MLA
MEDIA LAWYERS ASSOCIATION

1. This is a response to the 'Call for Views' issued by the Department for Culture, Media and Sport on the derogations to be implemented by the UK from the General Data Protection Regulation (the 'GDPR'). It is submitted on behalf of the Media Lawyers Association (the 'MLA'), which is an association of in-house media lawyers from many of the UK's leading newspapers, broadcasters, book publishers, magazines and news agencies, who publish information in the UK, EU and worldwide. The MLA's purpose is to promote and protect the fundamental right to freedom of expression and the right of everyone to impart and receive information, ideas and opinions. It is primarily, but not solely, concerned with "the media" and journalism. A number of members of the MLA have submitted individual responses to the Call for Views. A list of the MLA members who endorse this response is set out in Annex 1.

Summary of the MLA's response

2. The primary focus of the MLA's response to this submission is in relation to Theme 11, which is described as 'Freedom of Expression in the Media', and the derogations afforded by Article 85 GDPR. This response does, however, also address other themes in so far as the relevant rights and obligations have a particular adverse impact on the media, specifically issues raised by Themes 1, 2, 9 and 12.

3. The Supreme Court has recognised that the use and publication of personal data by those exercising the right to freedom of expression and information reflects the legitimate exercise of editorial judgment, protected under Article 10 of the European Convention on Human Rights. As Lord Rodger proffered, "*What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting*

*technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed…*"[1]

4. By contrast, the right to the protection of personal data encompasses a broad range of information, some - but by no means all - of which will merit protection under Article 8 of the European Convention on Human Rights. The right will not be engaged unless the interference attains a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. While the right to protect personal data may, in appropriate circumstances, provide a form of protection for an aspect of the right to privacy, in general the right to protect personal data may best be understood as a qualified right to exercise autonomy over personal information[2]. This is relevant to the exercise of balancing potentially competing rights.

5. Faced with implementing the Data Protection Directive[3], the statutory protection afforded for processing data for the special purposes of journalism, art or literature ('the special purposes') was intended to ensure that the Data Protection Act 1998 ('the DPA') did not inhibit, amongst other matters, the practice of media organisations. However, as judicial interpretation of the DPA has developed and the protections afforded to the special purposes have been challenged, it has become apparent both that there is inadequate protection for journalism, particularly as claimants have begun to attempt to utilise the DPA to usurp the protections afforded by the Defamation Act 2013, and also that in a number of respects uncertainty as to the application of the DPA remains, which is detrimental to the exercise of the right to freedom of expression and information.

6. The GDPR brings with it additional rights for data subjects and supervisory authorities and obligations on data controllers and data processors, and therefore the protections afforded to those processing for the special purposes, whether exercised by traditional media organisations, disseminators of content processed for the special purposes, other organisations and individuals, must be expanded to take into account these changes.

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[1] Application by Guardian News and Media Ltd and others in Her Majesty's Treasury v Mohammed Jabar Ahmed and others (FC) [2010] UKSC 1, at [63] per Lord Rodger giving the unanimous judgment of the Court

[2] Stunt v Associated Newspapers Ltd [2017] EWHC 695 (QB)

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

7. It is imperative that, in advance of the GDPR becoming enforceable as of 25 May 2018, and indeed at the earliest opportunity to bring certainty to organisations which are already preparing for its implementation, domestic legislation is introduced and commenced to protect the right to freedom of expression and information, as required by the GDPR itself. Such legislation must:
    i. Protect media freedom exercised by any controller or processor processing data for the special purposes, to include disseminators of such content, including by limiting the powers of supervisory authorities in connection with processing for the special purposes;
    ii. Clarify the circumstances in which those processing for the special purposes may be able to comply with the requirements of the DPA;
    iii. Maintain, clarify and extend the protection already provided for processing for the special purposes under the GDPR, to address deficiencies as well as new and expanded rights of data subjects;
    iv. Prevent data protection rights being used to usurp protections afforded to those exercising the right to freedom of expression and information under the Defamation Act 2013;
    v. Explicitly reflect the protection provided under the GDPR for news archives;
    vi. Explicitly provide a basis to permit those processing for the special purposes to process personal data relating to criminal convictions and offences and special categories of data;
    vii. Exempt those processing for the special purposes from certain obligations imposed on data controllers and data processors;
    viii. Provide for international data transfers in the context of processing for the special purposes;
    ix. Amend the defence under s55(2) DPA to be consistent with s32;
    x. Recognise that the only supervisory authority competent to exercise powers with respect to the exercise of the right to freedom of expression and information by data controllers and processors established in the UK is the UK's supervisory authority; and,
    xi. Expand the grounds upon which personal data may legitimately be disclosed to the media by organisations and individuals for the special purposes.

8. This is necessary to ensure that an appropriate balance is struck between competing rights and so the UK's cultural and artistic heritage is protected, enabling the media

and others to continue to operate effectively in creating and disseminating journalism, art and literature, which enriches society in the UK and promotes the UK abroad.

Protection for the right to freedom of expression and information under the GDPR

9. The GDPR mandates that Member States must implement such exemptions and derogations as are necessary to reconcile the right to the protection of personal data with rights to freedom of expression and information. It is well established in the jurisprudence of the Strasbourg court that the necessity for any restriction upon the right to freedom of expression, such as those contained within the GDPR, must be convincingly established and narrowly interpreted[4].

10. Recital (4) of the GDPR explicitly recognises that the Regulation *"respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity"*.

11. The scope of the protection that should be afforded to the fundamental right to freedom of expression is set out at Recital (153):

> *"Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where*

[4] The Sunday Times v UK (No.2) (1992) 14 EHRR 229, [50]

*such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly".*

12. Article 85 itself provides:

> *"1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.*
> *2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.*
> *3. Each Member State shall notify to the Commission the provisions of its law which it has adopted pursuant to paragraph 2 and, without delay, any subsequent amendment law or amendment affecting them."*

13. Such protection is necessary because, as the Advocate General recognised in Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy[5], the *"Strict application of the data protection rules could substantially limit freedom of expression"*. Accordingly, in its judgment, the Grand Chamber recognised the need *to "interpret notions relating to that freedom, such as journalism, broadly"*.

14. The MLA welcomes the explicit protection from the exercise of the right to erasure or right to be forgotten already provided by the GDPR at Article 17(3)(a).

<u>Article 10 of the European Convention on Human Rights</u>

15. Article 10 protects the right to freedom of expression and information and provides that:

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

[5] C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy [2010] All ER (EC) 213, at [43]

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

16. The scope of the right is now understood to extend to a right to obtain information from public authorities in certain circumstances[6], namely where the purpose of a request is for the purpose of the exercise of the right to freedom of expression and information and the information sought is necessary for the exercise of that right, there is a legitimate public interest in the information sought, the requester is acting in the role of "public watchdog" and having regard to the ease with which the information might be disclosed.

17. The European Court of Human Rights has recognised that Article 10 protects all kinds of expression. In Von Hannover v Germany (No.2)[7], the Court held that:

> *"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"."*

18. Article 10 does not solely protect investigative journalism, albeit that processing for this purpose would merit the strongest protection as being of the highest public interest, and, contrary to what was suggested by the Government when it published the consultation on press regulation issues[8], the need to ensure that journalism and freedom of expression is not curtailed as a result of the GDPR is not confined to investigative journalism. This has also been recognised by the domestic courts. For example, Munby J has upheld the right of those processing data for the purposes of freedom of expression and information to exercise that right in whatever manner they see fit:

> *"It is not the function of the judges to legitimise 'responsible' reporting whilst censoring what some are pleased to call 'irresponsible' reporting. The days*

[6] Magyar Helsinki Bizottság v Hungary (18030/11), 8 November 2016
[7] Von Hannover v Germany (No.2) (2012) 55 E.H.R.R. 15, [101]
[8] https://www.gov.uk/government/news/government-seeks-views-on-press-regulation-issues

*are past when the business of judges was the enforcement of morals. A judge, although it may be that on occasion he can legitimately exercise the functions of an aedile, is no censor. And as Strasbourg jurisprudence establishes… the freedom of expression secured by Art.10 is applicable not only to information or ideas that are favourably received, or regarded as inoffensive, but also to those that offend, shock or disturb the State or any section of the community. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. It is not for the court to substitute its own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 entitled journalists to adopt a particular form of presentation intended to ensure a particularly telling effect on the average reader. As Neill LJ recognised, a tabloid newspaper is entitled to tell the story in a manner which will engage the interest of its readers and the general public. If there is no bases for injunction a story expressed in the temperate or scholarly language of a legal periodical or the broad-sheet press there can be no basis for injuncting the same story simply because it is expressed in the more robust, colourful or intemperate language of the tabloid press"*[9].

19. Other members of the judiciary have expressed similar sentiments. Lord Woolf has recognised that *"The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, then there will be fewer newspapers published, which will not be in the public interest"*[10], and Baroness Hale *"One reason why freedom of the press is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in the intrusions into private grief so that they can maintain circulation and the rest of us can continue to enjoy the variety of newspapers and other mass media which are available in this country"*[11].

20. Furthermore, as stated by Lord Williams of Mostyn during the passage of the Data Protection Bill *"it is part of the British tradition of freedom of expression that entertainment programmes, such as arts programmes, comedy, attire or dramas, can refer to real events and people"*[12]. It was for this reason that Lord Williams emphasised that the government had *"deliberately placed upon the face of the Bill, I believe for the first time in an Act of Parliament in this country, that the public interest is not the narrow question of whether this is a public interest story in itself but that it relates to the wider public interest, which is an infinitely subtle and more complicated concept"*[13]. This is consistent with Strasbourg jurisprudence, which has recognised a right to freedom of expression not only in relation to publications concerning political

[9] Re Roddy (A Minor) [2004] EMLR 127, [89]
[10] A v B & C [2003] QB 195, [33]
[11] Campbell v MGN Ltd [2004] UKHL 22, [34]
[12] HL Deb 02 February 1998 vol. 585 cc436-55, 442
[13] Ibid

issues and crime but also concerning sporting issues and performing artists[14]. This approach must be maintained to secure the right to freedom of expression and information in the UK.

21. The protection of Article 10 applies not merely to the media, but to individuals, businesses and other organisations, including those who disseminate information processed for the special purposes, such as search engines. The protection afforded for the exercise of the right to freedom of expression and information under the GDPR must not be restricted to traditional media. The Information Commissioner has previously accepted this, for example in relation to processing by an NGO in certain circumstances[15].

<u>The existing protection for processing for the special purposes under the DPA</u>

22. The primary protection for processing for the special purposes, i.e. the purposes of journalism, art or literature, under the DPA is set out in s32, ss44-46, The Data Protection (Processing of Sensitive Personal Data) Order 2000[16], and The Data Protection (Designated Codes of Practice) (No.2) Order[17] (SI 2000/1864).

23. Section 32 provides:

> *(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—*
>
> *(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,*
>
> *(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and*
>
> *(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.*
>
> *(2) Subsection (1) relates to the provisions of—*
>
> *(a) the data protection principles except the seventh data protection principle,*
>
> *(b) section 7,*
>
> *(c) section 10,*
>
> *(d) section 12, and*
>
> *(e) section 14(1) to (3).*

[14] Von Hannover v Germany (No.2) (2012) 55 E.H.R.R. 15, [109]

[15] https://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20(2)%20(1).pdf

[16] The Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417)

[17] Data Protection (Designated Codes of Practice) (No.2) Order (SI 2000/1864)

*(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which—*

*(a) is relevant to the publication in question, and*

*(b) is designated by the Secretary of State by order for the purposes of this subsection.*

*(4) Where at any time ("the relevant time") in any proceedings against a data controller under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—*

*(a) only for the special purposes, and*

*(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller,*

*the court shall stay the proceedings until either of the conditions in subsection (5) is met.*

*(5)Those conditions are—*

*(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or*

*(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.*

*(6)For the purposes of this Act "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.*

24. Ss44-46 provide a bespoke regime for enforcement in relation to personal data which is claimed to be processed for the special purposes, including in relation to previously unpublished material pursuant to s32(4)-(5), which is necessary to maintain journalistic freedom and prevent the ICO becoming a censor.

25. The effect of ss32(4)-(5) and 45, which was deliberate, is to prevent the DPA being used to impose prior restraint in cases where the relevant data is being processed solely for the purposes of journalism and has not yet been published.

26. The protection afforded by s32 applies both before and after publication[18] and, in order to rely upon it, requires that compliance with the provisions of the DPA be incompatible with the special purposes, which has been interpreted to mean in the sense of being *"impractical"*[19] or *"inappropriate"*[20].

[18] Campbell v MGN Ltd [2002] EWCA Civ 1373, [121]
[19] Ibid, [123]
[20] Information Commissioner's Office guidance 'Data protection and journalism: a guide for the media', p37

27. It has been suggested that, unless media organisations have the consent of the relevant data subject(s), they may not be able to satisfy the Schedule 2 and 3 conditions under the DPA[21], which, if correct, would mean that the media would always be obliged to rely on the exemption under s32 when processing personal data for the special purposes. The media ought to be able to rely, in the absence of consent, on the conditions at Schedule 2 para.6 and Schedule 3 para.6 (i.e. for processing necessary for exercising the right to freedom of expression and information protected by Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Freedoms of the EU – which reflects the Convention rights - and at common law).

28. While the s32 exemptions and associated provisions were intended to ensure that the DPA did not inhibit the work of the media, since the commencement of the Defamation Act 2013 in particular, the subjects of legitimate journalistic investigations have sought to invoke the DPA to stymie investigations into and publications regarding their conduct, and to use it as an alternative tool to seek to protect their reputations, undermining Parliament's intentions.

29. The Defamation Act 2013 imposes a strict limitation period for the bringing of defamation claims and also imposes a threshold for bringing a claim, requiring the relevant publication to have caused or be likely to cause serious harm, which was intended to *"provide an effective deterrent to trivial and vexatious claims"*[22]. Claimants who are unable to meet these requirements are now turning to the DPA where they are unencumbered by these essential protections. For example, the BBC has had to defend a claim where the claimant, a convicted criminal, made allegations of minor inaccuracies (which were denied by the BBC) in respect of online publications which had first been published 6 years previously[23]. The Court of Appeal recently upheld[24] a decision permitting a claimant to amend his defamation claim, which had been struck out at first instance, to add a claim under the DPA and held that there was *"no good reason of principle why a claim under the DPA cannot be linked to a defamation*

[21] Campbell v MGN Ltd [2002] EWCA Civ 1373, [124]
[22] Per Lord McNally, Hansard 17 Dec 2012 : Column GC449
[23] Hannigan v BBC C35YJ825, unreported
[24] HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing Limited [2017] EWCA Civ 29

*claim"*[25] and that, in the event that the defence to the defamation claim was successful, *"the DPA claim may found an appropriate alternative means of redress"*[26].

30. The requirement that data be processed solely for the special purposes has also been the subject of attack; in one instance the fact that the police had obtained an order forcing the media to disclose journalistic information to them was used as a basis to argue that the personal data pertaining to the data subject was no longer processed only for the special purposes, and in another case it was argued that the processing of personal data in the context of an article which included links to products referenced in the article denied the media organisation the right to rely on the s32 exemption[27]. Given that Ofcom's Broadcasting Code specifically permits product placement on television, if this argument were correct it would have an unduly restrictive effect and could have a significant impact on legitimate processing for the special purposes which should not be undermined.

31. Where the media are impervious to these attempts, approaches have been made to the disseminators of content, including search engines such as Google, to restrict the public's right of access to information, for example by exercising the right to be forgotten. The consideration of such claims, even where complaint is made to the ICO, improperly shuts out the originating publisher who would be best placed to argue why the data is accurate or continues to be relevant and not excessive. To the extent that disseminators are entitled to rely on the exemption at Article 17(3)(a) of the GDPR, this will be resolved.

32. Subject access requests have been and continue to be used in attempts to obtain disclosure of unpublished journalistic research and notices are served pursuant to s10 DPA to try and halt the processing of personal data during the course of investigations. Complaints and claims have been brought arguing that the methods utilised in the course of investigations for the special purposes are excessive and unjustified, and that the data collected is excessive.

33. While these are relatively recent developments and the full impact of such manoeuvring in relation to processing for the special purposes is not yet understood, such claims result in uncertainty, expose the media to significant costs in defending

[25] Ibid, [44]
[26] Ibid
[27] http://www.bbc.co.uk/news/entertainment-arts-33679726

them - even when the defence succeeds- and have a chilling effect on the right to freedom of expression and information.

34. The protections afforded for processing for the special purposes must be augmented to address these potential deficiencies and provide greater certainty for controllers and processors relying on the exemption. This could be achieved, in part, by imposing a limitation period for bringing claims relating to processing for the special purposes and introducing a threshold of seriousness for bringing claims under the DPA, particularly in light of the decision in Vidal-Hall v Google[28] permitting claims for compensation for mere distress, which would also serve to minimise the cost or burden to business of the GDPR. In addition, clarity would be enhanced by amending the existing provisions as follows:

> *(1) Personal data which are processed ~~only~~ for the special purposes are exempt from any provision to which this subsection relates if—*
>
> *(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,*
>
> *(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and*
>
> *(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision ~~is incompatible~~ <u>would interfere</u> with the special purposes*
>
> *(2) Subsection (1) relates to the provisions of—*
>
> *(a) the data protection principles except the seventh data protection principle,*
>
> *(b) section 7,*
>
> *(c) section 10,*
>
> *(d) section 12, and*
>
> *(e) section 14(1) to (3).*
>
> *(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which—*
>
> *(a) is relevant to the publication in question, and*
>
> *(b) is designated by the Secretary of State by order for the purposes of this subsection.*
>
> *(4) Where at any time ("the relevant time") in any proceedings against a data controller under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—*
>
> *(a) for the special purposes, and*
>
> *(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller,*

[28] Vidal-Hall v Google Inc [2015] EWCA Civ 311

*the court shall stay the proceedings until either of the conditions in subsection (5) is met.*
*(5) Those conditions are—*
*(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or*
*(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.*
*(6) For the purposes of this Act "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.*
*(7) Where personal data are processed for the special purposes Schedule 2 shall take effect as if a further condition was inserted after condition 6 providing for "(7) The processing is carried out for the special purposes, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".*
*(8) Where sensitive personal data are processed for the special purposes Schedule 3 shall take effect as if a further condition was inserted after condition 10 providing for "(11) The processing is carried out for the special purposes, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".*
*(8) News archives and media libraries shall be exempt from the third, fourth and fifth data protection principles.*

Lord Justice Leveson's recommendations

35. In his report following the 'Inquiry into the culture, practices and ethics of the press', Lord Justice Leveson made a number of recommendations for the reform of the protections afforded to processing for the special purposes under the DPA. These were apparently made in reliance on the evidence solicited by the Inquiry from Philip Coppel QC although he recognised that the recommendations *"would be addressing matter relatively little noticed or debated in the public discussion of the inquiry"*[29].

36. Leveson LJ concluded that the DPA put *"unnecessary and inappropriate barriers in the way of regulatory law enforcement and the protection of victims' rights"*[30] and recommended the removal of what he described as *"unnecessary procedural red tape"*[31]. The specific recommendations set out in the report included, inter alia:

*i. The exemption in section 32 of the Data Protection Act 1998 should be amended so as to make it available only where:*
*(a) the processing of data is necessary for publication, rather than simply being in fact undertaken with a view to publication;*
*(b) the data controller reasonably believes that the relevant publication would be or is in the public interest, with no special weighting of the*

[29] Inquiry into the culture, practices and ethics of the press, p1000, para.1.8
[30] Ibid, Executive summary, p24, para.107
[31] Ibid

*balance between the public interest in freedom of expression and in privacy; and*

*(c) objectively, that the likely interference with privacy resulting from the processing of the data is outweighed by the public interest in publication;*

*ii. The exemption in section 32 of the Data Protection Act 1998 should be narrowed in scope, so that it no longer allows, by itself, for exemption from:*

*(a) the requirement of the first data protection principle to process personal data fairly (except in relation to the provision of information to the data subject under paragraph 2(1)(a) of Part II Schedule 1 to the 1998 Act) and in accordance with statute law;*

*(b) the second data protection principle (personal data to be obtained only for specific purposes and not processed incompatibly with those purposes);*

*(c) the fourth data protection principle (personal data to be accurate and kept up to date);*

*(d) the sixth data protection principle (personal data to be processed in accordance with the rights of individuals under the Act);*

*(e) the eighth data protection principle (restrictions on exporting personal data); and*

*(f) the right of subject access, subject to any necessary clarification that the law relating to the protection of journalists' sources is not affected by the Act.*

*iii. The procedural provisions of the Data Protection Act 1998 with special application to journalism in:*

*(a) section 32(4) and (5)*

*(b) sections 44 to 46 inclusive*

*should be repealed.*

37. These recommendations and the evidence upon which they were based disclose a lack of understanding of the manner in which processing for the special purposes is conducted, the practical application of the DPA by data controllers, lawyers and regulators, and the protections which are necessarily afforded to such processing. To describe the provisions as providing a *"blanket exemption"* for processing for the special purposes is simply inaccurate, and in so far as barriers are imposed to the enforcement of the rights of data subjects these are both necessary and proportionate for the effective protection of the right to freedom of expression and information. The recommendations were not supported by the Information Commissioner's Office in its response to the report, which instead preferred *"a broad exemption from the DPA once the threshold for engagement is reached"*[32].

38. As was recognised when the Data Protection Bill was being enacted, to restrict the exemption to information necessary for publication would inhibit investigative journalism by preventing legitimate research into data subjects and requiring the

[32] The Information Commissioner's Response to the Leveson Report on the Culture, Practices and Ethics of the Press

disclosure of information pertaining to the course of inquiry of journalistic investigations prior to publication.

39. To fail to take into account the public interest in freedom of expression itself, in the context of legislation aimed at protecting the rights of data subjects, would unlawfully give presumptive priority to the rights of data subjects to the detriment of Article 10, and would impose barriers to the breadth of cultural and journalistic output that society currently rightfully enjoys.

40. Introducing a purely objective test of the balance of the public interest would be contrary to the direction of jurisprudence[33] and would fail to take into account the discretion afforded to editors.

41. To require those processing for the special purposes to comply with the first, second, fourth, sixth and eighth principles would prevent legitimate investigative journalism from being undertaken and published. To give but one example, requiring compliance with the first data protection principle would have prevented the obtaining and publication of information pertaining to the MP's expenses scandal[34]. A requirement that data be accurate and kept up to date would inhibit the conduct of investigations where the accuracy of the information being collected cannot be verified. This was recognised by Parliament during the course of the passing of the Data Protection Bill. Lord Williams observed that *"When journalists are pursuing a story – which, I repeat, I believe is a notable public duty even if uncomfortable for those set in authority above us – and making their investigations, they simply cannot know in many instances whether or not the personal data are accurate. Application of the fourth principle (and this is very important) would prevent them collecting the data in the first place. It would prevent any journalist doing his or her job. It would prevent the collection of information with a view to publication because processing includes collection. It would stop them holding the data. It would stop them continuing the investigation of the story in order to find out, ironically, whether the original material collected was in fact accurate"*. A requirement to process data in accordance with the rights of data subjects would effectively withdraw the exemption and prevent the transfer of data not only relating to investigations but on the publication and dissemination of information.

[33] See, for example, Campbell v MGN Ltd [2003] QB 633 (CA), Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB) and LNS (John Terry) v Persons Unknown [2010] EWHC 119

[34] See http://www.pressgazette.co.uk/yes-journalists-have-broken-the-law-and-we-should-be-pleased-and-proud-that-they-did/

42. To repeal ss32(4)-(5) and ss44-46 would turn the DPA into a weapon of censorship in the hands of data subjects. The then Master of the Rolls, Lord Phillips, accepted in Campbell v MGN Ltd that the purpose of these provisions was to *"prevent the restriction of freedom of expression that might otherwise result from gagging injunctions"*[35]. The availability of injunctive relief under the DPA has not been ruled out[36]. In the context of defamation claims, the rule against prior restraint established in Bonnard v Perryman[37] has been expressly preserved following the implementation of the Human Rights Act 1998[38]. Indeed, the courts recognise that protection from pre-publication restraint is especially merited. The European Court of Human Rights has expressed the view that *"The dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the Court. This is especially in so far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest"*[39]. In the recent case of Stunt v Associated Newspapers Ltd[40] Mr Coppel QC argued, unsuccessfully, that the protection afforded by s32(4) ought to be disapplied. In rejecting his arguments, Mr Justice Popplewell recognised that *"Investigative journalism often requires acquiring and retaining data which is protected by the [Data Protection] Act over a period of time and using it for a number of stories, in a way which could be seriously hindered and discouraged were the data to be subject to the full rights under the Act at the suit of the data subject prior to its full and final deployment in the published journalistic material. The process would be thwarted if the subject had access to the detailed extent or direction of the investigation, of the information gathered or of the intended story. It would be severely inhibiting to such a process… on such an application the very investigation of whether the s32(1) conditions were fulfilled, or arguably fulfilled, would have to involve disclosing to the data subject the nature of the information held by the journalist and the scope and intended scope of the investigation and story, if the subject were to be afforded a fair opportunity of contesting the issue or fulfilment or arguable fulfilment of the s.32(1) criteria. Moreover, the mere existence of the possibility of such an application may*

[35] Campbell v MGN Ltd [2003] QB 633, [116]
[36] Sunderland Housing Co Ltd v Baines [2006] EWHC 2359 (QB)
[37] Bonnard v Perryman [1891] 2 Ch 269
[38] See Greene v Associated Newspapers [2005] QB 972
[39] The Observer and The Guardian v UK (1992) 14 EHRR 153, [60]
[40] Stunt v Associated Newspapers Ltd [2017] EWHC 695 (QB)

*have the chilling effect which Parliament legitimately wished to avoid by the clear terms of s32(4)"*[41].

43. Were the recommendations of Philip Coppel QC and Lord Justice Leveson, or any of them, to be accepted and implemented, this would result in a significant imbalance of rights, which would unlawfully infringe Article 10 and would impose the Information Commissioner as a statutory regulator of the media, which would not only be wholly inappropriate but would be a task for which the Information Commissioner's Office is ill-equipped, as it noted at the time of the report.

44. In addition, the Government indicated in its 'Consultation on the Leveson Inquiry and its implementation' that *"The General Data Protection Regulation (GDPR) (which comes into force in May 2018) will give the government an opportunity to look at the existing sanctions available in relation to the misuse of personal data to make sure they are both proportionate and fit for purpose in the digital age, in compliance with the terms of the GDPR. In particular, the government will review current penalties for data protection breaches and aim for sanctions that act as effective deterrents against the misuse of personal data in all contexts"*[42].

45. S55(1) DPA creates the offence of knowingly or recklessly disclosing, obtaining or procuring personal data without the consent of a data controller. Public interest journalism must not be criminalised. There is currently a lacuna whereby the processing of personal data may fall with the s32 exemption on the basis that the data controller honestly and reasonably believes that publication would be in the public interest (assuming the other conditions are met), but may nevertheless be exposed to criminal proceedings because, on a purely objective assessment, in hindsight the act was not considered to be in the public interest. Journalism, particularly journalism which would benefit from the special purposes exemption, must not be criminalised. The defence at s55(2)(d) should therefore be revised consistently with s32 and the approach to the defences at s55(2)(b) and s55(2)(c). The MLA continues to oppose the introduction of prison sanctions pursuant to s 77 of the Criminal Justice and Immigration Act 2008.

[41] Ibid, [56]
[42] Consultation on the Leveson Inquiry and its implementation, 1 November 2016, para.27

Derogations from the rights and obligations under the GDPR for processing for the special purposes

46. The GDPR will introduce a number of changes to the existing regime for the protection of data protection rights. In particular it will:
    i. expand the existing rights of data subjects;
    ii. create new rights for data subjects;
    iii. impose new obligations on data controllers and processors;
    iv. grant new rights to data controllers and processors; and,
    v. grant new powers to supervisory authorities.

47. In order to ensure the continued effectiveness of the protection currently afforded under the DPA for processing for the special purposes, and uphold the balance of rights reflected, it is necessary to expand the scope of the exemptions for such processing and restrict the application of certain provisions.

48. In addition to the amendments detailed elsewhere in this response, and the maintenance of the existing scope of protection for processing for the special purposes, the GDPR provisions which need to be addressed in domestic legislation are:
    i. To provide explicit protection for news archives and media libraries in accordance with Recital (153), including by limiting the right to challenge their contents.
    ii. To ensure that the obligation to demonstrate compliance with the GDPR under Article 5(2) would not require those processing for the special purposes to record editorial decision-making in relation to each data subject.
    iii. To provide an exemption from Article 7(3) relating to the withdrawal of consent, where this is the basis for the processing of personal data for the special purposes, particularly but not exclusively in circumstances where publication has already taken place.
    iv. To provide an explicit legal basis to enable those processing for the special purposes to process special categories of data, which is otherwise prohibited by Recital (51) and Article 9, and not merely in cases where the data subject has given explicit consent or where the processing is demonstrably objectively in the public interest.
    v. To provide an explicit legal basis to enable those processing for the special purposes to process personal data relating to criminal

convictions and offences or related security measures, which would otherwise be restricted by Recital (19) and Article 10.

vi. To provide an exemption from the procedural requirements of Article 12(2)-(3) relating to the rights of data subjects.

vii. To exempt processing for the special purposes from the requirement to notify the data subject of the information otherwise considered necessary to ensure fair and transparent processing set out at Recital (61) and Articles 14-15 where this would interfere with processing for the special purposes, is not practicable, or would involve disproportionate effort, and in all circumstances to exempt the media from the obligations at 14(1)(f), concerning data transfers, and Article 14(2)(f), concerning the disclosure of the source(s) from which the data originated – this may dovetail with protections which should be afforded by Article 90 in connection with controllers and processors subject to obligations of professional secrecy or equivalent obligations.

viii. To exempt the media from the obligation at Recital (59) and Article 16 to rectify inaccurate personal data without undue delay and to complete incomplete personal data. This would not exempt the media from the requirement to observe due accuracy in its publications, as this would continue to be addressed by codes of conduct such as the IPSO Editors' Code and Ofcom Broadcasting Code, but would protect investigations and prevent data subjects from requiring self-serving amendments to publications. It should be made clear that the burden of establishing an inaccuracy is on the data subject.

ix. To explicitly recognise that processing in connection with news archives and media libraries is necessary for exercising the right of freedom of expression and information and is thereby exempt from Article 17.

x. To exempt processing for the special purposes from the rights afforded by Recital (67) and Article 18 requiring the restriction of processing, which would otherwise enable unmeritorious complaints to restrain the legitimate processing of data for extended periods.

xi. To make clear that the right afforded by Article 19 may be met in relation to processing for the special purposes by the publication online of a clarification or notice of erasure and that the right to be informed of the recipients of personal data is subject to the rights of third parties

and restrictions required by law and is not required if this is impossible or involves disproportionate effort.

xii. To exempt processing for the special purposes from the requirement at Recital (68) and Article 20 to allow data portability, which would otherwise have a significant adverse commercial impact on those processing for the special purposes, including SMEs such as independent production companies and freelancers.

xiii. To exempt processing for the special purposes from the right at Recital (69) and Article 21 to prevent further processing upon objection unless compelling legitimate grounds are demonstrated, which would otherwise enable unmeritorious complaints to restrain the legitimate processing of data for extended periods.

xiv. To exempt processing for the special purposes from the obligation at Recitals (84) and (94) and Article 36 to consult and obtain authorisation from the relevant supervisory authority prior to conducting processing which would result in a high risk to the rights and freedoms of natural persons. Whether the Information Commissioner's Office or another body, this would effectively introduce statutory regulation of the media which would neither be appropriate nor consistent with the perishable nature of news and would equate to a form of prior restraint.

xv. To exempt any code of conduct pertaining to processing for the special purposes from the requirements for approval by the supervisory authority and Board under Article 40, and to stipulate that any code of conduct cannot be unilaterally imposed by a supervisory authority and must be supported by the data controllers to whom it would apply.

xvi. To restrict the powers of the supervisory authority under Article 41 to accredit bodies to monitor compliance with codes of conduct in relation to the processing for the special purposes.

xvii. To exempt processing for the special purposes from the requirements relating to international data transfers at Recitals (101) – (115) and Articles 44-49, which would otherwise impede journalistic investigations and the publication of material resulting from processing for the special purposes.

xviii. To stipulate that processing for the special purposes carried out by controllers and processors established in the UK constitutes processing in the public interest for which the only competent

supervisory authority should be that in the UK[43] in accordance with Recital (128), thereby preventing such processing from being subject to the rules as to the lead supervisory authority and one-stop shop mechanism.

xix. To restrict the powers of supervisory authorities in relation to processing for the special purposes, over and above the existing protections, in relation to the power to impose a ban on processing as set out at Article 58(2)(f) and to suspend data flows to a third country as set out at Article 58(2)(j).

xx. To expand the existing grounds upon which personal data in official documents may be disclosed, over and above those set out at paragraph 3 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000, in accordance with Article 86 and the decision of the European Court of Human Rights in Magyar Helsinki Bizottság v Hungary, referenced above.

Other derogations from the rights and obligations under the GDPR

49. While not the primary focus of this response, the MLA considers that other themes which are the subject of consultation are objectionable and would have a particularly invidious effect in relation to processing for the special purposes.

50. Under Theme 1, the discretion at Article 62(3) to confer powers on seconding supervisory authorities ought not to be exercised, whether to grant powers in connection with joint operations or to allow investigative powers to be exercised in accordance with the law of the Member State of the seconding supervisory authority. Such measures would potentially expose controllers and processors in the UK to draconian actions which could not be foreseen and would be contrary to the rule of law. The discretion to adopt modified powers for supervisory authorities in accordance with Article 90 should be exercised, and should also apply to those processing personal data for the special purposes.

51. Under Theme 2, any intention to expand the scope of the powers of the supervisory authority beyond those stated in Article 58 ought to be the subject of specific public consultation and Parliamentary approval. The MLA considers that it would be

[43] For the purposes of this Response, it is assumed that the Information Commissioner's Office will be the designated supervisory authority but if and to the extent that any other supervisory authority is contemplated, this should be a matter of public consultation.

beneficial to establish guidelines, subject to public consultation and Parliamentary approval, in relation to the fine/penalties which may be imposed on data controllers and data processors pursuant to Articles 83 and 84. In determining the application of such fines/penalties, strict measures of necessity and proportionality must be applied, including having regard to the right to freedom of expression and information, with clear and cost-effective rights of appeal. The Supreme Court has recently recognised that there is a very powerful argument for concluding that where significant liabilities are imposed on those exercising the right to freedom of expression and information, even where they have failed to win a claim, this would normally infringe Article 10[44]. Specific guidelines relating to fines/penalties imposed in relation to processing for the special purposes should be implemented.

52. Under Theme 9, the MLA considers that the UK should not adopt measures permitting representative complaints and legal actions on behalf of data subjects which permit the representative body to receive compensation or to act without the mandate of data subjects. Such actions would increase the burden on controllers and processors, including in circumstances where data subjects themselves did not wish to pursue an action and would result in claims being brought where the costs would be out of all proportion to the alleged damage. In the event that such measures were to be adopted, explicit provision should be made for data subjects to opt out of such rights through contractual terms. Under the DPA, by virtue of s13, the right to compensation for damage or distress is not limited to the relevant data subject, but potentially applies to any individual who suffers damage or distress. This should be rectified so as to limit the potential scope of claims, which is also relevant to the issue raised below in relation to Theme 12 and would serve to minimise the cost or burden to business of the GDPR.

53. Under Theme 12, the MLA does not consider that bodies representing categories of controllers or processors should be required to designate a data protection officer, as permitted by Article 37(4). Any proposals for mandating that certain organisations should have a data protection officer should be the subject of public consultation and Parliamentary approval. The MLA does not consider that specific conditions for the processing of national ID numbers or other identifiers is necessary pursuant to article 87, but in the event that such conditions were to be imposed, exemptions should be provided for processing for the special purposes.

[44] Times Newspapers Ltd v Flood; Miller v Associated Newspapers Ltd; and, Frost and others v MGN Ltd [2017] UKSC 33

54. Finally, and as set out above, imposing a threshold for bringing a claim would serve to minimise the cost or burden to business of the GDPR. As subject access requests will become free under the GDPR, and the time limit for compliance will reduce, the current issues of requests being used as an alternative or addition to disclosure in the course of litigation, often resulting in the doubling of required effort, will be exacerbated and addressing this would also assist in minimising the burden to business. The prompt provision of further guidance as to the interpretation and requirements of the GDPR, together with an indication of the government's position on the exemptions and derogation it intends to exercise would further serve this aim.

**On behalf of the Media Lawyers Association**

**Annex 1**

**List of current MLA members**

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

**2. Bloomberg**, leading publisher of business and markets news, data, analysis and video.

**3. 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.

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

**5. Channel 5 Broadcasting Limited**, a public service broadcaster of the Channel 5 service and 2 digital channels, interactive services and related websites.

**6. 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.

**7. CNBC (UK) Limited**, world leader in business news, providing real-time financial market coverage and business information.

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

**9. Express Newspapers**, publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.

**10. 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.

**11. Guardian News & Media Limited**, publisher of the Guardian, the Observer and theguardian.com.

**12. Independent Print Limited**, publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.

**13. Independent Television News Limited (ITN)**, producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.

**14. 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.

**15. The National Magazine Company Limited t/a Hearst Magazines UK**, publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

**16. News Group Newspapers Limited**, publisher of The Sun and related magazines and websites, and part of News UK.

**17. The News Media Association**, the voice of national, regional and local news media organisations in the UK – publishing over 1000 national regional and local titles read by 48 million adults every month in print and online.

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

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

**20. Thomson Reuters PLC**, international news agency and information provider.

**21. Times Newspapers Limited**, publisher of The Times and The Sunday Times and related websites, and part of NI Group Limited.

**22. Trinity Mirror PLC (including MGN Limited)**, publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.