of Human Rights (ECtHR) to be in violation of the ECHR.

Clause 168

3. Clause 168 provides as follows:-

168 Publishers of news-related material: damages and costs

(1) This section applies where—

- (a) a relevant claim for breach of the data protection legislation is made against a person (“the defendant”),
- (b) the defendant was a relevant publisher at the material time, and
- (c) the claim is related to the publication of news-related material.

(2) If the defendant was a member of an approved regulator at the time when the claim was commenced (or was unable to be a member at that time for reasons beyond the defendant’s control or it would have been unreasonable in the circumstances for the defendant to have been a member at that time), the court must not award costs against the defendant unless satisfied that—

- (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator, or
- (b) it is just and equitable in all the circumstances of the case to award costs against the defendant.

(3) If the defendant was not a member of an approved regulator at the time when the claim was commenced (but would have been able to be a member at that time and it would have been reasonable in the circumstances for the defendant to have been a member at that time), the court must award costs against the defendant unless satisfied that—

- (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator (had the defendant been a member), or
- (b) it is just and equitable in all the circumstances of the case to make a different award of costs or make no award of costs.

(4) This section is not to be read as limiting any power to make rules of court.

(5) This section does not apply until such time as a body is first recognised as an approved regulator.

4. Clause 169 makes provision for the interpretation of clause 168. Clause 169 provides as follows:-

169 Publishers of news-related material: interpretive provisions

(1) This section applies for the purposes of section 168.

(2) “Approved regulator” means a body recognised as a regulator of relevant publishers.

(3) For the purposes of subsection (2), a body is “recognised” as a regulator of relevant publishers if it is so recognised by any body established by Royal Charter (whether established before or after the coming into force of this section) with the purpose of carrying on activities relating to the recognition of independent regulators of relevant publishers.

(4) “Relevant claim” means a civil claim made in respect of data protection under the data protection legislation.

(5) The “material time”, in relation to a relevant claim, is the time of the events giving rise to the claim.

(6) “News-related material” means—

- (a) news or information about current affairs,
- (b) opinion about matters relating to the news or current affairs, or
- (c) gossip about celebrities, other public figures or other persons in the news.

(7) A relevant claim is related to the publication of news-related material if the claim results from—

- (a) the publication of news-related material, or
- (b) activities carried on in connection with the publication of such material (whether or not the material is in fact published).

(8) A reference to the “publication” of material is a reference to publication—

- (a) on a website, (b) in hard copy, or
- (c) by any other means;

and references to a person who “publishes” material are to be read accordingly.

(9) A reference to “conduct” includes a reference to omissions; and a reference to a person’s conduct includes a reference to a person’s conduct after the events giving rise to the claim concerned.

(10) “Relevant publisher” has the same meaning as in section 41 of the Crime and Courts Act 2013.

5. Section 41 of the Crime and Courts Act 2013 defines “Relevant publisher” as a person who, in the course of a business (whether or not carried on with a view to profit), publishes news-related material which is written by different authors, and which is to any extent subject to editorial control. However, schedule 15 to that Act excludes a substantial number of publishers from this definition, either individually (for example the BBC) or by category (broadcasters, special interest titles, scientific or academic journals, public bodies and charities, company news publications, certain micro-businesses employing fewer than 10 employees, and book publishers). The purpose of this complex definition is to capture national, local and regional newspapers and their online editions, online-only edited press-

like content providers, and gossip and lifestyle magazines¹. Accordingly, clause 168 will if enacted impact not only on all of the national, local and regional newspapers in the country, but also on online news providers, magazines, and news agencies such as the PA, Reuters, Bloomberg etc.

6. The Explanatory Notes to the Bill in its present form explain the purpose of clause 168 as follows:-.

Clauses 168 and 169: Publishers of news-related material

489 These clauses were inserted into the Bill by amendments tabled by Earl Attlee. They are not supported by the government.

490 These clauses provide a cost-shifting mechanism for "relevant publishers" as defined by section 41 of the Crime and Courts Act 2013 to incentivise membership of an "approved regulator". These clauses mean that, in relevant media related court cases (i.e. those in relation to data protection), the presumption is that newspapers which are members of an approved self-regulator are exempt from paying their opponents' legal costs, even if they lose a case. The presumption would also mean that newspapers outside an approved self-regulator must pay their own and their opponents' legal costs, even if they win a case. The overall objective is to drive the claimant and the publisher into low-cost arbitration by a regulator approved by the Press Recognition Panel. On 1 November 2016 the government published a consultation (http://bit.ly/Leveson_con) to explore the commencement of section 40 of the Crime and Courts Act 2013, which includes similar cost shifting incentives but in relation to different categories of media-related court cases. The government's response to the consultation will be published shortly.

7. As is well known, and as the extract from the Explanatory Notes cited above recognises, clause 168 is modelled on section 40 of the Crime and Courts Act 2013 (a controversial provision which has not been brought into force). The main difference between the two provisions is that section 40 of the 2013 Act deals with claims for libel, slander, breach of confidence, misuse of private information, malicious falsehood and harassment², whereas clause 168 deals with claims for breach of the data protection legislation.
8. It is important to appreciate the ambit and potential seriousness of claims against the media for breach of the data protection legislation to which clause 168 relates.
9. The first point to note is that because clause 169(7) provides that a relevant claim is related to the publication of news-related material if the claim results from either (a) the

¹ The purpose of the complex definition of "relevant publisher" was explained by Lord McNally, Minister of State for Justice, 744 HL Official Report (5th Series) cols 849, 850 as follows: "This section and [Sch 15](#) provide "a definition of "relevant publisher" that captures national newspapers and their online editions, local and regional newspapers and their online editions, online-only edited press-like content providers, and gossip and lifestyle magazines . . . Clearly, the online version of the national press, its regional counterpart or an online yet press-like news site, carry very different public expectations when compared with a small-scale blog-or, for that matter, a tweet. Our definition of "relevant publisher" seeks to make this differentiation. It does so by employing an interlocking series of tests, all of which must be met before the threshold of the definition is reached. They are, first, whether the publication publishes news-related material; secondly, whether it is written by different authors; thirdly, whether it is to any extent subject to editorial control; and, fourthly, whether it is published in the course of a business. The definition is therefore intended to protect small-scale bloggers while capturing the more sophisticated, press-like online material that Leveson described . . . The definition of "relevant publisher" is aimed at organisations that employ or otherwise commission journalistic content, and, even then, only to the extent that these organisations operate in line with the four interlocking tests that I outlined".

² See section 42(4) of the 2013 Act.

publication of such material or (b) activities carried on in connection with the publication of such material (whether or not the material is in fact published), clause 168 covers not only claims based on alleged breaches of the data protection legislation relating to published articles, but also to claims relating to pre-publication journalistic activities whether or not these result in the publication of any article.

10. Almost all journalism inevitably concerns some information about living individuals, and therefore involves personal data for the purposes of the data protection legislation. This applies not only to investigative journalism but to all day to day reporting of the courts, local and national government, the police, health service, education, public authorities, businesses, the charitable and voluntary sectors, and any other field of human activity which might be newsworthy. In all these fields of reporting, as the Court of Appeal recognised in *Naomi Campbell v MGN Ltd* [2003] QB 633 at [121]-[122], the definition of processing in the data protection legislation is so wide that it embraces all of the activities of journalism from obtaining and recording information to the relatively ephemeral operations carried out by way of the day-to-day tasks, involving the use of electronic equipment, such as the laptop and the modern printing press, in translating information into the printed newspaper or other medium.
11. The substantive requirements of the data protection legislation (including in particular a statutory duty to comply with a highly technical and restrictive set of data protection principles, and data subject rights to request access to their data and to object to its processing) mean that it will always be possible for individuals who are of interest to the media to formulate claims under that legislation in relation to the publication of any articles about them, or in relation to pre-publication journalistic enquiries about them. Indeed it is becoming increasingly common for claimants in media cases to bring claims for breach of the data protection legislation based on the publication of information about them or pre-publication processing of their data. In many cases media defendants can rely on defences available to them under the legislation (in particular the conditional exemption for journalistic processing currently contained in section 32 of the Data Protection Act 1998), but that does not prevent claims being brought which may disrupt journalistic enquiries and will inevitably be costly to defend.
12. This exposure to claims for breach of the data protection legislation which will inevitably be costly to defend is the key to understanding the significance of clause 168. In ordinary litigation the general rule is that costs “follow the event”, in other words the losing party pays both his own and his opponent’s costs – see CPR 44.2(2)(a). Clause 168 departs from this general rule by introducing a presumption applicable to claims for breach of the data protection legislation which depends on whether the media defendant is or is not a member of an approved regulator (the only one at present being IMPRESS).
13. If the media defendant is a member of an approved regulator, the court *must not* award costs against it, unless the issues in the claim could have been resolved by the arbitration

scheme of the approved regulator or it is just and equitable to make a different costs award: clause 168(2). Accordingly the general rule will be that a claimant suing a media defendant who is a member of an approved regulator will not be able to recover his costs, win or lose, in any case where the claim could have been resolved using the arbitration service, unless the defendant has refused to use the arbitration service. By contrast, if the defendant is not a member of an approved regulator, the court *must* award costs against it, unless the issues could not have been resolved by arbitration using an arbitration scheme of an approved regulator or it is just and equitable to make a different award of costs: clause 168(2). This means that where the defendant is not a member of an approved regulator, the general rule will be that it will be ordered to pay the claimant's costs, whether or not the claim has succeeded.

14. It is therefore clear that clause 168 imposes a much less favourable costs regime in claims for breach of the data protection legislation on media defendants who are not members of an approved regulator. Clause 168(3) creates a presumption that such defendants (unlike defendants who are members of an approved regulator) must pay all the costs of the claim, that is their own and the claimant's costs, whether the claim succeeds or not. There is no doubt that the markedly less favourable costs regime imposed on defendants who are not members of an approved regulator will have a chilling effect on the journalistic activities of publishers who have chosen not to join IMPRESS. They will inevitably be less willing to investigate and publish articles about living individuals which might attract claims for breach of the data protection legislation. That chilling effect will have an impact even where a publisher believes it has grounds to defend such a claim, because the effect of clause 168(3) is that it will be unlikely to recover its costs even if the claim fails.

The Article 10 ECHR/Article 11 Charter right to freedom of expression and information

15. It is well established that financially disadvantageous measures of this sort in connection with litigation can amount to an interference with the media defendant's right to freedom of expression and information under Article 10 ECHR and Article 11 of the Charter. It matters not that whether the chilling effect can be shown to have impacted on the particular facts of the case, since it is the potential chilling effect which matters. This is illustrated by the decision of the ECtHR in *MGN v United Kingdom* (2011) 29 BHRC 686³ holding that the success fees which the newspaper had to pay to the solicitors for Naomi Campbell after her successful privacy claim were a violation of Article 10. At [201] the ECtHR made the point that:-

“It is, moreover, not necessary to consider, in any particular case, whether a damages award has a chilling effect on the press as a matter of fact so that, for example, unpredictably large damages awards in defamation cases are considered capable of having such an effect (*Independent News and Media v Ireland* [2005] ECHR 55120/00 at para 114).”

³ This case was extensively considered by the Supreme Court in *Times Newspapers Ltd v Flood (No. 2)* [2017] 1 WLR 1415, and assumed at [41] to be correct.

16. The costs regime under clause 168 amounts to a more obvious interference with the right to freedom of expression and information than the liability to success fees considered in *MGN v United Kingdom*. In the case of the success fees the newspaper was only exposed to liability if the claim succeeded. Under clause 168 media defendants who have chosen not to join IMPRESS are exposed to the disadvantageous costs consequences whether the claim succeeds or not.
17. The interference created by clause 168 with the Article 10 ECHR/Article 11 Charter right of freedom of expression and information cannot in my view be justified under Article 10(2) ECHR and Article 52(1) of the Charter where the imposition of the disadvantageous costs regime on a category of media publishers is based solely on their lawful and principled⁴ decision to join IPSO and not to join IMPRESS.
18. No-one has suggested that in declining to join IMPRESS media publishers are acting unlawfully. Nor could that be suggested. Indeed it is noteworthy that the data protection regulator (the ICO) in her guidance to the media recognises, and encourages media publishers to follow, the Editors' Code of Practice, which sets out the rules that newspapers and magazines regulated by IPSO have agreed to follow⁵. In reality the imposition of the disadvantageous costs regime is a punishment for making a lawful decision to join IPSO and not to join IMPRESS. It is a fundamental principle of public law that it is unlawful to punish a person who has done nothing wrong – see *Congreve v Home Office* [1976] QB 629, 651 and *Wheeler v Leicester City Council* [1985] AC 1054. In EU law terms such a punishment would be regarded as arbitrary and/or would not pursue a legitimate aim and/or would contravene the principle of proportionality.

The prohibitions on discrimination contained in Article 14 ECHR and Article 21(1) of the Charter

19. Further, in my view the interference with the media publishers' rights of freedom of expression and information arising from the imposition of a disadvantageous costs regime on those publishers which have chosen to join IPSO and not to join IMPRESS is also contrary to the prohibitions on discrimination contained in Article 14 ECHR and Article 21(1) of the Charter respectively. Article 14 ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention "shall be secured without discrimination on any ground such as ... political or other opinion ...or other status". Similarly, Article 21 of the Charter prohibits any discrimination "based on any ground such as", amongst other things, "political or other opinion". Article 14 ECHR is one of the sources of Article 21(1) of the Charter.

⁴ In *R (News Media Association) v Press Recognition Panel* [2017] EWHC 2527 (Admin) it was recognised that the position of IPSO in declining to seek recognition from the PRP as an approved regulator was a "principled" one.

⁵ ICO publication "Data protection and journalism: a guide for the media", p.21.

20. The reference in Article 14 ECHR to “other status” has been interpreted widely, and Article 14 has been held to be engaged by, and to require a member state to justify, differential treatment between trade unions in a legislative measure providing for consultation – see *National Union of Belgian Police v Belgium* [1975] EHRR 578, cited with approval by Lord Walker in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [61].
21. As Lord Nicholls explained at [16] in *M v Secretary of State for Work and Pensions*, Article 14 ECHR is engaged whenever the subject matter of the disadvantage comprises one of the ways a state gives effect to a Convention right ("one of the modalities of the exercise of a right guaranteed"). It seems to me that the imposition of a disadvantageous costs regime on a category of media publishers falls squarely within that concept – if enacted clause 168 will be one of the ways the UK regulates the exercise of the right of free expression and information. Accordingly, the differential adverse treatment of media publishers which have chosen to join IPSO rather than IMPRESS will engage Article 14 ECHR and require justification. Since their choice was a lawful and principled one, and the differential adverse treatment applies across the board from the largest national newspaper to the smallest regional title, I find it difficult to see how justification could be established. Further, given that Article 21(1) of the Charter is based in part on Article 14 ECHR, it seems to me that it is likely to be interpreted in a similar way and with a similar outcome.

Article 6 ECHR/Article 47(2) Charter right of access to the court

22. There is in my view a further objection to the disadvantageous costs regime imposed by clause 168 on those publishers which have chosen to join IPSO and not to join IMPRESS.
23. One of the effects of clause 168 is to coerce media publishers into participating in an arbitration scheme offered by an approved regulator by penalising them in costs if they decline to do so. Where a financial penalty is imposed for refusing to use an arbitration service it is strongly arguable that such compulsion is incompatible with Article 6 ECHR/Article 47(2) of the Charter.
24. It is well-established that a court may deprive a successful party of his costs where there has been an *unreasonable* refusal to use alternative dispute resolution mechanisms (“ADR”) - see *Dunnett v Railtrack* [2002] 1 WLR 2434. However, this is subject to the important limitation that there should be no compulsion to use ADR, whether by means of costs provisions or otherwise. As Dyson LJ giving the judgment of the Court of Appeal stated in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [9]:-

“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the ECHR that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to ‘particularly careful review’ to ensure that the claimant is not subject to ‘constraint’: see *Deweert v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach

of the European Court of Human Rights to an *agreement* to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.”

25. In *Halsey* the Court of Appeal accepted that it was permissible for the court to encourage parties to use mediation, provided such encouragement did not amount to compulsion. Accordingly it was permissible to deprive a successful party of his costs if the losing party could show that the successful party had unreasonably refused a genuine invitation to mediate. The requirement to mediate involves a temporary interruption of a party’s right of access to the court, but does not ultimately deprive a party of such access. In the present case, the disadvantageous costs regime imposed by clause 168 is designed to compel parties to give up their right of access to the courts and participate in an arbitration scheme. In the circumstances the principle recognized in *Halsey* applies with even greater force.

Consequences of breach of Articles 10, 14 and 6 ECHR/11, 21 and 47(2) of the Charter

26. Parliament cannot lawfully enact legislation which is incompatible with directly applicable EU law measures, and any such legislative provisions, whether contained in primary or secondary legislation, are liable to be struck down by the UK courts. This has been clearly established since the landmark decision of the House of Lords in *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1, and has been applied many times since – for a recent example see *R (British Telecommunications plc) v Secretary of State for Culture, Olympics, Media and Sport* [2012] Bus LR 1766 where part of the draft Copyright (Initial Obligations) (Sharing of Costs) Order 2011 was struck down on the ground that it was incompatible with the Authorisation Directive.

27. The rights to freedom of expression and information, non-discrimination and access to the court now contained in Articles 11, 21 and 47(2) of the Charter have direct effect in UK law, and any legislative provision which is incompatible with those Charter rights is liable to be struck down by the UK courts. An example of this happening in the case of the existing data protection legislation can be seen in the decision of the Court of Appeal in *Vidal-Hall v Google Inc* [2016] QB 1003 where the court struck down part of section 13 of the Data Protection Act 1998 on the ground that it was incompatible with the Charter.

28. In my view, for the reasons developed above, the disadvantageous costs regime imposed by clause 168 on media publishers which make the lawful and principled choice to join IPSO and not to join IMPRESS violates these directly effective Charter rights and if enacted clause 168 would be liable to be struck down by the English court.

29. Alternatively, the compatibility of the provision could in due course be tested before the ECtHR, and a finding that it violates the Convention rights would in my view be likely to be made.

I shall be glad to advise further on any point arising if so desired.

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26 January 2018