DRAFT JOURNALISM CODE OF PRACTICE: CONSULTATION RESPONSE OF THE MEDIA LAWYERS ASSOCIATION

1. This submission is provided on behalf of the Media Lawyers Association ("MLA"), an association of in-house media lawyers set up to promote and protect, through co-operation, monitoring and lobbying, freedom of expression and the right of everyone to receive and impart information, opinions and ideas. The MLA has a broad membership including many of the major UK leading newspapers, broadcasters, book publishers, magazines and representative bodes (such as the News Media Association, which is the voice of national, regional and local news media organisations across the UK). A list of the MLA members is included within the Appendix.

2. The MLA provides input on behalf of the media on matters that have significant implications for the public's right to receive information, for media freedom and the ability of MLA members to report and investigate on matters of public interest. The MLA engages in public consultations on matters that affect the media including proposed legislation impacting freedom of expression.

3. The MLA and its members contributed to the debate and consultation that resulted in the 2014 ICO Guide "Data Protection and Journalism". This consultation process consisted of both written submissions and constructive dialogue with the then Commissioner, Christopher Graham. The MLA also submitted a written response in response to the ICO's Call for Views in 2019 consultation fundamental to all of the MLA members. The MLA supports the ICO's acknowledgement that "*journalism plays a vital role in the free flow of communications in a democracy*" and welcomes the opportunity to respond to this consultation.

4. DPA 2018 s124(1) requires the Commissioner to prepare a code of practice which contains
   (a) Practical guidance in relation to the processing of personal data for the purposes of journalism in accordance with the requirements of the data protection legislation; and
   (b) Such other guidance as the Commissioner considers appropriate to promote good practice in the processing of personal data for the purposes of journalism.

5. DPA s124(5) defines "good practice" as "such practice in the processing of personal data for those purposes as appears to the Commissioner to be desirable having regard to
   (a) The interests of data subjects and others, including compliance with the requirements of the data protection legislation, and
   (b) The special importance of the public interest in the freedom of expression and information.

6. Here are 9 suggestions as to how the draft Code should be amended to comply with these statutory objectives.

(1) Simplify, clarify and shorten the draft Code

7. At 93 pages, the draft Code is almost twice as long as the previous *Data protection and journalism: a guide for the media* (2014). It also lacks the helpful separation, observed in the 2014 Guidance, between "practical" and "technical" guidance. Technical aspects of data protection law are interwoven throughout the draft. The result is an unwieldy document that is unlikely to be of practical utility to busy journalists and editors. It speaks principally to in-house lawyers and DPOs, who are already likely to have a good grasp of how data protection principles apply to the media.

8. The MLA would therefore encourage the Commissioner to consider simplifying , clarifying and shortening the Code. There are a number of ways in which that could be achieved.

9. First, there is a high degree of repetition that could be reduced.

10. Second, for the reasons developed under heading (3) below, discussion of the accountability principle should be confined to Section 2 of the Code. Removal of the many references to policies and record-keeping elsewhere will shorten, clarify and simplify the Code.

11. Third, the MLA queries the appropriateness of including "case examples". A few case examples were included in the 2014 Guidance, but the new Code has statutory force

and must be taken into account by the courts and the Commissioner (DPA 2018, s127). The focus of such a Code ought to be on identifying the principles of data protection law that are relevant to the field of journalism. There is a particular concern, addressed under (4) below about the use of case examples drawn from first instance decisions which, through inclusion in a statutory code, may acquire a precedential value that they ought not to have. Case examples would be better included in the complementary material that the Commissioner proposes to publish, so that a clear distinction is drawn between principles that a court or the commissioner must take into account, and material that is purely illustrative.

12. Fourth, there are quite lengthy passages addressing the law in areas other than data protection (privacy, defamation etc). Whilst it is helpful to point out the similarities between data protection law and other areas of the law with which journalists may be familiar, this could be done much more briefly. We make the point below that there is a particular danger in including lengthy discussion of cases in areas where the law is developing. It may lead to the Code quickly becoming out of date.

(2) Explain "personal data"

13. The 2014 guidance contained a helpful section identifying the limits of the DPA 1998 as it applied to journalism: see p.22 "what is personal data". In particular this made it clear that the legislation did not affect anonymised records, information about deceased persons, or unstructured paper records such as journalists handwritten notebooks (except where it is intended that their contents be transferred to a computer system or structured filing system at a later date). We believe that a similar section should be included in the Code.

14. On a related point, there is a potentially misleading reference to "notebooks" on p.41. Either it should be made clear here that it is electronic notebooks that are being referred to, or a qualification needs to be included to make clear that information recorded in physical notebooks only qualifies as personal data where it is written with the intention of later transferring it to a computer or structured filing system.

(3) Give proper recognition to the principle of editorial discretion

15. An essential aspect of ECHR Art 10 is the requirement that due regard should be had to the editorial decisions made by journalists. This extends to their choice of which issues to cover, what newsgathering techniques to employ, and the verbal and pictorial content of what they finally decide to publish. Recognition of this principle, at the highest levels of authority, includes the following:

"Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case"

Axel Springer AG v Germany (2012) 55 EHRR 6, the ECtHR (Grand Chamber)

"...judges are not newspaper editors".

Campbell v MGN Ltd [2004] 2 AC 457 [59] (Lord Hoffman); see also Lord Hope at [108] & [116].

" The freedom of the press to exercise its own judgment in the presentation of journalistic material has been emphasised by the Strasbourg court. In Jersild v Denmark (1994) 19 EHRR 1 *, the court said, at para 31, that it was not for it, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. It recalled that article 10 protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed. In essence article 10 leaves it for journalists to decide what details it is necessary to reproduce to ensure credibility: see Fressoz and Roire v France (1999) 31 EHRR 28 , para 54"*

Re BBC [2010] 1 AC 145 [25], Lord Hope.

"A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively":

O v Rhodes [2016] AC 219, [78] (Baroness Hale).

16. The degree of deference that must be given to editorial discretion was explained in striking terms by the Court of Appeal in *Ali v Channel 5 Broadcasting Ltd* [2019] EWCA Civ 677 [83] after a review of the leading authorities:

"…editorial discretion cannot render lawful an interference with privacy which cannot logically or rationally be justified by reference to the public interest served by publication. But that where there is a rational view by which public interest can justify publication, particularly giving full weight to editorial knowledge and discretion, then the court should be slow to interfere." (emphasis added)

17. This required deference to editorial decision making needs to be respected when considering both limbs of the journalism exemption (reasonable belief that publication would be in the public interest *and* reasonable belief that the application of the listed GDPR provisions would be incompatible with the purposes of journalism). If it is not, courts and regulators will find themselves impermissibly substituting their own views as to what should be researched and published. Pluralism in the media (which is regarded as a public good in itself) will be damaged.

18. The present draft Code gives insufficient recognition to this important principle and is likely to lead the courts and ICO decision makers into error. The breadth of editorial discretion that the law protects should be expressly addressed in the introduction to Section 1 (*"Why is it important to balance journalism and privacy?"* p.25). The point should also be repeated explicitly when addressing both of the "reasonable belief" aspects of the journalism exemption (pp.28 & 32).

(4) Give greater recognition to the public interest in freedom of expression itself

19. This is acknowledged (e.g. at p.29) but requires stronger emphasis. Otherwise the Code risks creating the impression that the journalism exemption is only available in cases of serious investigative journalism concerning potential topics such as the exposure of wrongdoing, threats to public health and safety etc. Such an impression would be misleading. A belief that publication would be in the public interest simply because it involves the lawful exercise of the right to freedom of expression is capable of being a reasonable one. If this is not made clear, this will likely result in a chilling effect on journalism.

(5) Reduce the recommendations for policies and record-keeping

20. The draft Code makes frequent recommendations that journalists should have data protection-focussed policies in place and keep records. As well as DPIAs (which the

MLA accepts are mandatory where the conditions in GDPR Art 35(1) are made out) and records of processing activities (mandatory for at least the largest media organisations under Art 30), the draft Code recommends, among other things:

- "clear policies and procedures" for delegating data protection decision making (p.28, p.37)
- "clear policies and procedures" for decision making involving the special purposes exemption, and records of those decisions (p.33-34)
- Regular reviews of how policies/procedures are working (p.38)
- A data security policy (p.41)
- Records of decision making where covert surveillance, subterfuge etc to be used (p.55)
- Fact-checking policies and "systems to record inaccuracies and monitor recurring themes" (p.60, p.63)
- Records of sources and research used for a story (p.62)
- Policies and procedures for dealing with inaccuracy complaints (p.62, p.81)
- Retention policy (p.71)
- Data sharing agreements with third party controllers (p.74)
- Records of inaccuracy complaints (p.82)
- Records of the sources of opinions expressed in articles (p.82)

21. The MLA believes this prescriptive approach is impractical, unnecessary, and potentially in conflict with ECHR Art 10.

22. It is impractical because the Code will apply to a huge range of journalists, from individual bloggers and freelancers to international broadcasters. Many individuals and smaller organisations will be unable to cope with the administrative burden. Even within the membership of the MLA, the capacity of individual organisations to undertake additional record-keeping activities will vary. It is also impractical because it fails to take into account the nature of journalism. Modern journalism is a 24-hour operation, requiring quick decisions to be made in response to developing situations so that news can be reported in a timely manner. Individual stories are often the product of input from many journalists, operating with a high degree of independence. Sometimes they will be in different time zones or different territories with different

legal regimes. Some journalistic investigations involve confidential sources or other information so sensitive that it would be dangerous to document. Devising and implementing specific policies applicable to all the various fast-moving situations that present themselves, and producing specific audit trails, is unlikely to be workable.

23. The prescriptive approach is unnecessary because, with very few exceptions, the GDPR itself does not expressly require records and policies. What is required is that a controller should *"be able to demonstrate compliance"* with the data protection principles: Art 5(2). There are a variety of ways in which this can be done, and journalists/media organisations will often be able to do so by use of editorial guidelines, contemporaneous notes and drafts or witness evidence. Most media organisations already have compliance with their standards regulators (IPSO, Ofcom etc) built in to their operations and, as the draft Code acknowledges, this is likely to go a long way to enable them to demonstrate compliance with data protection law as well.

24. The prescriptive approach is potentially in conflict with ECHR Art 10 because of the resource implications, particularly for smaller organisations. Developing and maintaining the recommended policies and records is likely to impact disproportionately on the ability of media organisations to engage in their core (and Article 10-protected) endeavour of communicating valuable information to the public.

25. The danger with incorporating the prescriptive approach into the Code is that courts and ICO decision makers will regard it as the norm that media organisations should have these specific data protection-focussed policies and records in place and media organisations will be expected to justify their absence or face adverse consequences. That is not what the law requires. The requirement is simply that compliance can be demonstrated.

26. Accordingly, the MLA invites the Commissioner to remove the specific suggestions for particular policies and records, and to confine discussion of the Accountability Principle to Section 2 of the Code.

(6) Reduce the citation of first instance decisions

27. The MLA is concerned at the heavy reliance on first instance decisions in the draft Code, particularly when used as "case examples". First instance decisions have no formal value as precedents. They concern a specific set of facts, and their outcomes are sometimes contestable, even if not actually appealed. For example, the conclusion in *True Vision Productions* (case example on p.32), that the programme maker breached the law by using CCTV when hand-held cameras could have been used, is arguably inconsistent with the Tribunal's acknowledgment of the breadth of editorial discretion, earlier in its judgment. It is wrong that cases such as this should be elevated to the status of "model answers" and included in a Code whose provisions the courts and Commissioner "must take into account": DPA 2018 s127. It obscures the need for journalists, courts and the ICO to adopt a principle-based approach to the infinite variety of facts that arise in journalism.

28. There is an associated risk that over-reliance on first instance decisions will result in the Code becoming obsolete within a short amount of time. The law in this area is developing quickly and statements in first instance decisions are likely to be refined, even reversed, as the case law builds. It would be prudent to rely – at least for case examples – only on appellate cases which have a prospect of some longevity.

(7) State the law correctly

29. The MLA is concerned that the draft Code contains some statements of law which are wrong, or at least tendentious, and which should not feature in a Code which courts and the Commissioner "must take into account", three examples of which are set out as follows:

(a) Explanation of "incompatible with journalism"

30. The present draft states, p.32, *"You can rely on the exemption by demonstrating a reasonable belief that complying with a particular provision is incompatible with the purposes of journalism. In other words, it is necessary to not comply with data protection law in order to achieve your journalistic purpose*" (emphasis added).

31. The leading case on the journalism exemption remains *Campbell v MGN Ltd* [2003] QB 633 (CA). The Court of Appeal thought that the need for the journalism exemption

arises because the nature of news reporting makes it "impractical" for journalists to comply with many aspects of data protection law: see [122]. Considering the reasonableness of Piers Morgan's belief that omitting the photos of Ms Campbell would have been "incompatible" with the purposes of journalism, the Court then said this:

136. As to s.32(1)(c) Mr White submitted that there had been no necessity to publish the details of Miss Campbell's attendance at Narcotics Anonymous, or the photographs of her leaving the meeting, in order to put the record straight. It followed that Mr Morgan could not reasonably have believed it was incompatible with the purpose of journalism to refrain from publishing these details.

137.. We have held earlier in this judgment that the details of Miss Campbell's attendance at Narcotics Anonymous was part of a journalistic package that it was reasonable to publish in the public interest. We do not consider that it would have been reasonably practicable to comply with the provisions of the data protection principles while at the same time making the publications in question. It follows that the Appellants have made good their contention that the three conditions of exemption under s.32 were satisfied.

32. The Court was therefore clearly rejecting the proposition that compliance with data protection law will only be "incompatible" if it is necessary to breach its provisions in order to publish. What the editor must turn their mind to is whether full compliance would be "impractical" and it is this belief that the court or regulator must then test against the standard of reasonableness. This is an interpretation that gives proper effect to the principle of editorial discretion. An interpretation that permitted reliance on the exemption only where an editor believes that covering a story would necessarily involve a breach of data protection law would not give sufficient protection to editorial discretion.

33. To reflect the law as stated in *Campbell* therefore, the underlined words should be replaced with: *"In other words, it is impractical to comply with data protection law in conducting your journalism"*.

(b) Law on allegations of criminality

34. The current draft, at p.51, states *"The general starting point regarding criminal allegations is that a suspect has a reasonable expectation of privacy regarding investigations, including the fact that there is an investigation"*. This is potentially misleading. The law as it presently stands is that a straightforward allegation that

someone has behaved criminally (or that there are reasonable grounds to suspect that they have done so) does not engage their privacy rights. The individual may sue for defamation, but the publisher will have a defence of truth, if they have got their facts right. The individual cannot ordinarily frame their complaint in privacy. It is only the reporting of an investigation by the police or other state body that engages their privacy rights.

35. To avoid confusion on this point, the word "allegations" should be replaced with "investigations" both in the passage underlined above, and in the heading on p.51.

36. The MLA would add that the Supreme Court recently heard the appeal in *ZXC v Bloomberg*. The Court's judgment is likely to bring clarity to the law on this topic. If this section is to remain in the Code, it would be prudent to defer publication until the Court has given judgment.

(c) Protection of sources

37. The word "necessary" needs to be added to the following passage on p.80 in order to correctly state the law:

"...under section 10 of the Contempt of Court Act 1981, a publisher cannot be compelled to reveal the source of published information unless a court considers it to be [necessary] in the interests of justice or national security, or for the prevention of crime"

(8) Manage the expectations of data subjects

38. Media organisations now spend considerable time and resources dealing with subject access requests, requests for rectification, and other communications from data subjects seeking to exercise their GDPR rights. Regrettably, on occasions, these rights are asserted abusively, so as to frustrate journalistic investigations or to seek removal of inconvenient but lawful content. Section 10 of the draft Code could usefully be strengthened to make clear what a data subject might realistically expect when asserting their rights against a media organisation. Specifically, in this regard:

(1) *Reasons for refusal*: While the MLA accepts that it may be appropriate to explain why a data subject's request is being rejected, including by reference to the fact that the journalism exemption is being invoked, there will be cases where even giving that information will undermine the operation of the exemption, and cannot be required. This should be made clear on pp 80 and 83. By way of example, a response referring to the journalism exemption may tip off a data subject that they are the subject of an ongoing journalistic investigation, allowing them to destroy evidence and silence third-party sources;

(2) *Right to restriction*: cases where the right to restriction under GDPR Art 18 can properly be invoked against a media organisation pending determination of an accuracy dispute or objection to processing are likely to be very rare. There is a well-established practice of appending a notice to an online article that is the subject of a complaint while it is investigated (so called "*Loutchansky* notices" after *Loutchansky v Times Newspapers Ltd (nos2-5)* [2002] QB 793, a decision upheld by the ECtHR in *Times Newspapers Ltd (Nos 1 & 2) v UK* (Apps 3002/03 & 23676/03). This strikes the appropriate balance between claimant and defendant rights. In the case of an article which, an editor reasonably believes, it is in the public interest to publish, their belief that removing the article entirely would be incompatible with the purposes of journalism is highly likely to be accepted as reasonable. This should be made clear in the section headed "Right to restriction" (p.81) and the first paragraph on p.82 should be removed;

(3) *Right to rectification:* there is some ambiguity in the wording (p.82), *"Where you remain satisfied that the data is accurate, it is helpful to put a note on the system recording that the request challenges its accuracy and explain why"*. It might lead data subjects to expect that, by simply bringing an accuracy complaint, this would oblige a media organisation to flag the complaint in its online copy, even once the complaint has been investigated and rejected. That would not be required under the law. If this sentence is to remain, then *"the system"* should be changed to *"your internal system"*. Likewise, in the following paragraph (if it is to remain), *"your record"* should be changed to *"your internal record"*;

(9) Give greater clarity about the relationship between the ICO and other media regulators

39. The MLA welcomes the statement (p.18) that the Code does not concern press conduct or standards in general. Greater clarity could be achieved by setting out, in the "Disputes and Enforcement" section, two passages from the Commissioner's Regulatory Action Policy:

Regulatory Action Objective 5 reads:

"To work with other regulators and interested parties constructively, at home and abroad, recognising the interconnected nature of the technological landscape in which we operate and the nature of data flows in the expanding digital economy. Our aim is to establish effective networks with other regulators to cut down on regulatory burden and red tape."

And the section "selecting the appropriate regulatory activity for breaches of information rights" includes, in its list of considerations:

"whether another regulator, law enforcement bodies or competent authority is already taking (or has already taken) action in respect of the same matter"

40. Quoting these provisions in the body of the Code would again assist to manage data subjects' expectations as to where a complaint to the ICO might lead.

41. We would further suggest that, in accordance with Regulatory Action Objective 5, where a complaint to the ICO about a media organisation raises, in substance, an issue falling under the purview of the organisation's media regulator (IPSO, Ofcom etc), it would be appropriate, in the first instance, for the ICO to refer the matter to that regulator, and that this should be confirmed in the Code.

Conclusion

42. For the reasons given above, the MLA believes that the draft Code requires substantial further work. Attached to these submissions is a marked-up version of the draft Code, with suggestions consistent with the observations made above. We re-iterate however that, in our view, the draft needs to be rethought fundamentally, rather than simply being adjusted here or there. If the ICO accepts that a fundamental rethink is required,

the MLA would welcome the opportunity to provide further comments on the proposed redraft.

43. We note that it is the ICO's intention to supplement the Code with further guidance (without statutory effect) in due course. The MLA would welcome the opportunity to consult and comment on any such guidance prior to it being issued.

Appendix – MLA List of Members

Associated Newspapers Limited, publisher of the Daily Mail, the Mail on Sunday, MailOnline, Metro and related websites.

Bloomberg L.P: a financial, software, data and media company publisher of Bloomberg News and a variety of other business publications.

The British Broadcasting Corporation, a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.

British Sky Broadcasting Limited, a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.

BuzzFeed, a social news and entertainment company with a focus on digital media and digital technology.

Channel 5 Broadcasting Limited, a public service broadcaster of the Channel 5 service and two digital channels, interactive services and related websites.

Channel Four Television Corporation, public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.

The Economist Newspaper Limited, publisher of the Economist magazine and related services.

The Financial Times Limited, publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.

Guardian News & Media Limited, publisher of the Guardian, the Observer and Guardian website.

Harper Collins

Hearst, publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

Independent Digital News and Media Limited, publisher of the Independent online, the Evening Standard, and related websites.

Independent Television News Limited (ITN), ITN produces ITV News, Channel 4 News and 5 News through its Broadcast News Division. ITN Productions produces factual, entertainment and current affairs TV programmes, TV commercials and branded content, live sports clips and programmes, and digital content services.

ITV PLC, a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.

News Media Association, is the voice of the news media industry whose members publish over 900 national, regional and local titles, accounting for the majority of the total spend on news provision in the UK, and which reach 49.2 million adults each month, in print and online.

News UK, parent company of a) **News Group Newspapers** – publisher of The Sun and related magazines and websites; and b) **Times Newspapers Limited** – publisher of The Times and The Sunday Times and related websites.

The Press Association, the national news agency for the UK and the Republic of Ireland.

Reach PLC (including **MGN Limited** and **Express Newspapers**), publisher of over 140 local and regional newspapers, 9 national newspapers including the Daily Mirror, Sunday Mirror, The People, Daily and Sunday Express and Daily and Sunday Star, and over 400 websites.

Telegraph Media Group Limited, publisher of the Daily Telegraph, Sunday Telegraph and related websites.

Thomson Reuters PLC, international news agency and information provider.

Which?, the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.