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Dear Mr Powell,

## **REPRESENTATIONS BY THE LONDON BOROUGH OF HACKNEY**

### Introduction

1. These representations are made on behalf of the London Borough of Hackney (“the Council”) in response to the letter sent by CLG on behalf of the Secretary of State on 6 November 2017. That letter purported to enclose a direction under section 4A of the Local Government Act 1986. The Council pointed out in its letter of 15 November 2017 that the Secretary of State was not entitled to give such a direction without first affording a (proper) opportunity for the Council to make representations, which he had not done in relation to the direction then purportedly made. The subsequent CLG letter of 29 November 2017 invited the Council instead to treat the 6 November letter as notice of a proposed direction. These representations proceed upon that basis. The terms “the Reasons” or “Reasons”, when used below, refer to the paragraphs of the 6 November letter which set out the reasons for the direction then purported to be given, and which are now (as we understand it) to be taken as the Secretary of State’s reasons for proposing to make a direction.



## Procedural matters, and potential issues of bias or predetermination

2. In its letter of 15 November 2017, in addition to pointing out that the purported direction had not been lawfully made, the Council made two things clear:
  - (i) First, that the Council should be accorded a proper opportunity to make representations, and that in circumstances where the matter could not be seen as one of urgency, this would mean longer than 14 days.
  - (ii) Secondly, that the Council would require further information from the Secretary of State in order to make its representations. The Council's letter set out a suggested, sensible timetable (certainly in no way unnecessarily prolonged) for the identification of such required information, and the making of representations following its receipt. It invited the Secretary of State to respond positively.
3. The Secretary of State's brief letter of 29 November set a deadline of 5 January 2018 for making representations (a little over 5 weeks including the Christmas period). It made no reference at all to the Council's constructive proposals, or to the point about needing further information. It certainly did not suggest that the Secretary of State was unwilling in principle to provide any further information. The Council wrote a further letter on 1 December 2017, making clear that it would be formulating a request for further information, and that whether it was possible to make representations by 5 January 2018 would depend upon the timing of the Secretary of State's response. This letter elicited no response from CLG.
4. On 15 December 2017 the Council duly wrote a further letter in which it set out the information that it required in order to respond by making representations. The requests were specific and focused, and their relevance should have been apparent. CLG's response was sent on 22 December 2017, so immediately before the Christmas break. That letter failed to engage substantively with any of the specific requests for information that had been made, or to explain why (if this was the Secretary of State's view) they were considered inappropriate or unnecessary. It merely asserted that the Council was "very familiar with the issues involved" and refused "to enter into further correspondence", reasserting that any "final representations" must be made by 5 January 2018.
5. This approach by the Secretary of State is wholly unsatisfactory, and indeed without any apparent rational justification.

6. It is worth setting out here the basic chronology of events in this matter:
  - The Secretary of State first gave notice of a proposed direction on 16 April 2014 (about a fortnight after section 4A came into force). The Council was given 14 days to make representations, and did so.
  - Nothing more was heard from the Secretary of State until he gave a further notice on 25 September 2014. Again, the Council was given 14 days to make representations, and did so.
  - Again, nothing more was heard from the Secretary of State until he gave a further notice on 10 March 2015. Yet again, the Council was given 14 days to make representations, and did so. On 27 March 2015 the Secretary of State said that he “does not anticipate taking any decisions in the immediate future”.
  - After approximately another year of silence, the Secretary of State wrote a further letter (not a notice), to which the Council again responded promptly.
  - Again a period of months passed whilst the Secretary of State did nothing. Then a fourth notice of a proposed direction was given on 2 December 2016, once again (extraordinarily) calling for a response within 14 days. The Council responded soon afterwards.
  - Yet further silence followed until a factual query about advertising was sent on 21 September 2017, subsequently followed by the 6 November letter.
7. Against that background, characterised by the Secretary of State and his predecessors having repeatedly set short and arbitrary deadlines for the Council to make representations, and having then himself “gone to sleep” on the matter for extremely prolonged periods, the approach now being taken is simply unacceptable.
8. Regrettably, the inference seems to be that CLG’s current approach is being driven, not by any considerations of proper decision-making or the public interest, but rather by some other considerations. The strong suspicion must be that improper political pressure is being exerted, whether within the Department or from outside it. This is especially so when considered against the background of the long history of concerns, expressed in previous representations by this Council and others, about the

political statements that have accompanied previous notices and actual or threatened directions, and the implications of bias and predetermination which certain of those statements carried. In view of CLG's refusal to answer requests 1, 2 and 9 in our letter of 15 December, there is a limit to what more can be said about this aspect of the matter at this stage. However, the Council wishes to make clear that this is something that it does intend to pursue further if it becomes necessary to do so.

9. Further, it is plainly procedurally unfair both for the Secretary of State to expect the Council to make representations within an unreasonably constrained timetable, and for him to do so without responding to perfectly proper requests for information about his reasoning and the evidence (if any) upon which it is based. All the Council's rights are fully reserved in this respect.
10. In view of the Secretary of State's stance in his letter of 22 December, the Council is submitting these representations on 8 January 2018, the first working day after 5 January 2018. However, the Council may well wish to supplement them (even assuming that the Secretary of State does not think better of his refusal to provide the requested information) in the course of this week or the following week. If the Secretary of State is foolish enough to proceed to a decision without considering such additional representations, and if that decision is to make a direction, then that will simply constitute further procedural unfairness and further evidence of bias or predetermination on the Secretary of State's part.
11. As it is, the Council has had to assume for the purposes of these representations that, in a number of cases where the Secretary of State has not supplied responses to its requests for information about the relevant material or evidence, no such material exists, and to tailor its representations accordingly. Both generally, and in the specific requests identified below, it is necessary to make clear that, had the position been otherwise, the Council would in all probability have wished to make additional or different representations before any decision was taken.

#### The Council's position in summary

12. For the reasons set out below (and in earlier representations, upon which the Council continues to rely so far as relevant to the issues addressed below), there is no justification for the Secretary of State to make a direction such as the one proposed. Not only is there no positive justification for a direction, to make one would have significant adverse consequences.

13. Even if there was any justification for a direction of some kind (which, to be clear, is not the case), it would not be justified or proportionate to make the direction now suggested.
14. To make a direction in these circumstances would be unlawful. Quite apart from the issues of domestic law that may arise from the making of a direction that is not justified or proportionate (including the Secretary of State's public law duty to take proper steps to inform himself before taking a decision, as well as issues under the Human Rights Act 1998 and the Equality Act 2010), as well as issues of bias/predetermination and procedural fairness as identified above, the interaction between such a direction and the statutory requirements for the publication of certain notices in newspapers would give rise to unlawful state aid.

#### Absence of justification for a direction

15. It is clear that a direction may only be given under section 4A of the 1986 Act if there is some positive justification, in the circumstances of the local authority concerned, and beyond mere non-compliance with the Code, for giving such a direction. The structure of the Act is that there is no obligation on any authority to comply with the Code, so long as the authority has regard to the Code, and that compliance with the Code or particular provisions of it only becomes mandatory if the Secretary of State has made an order under section 4B, which requires the positive endorsement of Parliament.
16. As the Council has pointed out on previous occasions in relation to earlier notices, a great deal of what appears in the present Reasons consists merely of generalisations (and speculative ones at that). Other passages in the Reasons proceed, wrongly, as though the Secretary of State was simply entitled to enforce the Code for its own sake.
17. Additionally, it is clear (e.g. from the explanatory memorandum which accompanied the draft revised Code when it was laid before Parliament) that the purpose of the Code (so far as relevant to the present proposed direction) is to protect the independent local press from the detrimental effects of unfair competition. Accordingly, there can be no justification for a direction without some proper evidential basis for concluding that the publication to be inhibited by the direction represents unfair competition that is having a material detrimental impact on the local press.
18. From the inception of the present Code, questions have been raised as to how far there is any sound basis for thinking that local authority newsheets really do have an impact on local commercial media. At the time when the

revised (2011) Code was under consideration, it was the subject of a report by the House of Commons Communities and Local Government Committee, whose inquiry was directed inter alia at how far the proposals were a response to “persuasive evidence that local authority newspapers are having a direct and detrimental ‘competitive’ impact on the free press”. That question was discussed in chapter 3 of the report. The Committee noted that, when pressed for evidence and data to show that loss of advertising revenue by local newspapers had not just been symptomatic of the recession and other publishing trends such as the internet and the decline in demand for newspapers generally, the Newspaper Society had appeared “evasive”. The Committee concluded at paragraph 44 of the report that:

“Very scant evidence has been presented to this inquiry, and to previous inquiries, which would sustain the claim that local authority publications have contributed significantly to the decline of local newspaper advertising revenues or sales. There do appear to be isolated examples of where there may be a local relationship between the development of a local authority publication and the decline of a commercial publication, but these examples are extremely limited. There is no evidence of a widespread problem of unfair competition on this basis.”

19. In the light of that, paragraph 80 of the Committee’s report read as follows:

“If the Secretary of State continues to believe that publication of any local authority newssheet more frequently than quarterly poses a significant threat to the local press, a much stronger evidence base is required to justify the inclusion of any such restriction in the proposed Code. Although the evidence suggests that a quarterly, or less frequent, publication will usually be sufficient to meet a local authority’s need to communicate with residents, we doubt that it is necessary to specify a maximum frequency of publication within the Code. Before setting any replacement for the existing codes before Parliament, we recommend that the Secretary of State follow through a recommendation made by the Culture, Media and Sport Committee in the last Parliament. That is, that he commission an independent review to assess competition in the local media market and quantify the impact of council publications on commercial entities operating in their locale.”

20. The Government’s response to this (at paragraph 4.10 of its response to consultation on the proposed new Code) was to say that:

“in [its] judgment there is an issue with local authority newspapers constituting unfair competition to local newspapers and the Government is taking action to address this now rather than delaying to conduct further statistical exercises. The consultation exercise did not yield any evidence that would cause Government to revisit the policy.”

21. We must conclude from the failure to answer the questions at paragraph 10 of the Council’s 15 December letter not only that the Government has failed to take any steps to carry out a further review as suggested by the Committee, but also that the present Secretary of State was not even made aware of there having been such a recommendation before he decided to issue the letter of 6 November 2017. Although the Government response referred to “further” statistical exercises, we are not aware of any such exercises at all. If there are any, then the Council should have had an opportunity to comment upon them. The idea that the desire to avoid “delay” (the only reason then given for rejecting the recommendation) can justify the continuing absence of such a review nearly 7 years later is evidently untenable. Were there any other suggested reason for proceeding to a notice and direction without commissioning such a review, the Council would have wished to comment upon it.
22. Indeed, the matter goes further, because the explanatory memorandum to the Code (at paragraph 12) promised a post-implementation review of the Code in 3 to 5 years after it came into effect (i.e. at some point between March 2014 and March 2016), with the details of the proposed research and analysis to be “developed over the coming months”. However, it does not appear that any such review has taken place, or indeed that any steps have been taken towards that end. The refusal by CLG to answer our questions on this issue (again, in paragraph 10 of the 15 December letter) once again indicates that the Secretary of State was not even made aware that his predecessor’s effective promise to Parliament has been broken. We would suggest that to proceed with a direction in such circumstances would amount to an abuse of power. Of course, if anything had been done towards a post-implementation review, or indeed if there had been any reasons for not commissioning one, the Council would have wished to comment on those matters.
23. The more time has gone by since the original consultation upon, and making of, the Code in its present form, and the more that the landscape of print journalism, digital media and social media has changed, the more ridiculous it has become for the Secretary of State to take the view that

there is any evidential justification for a direction of this kind – probably in the case of any authority, and certainly so far as this Council is concerned.

24. Indeed, paragraph 2 of the Council's letter of 15 December asked specifically why the Secretary of State had issued the letter that he did on 6 November 2017, having decided not to do so on the several prior occasions when notice had been given and representations made. We asked what, if anything, the Secretary of State thought had changed. The absence of any response can only be taken as meaning that the change in the Secretary of State's stance (if not motivated by extraneous political considerations or similar) is an arbitrary one. Had there been any genuine reasons for the change of position, the Council would almost certainly have wished to direct representations towards them.
25. The reality is that there appears to be no evidence whatsoever of local authority newspapers having a material detrimental impact on the local press, whether generally or in this Council's area in particular. At best the Reasons simply consist of unsubstantiated assertions. This is confirmed by the Secretary of State's failure or refusal to respond to the questions in paragraph 5 of the Council's 15 December letter, thereby accepting in effect that the predictions in the Reasons are based upon nothing more than supposition. Had there been any other evidence or reasoning, the Council would of course have needed to address it, and to do so in the context of up to date information about the local and national position. (Nor is there any explanation at all in the Reasons of why any alleged effect on the local press could or should be seen as the result of "unfair competition" in any event.)
26. In paragraph 10 of the Reasons the Secretary of State explicitly accepts that the impact on the independent press in the Council's area "may not be easy to assess". All the more reason, one might have thought, to carry out the proper, independent reviews that were suggested or promised in 2010 or 2011.
27. However, the Secretary of State has instead chosen to rely upon three sentences from an August 2017 London Assembly report, entitled The fate of local news – read all about it. They contain an assertion, or expression of opinion, to the effect that "in some cases" (unidentified and unquantified) local newspapers have been negatively affected by regular local authority newsletters. This assertion does not appear in the body of the report, but in a section at the start headed "Summary". To the extent that it relates to anything in the body of the report, it would appear to be paragraph 2.6, but that paragraph in fact contains no such assertion about

cause and effect. It is not clear who drafted the Summary, or what scrutiny it received from the committee which produced the report.

28. Indeed, the final sentence from the London Assembly report that is quoted in the Reasons, which seems to be referring to the Code introduced in 2014 and suggesting that it will help local newspapers, seems starkly at odds with much of the (relatively) detailed analysis that does appear in the remainder of the report about the extent and timing of decline and the reasons for it, changing patterns of publication etc. There is nothing to suggest that the Secretary of State has given any thought to this or any other relevant analysis of trends and patterns which exists. Indeed, it is rather remarkable that the only authorities against which the Secretary of State has so far proposed to take any action are London boroughs, when the London Assembly report upon which he relies expresses the view that “the market for local newspapers in London has been fairly resilient compared to the rest of the country.” What is the Secretary of State’s explanation for this?
29. Further, and without intending any disrespect to whoever wrote or approved the Summary, it is at best unclear on what experience or evidence the apparent view set out there was based. It is further notable that the list of persons from whom the committee took oral evidence, or who made written submissions to it, seems to have been very heavily weighted towards commercial media interests. We note that the Secretary of State has been unable to answer the question raised in the Council’s letter of 15 December 2017, namely to state his understanding of the evidential basis for the passage of the report upon which he relies.
30. We would also question why the Reasons have chosen to refer to this short passage in the London Assembly report and not, for example, to the Welsh Government’s August 2014 version of the Code, paragraph 48 of which expressly states that it “does not share the view that local authority newspapers are responsible for the demise of local newspapers”, and gives reasons for that. It is a matter of some concern that the Reasons seem to have set out to “cherry pick” the expressions of view that exist.
31. It is notable that the real thrust of paragraph 10 of the Reasons, in contrast to earlier statements of the Secretary of State’s position, seems to be about advertising revenue. No doubt this reflects a realistic recognition on the part of the Secretary of State, in the light of earlier representations, that the nature and content of Hackney Today is not such as could conceivably be said to have any circulation impact upon local commercial or independent newspapers from an editorial perspective (again, if the Secretary of State had said anything different in the Reasons, it would

have been necessary for the Council to make further representations about that).

32. In relation to the question of advertising, the Secretary of State quotes (Reasons paragraph 10) the figure of £115,000 for external advertising income from our letter of 25 September 2017, but omits what was said about the particular nature of that advertising, and makes no attempt to assess either how much of that spend might realistically transfer to local commercial newspapers, or how far it might make a real commercial difference to them. Paragraph 10 of the Reasons also relies heavily upon an “open letter” from the Founding Editor of the Hackney Citizen (Mr Keith Magnum) to the Mayor on 28 November 2016. It is remarkable that the Reasons refer to this letter, and not to what Mr Magnum had earlier been quoted as saying on this issue, in the Press Gazette of 29 July 2013, namely:

“I understand there’s a lot of animosity for these council newspapers, but we don’t understand the fuss particularly . . . We have never regarded Hackney Today as a competitor: any advertising revenue that they take from us is minimal, and a survey we conducted showed only 30 per cent of our readers read Hackney Today, so there is no particular concern.”

33. We are not aware of anything to do with the nature or content of Hackney Today that changed in between these two statements by Mr Magnum, and nor has the Secretary of State put forward any explanation of his conflicting statements for our consideration. It would appear that the issue is really one of the Hackney Citizen experiencing commercial difficulties at that time, and looking for something that might help it. In any event, the Council (which is keen to work with the Hackney Citizen and to see it thrive) has held meetings with Mr Magnum since that open letter was written, leading to a change in the advertising policy of Hackney Today. Until that time the Council had sold advertising space proactively, first using the services of an advertising manager, and then (as a shared service pilot) basis, staff at the Royal Borough of Greenwich, selling space in Hackney Today on our behalf. Mr Magnum was concerned that, during this latter arrangement, Hackney Citizen advertisers may have been “targeted”. To show support to the Hackney Citizen, we told Mr Magnum that we would cease proactive sales of advertising, which we then did - we no longer employ a salesperson or contract it out to anyone else. We only take advertising when people contact us directly and request it. The Secretary of State’s supposed “evidence” is therefore out of date and misconceived. (We also note that Mr Magnum sought to launch a sister title, the East End Citizen, in Tower Hamlets after the local authority there

started to publish its own newssheet quarterly, but the venture failed – a further example of the lack of correlation between the frequency of publication of local authority newssheets and the financial viability of commercial media.)

34. There is really no basis upon which the Secretary of State could sensibly conclude that diversion of advertising revenue exists here, certainly on a scale significant enough to have any material impact on the commercial fortunes or the pattern of distribution of the local commercial newspapers. Still less would it be rational to conclude that such an impact was enough to outweigh the disadvantages of restricting the Council to quarterly publication.
35. Further, the Secretary of State's position in relation to advertising is flawed by logical inconsistency. As at least one authority has pointed out in previous representations, the Secretary of State has been positively encouraging local authorities to sell website advertising space. In the absence of a reply to paragraph 6 of the Council's letter of 15 December, it must be assumed that this is still the Secretary of State's policy. However, it is clear that local newspapers, given the decline in print advertising, rely heavily upon the sale of advertising on their websites to maintain their commercial position. There is no rational basis for saying on the one hand that local authorities ought to be active in that market, and yet on the other hand that any sale of advertising space in a local authority printed newssheet is to be deprecated. Indeed, the Code would not on any view prevent the distribution by a local authority of a regular, printed publication that was not in the nature of a newsletter, newssheet or similar (i.e. one that contained information not in the nature of news), however much advertising it contained, and however aggressively that advertising space was marketed. It is illogical, therefore, for issues about advertising to be the reason for giving a direction.
36. We cannot comment upon the statement in paragraph 10 of the Reasons that "other markets would probably develop for alternative media that would otherwise have been deterred by the existence of a Council newssheet published fortnightly". We do not understand what it means, and (despite the request in paragraph 5 of the Council's letter of 15 December), the Secretary of State has declined to explain further.
37. Finally, we note that the Secretary of State has refused to answer the question set out in the third sentence of paragraph 2 of the Council's letter of 15 December, namely why he has at this stage taken action against only some of the authorities which publish newssheets more frequently than quarterly (or indeed, so far as we are aware, even recently sought

information from most or all of the other authorities that do so). We are not aware that any councils other than Hackney and Waltham Forest have received recent correspondence. There is certainly nothing that we have seen to suggest that this is the product of some considered analysis of where, on local facts concerning specific media impact, intervention is or is not justified. Had the Secretary of State explained his reasoning, the Council would in all probability have wished to make representations about it. As it is, we can only assume that the singling out of Hackney and Waltham Forest is either entirely arbitrary, or that it is the result of political considerations or some other irrelevant and impermissible matter.

#### Adverse consequences of a direction

38. If the Council is limited to quarterly publication that will certainly have a significant impact in at least three respects.
39. The first is upon the ability of local residents to obtain the information that the Council's publication contains. Although the relevant information can still be published quarterly, much of the information currently provided to readers is likely to be effectively pointless if it cannot be published promptly. The Reasons simply fail to grapple with what the Council has said in earlier representations about the relative lack of coverage of alternatives to Hackney Today, especially in relation to less affluent parts of the borough.
40. The second is upon the Council itself, both in terms of its ability to communicate effectively and cost-effectively, and in terms of the cost of publishing statutory notices. Paragraph 12 of the Reasons describes the Council's arguments (previously made in some detail) about value for money as not "wholly convincing", yet makes no reasoned case for rejecting them. At best, the Secretary of State's argument seems to be that, because the Council's overall budget is large, it should be prepared to accept unnecessary extra costs in this particular respect. Not only is that devoid of logic (and wholly unrealistic to anyone who understands the present financial position of local authorities), it is plainly contrary to the policy that appears at paragraph 10 et seq of the Code.
41. The third concerns the particular adverse impact, in terms of greater difficulty in accessing the information currently published, that will be felt disproportionately by disadvantaged sections of the community, including groups who have protected characteristics for the purposes of the Equality Act 2010. That is partly because it is likely to be those groups at whom much of the information in question is particularly aimed, and partly because they are the groups who are least likely to access the information

by other (in particular, digital) means. Neither the Reasons nor the DCLG's Equality Statement has grappled with the detail of the information about issues concerning protected characteristics locally, and how those relate to the Council's communications strategy, that were given in the Council's earlier representations.

42. The Secretary of State refers (e.g. Reasons paragraph 17) to use of the internet as an alternative. The government's own Digital Inclusion Strategy (as updated in December 2014) refers to research indicating that no less than 21% of the population is unable to use the internet to obtain day to day benefits, 14% because they do not have internet access at all, and 7% because they lack the capability to make use of it. We note (although it is unclear whether CLG has troubled to look into these issues) that more recent research confirms that digital exclusion remains a significant problem; that it affects some of the most vulnerable and disadvantaged groups in society; that those whom it disproportionately affects include those who are older or disabled physically or by poor mental health or learning disability, and also women as compared with men in some age groups. If those who advise the Secretary of State have not yet familiarised themselves with recent work carried out by (for example) the Office for National Statistics, the Carnegie UK Trust, Age UK, and the Mayor of London, they should perhaps do so before the Secretary of State takes any decision.
43. The Reasons also refer to other means of communication, such as targeted leaflets and libraries, churches etc. There is not the slightest attempt to analyse the relative cost or effectiveness of such approaches, whether generally or in relation to those for whom digital exclusion is an issue and/or who have protected characteristics.
44. It is self-evident that access to information about local services and activities is a matter of importance to equality of opportunity generally, and to the matters set out in s 149(3) in particular. That is especially so where the information concerns (as it does here) matters such as health, housing and jobs. The Reasons contain no discussion or analysis of the material that actually appears in Hackney Today, or how likely it is that it would be delivered by other local media, effectively or at all.
45. The Equality Statement which was produced for the purposes of the decision effectively accepts the premise of the Council's argument, when it says:

“The Department recognises that it may be the case that some groups in the community who share certain protected characteristics may less

readily be able to obtain the information included in local authority newsletters that are published by the local authority more frequently than quarterly, if publication of those newsletters is restricted to quarterly.”

46. The Equality Statement seeks to meet this by the claim that there are other means of effective communication. However, it is apparent that those listed (essentially, leaflets and websites) cannot possibly be anything like as effective as borough-wide distribution of a newssheet. This is a classic example of an equality statement which fails to face up to the real implications of what is being proposed. The equality statement also invokes the creation of an environment “conducive to the flourishing of an independent press”. But the difficulty with this is the same as has already been discussed – there is simply no evidence that enforcing quarterly publication will have any material impact in that respect. Nor is there any attempt to assess, realistically or at all, the extent of the likely adverse impact on equalities issues on the one hand, or any likely positive impact on local media on the other, so that one can be weighed against the other.
47. In truth, the Equality Statement reads like a document that has been written to justify a policy, not as a frank and objective analysis of the issues to inform a decision. We do not know what credentials its authors have to undertake an equality impact assessment in relation to a matter of this kind. What can be seen is that they have made no reference to relevant literature or research; have (apart from recording briefly the specific submissions made by various authorities) made no serious attempt to analyse the relevant local circumstances of any given authority or the particular impact that a direction might have upon its citizens; and have repeated the same generalisations parrot-fashion in relation to one protected characteristic after another. This really does not represent a remotely serious attempt to discharge the public sector equality duty. Further, there is once again a failure to address the policy enshrined in the Code itself, in this case paragraph 29.
48. Both the Reasons and the Equality Statement repeat many times that other authorities publish newssheets only quarterly, as if that was an answer to all objections. There are many reasons why such an approach is fallacious. They include: that the making of a direction under section 4A must as a matter of law be case-specific; that local circumstances vary widely, not least in relation to protected characteristics; and that the fact, in the face of the threats made by various Secretaries of State, many authorities have decided to follow the letter of the Code does not mean either that they would not prefer more frequent publication, or that such

publication would not be more effective, or indeed that they are not having to “get round” the Code in other ways.

49. We also note that the Secretary of State has neither set out himself to obtain updated statistical, financial and other information in relation to the matters dealt with in detail in the Council’s earlier representations; nor has he allowed the Council a time period for making representations that would suggest that he himself has the slightest interest in the current factual position and its implications, as opposed to the making of a political gesture. Based upon this, and upon the repeated recourse in the Reasons and the Equality Statement to thin generalisations, and unsubstantiated assertions, without any engagement with the detail of the Council’s earlier representations, we take the position to be that the Secretary of State accepts in all essentials that the factual content of the Council’s earlier representations was and remains valid, but sees it as unnecessary to analyse or engage with it. If that is an incorrect assumption, please let us know what further factual information the Secretary of State would like to have, and might genuinely be influenced by, before reaching a decision.

#### Form of direction

50. There are two points here. One is that the effect of the direction is to put the Council into a position where it is being treated differently from other authorities. There are a number of local authorities which publish newssheets more frequently than the quarterly basis recommended by the Code, but only the Council and one other authority (and one which was the subject of an earlier direction) have been required to limit themselves to quarterly publication. To the extent that the Secretary of State would seek to distinguish according to the precise frequency of publication (although it is unclear whether that is indeed his position), then a proportionate direction would be limited to one which restricted the Council to whatever frequency of publication the Secretary of State is prepared to accept from other authorities without making a direction.
51. The other point is that, if (as the Reasons tend to suggest) the Secretary of State’s concern is with the sale of advertising, then the proportionate measure would be one which restricted the Council’s ability to sell advertising space in the newssheet (so that, for example, advertising space could only be sold in four editions per year, or that only certain sorts of advertising should appear in fortnightly issues). The Secretary of State has not made any attempt to discuss with the Council what sort of advertising policy he would regard as acceptable.

52. These contentions are of course without prejudice to the Council's primary case that no direction is justified in any event.

### State aid

53. Representations on this issue have been made previously by a number of authorities. In short, the Council will be forced, in order to comply with certain statutory obligations concerning the publication of notices, to purchase a great deal of newspaper advertising space for the publication of such notices. In other words, the combined effect of the statutory notice obligations and the challenged direction will be to force the Council to subsidise the undertakings in question by buying from them a service which it would not otherwise want or need, and so to benefit them by comparison with their competitors. Such a subsidy is a well-recognised form of state aid, contrary to EU law.
54. However, the Reasons simply fail to address this issue at all, other than to assert in paragraph 18 that the Secretary of State does not accept the Council's argument. In the absence of reasoned analysis as to why that is, the Council is unable to make useful further representations upon this issue. Clearly, to the extent that the Secretary of State's position is based upon any factual analysis of the relevant market, that is a matter upon which the Council should have had an opportunity to comment. But if there has been no such analysis, we fail to see how the Secretary of State feels able to reject the argument.
55. In addition to the question of state aid law as such, we note that paragraph 13 of the Code expressly states that the purchase of advertising space by local authorities "should not be used as a method of subsidising voluntary, public or commercial organisations." In the Reasons' focus on advertising revenue for commercial newspapers, and in the Secretary of State's apparent concern to ensure that local authorities have to incur expenditure on placing statutory notices in commercial newspapers (or at any rate his indifference to that fact), the Secretary of State is proposing to use his direction-making power in a manner that directly contradicts the policy of the Code.
56. We also note, and reserve the Council's position in relation to, the Secretary of State's refusal to provide us (despite the request made in paragraph 8 of the Council's letter of 15 December 2017) with any analysis of the 2015 pilot schemes for alternative approaches to statutory notices. The Secretary of State's evasiveness on this issue once again tends to suggest that the proposed use of the direction-making power represents an illicit "feather-bedding" of the commercial press.

Conclusion

57. We invite the Secretary of State to conclude that it would be wholly inappropriate to make the proposed direction.

Yours sincerely,

A handwritten signature in black ink, reading "T Shields". The letter "T" is stylized with a vertical stroke that loops back to the top.

Tim Shields  
Chief Executive